NO. 12-40856

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE HONORABLE TERRY PETTEWAY; THE HONORABLE DERREC ROSE; THE HONORABLE MICHAEL MONTEZ; THE HONORABLE PENNY POPE; THE HONORABLE SONNY JAMES; THE HONORABLE STEPHEN HOLMES; THE HONORABLE PATRICK DOYLE; ROOSEVELT HENDERSON

Plaintiffs – Appellees

v.

THE HONORABLE MARK HENRY; GALVESTON COUNTY, TEXAS

Galveston County – Appellants

BRIEF FOR THE HONORABLE TERRY PETAWAY ET AL., PLAINTIFFS – APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1 the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications.

1. THE HONORABLE TERRY PETTEWAY, *Plaintiff-Appellee*
2. THE HONORABLE DERREC ROSE, *Plaintiff-Appellee*
3. THE HONORABLE MICHAEL MONTEZ, *Plaintiff-Appellee*
4. THE HONORABLE PENNY POPE, *Plaintiff-Appellee*
5. THE HONORABLE SONNY JAMES, *Plaintiff-Appellee*
6. THE HONORABLE STEPHEN HOLMES, *Plaintiff-Appellee*
7. THE HONORABLE PATRICK DOYLE, *Plaintiff-Appellee*
8. ROOSEVELT HENDERSON, *Plaintiff-Appellee*
9. JOSE GARZA, *counsel for plaintiffs-appellees*
10. MELISSA CASTRO KILLEN, *counsel for plaintiffs-appellees*
11. NEIL G. BARON, *counsel for plaintiffs-appellees*
12. CHAD WILSON DUNN, *counsel for plaintiffs-appellees*
13. THE HONORABLE MARK HENRY, *Defendant-Appellant*
14. GALVESTON COUNTY, TEXAS, *Defendant-Appellant*

15. JOSEPH M. NIXON, *counsel for defendants-appellants*

16. N. TERRY ADAMS, *counsel for defendants-appellants*

17. JOHN K. BROUSSARD, JR., *counsel for defendants-appellants*

18. JAMES EDWIN TRAINOR, III, *counsel for defendants-appellants*

19. KELLY H. LEONARD, *counsel for defendants-appellants*

20. BEIRNE, MAYNARD & PARSONS, LLP, *counsel for defendants-appellants*

21. THE HONORABLE EMILIO GARZA, United States Circuit Judge for the Fifth Circuit Court of Appeals,

22. THE HONORABLE KENNETH HOYT, United States District Judge, Southern District of Texas

23. THE HONORABLE MELINDA HARMON, United States District Judge, Southern District of Texas.

/s/ Jose Garza
Jose Garza

STATEMENT REGARDING ORAL ARGUMENT

Oral argument in this case is unnecessary. This is an appeal of an award of attorneys' fees to prevailing Voting Rights Act plaintiffs. The legal issues in this case are well settled. Since the factual record below is significantly different than that portrayed by the Appellants and clearly shows that the trial court did not stray from this Court's rulings regarding the issue of prevailing party in fee shifting civil rights cases, oral argument would not be helpful. With regard to whether administrative advocacy, which has not been contested as both timely and necessary to on-going litigation, is compensable for work in voting rights act cases, the Galveston County' legal position is not supported by the cases relied upon in their brief and again oral argument would not assist this Court in its review of the case.

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STATEMENT OF THE ISSUES

1. When Plaintiffs challenge newly adopted redistricting plans for County Commissioner, Constable and Justice of the Peace under Section 5 of the Voting Rights Act, are they prevailing parties entitled to attorney's fees pursuant to 42 U.S.C. § 19731(e) when they accomplish the following in the litigation: obtain a letter of objection from the Department of Justice as to all three plans and secure numerous court orders including: (1) enjoining the use of the unprecleared redistricting plans; (2) enjoining that the elections be conducted pursuant to the benchmark redistricting plans (Constable and Justice of the Peace) and different precleared redistricting plan (County Commissioners); (3) scheduling special court ordered elections; and permanently enjoining the use of unprecleared plans; and (4) granting final judgment for Plaintiff on their Section 5 claims, are they "prevailing party" and entitled to attorneys' fees pursuant to 42 U.S.C. § 1973l(e).

2. When Section 5 of the Voting Rights Act Plaintiffs present the only evidence before the Court showing the necessity and importance of administrative advocacy before the Department of Justice to the litigation and when the District Court's orders on the merits of the case are intertwined with the disposition of the administrative proceedings, did the district court abuse its discretion in determining that plaintiffs were entitled to attorneys' fees for time devoted to the case at administrative proceedings before the Department of Justice?

STATEMENT OF THE CASE

Galveston County adopted redistricting plans for County Commissioners, Justices of the Peace and Constables. Plaintiffs consistently argued that these plans reduced the ability of minority voters to elect candidates of their choice and were retrogressive. Due to the closely impending election, Galveston County began to implement these plans for the upcoming election despite having not yet received preclearance for same. Galveston County did not apply to state or federal court in order to alter federal and state laws governing the timing of election activity and without such relief, Galveston County was moving full speed ahead in preparing the election to be held under newly adopted but unprecleared plans. Due to these direct violations of 42 U.S.C. § 1973c ("Section 5"), Plaintiffs filed suit and requested injunctive relief and attorneys fees.

As a result of Plaintiffs efforts, while the litigation was pending, the Department of Justice did not grant preclearance but rather requested significant amounts of additional information from the County in a letter issued on or about December 19, 2011. By order of the Three Judge Panel in this case, the voting changes adopted by the Galveston County were enjoined unless or until the changes were precleared. *See* R. p. 1138. A

letter of objection was then issued by the United States Department of Justice on March 5, 2012 denying preclearance for all the plans.

