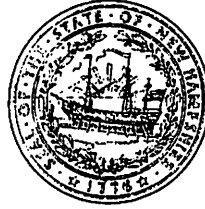


**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

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ATTORNEY GENERAL



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DEPUTY ATTORNEY GENERAL

June 11, 2004

VIA UPS NEXT DAY

Mr. Joseph D. Rich, Esquire
Chief, Voting Section
Civil Rights Division
Room 7254 – NWB
Department of Justice
1800 G. St., N.W.
Washington, DC 20006

Re: New Hampshire and Submissions Under Section 5 of the Voting Rights Act.

Dear Voting Section Chief:

New Hampshire seeks the assistance of the Department of Justice in developing a rational approach to resolving the dilemma faced by the State and the Federal Department of Justice ("DOJ") given the current status of the State relative to compliance with 42 U.S.C. § 1973 (c) preclearance requirements.

The immediate and critical concern facing New Hampshire is satisfying the preclearance requirements for the implementation of administrative complaint procedures required by the Help America Vote Act of 2002. In order for New Hampshire to be eligible for disbursement of the funds necessary to implement HAVA, we must have administrative complaint procedures in force. While we have adopted those procedures, in accordance with the Voting Rights Act we are not able to enforce them until they are precleared.

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The Election Assistance Commission, therefore, is unable to disburse the funds allocated to New Hampshire until preclearance is completed. Your staff has been exceptional in assisting us with addressing this problem.

We have submitted a preclearance request for the administrative complaint procedures and one for the session law that enacted the statute which authorizes the New Hampshire Attorney General to implement the procedures. Mr. Burhman has advised that a preliminary examination of those submissions suggests it will be possible to treat the preclearance of the authorizing statute separately from the remainder of that chapter law and to complete preclearance review for the procedures and the authorizing statute on an expedited basis. We greatly appreciate DOJ's assistance in this aspect of the problem.

New Hampshire also places a high priority on achieving bailout from the Voting Rights Act ("VRA") preclearance requirement. New Hampshire believes it can establish that the intent of Congress was not carried out when ten New Hampshire towns became subject to the requirement that all changes to voting qualifications, prerequisites to voting, voting standards, practices or procedures be precleared by the DOJ or the United States District Court for the District of Columbia. The DOJ has stated that to preclear a change it must make a determination that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." 28 CFR §51.1. Census data establishes that the evils Congress intended to deter with the VRA could not have been occurring in these ten New Hampshire jurisdictions at the time when they became subject to the act. The limited census data that we have been able to obtain also raises questions regarding whether all of the towns should even be subject to the preclearance requirement.

We believe that further historical research will disclose causes, other than discrimination, led to poor voter registration/turnout in these ten towns in 1968. Anecdotal information that we are now attempting to verify suggests that bad weather and population shifts out of small jurisdictions were the cause of the poor registration/voting levels. The small towns in the northern part of the State also have historically been populated with immigrants from Canadian towns in the region, and we are trying to determine if some of the poor percentage of registered voters is attributable to part of the voting age population being ineligible due to citizenship status.

New Hampshire may not have submitted timely preclearance requests for all changes subject to preclearance, however, we also find no record of the DOJ taking steps to request or require compliance for changes other than redistricting. We believe both the DOJ and New Hampshire made reasonable decisions to direct their limited public resources where those resources were most needed. In the past and

today, we believe the best use of limited tax dollars, State and Federal, does not include preclearance of 36 years of changes to New Hampshire's voting laws.

Congress made a clear decision to limit the application of section 5 preclearance requirements of the VRA to jurisdictions where a comparison of the voting age population and voter registration/turnout indicated that appreciable problems with discriminatory behavior was occurring. If it had been Congress's intent to impose restrictions and to direct federal and state resources to every jurisdiction where a test was used for voter registration and registration/turnout numbers suggested that any one citizen or even a small percentage of the population was potentially discriminated against, it would not have established the 50% test. Census data shows, however, that a blind application of that test caused unintended consequences. For the reasons described below, the goals and intentions of Congress are unquestionably thwarted by the rigid application of this test to the ten New Hampshire jurisdictions.

