Case No. 12-40856

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE HONORABLE TERRY PETTEWAY; THE HONORABLE DERRECK 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,

Defendants – Appellants.

On Appeal from the U.S. District Court for the Southern District of Texas, Galveston Division
Civil Action No. 3:11-cv-00511

APPELLANTS' BRIEF

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CERTIFICATE OF INTERESTED PERSONS

In accordance with 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 disqualification or recusal.

1. The Honorable Terry Petteway, *Plaintiff-Appellee*;
2. The Honorable Derreck 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. Neil G. Baron, *counsel for Plaintiffs–Appellees*;
10. Chad Wilson Dunn and Brazil & Dunn, LLP, *counsel for Plaintiffs-Appellees*;
11. Jose Garza, *counsel for Plaintiffs-Appellees*;
12. Melissa Castro Killen and Kaufman & Killen, Inc., *counsel for Plaintiffs-Appellees*;
13. The Honorable Mark Henry, in his capacity as Galveston County Judge, and Galveston County, *Defendants-Appellants*;

14. Joseph M. Nixon, N. Terry Adams, Jr., John K. Broussard, Jr., James Edwin Trainor, III ("Trey"), Kelly H. Leonard, and Beirne, Maynard & Parsons, LLP, *counsel for Defendants-Appellants*;

15. The Honorable Emilio Garza, United States Circuit Judge for the Fifth Circuit Court of Appeals.

16. The Honorable Kenneth Hoyt, United States District Judge, Southern District of Texas.

17. The Honorable Melinda Harmon, United States District Judge, Southern District of Texas.

/s/ *John K. Broussard, Jr.*
John K. Broussard, Jr.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested in this matter. *See* 5TH CIR. R. 28.2.3. This case addresses questions relating to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and asks the Court to analyze the section of the Act providing for an award of a reasonable attorney's fee to a "prevailing party." The District Court's award of attorneys' fees came after a complex and unusual procedural history, including consideration of simultaneous administrative proceedings and state-wide litigation relevant to both the eventual award and the amount of attorneys' fees. Appellants, therefore, believe that oral argument would be useful in assisting this Court in its deliberations on this case.

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STATEMENT OF JURISDICTION

(1) *Basis for the district court's subject-matter jurisdiction*: 28 U.S.C. § 1331. The Original Complaint alleges causes of action under the Voting Rights Act.

(2) *Basis for the Fifth Circuit's jurisdiction*: 28 U.S.C. § 1291. Appellants timely appealed from the district court's Final Judgment and orders granting Plaintiffs' motions for attorneys' fees.

ISSUES PRESENTED

1. Plaintiffs in Voting Rights Act cases may recover attorneys' fees as "prevailing parties" under this Court's three-part test following *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). Here, the substantive relief granted to the Plaintiffs was an injunction enjoining Galveston County from using election maps that were not "precleared" by the Department of Justice, even though Galveston had submitted its proposed maps to the Department of Justice for preclearance and agreed to not use maps that were not precleared. Did the District Court's injunction (1) materially alter the legal relationship of the parties, and (2) modify Galveston County's behavior in a way that directly benefited the Plaintiffs?

2. *Assuming arguendo that the Plaintiffs are entitled to attorneys' fees*: When determining the amount of attorneys' fees to award in Voting Rights Act litigation, courts award fees for the work done by attorneys in related administrative proceedings only when those legal services were useful and required for the litigation. Here, the District Court made no allocation of fees and made no finding that the fees were useful or required for the litigation, yet it still awarded the Plaintiffs all fees requested for their attorneys' lobbying and administrative efforts at the Department of Justice. Was this error?

STATEMENT OF THE CASE[1]

This appeal arises from a judgment and order awarding attorneys' fees to the Plaintiff-Appellees in a case brought under the Voting Rights Act.

In the fall of 2012, Galveston County proposed changes to its primary and general elections for justice of the peace, constable, and commissioners' court positions. (R. 64, 387.) The County submitted those changes to the Department of Justice for preclearance approval under Section 5 of the Voting Rights Act. (R. 284, 375.)

The Plaintiffs (seven elected officials and one citizen) subsequently sued Galveston County and the Honorable Mark Henry, in his official capacity as county judge. (R. 15.) The Plaintiffs requested declaratory and injunctive relief, specifically seeking a ruling that the proposed maps violated the First and Fourteenth Amendments of the United States Constitution, as well as the Voting Rights Act. (R. 35, 278-81.)

The case was pending originally before the Honorable Kenneth Hoyt. Pursuant to the procedures prescribed by the Voting Rights Act, the case was referred to a three-judge panel consisting of Judge Hoyt,

[1] The Record on Appeal is cited as: (R. [page number].). Record Excerpts required under 5th Cir. R. 30 are cited as: (R.E. [letter].).

the Honorable Emilio Garza, Judge for the United States Court of Appeals for the Fifth Circuit, and the Honorable Melinda Harmon, United States District Court Judge.

In March 2012, the Department of Justice precleared Galveston's proposed map for the county commissioner elections. For the constable and justice of the peace elections, the parties agreed to use the maps from the 2001 elections in the 2012 primary and general elections. (R. 1435, 1792-99.) The District Court entered a final order consistent with this agreement and the DOJ's preclearance. (R. 1518-20.) After the panel entered its final order, the panel was dissolved and the case returned to Judge Hoyt, who concluded that the Plaintiffs were "prevailing parties," and awarded attorneys' fees to the Plaintiffs. (R. 1691, 1683.)

On May 31, 2012, the District Court entered a final judgment consistent with those prior orders. (R. 1697.) Galveston County and County Judge Henry timely appealed. (R. 1750.)

STATEMENT OF FACTS

Texas, and by extension Galveston County, are "covered jurisdictions" under Section 5 of the Voting Rights Act. 42 U.S.C. § 1973; *Perry v. Perez*, 132 S. Ct. 934, 939-40 (2012). Section 5 suspends changes to a covered jurisdiction's election procedures, including district lines, until those changes are submitted to and approved by a three-judge panel for the United States District Court for the District of Columbia or the Attorney General in a process known as "preclearance." *Perry*, 132 S. Ct. at 939-40 (citing *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 198 (2009)).