Subsequently, the three-judge court ordered that the district plans for the 2012 elections for Constable and Justice of the Peace would be restored to the status quo districts exactly as Plaintiffs had been requesting since the filing of the lawsuit. *See* R. p. 1518. Finally, for County Commissioner precincts, Galveston County abandoned the challenged plan (after Plaintiffs were successful in obtaining a DOJ objection to same) and Galveston County adopted a new plan that restored minority voting strength in Commissioner Precinct 3. As a result Galveston County secured the required Section 5 preclearance demanded by the Plaintiffs. The District Court then ordered that this new plan be used for the 2012 elections pursuant to a new election schedule established by the District Court. *See* R. p. 1518-9. Galveston County abandoned the original challenged voting changes and did not appeal from any of the orders on the merits issued by the District Court.

In final summary, the District Court ordered: a) the use of the benchmark plan for Justices of the Peace and Constable elections; b) the use of the County's newly adopted plan that secured preclearance for County Commissioner elections; c) modifications to the election schedule to allow

the use of the ordered plans for use in the 2012 election; and d) a permanent injunction. *See* R. p. 1518.

As a result, there was no close question as to whether Plaintiffs were granted substantial relief and were therefore prevailing parties entitled to attorneys fees and the District Court accordingly granted Plaintiffs their reasonable attorneys fees. Galveston County's appeal from the fee award, but not the orders of affirmative relief should be summarily denied.

STATEMENT OF THE FACTS

This action was brought pursuant to Section 5 Voting Rights Act of 1965, (as amended), 42 U.S.C. §1973c ("Section 5"), challenging the failure of Galveston County to secure the necessary preclearance required by the Act for voting changes in the election districts for County Commissioners, Constables and Justices of the Peace for use in the 2012 elections. *See* R. p. 15.

A. Events Giving Rise to Plaintiffs' Claims

On August 30, 2011, the Galveston County Commissioners' Court adopted Orders establishing boundaries of the County Commissioners, Constables and Justices of the Peace Precincts. *See* R. pp. 17, 64-65, & 162. The plans adopted by the Galveston County Commissioners Court reduced the number of Constables and Justices of the Peace Precincts in Galveston County from eight to five. *See* R. p. 166. Substantially all of the eliminated Justice of the Peace and Constable districts were in areas of the County where there are large populations of African-Americans and Latinos. R. pp. 25-29. The reduction of Justice of the Peace and Constable districts was accomplished by eliminating the very minority opportunity districts that were created by court order in the prior litigation of *Hoskins v. Hannah,* Ca.

No. G-92-12, filed in the United States District Court for the Southern District of Texas. *See* R. p. 25-27.

The plans also caused substantial harm to the African-American and Latino populations in the way it altered the boundaries of most of County Commissioners Precincts. *See* R. pp. 30-31. The proposed plan for Commissioners reduced the percentage of African American and Latino voting age population in all of the newly proposed precincts and reduced minority voting strength in Commissioner Precinct 3. *Id.* The plan essentially cracked the minority population in such a way that would have effectively prevented minority citizens from having a reasonable opportunity to elect the candidates of their choice in any of the commissioners' court precincts.[1]

Despite having been subject to Section 5 since 1972, Galveston County did not submit its redistricting plans for the Commissioner Precincts (Submission No. 2011-4317) until October 14, 2011 and for the Constables and Justices of the Peace Precincts (Submission No. 2011-4374) until October 19, 2011, respectively, forty-five (45) and fifty (50) days after adopting them. *See* R. p. 537-8. Such unexplained delay resulted in

[1] Plaintiffs argued against adoption of plans due to the severe minority vote retrogression before they were adopted by the Commissioners' Court, but their complaints fell on deaf ears. Ultimately, through this litigation and their advocacy before the DOJ, Plaintiffs prevailed in preventing implementation of these injurious plans. DOJ issued an objection essentially adopting Plaintiffs complaints.

Galveston County having to move forward with the election, pursuant to state law, without new, precleared plans. Rather than rely upon the old Justice of the Peace and Constable plans, Galveston County elected to proceed with the new unprecleared plans. Because Galveston County could not hold elections under the old Commissioner precinct lines because of the large disparity of population in the four precincts after the results of the 2010 census, Galveston County also chose to proceed with the unprecleared newly adopted plans. Galveston County did not attempt to obtain any legal relief from any of the election deadlines or redistricting laws and simply acted in defiance of the clear law.

As a result, on November 14, 2011, as primary election deadlines began to expire, Plaintiffs filed this action seeking declaratory and injunctive relief to prevent Galveston County from using the newly enacted but not yet precleared plans. Plaintiffs brought this action pursuant to Section 5 and other laws. Plaintiffs maintained that the redistricting plans would harm minority voters, including Plaintiffs, by reconfiguring the boundaries of most of the existing Commissioners, Constables and Justices of the Peace Precincts in Galveston County. The injury to minority voters throughout the County as a result of the reconfiguration of the precincts was neither necessary nor lawful.

B. Course of the Proceedings and Disposition in the Court Below

This was a Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, enforcement action. *See* R. p. 15. Plaintiffs filed this action on November 14, 2011, seeking to enjoin the enforcement of new election redistricting plans for County Commissioner, Constable and Justice of the Peace precincts, unless or until these plans were precleared pursuant to Section 5 of the Voting Rights Act. *Id.* Plaintiffs also filed a Motion for Temporary Injunction on May 14, 2008. *See* R. p. 267. Although Plaintiffs' complaint included additional claims pursuant to Section 2 of the Voting Rights Act and the 14th Amendment, the emphasis of the case, the only time devoted to the case and the relief sought through the temporary injunction motion and throughout the case only involved the Section 5 claim. *Id.* Moreover, Plaintiffs opposed preclearance of all the challenged plans under Section 5 because the plans had a discriminatory impact, were retrogressive and were adopted with a discriminatory intent.