On information and belief, there is no history of New Hampshire being accused of voting related discrimination against individuals who are members of a protected class, based on that status. We are not aware of any court actions related to the denial or discouragement of voting by protected class members, because of that status, in New Hampshire. While, if necessary, New Hampshire is prepared to conduct extensive research and to have a pertinent history written by a qualified expert, the best available information suggests both the DOJ and the State directed our limited resources elsewhere because New Hampshire was not and is not discriminating against members of protected classes in its voting practices.

History

Congress devised a mathematical test to determine what jurisdictions that used a test or device would become subject to the VRA's preclearance requirement. As we understand it the purpose of the VRA was to protect the voting rights of protected class members by preventing or deterring discriminatory treatment in the voter registration and voting processes.

The provisions of subsection (a) shall apply in any State or in any political subdivision of a state which . . . (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968.

42 U.S.C.S. §1973b (b). While it has long since been discontinued, on the pertinent date New Hampshire used a literacy test as a voter qualification. The federal census data for 1960 and 1970, however, shows that New Hampshire generally and the ten covered towns specifically could not have been engaged in the kind of widespread racial discrimination which Congress intended to target.

STATEWIDE:

If it were practical to make such an assessment at this time, we believe an assessment would reveal either no discrimination against protected class members in the voter registration or voting processes or if any were found that it would be extremely rare and involving only isolated incidents involving individual election officials.

The United States Census reports that in 1960 New Hampshire had a population of 606,921 people. Of that number, 604, 334 (99.57%) were white. The 1970 census reports a statewide population of 737,681, of that number 733,106 (99.38%) were white. In a State that was homogenous to this extreme, it would have been impossible to engage in widespread racial discrimination because there simply was virtually no protected class population.

COVERED JURISDICTIONS:

Ten New Hampshire towns are subject to preclearance. Census and voting data confirm that there either could not have been any widespread racial discrimination or it was next to impossible for it to exist. We have been unable to locate voting age population statistics for 1960, estimates for 1968, or data for 1970. The 1960 census data we have provides data on the percentage of the population that was under 14 years of age, while the 1970 census provides those statistics for persons under 18 years of age, therefore, in this preliminary analysis we used the 1970 statistics for each town. We recognize that the Director of the Census apparently made some estimate of the 1968 voting age population in making the coverage determination. However, as we have been unable to locate that information to date, for the purpose of trying to explain New Hampshire's position to you, we have attempted to extrapolate the probable number from the available information. The following is a town by town analysis:

Antrim, Hillsborough County:

1960 Census:	1,121 people, 1,121 of whom were white.
1970 Census:	2122 people, 21 (0.99%) of whom were either African American or "other."

State records indicate the following voter registration and voting data at the time of the Presidential elections shown:

Year	Registered Voters	Total ballots cast.	Turnout %
1964	774	642	82.9 %
1968	805	650	80.7 %
1972	1009	762	75.5 %

In 1970 the US census reports that 26.9 percent of the population in Antrim was under 18 years of age. Voting age was 21 in 1968. 73.1 % of the 1960 total population (1121 * .731) is 819.451 or 819 people. The total votes cast in 1968 of 650 = 79.36% of this figure. This is a low estimate as the total population number is not reduced by those 18, 19, and 20 years of age. Even so, this data suggests that Antrim may have been erroneously subject to VRA preclearance.

Depending on when between 1960 and 1970 the 21 protected class members moved into Antrim, it may have been impossible that discrimination occurred at the 1968 Presidential election, at the most it would have been very unlikely and not widespread.

Benton, Grafton County:

1960 Census: 172 people, 172 of whom were white.
1970 Census: 194 people, 194 of whom were white.

State records indicate the following voter registration and voting data at the time of the Presidential elections shown:

Year	Registered Voters	Total ballots cast.	Turnout %
1964	52	43	82.7 %
1968	55	43	78.2 %
1972	75	48	64 %

In 1970 the US census reports that 27.3 percent of the population in Benton was under 18 years of age. Voting age was 21 in 1968. 72.7 % of the 1960 total population (172 * .727) is 125.044 or 125 people. The total votes cast in 1968 of 43 = 34.4 % of this figure. This is a low estimate as the total population number is not reduced by those 18, 19, and 20 years of age.