The Voting Rights Act also grants district courts with remedial powers, including authority to award a reasonable attorney's fee to a "prevailing party" in a suit brought under the Act. 42 U.S.C. § 1973*l* (e). When awarding fees, however, courts carefully analyze the chronology of events underlying Voting Rights Act litigation in order to assess whether the plaintiffs truly prevailed in the litigation. *Leroy v. City of Houston*, 831 F.2d 576, 579 (5th Cir. 1987) (quoting *Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148, 1151 (5th Cir. 1985)). It is through this prism that the following facts are presented, focusing on

the procedural history of the case and the events leading to the erroneous award of attorneys' fees.

A. Pre-litigation events: Galveston County approves new election maps.

In August 2011, in response to new population data disclosed by the 2010 census, Galveston County proposed new election maps. (R. 39-40.) The three elections for which the maps were proposed were the county commissioner, justice of the peace, and constable elections. (R. 40.) The County held five specially-scheduled public hearings, two regularly-scheduled Commissioner Court meetings, and considered several different plans and public input on redistricting all prior to adopting any new maps. (R. 62, 63, 124, 292.)

On August 30, 2011, the County adopted two orders proposing new boundaries for the upcoming 2012 elections. (R. 64, 387.) One order proposed boundaries for the commissioner districts. (R. 64.) The other order proposed new boundaries for the justice of the peace and constable districts. (R. 387.)

With respect to the county commissioner maps, the new maps were different from the old maps in that they reallocated the voting population across the four commissioner districts to preserve the "one

person-one vote" principle. The new maps had to account for considerable population growth in two of the four districts, while also aiming to "maintain the coalition of minority voting strength." (R. 289.)

For the justice of the peace and constable maps, the County reduced the number of precincts from eight to five, with the goal of achieving cost savings from the consolidation of offices. (R. 375-80.) The proposed maps also preserved the percentage of majority-minority districts from Galveston County's existing maps—the 2001 "benchmark" maps. (R. 375-80.)

B. Galveston County submits its proposed election maps to the DOJ for preclearance under Section 5 of the Voting Rights Act and stipulates that it will not use the proposed maps unless they are precleared.

Galveston County's two August 30 orders adopting the proposed maps stated that the County would adhere to the requirements of the Voting Rights Act and the United States Constitution. (R. 64, 387.) Accordingly, Galveston County submitted its proposed maps to the Department of Justice ("DOJ" or "Department of Justice") for preclearance consideration under Section 5 of the Voting Rights Act. (R.E. C; R. 284, 375.) (On October 14, 2011, Galveston submitted maps for its commissioner precincts (R.E. C; R. 284); on October 19, 2011,

Galveston made its second submission for its justice of the peace and constable precincts (R. 375.))

Each of the County's submissions followed the form specified by the DOJ, including population data, explanation of the proposed change, and its anticipated effect, if any, on minority groups. (R. 284-295.) More importantly, Galveston County's submissions to the DOJ stated that Galveston's proposed maps would not become effective until the maps were approved under Section 5. (R. 288.) Specifically, each submission provided:

> **(j) The date on which the change is to take effect.**
>
> The order is effective on the later of January 1, 2012 or when preclearance is obtained.
>
> **(k) A statement that the change has not yet been enforced or administered, or an explanation of why such statement cannot be made.**
>
> The change has not yet been enforced or administered.

(R. 288, 379-80.) In other words, Galveston County represented to the Department of Justice, in an official administrative filing, that it would not enact or administer maps without preclearance under Section 5 of the Voting Rights Act.

C. Elected officials sue Galveston County, seeking a declaratory judgment under Section 2 of the Voting Rights Act, an injunction under Section 5, and implementation of court-ordered maps for the 2012 elections.

Nearly a month after Galveston County submitted its maps for preclearance, a group of elected officials and one citizen filed suit against Galveston County and Galveston County Judge Mark Henry. (R.E. D; R. 15.) The plaintiffs included Mark Petteway, Constable of Precinct No. 2, and Patrick Doyle, Commissioner of Precinct No. 1 ("Petteway" and "Doyle" Plaintiffs) (collectively, "the Plaintiffs").[2] (R. 22-23.)

The Plaintiffs broadly alleged that the County's redistricting plan violated the Voting Rights Act and U.S. Constitution because the new maps harmed minority voters and minimized opportunities for minority voters to participate in the political process. (R. 16-21.) Their Complaint also discussed "alternative redistricting plans" that purported to "preserve and improve the minority election effectiveness of minority opportunity districts." (R. 31-32.)

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[2] The plaintiffs can be divided into two groups based on their attorneys of record. Plaintiffs Petteway, Rose, Montez, Pope, James, and Henderson have common representation; Plaintiffs Doyle and Holmes have common representation. This distinction becomes relevant later because of the attorneys' fees awarded by the District Court.

The Plaintiffs specifically requested three things:

(1) a declaratory judgment finding that the proposed maps were unconstitutional and violated Section Two of the Voting Rights Act;

(2) an injunction preventing Galveston County from using maps that were not precleared—even though the County had already submitted its proposed maps for DOJ approval and had not implemented any redistricting changes; and

(3) an injunction preventing Galveston County from conducting "unlawful voter registration practices."

(R. 35.)

Along with their Complaint, the Plaintiffs filed an application for injunctive relief. (R. 267.) Their request for injunctive relief reveals their true ambition in this litigation: the Plaintiffs sought not only to enjoin the use of the maps proposed by Galveston County, but the Plaintiffs also asked that the court create and impose interim maps to use in their place. (R. 278-81.) The Plaintiffs, throughout the litigation, would continue to seek issuance of court-ordered, alternative maps. (R. 542, 971-72, 1397, 1447, 1799-1804.) (The Plaintiffs' alternative maps sought to increase the minority voting percentage in Precinct 1 which, according to Plaintiffs, would create a minority "influence district" in

Commissioner Precinct 1, (R. 32(¶69)) while maintaining (but diluting) the existing majority-minority district in Precinct 3. (R. 30-32, 643-55.))

In November 2011, Galveston County responded to the Complaint and Application for TRO. Galveston County observed that the lawsuit was premature because the County had already submitted its maps to the DOJ for preclearance. (R. 493.) Galveston County repeated these arguments to the trial court during an oral hearing on the motion. (R. 1841-1845.) Thus, by way of its answers, Galveston immediately notified the Plaintiffs and the trial court that it would not implement the new maps prior to preclearance and that it would not hold elections with these maps absent DOJ approval—just as Galveston had told the DOJ the month before. (R. 493-94.) Galveston asked the court only for sufficient time for the preclearance process to play out with the Department of Justice. (R. 493.)