Galveston County responded by filing their opposition to the Motion for Temporary Restraining Order. *See* R. p. 493. Initially, Galveston County' opposed the TRO contending that 1) the County had timely filed its submission for preclearance; 2) the DOJ would surely preclear the proposed plans; and 3) the plans had no adverse impact on minority voters and only

sought to secure proportional representation for the political parties of Galveston County. *See* R. pp. 496-501.[2] In fact, Galveston County wrongfully stated "It is highly likely that preclearance will be obtained in time to allow the elections for County Commissioner to be held under the districts that have been submitted for preclearance." R. p 495.

Although Galveston County claimed it would never do anything to implement or enforce the unprecleared plans, preparations were underway to accept candidate filings for the 2012 primary under the new plans prior to the filing of this cause of action. *See* R. p. 502. Galveston County sought to excuse this contradictory conduct by arguing that in the unlikely event of its failure to secure preclearance, the filing fees could be refunded. *Id.* ("If filing were to open on Monday and the plan subsequently fails to receive preclearance, then the filing fees will be refunded and a new plan will be prepared and the election will take place at a later date. Allowing filings to take place on Monday provides the most efficient plan of action in that it

[2] Over the course of the litigation, the District Court requested and received a number of briefs from the parties addressing the complex and difficult issues raised by the circumstances of this case. *See* R. p. 532 (Order requiring parties to submit briefs on constitutional dilemma), R. p. 536-570 (Joint Brief and Cross Brief in response to Court's Order), R. pp. 586- 641, 675-678 (Galveston County' Posts Hearing Brief, Post-Trial Brief; and Post Trial Brief); R. pp. 917-923 (Order for briefs on several issues), R. pp. 923-957 (Joint Response to Court Inquires) R. pp. 1018-1135 (Briefing responsive to Court's Order), R. p. 1141 (Order for briefing), R. pp. 1142- 1476 (Briefing responsive to Order), R. p. 1417 (Order for Expedited Response to Motion for Reconsideration), R. p. 1418-1434 (Expedited Responses), and R. p. 1481 (Order for Expedited Response to Motion to Dissolve Three Judge Court). After vacating the initial temporary restraining order, the Court reinstated the injunction upon motion of the Plaintiffs. *See* R. p. 1138. In addition, a number of evidentiary and argument hearings were conducted by the court. *See* R. p. 486 (Order setting hearing for November 21, 2011), R. p. 529 (Order setting hearing for November 30, 2011), R. p. 1017 (Order setting hearing for January 10, 2012), and R. p. 1435 (Order setting hearing for March 23, 2012).

allows for the current publicized filing process and the opportunity for use of a legislatively enacted plan which will be addressed by DOJ in the next few weeks, if not earlier".)

On November 21, 2011 the district court issued and entered an order granting Plaintiffs' Motion for injunctive relief. *See* R. p. 522. At the hearing before the three judge court on November 30, 2011, Galveston County argued that the Court lacked the jurisdiction to enjoin the use of the unprecleared plans because Galveston County had no role in conducting the Primary elections[3] and that injunctive relief was premature because there was still time to secure preclearance before the election. *See* R. pp. 703-5. Moreover, Galveston County argued that the District Court should not interfere with the County's efforts to save money by reducing the number of Justice and Constable positions from 8 to 5 regardless of the status on preclearance. *See* R. p. 705-6.

Based on the representations of the Galveston County that preclearance was forthcoming, and the court's determination that its authority only extended to insuring that Galveston County had submitted the voting changes for prelearance, the three judge court (with Judge Hoyt

[3] Galveston County did not argue that election activities were not moving forward under the unprecleared plans but rather that those activities such as candidate filing and precinct modifications were being performed by the political parties, not the County. R. Vol. 1, p. 705. Galveston County never explained how the political parties were responsible for the adoption of redistricting plans and the district court declined to adopt this determination.

dissenting) issued an order on December 9, 2011, vacating the temporary restraining order earlier entered by Judge Hoyt thereby permitting the County to move forward with the 2012 election using the unprecleared plans. *See* R. p. 889, 893 ("Any person wishing to stand for election as county commissioner, justice of the peace, or constable of Galveston County… may file for election under the unprecleared plan, …").

As the impending election time-lines drew closer, the Department of Justice showed concerns about the impact of the plans on minority voters by issuing a request for significant amounts of new information on December 19, 2011. The County continued to proceed with the unprecleared plans, so Plaintiffs filed a motion to reconsider the lifting of the injunction. *See* R. p. 958. At the hearing, Galveston County again argued that the injunctive relief was unnecessary, since the County would not enforce the unprecleared plans. Plaintiffs again presented evidence and argument that the County was indeed proceeding with the implementation of the unprecleared plans. The three judge court reversed itself, granted Plaintiffs' Motion for Reconsideration, and enjoined Galveston County from taking any actions to enforce the unprecleared plans. *See* R. p. 1138-9. Plaintiffs had prevailed in obtaining the relief they sought.

On March 5, 2012 the United States Department of Justice interposed an objection to both the new redistricting plan for County Commissioners and the new redistricting plans that reduced the number of Constables and Justice of the Peace precincts from 8 to 5. *See* R. pp. 1402-6. The Department of Justice found that the plans were retrogressive and that the evidence indicated purposeful discrimination. *Id.* The position taken by Plaintiffs all along had been vindicated.