As there were no people in Benton who were members of a protected class at either census, it would have been impossible for discrimination against protected class members to occur. To the extent that the VRA population test was a proxy for

determining how many protected class members had been discouraged from voting or denied the opportunity, the application of the test failed here. The cause of poor voter registration/turnout here had to be from causes other than racial discrimination. Whatever those causes were, we believe they are the causes of poor registration/turnout in the other nine covered towns.

Boscawen, Merrimack County:

1960 Census: 2181 people, 1 (0.05%) of whom was African American.
1970 Census: 3162 people, 7 (0.22%) of whom were African American or "Other."

State records indicate the following voter registration and voting data at the time of the Presidential elections shown:

Year	Registered Voters	Total ballots cast.	Turnout %
1964	1126	846	75.1 %
1968	1282	879	68.6 %
1972	1700	1087	63.9 %

In 1970 the US census reports that 35.1 percent of the population in Boscawen was under 18 years of age. Voting age was 21. 64.9% of the 1960 total population (2181 * .649) is 1415.469 or 1416 people. The total votes cast of 879 = 62% of this figure. This is a low estimate as the total population number is not reduced by those 18, 19, and 20 years of age. Even so, this data suggests that Boscawen may have been erroneously subject to VRA preclearance.

It cannot be reasonably construed that widespread discrimination of the character Congress intended to target existed in Boscawen, when the population was only four hundredths of one percent (1960) or 2 tenths of one percent (1970) non-white.

Millsfield, Coos County:

1960 Census: 7 people, 7 of whom were white.
1970 Census: 18 people, 18 of whom were white.

State records indicate the following voter registration and voting data at the time of the Presidential elections shown:

Year	Registered Voters	Total ballots cast.	Turnout %
1964	6	3	50 %

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1968	5	3	60 %
1972	7	3	42.8 %

In 1970 the US census reports that 27.8 percent of the population in Millsfield was under 18 years of age. Voting age was 21. 72.2% of the 1960 total population (7 * .722) is 5 people. The total votes cast of 3 =60% of this figure. This is a low estimate as the total population number is not reduced by those 18, 19, and 20 years of age. This data suggests that Millsfield may have been erroneously subject to VRA preclearance.

As there were no people in Millsfield who were members of a protected class at either census, it would have been virtually impossible for discrimination against protected class members related to voting to occur, and impossible for widespread discrimination to occur. In towns as small as Millsfield, sickness or a family vacation by a family of two voting age residents would shift voter turnout by 29%. A vehicle breakdown affecting a family of 4 voting age residents (58% of the voting age population), (parents and grandparents) and preventing them from driving into the polls could easily have subjected the town to the preclearance requirement. One or two families of Canadian immigrants who had not yet obtain US citizenship would have a similar effect. We cannot believe that this is what Congress intended.

Newington, Rockingham County:

1960 Census: 2499 people, 294 (11.8%) of whom were African American or "Other."
1970 Census: 798 people , 2 (0.25%) of whom were African American.

State records indicate the following voter registration and voting data at the time of the Presidential elections shown:

Year	Registered Voters	Total ballots cast.	Turnout %
1964	236	194	82.2 %
1968	290	239	82.4 %
1972	367	300	81.7 %

In 1970 the US census reports that 32.3 percent of the population in Newington was under 18 years of age. Voting age was 21. 67.7% of the 1970 total population (.677 * 798) is 540.246 or 540 people. The total votes cast of 239 = 44% of this figure. This is a low estimate as the total population number is not reduced by those 18, 19, and 20 years of age. This data suggests that if the 1968 population was actually closer to the census figures for 1970 than those for 1960, and

there were at least 33 persons aged 18, 19, or 20, then Newington may have been erroneously subject to VRA preclearance.

Local officials in the Town of Newington are currently unable to explain the population drop of 1701 people between 1960 and 1970 reported by the census. They believe their community has always had a population near the 798 reported for 1970 (775 in 2000). They suspect an error by the US census, that the number for 1960 is just wrong. The state voter registration and voting data suggests a stable population throughout this period or that if there ever were 2499 people in Newington, the drop occurred prior to 1964.