Galveston also informed the court that the Department of Justice was aware of the timing considerations of Galveston's maps and the 55 other Texas counties that filed for preclearance on or after Galveston County did, and that this should be considered when determining the likelihood of preclearance in time for the elections. (R. 1847-48.)

Moreover, this litigation and Galveston County's preclearance submissions to the Department of Justice occurred against a larger backdrop of statewide litigation and multiple other Texas jurisdictions seeking preclearance. The primary statewide litigation was the consolidated action known as *Perez v. Perry*, No. 11-CA-360 in the United States District Court for the Western District of Texas, San Antonio Division.

Nonetheless, on November 21, 2011, the District Court issued a temporary restraining order declaring that, since the plans had not been precleared by the Department of Justice, they may not be implemented by Galveston County. (R. 522.)

D. A three-judge panel is convened to preside over the lawsuit.

As part of their initial filings, the Plaintiffs requested that a three-judge panel preside over their claims. (R. 480.) The District Court initially denied this request but later reconsidered its ruling and ordered a three-judge panel to be convened to preside over the Plaintiffs' Section 5 claims. (R. 530.)

The three-judge panel consisted of the requesting judge, Judge Hoyt of the Southern District of Texas, Circuit Judge Emilio Garza of

the Fifth Circuit Court of Appeals, and District Judge Melinda Harmon of the Southern District of Texas. In its first act, the panel held an evidentiary hearing to reconsider the injunctive relief requested by Petteway and Doyle. (R. 529, 571.)

E. The District Court vacates the temporary restraining order.

On November 30 and December 1, the three-judge panel conducted evidentiary hearings on the propriety of the injunctive relief requested by Petteway and Doyle under Section 5 of the Voting Rights Act. (R. 686-886.) Following those hearings, the court vacated the temporary restraining order and issued a new order in its place. The new order ruled that the Plaintiffs were not entitled to injunctive relief under Section 5 of the Voting Rights Act because Galveston County had already sought preclearance of its maps from the DOJ. (R. 889, 917.) The court also found that the Plaintiffs had not met the requirements for Section 5 relief. More importantly, the court ruled that the Plaintiffs' continued insistence that the court adopt interim maps was premature, as it mattered not that preclearance had not been obtained, but only that it had been requested. (R. 892 n.6.)

Judge Hoyt dissented from the panel's order. (R. 894-910.) Judge Hoyt not only would have granted injunctive relief to the Plaintiffs, but he also would have ordered that the maps proposed by Plaintiffs govern the elections. (R. 903-904, 905.) Judge Hoyt's dissent echoes the Plaintiffs' goal of establishing a "minority opportunity" or "minority influence" district in Precinct 1. (*Compare* R. 904 *with* R. 32, 543-44, 738.)

F. Petteway's and Doyle's lawyers begin lobbying efforts at the Department of Justice.

Meanwhile, Galveston County continued to participate in the preclearance process. In December 2011, it sent additional information to the DOJ to expedite administrative preclearance. (R. 975.) Galveston County also updated the District Court on the status of the DOJ proceedings, and it reassured the court that it would "take no action to implement the plans prior to receiving preclearance." (R. 923.)

As the preclearance process continued, however, Petteway and Doyle began their own efforts to influence the administrative process. Between December 5 and 12, according to their attorneys' time records, Petteway's and Doyle's attorneys worked on preparation of a report to send to the Department of Justice and worked with experts to assist in

preparing that report. (R. 1552-53, 1575, 1620.) Petteway and Doyle eventually submitted a report to the Department of Justice (R. 1553), but the contents of the report were not disclosed to the court below and, therefore, are not part of the appellate record.

G. Plaintiffs obtain temporary injunction to prevent implementation of the maps that are not yet precleared.

On December 19, 2011, the Department of Justice made a one-time request to Galveston County for additional information to complete its review of the proposed maps. (R. 928, 946.) Seizing upon this request, Petteway and Doyle moved the panel for reconsideration of injunctive relief. Petteway and Doyle also used the DOJ's request as a second opportunity to invite the panel to impose court-ordered interim maps. (R. 958, 971-72, 973.)

In response, Galveston County submitted affidavits certifying that the county and its representatives had not taken any steps to implement the maps that were pending before the DOJ. (R. 1018-23.) Petteway and Doyle, however, again submitted briefs requesting court-ordered maps for the county commissioner elections. (R. 1027-28.)

As it had before, the panel rejected the Plaintiffs' invitation to develop and impose its own set of maps. The court, however, partially

granted Petteway and Doyle's motion by enjoining Galveston County from implementing "unprecleared election plans." (R.E. E; R. 1138.) The District Court's order acknowledges that the DOJ's decision on preclearance may be imminent and that Galveston County "[had] no intention[ ] of implementing [its] unprecleared redistricting plan." (R. 1139.) Notably, the temporary injunction does not prescribe (or proscribe) any specific line-drawing or any specific maps; the injunction merely says that whatever maps are eventually used for the 2012 Primary Election must be precleared. (R. 1139.)

H. Petteway and Doyle continue to seek imposition of court-ordered maps.

On the same day as the District Court's injunction order, the Supreme Court overruled and vacated the statewide maps drawn by the Western District of Texas in *Perez v. Perry*. 132 S.Ct. 934. The *Perez* district court immediately issued an order indicating that it would adjust the statewide election schedule and reset deadlines for filing. (R. 1149-53.) In response, the Southern District panel requested briefing on whether or not interim maps would be necessary for the Galveston elections in light of this order and the likely resulting schedule. (R. 1141.)

Galveston County again asked that the court abstain from imposing its own maps and instead allow the preclearance process to conclude. (R. 1142.) Conversely, Petteway and Doyle insisted that the court adopt its own interim maps. (R. 1164.) This was Petteway and Doyle's third request for court-ordered maps. Yet, by this point, the April 6 primary date was highly unlikely given the status of the statewide litigation. Even the lead attorney for the Doyle plaintiffs was counseling the Western District of Texas to put off the elections until late June, which would remove any need for court-imposed maps for Galveston County's elections. (R. 1173, 1174, 1201-03.)