Having no other alternative, the County then abandoned both new plans, and adopted yet another new plan for County Commissioner elections while asking the Court to do what Plaintiffs had consistently requested, namely to order the use of the benchmark plans for Constable and Justice of the Peace. *See* R. p. 1477-8.[4] As a result of this lawsuit, Plaintiffs secured both the injunctive relief in the case and the letter of objection from the Department of Justice with the result being that the specific redistricting plans that were the subject of Plaintiffs' lawsuit were never used in Galveston County elections. Judgment on Plaintiffs' Section 5 claims was entered for the Plaintiffs May 31, 2012. *See* R. p. 1697.

[4] In fact, in their pleading at that time, Galveston County acknowledged that it was appropriate for the District Court to issue an order implementing the benchmark plan for elections for Justice of the Peace and Constable. R. p. 1478. Galveston County knew it had lost the fight and acknowledged the writing on the wall. But for Plaintiffs relentless advocacy, Galveston County would have moved forward with its plans, unimpeded.

Thus, Plaintiffs secured the relief they sought and are prevailing parties entitled to attorneys' fees pursuant to the Act. Plaintiffs' filed their motions for attorneys' fees on April 5, 2012 (R. p. 1521) and on April 6, 2012 (R. p. 1588). Plaintiffs submitted evidence supporting their fee claims including contemporaneous time records for each attorney claiming fees, expert affidavits on the issues of whether the fee claims were reasonable and as to prevailing market rates. *See* R. pp. 1537-1559, 1560-1563, 1600-1611, 1612-1628, & 1629-1632. In addition, Plaintiffs' counsel Jose Garza provided an affidavit detailing the need for advocacy before the Department of Justice as an integral part of this litigation. *See* R. pp. 1601-2. Galveston County responded by opposing plaintiffs claim of prevailing party status and objecting to the award of fees for work before the Department of Justice. *See* R. pp. 1655. In two separate orders, the District Court granted plaintiffs motion for fees. *See* R. pp. 1691 & 1693. Galveston County unsuccessfully urged a Motion to Amend the Judgment. *See* R. p. 1704. Then, Galveston County filed their Notice of Appeal on July 26, 2012. *See* R. p. 1750.

SUMMARY OF THE ARGUMENT

Galveston County argues that Plaintiffs are not prevailing parties in this action because Galveston County claims that: 1) Galveston County's changed behavior was voluntarily; 2) Plaintiffs failed to secure any relief

that materially altered the relationship between the parties; and/or 3) Plaintiffs failed to obtain any judicial relief that modified the Defendant's behavior in a way that directly benefitted the Plaintiffs.

Galveston County' position completely misstates the facts and record of this case. Regardless of the assertions and promises of their counsel to the contrary, Galveston County was in fact implementing the unprecleared plans for the impending elections. Galveston County never defaulted to the benchmark plans for County Commissioner, Constable or Justice of the Peace in their preparations for the impending 2012 primary elections, until ordered to do so by the trial court. A review of the Record, shows that Galveston County's election activities leading up to the primary elections were exclusively based on the new unprelceared plans. The arguments of Galveston County before this Court creates facts that were never established below and the record here simply does not support Galveston County's contentions.

Moreover, the trial court, in fact, issued Judgment for the Plaintiffs on its Section 5 claims and none of the originally challenged redistricting plans were ever used in any elections in Galveston County. Thus, the Plaintiffs secured the exact relief they sought. The plaintiffs secured orders from the District Court that altered the legal relationship between the parties, and

secured court orders that modified Galveston County' behavior in a way that directly benefited the Plaintiffs.

The trial court considered Galveston County's assertions that they were not implementing the unprecleared changes when it considered and granted Plaintiffs' Motion for preliminary injunction; Galveston County never appealed these district court determinations. *See* R. p.1138. The trial court also considered Plaintiffs' evidence that: a) the County was indeed preparing for elections using the unprecleared plans; b) that no preclearance had been obtained for the challenged plans; and c) that the County had not defaulted to the benchmark plans. Id. *See* R. p. 1024 and R. p. 1042. Therefore, the trial court had before it Galveston County's assurances that it would not attempt to use the unprecleared plans for the upcoming elections, and Plaintiffs' evidence that in fact, Galveston County was implementing the unprecleared plans for the upcoming election. Galveston County lost this argument below and by falling to secure a timely appeal of this determination, cannot argue this fact now.

In the end, the trial court determined that Plaintiffs' evidence and arguments were credible and it issued an injunction. *See* R. p. 1138. The trial court then specifically found that "injunctive relief was appropriate" and ordered that "Galveston County, … ENJOINED from doing *any* act that

begins the process of implementing an unprecleared election plan for the 2012 Primary Election, without prior approval of the Panel Court." (emphasis in original). *Id.* In addition, Plaintiffs secured letters of objection, under Section 5 blocking the use of the plans being challenged in their legal action. Finally, Plaintiffs secured Judgment for Plaintiffs on their Section 5 claims and the resulting judgment was not appealed by the Galveston County. Under these facts, the legal authority relied upon by the Galveston County offers no basis for modifying the District Court's ruling that Plaintiffs were prevailing parties.

The District Court also correctly awarded fees for the administrative advocacy of the Plaintiffs before the Department of Justice. The Galveston County claim that fees are never available for administrative work in a Section 5 case, simply is not supported by rulings of the United States Supreme Court nor of this Court. As set out by this Court in *Leroy v. City of Houston*, 831 F. 2d 576, (5th Cir. 1987), where the hours claimed are contemporaneous with the legal action and "work that was both useful and of a type ordinarily necessary to advance the civil rights litigation" fees may be awarded in Section 5 cases for administrative work at the Department of Justice.