Before 1960, the United States Air Force established the Pease Air Force Base in New Hampshire, partially in the Town of Newington. In the 1980s that base was closed. The drop in population of 1701 (68%) that occurred in Newington between 1960 and 1970 might also have been related to some change made at the Air Force base that occurred prior to November 1, 1968. Local officials, however, doubt this theory.

If either alternative is proven, it would have been the case if there was 100% turnout of the actual voting age population in Newington at the 1968 election, the town would still have failed the 50% of 1960 voting age population test. If the actual population in 1968 is approximately that shown by the 1970 census, Newington was similarly situated to the other New Hampshire towns. In that case it was 99.75% white and it would have been impossible for discrimination of the type targeted by Congress to occur. Any failure of turnout attributable to people who were actually still living in Newington in 1968 was from causes other than a discriminatory voter registration or voting process.

Pinkhams Grant, Coos County:

1960 Census: 15 people, 15 of whom were white.
1970 Census: 16 people, 16 of whom were white.

State records indicate the following voter registration and voting data at the time of the Presidential elections shown:

Year	Registered Voters	Total ballots cast.	Turnout %
1964	not reported		
1968	3	3	100 %
1972	9	9	100 %

In 1970 the US census reports that 43.7 percent of the population in Pinkhams Grant was under 18 years of age. Voting age was 21. 56.3% of the 1960 total population ($.563 * 15$) is 8.445 or 8 people. The total votes cast of 3 = 37.5% of this figure. This is a low estimate as the total population number is not reduced by those 18, 19, and 20 years of age. This data suggests that if there were at least 2 persons aged 18, 19, or 20, then Pinkhams Grant may have been erroneously subject to VRA preclearance.

As there were no people in Pinkhams Grant who were members of a protected class at either census, it would have been impossible for discrimination against protected class members to occur. It is noteworthy that currently Pinkhams Grant has a population of 0.

Ringe, Cheshire County:

1960 Census: 941 people, 1 (0.1 %) of whom was African American.
1970 Census: 2175 people, 29 (1.3%) of whom were African American or "Other."

State records indicate the following voter registration and voting data at the time of the Presidential elections shown:

Year	Registered Voters	Total ballots cast.	Turnout %
1964	677	552	81.5%
1968	805	614	76.3%
1972	1141	915	80.2%

In 1970 the US census reports that 23.2 percent of the population in Ringe was under 18 years of age. Voting age was 21. 76.8% of the 1960 total population ($.768 * 941$) is 722.688 or 723 people. The total votes cast of 614 = 84.9% of this figure. This is a low estimate as the total population number is not reduced by those 18, 19, and 20 years of age. This data suggests that Ringe may have been erroneously subject to VRA preclearance.

As the population of protected class members was somewhere between one tenth of one percent and one and one-third percent at the time of the 1968 election, it would have been impossible for widespread discrimination to have been occurring at that time. Ringe had phenomenal growth during this decade. Local officials report that this growth in population stemmed in large part from the development of Franklin Pierce College in the community. If proven, this would suggest that poor registration/voting was attributable to non-participation by the young adults at the college, not racial discrimination.

Stewartstown, Coos County:

1960 Census: 918 people, 918 of whom were white.
1970 Census: 1008 people, 4 (0.4%) of whom were African American or
"Other."

State records indicate the following voter registration and voting data at the time of the Presidential elections shown:

Year	Registered Voters	Total ballots cast.	Turnout %
1964	439	311	70.8%
1968	391	287	73.4%
1972	444	274	61.7%

In 1970 the US census reports that 38.4 percent of the population in Stewartstown was under 18 years of age. Voting age was 21. 61.6% of the 1960 total population (.616 * 918) is 565.488 or 565 people. The total votes cast of 287 = 50.79 % of this figure. This is a low estimate as the total population number is not reduced by those 18, 19, and 20 years of age. This data suggests that Stewartstown may have been erroneously subject to VRA preclearance.

Depending on when between 1960 and 1970 the 4 protected class members moved into Stewartstown, it may have been impossible that discrimination occurred at the 1968 Presidential election, at the most it would have been extremely unlikely.