I. Petteway's and Doyle's attorneys meet with the Department of Justice as part of the preclearance administrative process.

While the election litigation continued to unfold (in both the District Court and in *Perez v. Perry*), the attorneys for Petteway and Doyle turned their attention to the Department of Justice. According to their time records, between February 8 and 28, Petteway's and Doyle's attorneys conferred with Department of Justice representatives and prepared for meetings at the DOJ. (R. 1556, 1580, 1610, 1622.)

Their attorneys then traveled to Washington D.C. and met in person with Department of Justice representatives. (R. 1556, 1581,

1610, 1622-23.) There is no evidence in the record, however, explaining Petteway's and Doyle's position before the DOJ—i.e., there are no meeting minutes, memoranda recounting the meeting(s), discussion talking points, transcripts of discussions, etc. that would explain the substance of their arguments to the DOJ.

The following month, the DOJ notified Galveston of its objections to the proposed maps for the 2012 elections. (R. 1402.) The DOJ concluded that the County had not met its preclearance burden, primarily complaining of possible retrogressive effect on African-American voters in Commissioner Precinct 3. (R. 1402-06.) The DOJ's objection letter does not express such concerns with respect to Precinct 1.

In short form, Petteway and Doyle once again asked the panel to develop its own map for the county commissioner elections, namely the map suggested to Judge Hoyt at the outset of the case. (R. 1388.) In response, Galveston County again argued that Petteway's and Doyle's proposed commissioner election map was fundamentally flawed and should not be enacted. (R. 1427, 1431-32.) Also, Galveston advised the court that it need not develop its own maps for the constable and justice

of the peace elections because the existing maps (the 2001 benchmark maps) complied with the Constitution and Voting Rights Act and could be used in the 2012 elections. (R. 1428.)

J. Galveston County reaches an agreement with the Department of Justice and obtains preclearance.

Following the DOJ's March 5 letter, Galveston County engaged the Department of Justice in direct settlement discussions to timely obtain preclearance. (R. 1476.) To address the DOJ's concerns of minority retrogression in Precinct 3, Galveston County proposed a slight change to the maps and increased the minority voting population in that precinct. (R. 1476-78.) However, because the DOJ raised no issue with the District 1 boundaries, (R. 1402) Galveston did not create the "minority influence district" sought by Plaintiffs.

On March 23, 2012, the Justice Department precleared Galveston County's newly-proposed map for the county commissioner precincts. (R. 1512.) The Department of Justice and Galveston County jointly presented the newly precleared map to the three-judge panel during a March 23, 2012 hearing. (R. 1435, 1792-99.)

Although the Plaintiffs did not object to Galveston County's precleared plans during the hearing, they nevertheless invited the

court, *for a fifth time*, to develop interim maps governing the 2012 County Commissioner election. (R. 1799-1804.) The panel again rejected that invitation.[3] Instead, the panel ordered that Galveston County's newly precleared maps would govern the upcoming county commissioner election. (R. 1518-19, 1817.) During that same hearing, all parties agreed to proceed with the justice of peace and constable elections under the 2001 benchmark plans. (R. 1814-15.)

Following the resolutions presented during the March 23, 2012 hearing, the panel entered a final order modifying its prior injunction. (R.E. F; R. 1518-19, 1817.) The order:

> (1) Permits Galveston County to proceed with the County Commissioner elections under its pre-cleared maps;
>
> (2) Orders that the justice of the peace and constable elections proceed under the benchmark districting plan; and
>
> (3) Dissolves the three judge panel.

(R. 1518-20.)

The order also enjoins Galveston County from implementing any plans for the 2012 elections that have not obtained clearance from the

[3] Even after this final order, and after the DOJ issued preclearance, the Plaintiffs asked yet another time for the District Court to impose interim maps. (R. 1640-43.) The district court rejected this request too.

Justice Department, confirming by judicial order the position that Galveston County asserted throughout the litigation (i.e. that it would obey the law and would not implement any un-precleared voting changes). (*Id.*)

K. The District Court awards fees to Plaintiffs, including for lobbying work before the Department of Justice.

After the three-judge panel was dissolved, the Petteway Plaintiffs moved to recover their attorneys' fees, contending that they had prevailed in the litigation. (R. 1521.) In support of their motion, the Petteway Plaintiffs argued that their lawsuit had "caused" Galveston County to obtain preclearance of its maps from the Justice Department. (R. 1521-26.)

The Doyle Plaintiffs likewise moved to recover their attorneys' fees. (R. 1588.) They too argued that their lawsuit caused Galveston County to conduct elections pursuant to precleared maps. In support, the Doyle Plaintiffs pointed to the panel's final order, which permitted Galveston County to conduct the County Commissioner elections under its precleared maps and ordered that the justice of the peace and constable elections proceed under the agreed-upon benchmark plan. (R. 1592.)

As proof of the amount of fees incurred, the Plaintiffs tendered affidavits and statements of the legal services rendered. (R. 1546-59, 1564-84.) The invoices and reproduced summaries of fees include work expended on the litigation *and* on lobbying efforts before the Department of Justice. Specifically:

- Chad Dunn invoices show $10,329 in fees and $1,327 in expenses attributable to DOJ work. (R. 1546-1559.)
- Neil Baron invoices show $10,660 in fees and $1,046 in expenses attributable to DOJ work. (R. 1564-1584.)
- Jose Garza's summary of fees shows $8,755 in fees and $1,054 in expenses attributable to DOJ work. (R. 1608-1611.)
- Melissa Killen summary of fees shows $14,349 in fees and $958 in expenses attributable to DOJ work. (R. 1618-1624.)
- (Expert witness fees of $35,580 at least partially attributable to DOJ preclearance work.)

(*Id.*) Taken at face value, the attorneys' fees and expenses attributable to DOJ work total at least $48,478, out of $254,769 in total fees and expenses. (*Id.*) (See also Record Excerpt J, which is a chart duplicating and summarizing the attorneys' time entries that reference DOJ preclearance work.)

In response, Galveston County maintained that the Plaintiffs were not "prevailing parties" within the meaning of the statute. (R. 1655.)

Judge Hoyt awarded Petteway and Doyle respectively all of the fees they requested: the Petteway Plaintiffs were awarded fees and expenses totaling $111,332.36; the Doyle Plaintiffs were awarded fees and expenses totaling $143,437.92. (R.E. G and H; R. 1691, 1683.)