The correct test to be applied to determine whether the fees claimed are compensable is whether the counsel's participation in administrative activities is connected both qualitatively and in timeliness to the lawsuit in order to establish that such work was performed "on the litigation." *Webb v. Board of Education of Dyer County* 471 U.S. 234, 582 (1982). Here, Galveston County offered no factual support to counter the affidavits submitted by the Plaintiffs, for their claim that fees were inappropriate for work before the Department of Justice.

STANDARD OF REVIEW

The district court has broad discretion to award attorney's fees under civil rights fee shifting statutes. *See Hopwood v. Texas, 236 F.3d 256, 277 (5th Cir. 2000)*. In evaluating whether the district court abused its discretion to award attorney's fees, this Court reviews the factual findings supporting the grant or denial of attorney's fees for clear error and the conclusions of law underlying the award *de novo*. *Energy Mgmt. Corp. v. City of Shreveport, 467 F.3d 471, 482 (5th Cir. 2006)*. "[T]he characterization of prevailing-party status for awards under fee-shifting statutes such as *§ 1988* is a legal question subject to *de novo* review." *Bailey v. Mississippi, 407 F.3d 684, 687 (5th Cir. 2005)*.

ARGUMENT

I. The District Court's Rulings Enjoining Galveston County, Ordering Redistricting Plans for the 2012 Election and Entering Judgment on Plaintiffs' Section 5 of the Voting Rights Act Claims Altered the Legal Relationship Between the Parties.

Once a three-judge district court has determined that a violation of the Voting Rights Act has occurred, and issues an injunction, it is proper to remand the case to a single judge to determine matters ancillary to the main proceedings, such as a determination whether to award attorneys' fees. *Bond v. White,* 508 F.2d 1397(5th Cir. 1975). That is exactly what occurred here. The Three-Judge District Court was dissolved once it ordered: a) the use of the benchmark plan for Justices of the Peace and Constable elections; b) the use of the County's newly adopted plan that secured preclearance for County Commissioner elections; c) modifications to the election schedule to allow the use of the ordered plans for use in the 2012 election; and d) a permanent injunction. (R. p. 1518). The remaining convening single judge then determined entitlement to attorney's fees and the amount to be awarded.

The Supreme Court has held that civil rights plaintiffs are prevailing parties "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Texas State Teachers Association v. Garland Independent School District,* 489 U.S. 782, 789, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989). In other words, "the

plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between [it] and the defendant." *Id at 792.* In this case, this Court granted Plaintiff's motion to enjoin Galveston County' efforts to conduct elections pursuant to unprecleared election change. The Court further granted Plaintiffs' motions by ordering the elections be conducted pursuant to the benchmark plan for Justice of the Peace and Constable Precincts and pursuant to a new County plan that complied with Section 5 of the Voting Rights Act for the commissioners precincts. As a result of the Department of Justice objection Plaintiffs vigorously advocated for, Galveston County abandoned its adopted but unprecleared plans and those plans were not used for the 2012 elections. In other words, Plaintiffs received precisely the relief they requested and the only relief they could have been afforded under Section 5 of the Act.

A prevailing party in a civil rights action is entitled to an award of attorney's fees under 42 U.S.C. § 1988(b) and 1973l (e). Prevailing party is a legal term of art, generally meaning a "party in whose favor a judgment is rendered ...." *Buckhannon Bd. & Care Home, Inc. v. W. Vir. Dept. of Health and Human Res.*, 532 U.S. 598, 603 (2001) (quotation omitted).

> To qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or

> comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affect[t] the behavior of the defendant toward the plaintiff." Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship between the parties" and thereby transform the plaintiff into a prevailing party. In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Farrar v. Hobby, 506 U.S. 103,111-112 (1992)(citations omitted).

The United State Supreme Court in *Buckhannon Bd. & Care Home v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598 (2001) rejected the so called "catalyst theory" as a basis for recovery of attorney's fees and determined that to be a "prevailing party" a plaintiff must show that the material alteration in the legal relationship must have a "necessary judicial *imprimatur*."

The Fifth Circuit has determined that such "judicial *imprimatur*" need not be a final judgment. *Dearmore v. City of Garland,* 519 F.3d 517, 526 (5th Cir. 2008)("The fact that Dearmore never obtained a final judgment on the merits does not affect our ruling, as a final judgment is not required.") Rather, the key question is whether the particular judicial determinations in the particular case, which led to the Plaintiffs securing

the relief they sought, were merely technical or de *minimus* judicial pronouncements or whether such judicial decrees are substantial. *Dearmore*, 519 F.3d at 521("Although an enforceable judgment on the merits and a court-ordered consent decree have sufficient judicial *imprimatur*, these examples are not exclusive. *See Buckhannon*, 532 U.S. at 605 (referencing the judgment on the merits and consent decree as mere "examples")".

Thus, although an enforceable judgment on the merits and a court-ordered consent decree have sufficient judicial *imprimatur*, these examples are not exclusive. *Dearmore,* 519 F. 3d at 521.

In this case, Plaintiffs, secured preliminary and permanent injunctive relief as well as final judgment on the merits of their Section 5 claims. R. p. 1518).

In their Original Complaint (and subsequent filings), Plaintiffs sought relief pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973(c) (as amended). Plaintiffs requested the Court issue a temporary restraining order enjoining Defendants from implementing the unprecleared redistricting plans for County Commissioner, Justice of the Peace and Constable offices for use in the Primary Election. Plaintiffs also requested permanent injunctive relief and judgment on their claims. Each of these was granted by

the district court. Finally, no appeal was taken by the Defendants on these merits determinations.