Stratford, Coos County:

1960 Census: 1029 people, 3 (0.3 %) of whom were African American or
"Other."
1970 Census: 980 people, 1(0.1%) of whom was "Other."

State records indicate the following voter registration and voting data at the time of the Presidential elections shown:

Year	Registered Voters	Total ballots cast.	Turnout %
1964	440	353	80.2%
1968	403	274	68%
1972	431	245	56.8%

In 1970 the US census reports that 39.1 percent of the population in Stratford was under 18 years of age. Voting age was 21. 60.9% of the 1960 total population (.609 * 1029) is 626.661 or 627 people. The total votes cast of 274 = 43.7 % of this

figure. This is a low estimate as the total population number is not reduced by those 18, 19, and 20 years of age. If 40 people were 18, 19, or 20 years of age, this data suggests that Stratford may have been erroneously subject to VRA preclearance.

As the population of protected class members was somewhere between three tenths of one tenth of one percent at the time of the 1968 election, it would have been impossible for widespread discrimination to have been occurring at that time.

Unity, Sullivan County:

1960 Census: 708 people, 708 of whom were white.
1970 Census: 709 people, 2 (0.28%) of whom were "Other."

State records indicate the following voter registration and voting data at the time of the Presidential elections shown:

Year	Registered Voters	Total ballots cast.	Turnout %
1964	287	207	72.1%
1968	288	193	67%
1972	378	232	61.3% 61.4

In 1970 the US census reports that 32 percent of the population in Unity was under 18 years of age. Voting age was 21. 68 % of the 1960 total population (.68 * 708) is 481.44 or 481 people. The total votes cast of 193 = 40.1 % of this figure. This is a low estimate as the total population number is not reduced by those 18, 19, and 20 years of age. If 48 people were 18, 19, or 20 years of age, this data suggests that Stratford may have been erroneously subject to VRA preclearance.

Depending on when between 1960 and 1970 the 2 protected class members moved into Unity, it may have been impossible that discrimination occurred at the 1968 Presidential election, at the most it would have been extremely unlikely. It is impossible that the kind of widespread discrimination targeted by Congress's 50% rule existed.

Form of Preclearance Submissions

For approximately one year the New Hampshire Attorney General's Office has had staff researching New Hampshire's laws and drafting pre-clearance submissions. In addition to the 41 preclearance submissions recently finalized and sent to the DOJ, we have over 100 additional preclearance submissions drafted awaiting final review and cross referencing by an attorney, signature and mailing. The verification process for the initial 41 submissions identified an additional 70 chapter laws, which, at least under our understanding of the usual process, would turn into an additional 70.

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submissions. Based on this experience, our best guess is that it will take somewhere between 300 and 450 submissions, if each is based on a chapter law, to cover 1968 to 2004.

The approximately 140 preclearance submissions already drafted or finalized have taken hundreds of hours of human resources. Each was prepared in accordance with law and DOJ rules. We recognized the need for the DOJ to track a particular law or practice to its pre-1968 status. As part of our process, we created an Excel spreadsheet that is a cross reference between submissions and a statute history. The history identifies each legislative act that affects a particular statute. An early partial draft of the statute history was submitted with the most recent batch of submissions. It would allow the DOJ to identify which submissions address a particular statute. A complete review of a statute, however, would require bringing together several submissions.

We are now advised that when South Dakota presented a similar circumstance, that a different format for submissions was established by a Court order. We are advised that because the DOJ must track the history of a single statute from its 2004 form back to its state as of November 1, 1968, DOJ prefers submissions organized around a particular statute, not a particular change. It is currently unclear what the DOJ wants in terms of the a – r items listed in the DOJ rules. Does the DOJ want the full response to each rule item for each change to each statute, i.e. if a statute has been changed ten times from its pre-1968 form to its current form, do you intend that we provided each item, a – r, repeated ten times? Some items are unique to each change, others for example the source of authority for the Legislature to act has remained the same since before 1968.