L. Galveston County appeals.

In May 2012, Judge Hoyt entered a final judgment in favor of the Plaintiffs. (R.E. I; R. 1697.)

Galveston County moved to amend Judge Hoyt's judgment. (R. 1704.) Galveston County's motion made arguments on "prevailing party" status and arguments regarding the court's failure to segregate the fees incurred during the litigation from fees incurred from non-compensable, administrative activity. (R. 1704.)

Judge Hoyt denied the motion to alter or amend the judgment. (R. 1748.) Thereafter, Galveston County timely appealed Judge Hoyt's ruling to this Court. (R.E. B; R. 1750.)

SUMMARY OF THE ARGUMENT

Following the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), this Court has applied an exacting standard in determining "prevailing parties" in Voting Rights Act litigation. Plaintiffs can recover fees only if they obtain judicial relief that materially alters the relationship between the parties and modifies the defendant's behavior in a way directly benefiting the plaintiffs. The Plaintiffs did not obtain such relief here.

An analysis of the relief sought by Plaintiffs reveals the *de minimis* nature of the District Court's rulings. Specifically, the Plaintiffs first sought a declaration that the maps proposed by Galveston County were unconstitutional. That did not happen. The Plaintiffs then repeatedly sought the imposition of court-ordered election maps to replace the ones proposed by Galveston County. That did not happen. Instead, the only relief they eventually obtained was an injunction that ordered the County to (a) keep doing what it had been doing, and (b) not do what it had said it wouldn't. (R. 1518-20.) This "relief" is not sufficient to withstand post-*Buckhannon* scrutiny.

In the event this Court finds that fees are recoverable, the District Court committed further error by awarding fees for services that are not compensable as a matter of law. The Fifth Circuit has consistently held that administrative and lobbying work by attorneys in preclearance proceedings is not compensable when sought in the related litigation, but the District Court awarded fees that, on their face, include administrative and lobbying work at the DOJ. To recover such fees, the plaintiff must show that its attorneys' preclearance work was so astute and creative that the Department of Justice would not have reached the same conclusion on its own. The District Court made no such finding here, and there is no evidence to support one. (R. 1691, 1683.) Indeed, the Plaintiffs never disclosed their position at the DOJ to the District Court.

Accordingly, the District Court's finding that Plaintiffs were prevailing parties, and its concomitant rulings awarding attorneys' fees and expenses to Plaintiffs, are errors of law that should be reversed. (R. 1691, 1683, 1697.)

ARGUMENT

I. The Plaintiffs are not prevailing parties.

The District Court erred in awarding Petteway and Doyle attorneys' fees because they are not "prevailing parties" under this Court's three-prong test following *Buckhannon*. *See Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008) (applying *Buckhannon Bd & Care Home, Inc.*, 532 U.S. 598 (2001)).

Whether a party is a prevailing party "is a legal question subject to de novo review." *El Paso Indep. Sch. Dist. v. Richard R.*, 591 F.3d 417, 422-23 (5th Cir. 2009); *see also Bailey v. Mississippi*, 407 F.3d 684, 687 (5th Cir. 2005).

A. Since *Buckhannon*, this Court has required a "prevailing party" to (1) obtain judicially-sanctioned relief, (2) that materially alters the legal relationship, and (3) modifies the defendant's behavior that directly and contemporaneously benefits the plaintiff.

In May 2001, the United States Supreme Court decided *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*. 532 U.S. at 600. In *Buckhannon*, the plaintiff sought fees incurred for its claims against a state agency under the Fair Housing Amendments Act and the Americans with Disabilities

Act. *Id.* at 601-02. The Court held that the plaintiff was not a "prevailing party" and could not recover its fees. *Id.* at 600. In so holding, the Court explained that, in order to be a prevailing party, a plaintiff must obtain some form of judicially-sanctioned relief that materially alters the legal relationship between the parties. *Id.* at 604.

Post-*Buckhannon*, this Court has required the following three elements to establish "prevailing party" status: (1) a plaintiff must obtain judicially-sanctioned relief (judicial imprimatur); (2) the relief must materially alter the legal relationship between the parties (material alteration); and (3) it must modify the defendant's behavior in a way directly benefitting plaintiff at the time of the relief granted (modification of defendant's behavior). *Dearmore*, 519 F.3d at 521; *see also LULAC of Texas v. Texas Democratic Party*, 428 Fed. Appx. 460, 463, 2011 WL 2420004, at *3 (5th Cir. 2011); *Envtl. Conservation Org. v. City of Dallas*, 307 Fed. Appx. 781, 783 (5th Cir. 2008).

Under this framework, "[w]here the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, he is not a prevailing party." *LULAC of Texas*, 428 Fed. Appx. at 463 (quoting *Jenevein v. Willing*, 605 F.3d 268, 271 (5th Cir. 2010)). Moreover, a

"defendant's *voluntary change in conduct*, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.* (quoting *Buckhannon*, 532 U.S. at 605). "Voluntary conduct" is exactly what happened in this case. As a result, Petteway and Doyle are not prevailing parties entitled to recover fees.

B. Instead of following *Buckhannon*, the District Court applied authority that was consistent with the "catalyst theory" rejected in *Buckhannon*.

Because the District Court's prevailing party determination is subject to de novo review, we note here the improper legal standard applied by the District Court, before analyzing the facts under the framework of *Buckhannon*. *See Bailey*, 407 F.3d at 687 (noting that every Circuit to address this issue has applied *de novo* review).

With respect to the award of attorneys' fees, the District Court's final judgment states only, "[c]onsistent with this Court's prior orders, Plaintiffs are prevailing parties entitled to attorney's fees and costs" under Section 5 of the Voting Rights Act. (R. 1697.) Of the two prior orders that are relevant, both conclude that the respective plaintiffs are "prevailing parties." (R. 1691, 1693.) The first order provides no

explanation or basis for this ruling, while the second order appears to supply the District Court's rationale and cites to *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 789 (1989). Notably, the District Court does not cite *Buckhannon*. The district court's reliance on *Texas State Teachers* in lieu of *Buckhannon* is important.