A. The Factual Record Does Not Support Appellants' Claims that the Court's Orders Had No Real Impact on Their Conduct.

Galveston County falsely claims throughout its brief here that the county at all times complied fully with the requirements of the Voting Rights Act, regardless of this lawsuit. Appellants' Brief. This assertion is disingenuous, as this case exactly centered on these very questions. Specifically Plaintiffs consistently contended that Galveston County did not obtain preclearance for newly enacted redistricting plans for County Commissioner, Justice of the Peace and Constable offices and that Galveston County was proceeding to conduct the election pursuant to those unprecleared plans prior to the filing of this lawsuit. When the district court ruled for Plaintiffs, Galveston County took no timely appeal.

In a Section 5 case, the court's role is strictly limited to determining whether §5 covers a contested change, whether the §5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate. *Lopez v. Monterey County [Lopez I]*, 519 U.S. 9, 20 (1996). The merits of this case and claim centered precisely on the *Lopez* three part test.

Galveston County's argument that "the record is indisputable that the Galveston County never attempted to implement an unprecleared plan," is chimerical.[5] Even were the Court to review such a question despite the lack of a timely appeal by Galveston County, there is no doubt that Galveston County, was "seeking to administer" the changes for which preclearance was sought when its attorney made his initial submission to DOJ on October 19, 2011 and when it provided additional information regarding the plans on January 4 and February 6, 2012. *See Branch v. Smith*, 538 U.S. 254, 265 (2003). In addition, Galveston County's Submissions entered into the record of this case contain the Galveston County Commissions Court Orders adopting the boundary changes for its county commissioner, justice of the peace and constable precincts. The Galveston County submission plainly and clearly states that the proposed redistricting changes are effective on January 1, 2012. (R. p. 78)("effective January 1, 2012 or when preclearance is obtained".

In addition, the factual record below clearly sets out that elections were proceeding pursuant to the unprelceared plans. *See* R. pp. 1138-9.

[5] Galveston County also claimed they were attempting to expedite the Section 5 preclearance process by filing a lawsuit in the District Court for the District of Columbia. This may have been the intent of the County's attorneys, however for all practical purposes, voting rights attorneys know that the more expeditious route when one is seeking preclearance is administrative review by the DOJ, which normally is 60 days. We can glean from the docket sheet that suit was filed on October 17, 2011, but Galveston County had difficulty effecting service of process resulting in the Government's answer being due on February 14, 2012, which was 120 days later. Again, Galveston County does not explain its considerable delay in seeking administrative preclearance.

Although the County claimed it would never do anything to enforce the unprecleared plans, preparations were underway to accept candidate filings for the 2012 primary under the new plans. *See* R. p. 502. In fact, in a hearing, Galveston County conceded that election activities were moving forward under the unprecleared plans, but contended disingenuously that those activities such as candidate filing and precinct modifications were being performed by the political parties, not the County. *See* R. p. 705.

Thus, the district court had before it both the Galveston County assertions that it would not seek to conduct elections under the unprecleared plans and evidence that the County was in fact proceeding with elections under the unprelceared plans.[6] The district court rejected Galveston County's assertions that it was not implementing the challenged plans and after careful consideration of the arguments and evidence presented and the timetable in place, determined that Plaintiffs were entitled to injunctive relief. *See* R. pp. 1138-9. Clearly, Plaintiffs obtained relief on the merits of their claim.

In *Buckhannon*, the court reviewed the legislative history of § 1988 and found that:

[6] There are only two interpretations of the underlying facts. Either (1) Galveston County had no intention to hold an election under the timelines required by law or (2) Galveston County was seeking to implement unprecleared plans in the upcoming elections. Either way, Galveston County was in violation of Section 5.

> "'Our "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Hewitt v. Helms,* 482 U.S. 755, 760, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). We have held that even an award of nominal damages suffices under this test. *See Farrar v. Hobby,* 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). In addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees. *See Maher v. Gagne,* 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980). Although a consent decree does not always include an admission of liability by the defendant, see, *e.g., id.*, at 126, n. 8, 100 S.Ct. 2570, it nonetheless is a court-ordered "chang[e][in] the legal relationship between [the plaintiff] and the defendant." *Texas State Teachers Assn. v. Garland Independent School Dist.,* 489 U.S. 782, 792, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (citing *Hewitt, supra,* at 760–761, 107 S.Ct. 2672, and *Rhodes v. Stewart,* 488 U.S. 1, 3–4, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) *(per curiam)*). These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create the "material alteration of the legal relationship of the parties" necessary to permit an award of attorney's fees. [citations omitted]"

Buckhannon, 532 U.S. at 603-4.

Here, not only did Plaintiffs secure injunctive relief but also judgment on the merits of their Section 5 claims. (R. p. 1697).

B. The District Court's Granted the Plaintiffs the Relief they sought Under Section 5: the 2011 redistricting plans for County Commissioner Precincts, Constable and Justice of the Peace Precincts Adopted by the Galveston County Were Never Implemented or Used in Galveston County Elections.

Galveston County claims that this case is analogous to a number of cases post-*Buckhannon* that make clear that no catalyst theory of recovery is

available under the civil rights fee shifting provisions. *See* Appellants Brief at 25-27. However, what the Galveston County fails to observe is that in this case, Plaintiffs secured an enforceable judgment, not just merely a temporary restraining order.

The Three-Judge Court entered a permanent injunction enjoining Galveston County from use of the unprecleared voting changes including the reduction of constables and justices of the peace precincts and redistricting of same. *See* R. p. 1138-9. Clearly, Plaintiffs obtained an enforceable judgment against the Defendant from whom fees are sought.

Farrar requires some relief on the merits and an enforceable judgment - one that materially alters the legal relationship between the parties. Material alteration occurs when the plaintiff becomes entitled to enforce a judgment, consent decree or settlement against Defendant. *Farrar*, 506 U.S. at 113; *Buckhannon*, 532 U.S. at 604.