We remain open to the idea that completing preclearance may be the path of least resistance, the most efficient way to get New Hampshire out from under what we view as an unjust burden. While we explore alternatives and unless some alternative equitable solution can be achieved, we remain committed to making progress on the backlog of preclearance submissions. We are, however, discouraged and frustrated to learn that our extensive efforts to date may have been ineffective. I have had informal conversations with you and members of your office over the past two or so years and, apparently incorrectly, believed that I had received clear guidance on how New Hampshire should proceed to address the backlog. While, it had been clearly communicated that the ultimate preclearance of a particular change required tracking that practice back to the practice in place in 1968, until this week, no one indicated that a different submission format was required or desired. We look forward to resolving this problem.

Conclusion

New Hampshire is in agreement with the goals of the VRA and respectful of the work of the DOJ and your need to apply the law. We recognize that New Hampshire should have made these census and history based arguments in 1972 and should have more fully complied with the preclearance requirement. It can also be questioned why the DOJ failed to enforce the requirement of these laws in New Hampshire. Using resources now to pursue either failure to act does not serve the people of New Hampshire or of the United States. We respectfully suggest that the New Hampshire Attorney General and the DOJ spending tens of thousands of tax dollars to now pre-clear every change to New Hampshire law that affects voter registration or voting that occurred since 1968 also does not serve our constituents well.

The extremely homogenous character of New Hampshire's population makes the kind of discriminatory public policy and practice that is the target of the VRA virtually impossible to effect and completely impractical. Where such conduct occurred it is generally understood as an effort to keep a significant part of the community from influencing the outcome of elections and thereby public policy. In New Hampshire there was no significant part of the community with a conflicting set of interests in who was elected or what public policy would be adopted. There is no history of the kind of discrimination that is the target of the VRA having occurred and no evidence of it occurring now in New Hampshire. We are highly confident that were a Court to engage in extensive fact finding it would conclude that New Hampshire did not engage in and is not now engaging in the kind of discriminatory voting practices that Congress intended to affect by the VRA.

Diverting resources, State or Federal, to preclear 36 years of New Hampshire law changes harms our common goal of improving elections and ensuring that every qualified citizen has an equal opportunity to register and vote. Prior to diverting resources to work exclusively on pre-clearance submissions, the attorneys and staff were working on an ongoing project to ensure that each New Hampshire polling place is fully accessible.

At the time of the January Presidential Primary we hired and trained Deputy Sheriffs from throughout the State and they were sent to every polling place to conduct an inspection. The Sheriffs inspected ramps, doorways, signage, etc. to determine if they were compliant with accessibility laws. They also assessed compliance with other requirements, such as the posting of voting instructions, pertinent state and federal statutes, and information on State Attorney General's toll free election complaint phone number. We were engaged in the process of sending letters to the election officials in charge of each polling place, alerting them to any deficiencies found and requiring a plan to correct those deficiencies before the fall

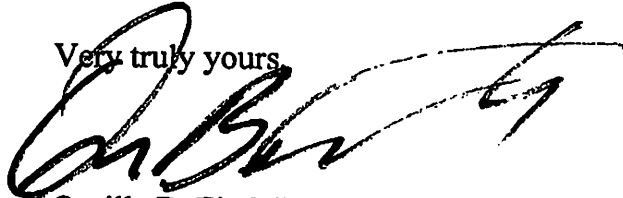
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election. That project has now been stalled, because resources had to be diverted to the preclearance project.

The goal of equal opportunity in voting for all is harmed, not advanced, by spending hundreds of hours and tens of thousands of dollars, State and Federal, on preclearance of the past 36 years of voting changes in New Hampshire. New Hampshire is exploring seeking an equitable order from the Federal District Court for the District of Columbia relieving New Hampshire from the preclearance requirement. Before pursuing court action we would like to determine whether any less onerous alternative exists. Should court action be necessary we will be seeking your assent or non-objection.

I have had occasion to speak during the last two weeks with Mr. Burhman, Mr. Herren, Ms. Fernandez, and Ms Govan. Each was very helpful and as responsive as the circumstances allowed. Ms. Fernandez, in particular, was very patient with my frustrations with the evolving difficulties with our attempts at preclearance. Their efforts are greatly appreciated and I hope we can find a resolution to this problem that does not unduly burden the staff of your office or of the State.

Very truly yours,



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