In *Texas State Teachers*, the Supreme Court adopted a generous formulation for prevailing party status that included any plaintiff who succeeded on a significant issue and achieved "some of the benefit the party sought in bringing suit." *Id.* at 791-792. Thereafter, the Fifth Circuit and district courts within the Fifth Circuit employed the "catalyst theory," which allowed a plaintiff to be a "prevailing party" merely by serving as a catalyst for change in the defendant's conduct. *See, e.g.*, *Foreman v. Dallas Cnty., Tex.*, 193 F.3d 314, 318-21 (5th Cir. 1999); *Pembroke v. Wood Cnty.*, 981 F.2d 225, 231 n.27 (5th Cir. 1993); *Craig v. Gregg County*, 988 F.2d 18, 21 (5th Cir. 1993).

In 2001, the Supreme Court expressly disapproved of the catalyst theory and placed new, more stringent guidelines on "prevailing party" status. *See Buckhannon*, 532 U.S. at 605; *LULAC of Texas*, 428 Fed.

Appx. at 463. The Court explained that a plaintiff must obtain judicially-sanctioned relief that materially alters the legal relationship between the parties. *Buckhannon*, 532 U.S. at 604. Nevertheless, consistent with the old "catalyst theory," the District Court's order cites to *Texas State Teachers* and then states as follows:

> In this case, this Court granted Plaintiff's motion to enjoin the use of unprecleared election changes, and approved modifications to the election schedule and requirements in order to facilitate the conduct under newly precleared redistricting plans for the May 29, 2012 election. *The Defendants consistent with their obligation under Section 5, and [sic] secured the required federal approval* [sic] *different restricting plans for County Commissioner and abandoned the challenged voting procedures. This was precisely the relief Plaintiffs requested and to which they were entitled under Section 5.* Therefore, Plaintiffs are prevailing parties and entitled to an award of attorney's fees.

(R. 1694.) (emphasis added).

In other words, the trial court's order recognizes that Galveston County had already endeavored to comply with Section 5's requirements. (*Id.*) The order further recognizes that the County's conduct happens to coincide with the relief that the Plaintiffs were seeking. (*Id.*) But the obvious missing link is whether the two are causally-related, and the District Court made no such finding. This type of analysis is precisely what the Supreme Court rejected in

Buckhannon, and which could only survive by relying on pre-*Buckhannon* authority.[4]

C. Petteway and Doyle are not prevailing parties because they did not obtain judicial relief that materially altered the relationship between the parties.

Post-*Buckhannon*, this Court has required that a prevailing party obtain judicial relief that materially alters the legal relationship between the parties. *E.g., Dearmore*, 519 F.3d at 521. The question therefore is whether the District Court's orders *materially altered* the relationship between Galveston County and the Plaintiffs merely by memorializing Galveston County's agreement with the DOJ, or whether the relief granted to Plaintiffs was *de minimis* or purely technical.

A comparison of the relief the Plaintiffs sought with the relief they actually received exposes the *de minimis* nature of the court's orders. In

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[4] Even under the old catalyst theory, the Plaintiffs would not qualify as "prevailing parties." *See Craig*, 988 F.2d at 21-22 (holding plaintiff was not a "prevailing party" under 42 U.S.C. § 1973*l*(e) for attorney's fees because County had already complied with Section 5 and sought preclearance *before* suit was filed); *see also Foreman v. Dallas County*, 193 F.3d 314, 321 (5th Cir. 1999) (stating that "even under the catalyst theory it [would] be a rare case indeed where a defendant is made to pay attorney's fees for relief that was secured from an independent third-party who was never a party to the lawsuit"—like the DOJ in the present matter); *LULAC of Texas v. City of Austin*, 180 F.3d 264 (5th Cir. 1999) (holding plaintiff was not a "prevailing party" under 42 U.S.C. § 1973*l*(c) because City had substantially completed a preclearance plan before suit was filed, sought preclearance, and agreed not to dissolve the MUDs during preclearance review as sought by plaintiff's complaint).

their Original Complaint and throughout the litigation, the Plaintiffs sought three primary forms of relief from the court:

RELIEF REQUESTED	**OUTCOME**
Declaration that Galveston's proposed maps violated Section 2 of the Voting Rights Act and the U.S. Constitution. (R. 35.)	Not granted. (R. 1518-19.)
Injunction preventing use of un-precleared maps. (R. 35.)	Granted, but Galveston County told the DOJ prior to the lawsuit–and told the court during the lawsuit–that it would not use any new maps without DOJ preclearance. (R. 1518-19.)
Court-ordered maps with precinct and district boundaries favorable to Plaintiffs. (R. 542, 971-72, 1397, 1799-1804.)	Not granted. (R. 1518-19.)

While the Plaintiffs may assert that they were at least nominal winners in the District Court, their lawsuit achieved nothing close to what they really sought. They obtained no Section 2 relief. They did not impose court-ordered maps. They also did not obtain an injunction that placed any prospective limits on Galveston's elections beyond what Galveston was already doing in compliance with the law.

The injunction, therefore, did nothing more than preserve the *status quo*: before the lawsuit, they already had a promise by Galveston

to use precleared maps only, and after the lawsuit, they had the same thing. The District Court did not prohibit re-drawing maps for elections after 2012, nor did the District Court specify how future maps must be re-drawn. The court only ordered Galveston to use precleared maps for the 2012 election, and the District Court never reached the substantive merits of the Plaintiffs' claims. The injunction and judgment became nothing more than a technical victory to Plaintiffs, not a substantive one. *See Jenevein*, 605 F.3d at 271 (explaining that judicial relief cannot be "purely technical or *de minimis*").

From a practical perspective, the result of this lawsuit was more favorable to Galveston than it was to the Plaintiffs. For the commissioner elections, Galveston obtained Section 5 preclearance on maps substantially similar to the maps proposed in August 2011. For the justice of the peace and constable elections, Galveston County was allowed to use its 2001 maps for the 2012 election, and it can seek preclearance on new maps for future elections based on the 2010 census data. More importantly, Galveston ultimately was allowed to choose its own fate and not have maps imposed on it, and that in itself is a victory in Voting Rights litigation.

D. Petteway and Doyle are not prevailing parties because they did not obtain judicial relief that modified the County's behavior in a way directly benefiting plaintiffs.

The final post-*Buckhannon* element that this Court has required is that the prevailing party obtain relief that modified the plaintiff's behavior in a way directly benefiting the plaintiff. *Dearmore*, 519 F.3d at 521. The District Court did not award such relief to the Plaintiffs here.