After the permanent injunction and the judgment were entered Plaintiffs were and are entitled to enforce it against Galveston County. The permanent injunction order changed the legal relationship of the parties. For example, had the County missed deadlines set out in the order or proceeded with another attempt to redistrict constable and justice of the peace lines without court oversight, the Plaintiffs could have requested that the district

court enforce the judgment. Moreover, Galveston County themselves, acknowledged that in the end, a district court order was required to mandate that the benchmark constable and justice of the peace redistricting plans be used for the 2012 elections. *See* Galveston County' Advisory to the Court, R. p. 1478. In fact, given the necessity of Court imposed election deadlines that excused passed deadlines required by state law, Galveston County needed this judicial proceeding in order to give the untimely held election processes some imprimatur of legitimacy.

In its final order, the Three-Judge District Court ordered: a) the use of the benchmark plan for Justices of the Peace and Constable elections; b) the use of the County's newly adopted plan that secured preclearance for County Commissioner elections; c) modifications to the election schedule to allow the use of the ordered plans for use in the 2012 election; and d) a permanent injunction. *See* R. p. 1518. Plaintiffs sought this order so that the election would comply with Section 5 and by obtaining such orders, Plaintiffs prevailed.

The United States Supreme Court in *Allen v. State Bd. Of Elections*, 393 U.S 544 (1969) stated that "the achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on the litigation instituted at the discretion of the Attorney

General... It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the Section 5 approval requirements." *Id* at 827. This is exactly the case here. The guarantee of Section 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to Section 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition" *Id*.

Plaintiffs complained that Galveston County plans had not received preclearance and that the plans were retrogressive and diluted African American and Latino voters' ability to elect the candidate of their choice. The Court agreed and issued first a preliminary injunction and then a permanent injunction. The DOJ agreed with Plaintiffs that the plans were retrogressive and adopted with a discriminatory intent. *See* R. pp. 1388 & 1402-6.

There is need for private enforcement of Section 5, and awarding attorneys' fees encourages private enforcement actions. This is particularly vital here since damages are not available. *Bond v. White*, 508 F.2d 1397 at 1402 (1975) citing *Lee v. Southern Home Sites Corp*., 444 F.2d 143, 147-48 (5th Cir. 1971).

Clearly, in this case, Plaintiffs were enforcing the Voting Rights Act's goal and achieved their goals by obtaining a permanent injunction and a favorable final judgment. Plaintiffs are therefore entitled to prevailing party status.

Galveston County, on the other hand, wants this Court to deny prevailing party status to Plaintiffs based on their assertion already rejected by the trial court that their conduct in defaulting to the baseline plan for Justices of the Peace and Constables and abandoning their adopted plan for County Commissioner elections was completely voluntary. Galveston County' position defies common sense.

Galveston County' adopted and began to implement their proposed redistricting plan without preclearance. Plaintiffs filed this lawsuit challenging such action and developed the evidentiary record before the District Court and obtained the injunctions and other court orders issued during the lawsuit. Galveston County cannot be allowed to abandon their proposed unprecleared redistricting plan at the last moment and claim that their conduct was voluntary under the factual and evidentiary record before this Court.

II. The District Court's Discretion Regarding Entitlement to Fees Requested by the Plaintiffs For Work Associated With Their Section 5 Claims at the Department of Justice Was Supported by the Only Evidence in the Record on this Issue.

A. Under the Voting Rights Act's fee shifting provisions attorneys' fees may be compensable for administrative work before the Department of Justice.

Appellant's claim that "the District [sic] compounded its error by awarding fees for services that were not part of this litigation and were not compensable as a matter of law. Galveston County states the fees and expenses for Plaintiffs' attorneys' preclearance advocacy before the Department of Justice is not compensable under well-established precedent from this Court. *See* Appellants' Brief at page 33. Galveston County is incorrect in this theory because it fails to distinguish between administrative work in a completely separate presubmission context and administrative work done that is both contemporaneous to the litigation and impactful on the outcome of the particular case.

Galveston County' rely on *Craig v. Gregg County*, 988 F. 2d 18 (5th Cir. 1993), which is inapplicable because *Craig* discusses prevailing party issues not preclearance issues . Galveston County also cites to *Arriola v. Harville*, 781 F. 2d 506, 508-10 (5th Cir. 1986), however Galveston County fail to read the case to its logical conclusion (on page 511), that fees for preclearance may be allowed if there is a connection between the

preclearance submission and the lawsuit. See *Arriola* 781 F. 2d at 511. In addition, Appellants ignore footnote 1 of *Arriola* which makes the observation that prevailing counsel might in some cases recover "compensation for services rendered in a preclearance submission that bear directly on the issues in an independent lawsuit and were the work is required and necessary to resolve the issues of the independent lawsuit."

Appellants reliance on *Leroy v. City of Houston*, 831 F.2d 576 (5th Cir. 1987) is similarly misplaced. The *Leroy* Court referred to an administrative process completed before the litigation. Appellants further fail to mention that the *Leroy* Court (citing *Webb*) held there was no prohibition on the recovery of attorneys' fees for administrative proceedings for "work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement." *Id.*, 831 F. 2d at 582.

Galveston County refuses to acknowledge that this Court has distinguished between work performed "on the litigation" and work that only advanced the administrative process. The cases Galveston County relies upon did in fact deny attorneys' fees for preclearance work. However, the courts did not rule that there was a blanket prohibition against awarding such fees. The cases cited by Galveston County reference examples of fee requests that were denied because they were for work performed prior to

the filing of the litigation or after the litigation had already been concluded. In addition, the cases cited by Appellants do not foreclose fees for preclearance work. Those cases in fact lay out a test to determine when attorney's fees for work done during the preclearance process are compensable.