The District Court's orders enjoined Galveston County to take statutorily required steps under Section 5 (seek preclearance) that it had started before the lawsuit was filed and to not take other steps (not use un-precleared plans) that the County had already said it would not do. (*Compare* R. 288, 379-80 *with* 1518-20.) In other words, "keep doing what you're doing, and don't do what you've said you won't do." The March 23 Order, as embodied in the May 31 Judgment, is nothing more than an exhortation to statutory compliance, not court-ordered relief. Because the County was voluntarily complying with Section 5 beforehand, the County's behavior was not *modified* by any court order. *Buckhannon*, 532 U.S. at 605 ("A defendant's voluntary conduct,

although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change.").

The Plaintiffs, nonetheless, will argue that they benefitted from the lawsuit. They will likely claim that their lawsuit "caused" the County to adjust its plan and ultimately seek preclearance of maps that were different from the maps originally proposed. But there is nothing in the Court's orders or judgment to support such an argument, and there is nothing to indicate that this would not have been the same result had the lawsuit never been filed, as the preclearance process was initiated *before* the lawsuit and the DOJ ultimately reviewed and precleared the maps, not the court. In other words, even if there were a "change in the parties' relationship"—i.e., the new plans for the justice of the peace, constable, and commissioner precincts—it occurred *prior* to the filing of this lawsuit when the County voluntarily sought preclearance with the DOJ.[5]

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[5] Plaintiffs' position below—which the court never adopted—had its own constitutional infirmities. Specifically, Precinct One had elected an Anglo Democrat, Commissioner Patrick Doyle. Plaintiffs' proposed maps supported their argument that Precinct One should be a "minority influence" district in which the preferred candidate was an Anglo Democrat. (R. 677.) This argument has been rejected and "minority influence" districts are not required under Section 2. *See Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). Even the DOJ rejected this argument, as its objection letter required maintaining Section 3's status by including more, not fewer, minority voters in Precinct Three. The

In sum, there is no judicially-sanctioned relief that modified the County's behavior in a way that directly benefitted the Plaintiffs. The Plaintiffs are like the "late arrivers" the Fifth Circuit has criticized who seek to "jump the train as it leaves the station and hope to seize prevailing plaintiff status." *Craig*, 988 F.2d at 21. The law does not reward such behavior, and it should not now.

II. The District Court erred by awarding fees incurred for Plaintiffs' attorneys' lobbying efforts at the Department of Justice.

The District compounded its error by awarding fees for services that were not part of this litigation and are not compensable as a matter of law. As this Court has observed, "a finding that a party is a prevailing party only makes him *eligible* to receive attorney's fees . . . it does *not automatically entitle* him to recover the full amount that he spent on legal representation." *Gary G. v. El Paso Indep. Sch. Dist.*, 632 F.3d 201, 208 (5th Cir. 2011) (quoting *Jason D.W. v. Houston Indep. Sch. Dist.*, 158 F.3d 205, 209 (5th Cir. 1998)).

DOJ's directive forced the reduction of the minority population in Precinct One because these voters were shifted to Precinct Three, effectively eliminating any possibility of creating a "minority influence" district in Precinct One. Therefore, once Galveston County voted to make the changes suggested by the DOJ, Plaintiffs' hopes of using this litigation to create a district that would elect an Anglo Democrat as the minority voters' candidate of choice vanished.

Here, the full amount that the Plaintiffs spent on legal representation, which they submitted to the District Court, included fees and expenses for their attorneys' preclearance lobbying before the DOJ. This portion of fees is not compensable under well-established precedent from this Court.

A. The Fifth Circuit has disallowed legal fees for preclearance activities and submissions to the Department of Justice in Voting Rights Act cases.

The plain language of the Voting Rights Act does not permit an award of attorney's fees for services rendered for preclearance submissions to the DOJ under Section 5 of the Act. *Craig*, 988 F.2d at 21; *Arriola v. Harville*, 781 F.2d 506, 508-10 (5th Cir. 1986); *Leroy*, 831 F.2d at 582. The *Arriola* and *Leroy* opinions are particularly instructive. In *Arriola*, this Court reasoned that "Congress did not intend the term 'action or proceeding' [in 42 U.S.C. §1973*l*(e)] to include a preclearance submission, nor did it intend the term 'prevailing parties' to include interested individuals and groups who submit comment to the Justice Department in preclearance submissions." 781 F.2d at 510.

This rationale makes sense—preclearance is a fundamentally separate and distinct process from a judicial proceeding covered by the statute. This Court explained:

> [T]he preclearance submission is separate from the lawsuit. The participants are not the same. The preclearance process is in a different forum. It follows different law. In fact . . . it is not a judicial proceeding at all. There need be no connection between the lawsuit and the preclearance submission . . . . It is therefore inaccurate to view the Justice Department's decision as the remedy phase of the separate and distinct injunction proceeding.

Id. at 511-512; *see also Leroy*, 831 F.2d at 582.

The language and reasoning from the *Leroy* opinion is just as instructive. Like this case, the *Leroy* court was confronted with a district court order that accepted "wholesale" the plaintiffs' time records and awarded attorneys' fees that included work done in furtherance of preclearance proceedings. 831 F.2d at 578, 585. The *Leroy* fee award was overturned, and this Court criticized the lower court's order because it "failed to state how the Justice Department efforts were 'both useful and of a type ordinarily necessary to advance the civil rights litigation.'" *Id.* at 582 (quoting *Webb v. Board of Education of Dyer County*, 471 U.S. 234, 243 (1985)). That same deficiency is found in the District Court's order in this case.

According to this Court's precedent, more than a causal connection is needed to recover fees for preclearance or administrative work. *See Leroy*, 831 F.2d at 583. The prevailing party must establish that the fees incurred for the work done at the DOJ were "legally required or necessary" to resolve the litigation. *Id.* In other words, counsel's preclearance lobbying work must be so "astute and creative" that the DOJ would not have come to the same result by itself (or without such lobbying by the Plaintiffs' counsel). *See Arriola*, 781 F.2d at 509 (quoting *Posada v. Lamb County*, 716 F.2d 1066, 1074 (5th Cir. 1983)). That is not the case here, and there is no evidence in the record to support such a conclusion.