The correct test to be applied is that the counsel's participation in administrative activities must be tied both qualitatively and in timeliness to the lawsuit in order to establish that such work was performed "on the litigation." *Webb* at 582.

From the standpoint of timeliness, the work Plaintiffs' Attorneys' performed in this litigation and in this administrative proceeding is *not* easily separable. Here the administrative work was performed contemporaneous with the activity in the case and impacted in the results obtained (for example, the permanent injunction was issued immediately after the letter of objection was issued). Plaintiffs provided evidence of these factors to the District Court by submitting their time sheets together with briefing and argument to support their claim that the administrative work done in this particular case occurred contemporaneously with the litigation and had an impact on the outcome of the litigation and was therefore compensable.

Appellants contend inaccurately that the administrative work performed in this case is not compensable because the work done at the DOJ by Plaintiffs was not legally required or necessary to resolve this litigation. The detailed time entries provided to the District Court establish that the type of work Plaintiffs performed before the DOJ and the timing of that work was critical to their representation and to the result obtained on behalf of their clients in this matter. Among other things the detailed time entries establish that the administrative work performed at the DOJ by the Plaintiffs took place during an extremely critical moment in the case. Plaintiffs made their presentation to the Department one week before the DOJ letter of objection was issued objecting to the Appellants' redistricting plans for Commissioner's Court, Justice of the Peace and Constable Precincts. Plaintiffs' presentation to the DOJ took place literally less than 30 days before the case was concluded on terms favorable to the Plaintiffs.

B. Plaintiffs uncontroverted affidavits established that the Department of Justice, advocacy was both necessary to the ultimate outcome in this litigation and also that the advocacy was of the sort customarily devoted to the representation of Plaintiffs in Section 5 enforcement actions.

Plaintiffs' communicated concerns with the Department of Justice regarding the redistricting plans by participating in phone and in person conversations with Department personnel, sending comment letters, and

expert reports. The results of these activities and the chronology of the timeliness of the work were important in the normal representation of the Plaintiffs and consistent with their attorneys' obligation to their clients. The chronology of events show Plaintiffs influenced the Department by furnishing them with factual information and expert analysis that the Department did not previously have. Furthermore Plaintiffs' lawsuit and the resulting orders entered after DOJ's initial objection and while Appellants proposed plans were still pending before the Department caused Appellant to remedy its' objectionable plan. In fact, Plaintiffs' lawsuit and Plaintiffs' activity before the DOJ caused Appellants to completely abandon its proposed redistricting plan for Constables and Justices of the Peace and to mostly abandon its adopted plan for Commissioners' Court.

The trial court was in possession of evidence that showed Plaintiffs' administrative activities were timely and qualitatively tied to the lawsuit. For example, in Mr. Garza's fees application he states that:

> Some of the time I spent on the case was for advocating before the Department of Justice during Section 5 submission of the challenged election changes in a successful attempt to secure a letter of objection to the challenged enacted plans. The Section 5 preclearance process in this case proceeded on a dual track with the litigation. In fact, this Court clearly understood how intertwined the litigation and the Section 5 process were because. The Court conditioned its injunctive relief on the status of the Department of Justice preclearance process. It was thus, imperative for counsel for the Plaintiffs, to advocate its

> position to the Department of Justice in order to protect its interests in this action.

R. p. 1601.

The District Court Judge was present during evidentiary hearings where Appellants did not agree to withdraw their proposed plan for the Constables and Justices of the Peace until they were ordered to. The District Court Judge was also present during evidentiary hearings where Appellants did not agree to back away from their adopted map for Commissioners' Court until after DOJ denied preclearance on March 5, 2012. The District Court was provided evidence that established the Department took action one week after Plaintiffs presented their witnesses and expert analysis to the Department. In addition, Appellants raised no arguments and did not provide evidence to counter Plaintiffs' Attorneys' request for fees.

In conclusion, the record established before the District Court is clear that the administrative work performed by the attorneys on behalf of the Plaintiffs below took place during a critical period of this lawsuit and had an impact on the outcome of the lawsuit that was favorable to the Plaintiffs. Therefore based on the cases cited by the Galveston County, itself, this work is clearly compensable.

CONCLUSION

Because Plaintiffs prevailed on their Section 5 claim and obtained all the relief they requested, the district court did not abuse its discretion by awarding attorneys fees. Also, because Plaintiffs efforts before DOJ were integral to the resolution of this lawsuit, the District Court did not abuse its discretion in awarding attorneys fee for such work.

Defendants argue that these achievements are insufficient where a defendant declares its intent not to enforce unprecleared plans, all the while proceeding with using those plans in upcoming elections. The Defendants' argument to expand *Buckhannon* in this way would result in the nullification of the fee shifting provision of the Voting Rights Act for Section 5 enforcement actions.

In light of the foregoing, Appellees/Plaintiffs request that this court affirm the District Courts award of attorneys' fees, order that Plaintiffs are prevailing party on this appeal and remand to the District Court to determine a fair and reasonable fee award for Plaintiffs for work on this appeal. *See Johnson v. State of Mississippi*, 606 F. 2d 635, 639 ("Plaintiffs are entitled,

… to fees for time spent protecting their fee award on appeal.")

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Respectfully Submitted,

/s/ Jose Garza

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2013, I electronically filed the foregoing document with the Clerk of the United States District Court, Southern District of Texas, Galveston Division, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7(c), undersigned counsel certifies that this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b).

1. Exclusive of the portions exempted by 5TH CIR. R. 32.2.7(b)(3), this Brief contains 9,596 words printed in a proportionally spaced typeface.

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4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5TH CIR. R. 32.2.7, may result in the Court's striking this Brief and imposing sanctions against the person who signed it.

By: *s/ Chad W. Dunn*