B. The District Court abused its discretion by awarding all fees requested without determining whether fees attributable to DOJ work were necessary and related to the underlying litigation.

The Plaintiffs first approached the DOJ in December 2011, after Galveston County had submitted its maps to the DOJ for administrative preclearance. According to their attorneys' time records, Petteway and Doyle's attorneys prepared and submitted a report to send to the Department of Justice and worked with experts to assist in preparing that report. (R. 1552-51, 1575, 1620.)

The Plaintiffs again worked on the preclearance administrative proceedings in February 2012. Throughout the month, Petteway's and Dolye's attorneys prepared for meetings before the DOJ. (R. 1556, 1580, 1610, 1622.) The attorneys then traveled to Washington D.C. to confer with Department of Justice representatives. (R. 1556, 1581, 1610, 1622-23.)

The Plaintiffs sought to recover all fees incurred in these administrative proceedings. (R. 1546-59, 1564-84.) As summarized in Record Excerpt J, the Plaintiffs' attorneys' time entries submitted in support of their motions for fees total $48,478, and include:

- Chad Dunn's fees of $10,329 and expenses of $1,327 attributable to DOJ work.
- Neil Baron's fees of $10,660 and expenses of $1,046 attributable to DOJ work.
- Jose Garza's fees of $8,755 and expenses of $1,054 attributable to DOJ work.
- Melissa Killen's fees of $14,349 and expenses of $958 attributable to DOJ work.
- (Expert witness fees of $35,580 at least partially attributed to DOJ work.)

Without a hearing and without segregating these fees, the trial court awarded the Plaintiffs *all* sums requested, collectively totaling

$254,770.28. (R. 1691, 1683.) In so doing, the district court "breezed to [the conclusion that all fees incurred were compensable] in the face of formidable procedural and legal obstacles." *Leroy*, 831 F.2d at 581. The trial court's failure to distinguish between compensable and non-compensable fees constitutes an abuse of discretion because the trial court did not engage in the kind of searching analysis required to award administrative fees to a "prevailing party" under the Voting Rights Act. *See id.* at 581-83.

Just as the trial court did not distinguish the fees incurred in pursuing optional, administrative remedies from those incurred during this lawsuit, the court also did not find that counsel's DOJ work was both timely and tied qualitatively to this lawsuit. And how could it have, given that the Plaintiffs never disclosed to the District Court the arguments that they apparently made to the DOJ?

A finding that the administrative work is "timely and qualitatively tied" to the litigation is required for an award of attorneys' fees because the party must establish that any administrative work was performed "on the litigation." *Id.* at 582; *see also Webb*, 471 U.S. at 241-42 (the time that is compensable under § 1988 is that which is "reasonably

expended *on the litigation*."). Because the trial court did not—and could not—find that the Plaintiffs' administrative activities were timely and qualitatively tied to this lawsuit, the trial court had no discretion to award fees related to the preclearance work.

Likewise, the trial court had no discretion to presume that Plaintiffs' administrative activities were useful or required for the litigation. "Where the decision to pursue administrative proceedings rests solely with the plaintiff, it cannot be presumed that the proceedings are integrally related to the enforcement of federal civil rights." *Webb*, 471 U.S. at 249 (Brennan, J. and Blackmun, J. concurring). Plaintiffs sued Galveston County after the County had submitted its proposed voting changes to the DOJ for preclearance. Their lawsuit sought to enjoin the County from implementing un-precleared voting changes, and the Plaintiffs invited the court to develop new maps to govern the 2012 elections. Therefore, any efforts at the DOJ, whether to ensure timely pre-clearance or block clearance of Galveston County's proposed maps, were purely optional.

C. The Plaintiffs did not carry their burden to establish that the fees incurred changed the result of the pre-clearance proceedings.

The trial court had no discretion to award the fees incurred in the preclearance work because the Plaintiffs did not carry their burden by showing that their participation in the preclearance process changed the result. *See Arriola*, 781 F.2d at 509. If attorneys' fees incurred in preclearance proceedings are available at all, this Court has required a showing that the participation in the preclearance process "changed the result that the Attorney-General would have reached, and that the change was accomplished through counsel's 'particularly astute criticism or creative legal argument.'" *Id.* (quoting *Posada*, 716 F.2d at 1074).

Here, the Plaintiffs' position before the DOJ was never disclosed to the trial court—neither the contents of the Plaintiffs' December 2011 report to the DOJ nor their position to the DOJ during their February 2012 visit to Washington, D.C. Absent evidence demonstrating that the Plaintiffs' arguments to the DOJ caused the DOJ to reach a conclusion that it would not have otherwise reached, the trial court abused its discretion in awarding $48,637 in fees attributable solely to DOJ work.

CONCLUSION AND PRAYER FOR RELIEF

This is a case that, post-*Buckhannon*, allows for a right and wrong answer to the issues presented. The Fifth Circuit has consistently applied an exacting three-part test on plaintiffs who seek "prevailing party" status in Voting Rights Act litigation. Petteway and Doyle simply do not meet that test here: the only substantive relief that they obtained was an injunction telling Galveston to not do what it had already said it would not. That injunction did not materially alter the legal relationship of the parties, and it did not modify Galveston's behavior to the benefit of the Plaintiffs. For these reasons, Appellants respectfully request that the Court reverse the judgment and attorneys' fees awards of the District Court and render judgment in favor of Appellants.

Alternatively, if the Court finds that the Plaintiffs were prevailing parties, Appellants request that the Court reverse the attorneys' fees award of the District Court and award Plaintiffs only the fees that were incurred for services that were required and necessary in the litigation. Plaintiffs are not entitled to any fees incurred for their attorneys' preclearance work at the Department of Justice, and the Fifth Circuit has consistently rejected similar claims. Because the record contains

sufficient indicia of the amount of fees that were incurred for prohibited preclearance work, Appellants request that the Court vacate the judgment and attorneys' fees award and remand for an entry that subtracts the preclearance fees and expenses (assuming the Court awards any fees at all). *See Leroy*, 831 F.2d at 586 (reversing and remanding for entry of judgment in specific amount).

Further, *in the alternative*, Appellants request that the Court reverse and remand the case to the District Court for a determination of the proper amount of fees by excluding preclearance and administrative work at the Department of Justice, as well as any other work that was not necessary and required for the litigation.

Respectfully submitted,

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