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

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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SUMMARY OF THE ARGUMENTS

To recover attorneys' fees under the Voting Rights Act, the Supreme Court's decision in *Buckhannon* requires that a plaintiff obtain judicial relief that both materially alters the legal relationship between the parties *and* modifies the defendant's behavior in a way that directly benefits the plaintiff. *See Buckhannon Bd. & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 600 (2001). Here, the judicial relief that the Plaintiffs obtained was an injunction preventing Galveston County from implementing any "un-precleared" election plan for the 2012 primary season. As Galveston argued in its opening brief, that injunction did not materially alter the legal relationship between the parties, and it did not modify Galveston's behavior to Plaintiffs' benefit.

Plaintiffs argue the injunction was a "but for" cause of Galveston's efforts to obtain preclearance from the Department of Justice. But the procedural timeline in this case reveals that the Plaintiffs' position is wrong. Before this litigation ever began, Galveston had sought (and continued to seek) preclearance of its re-districting efforts from the DOJ. Then, throughout the litigation, Galveston evidenced and

repeatedly represented to the District Court that it was continuing in its efforts to obtain DOJ preclearance. The resulting injunction did not, therefore, modify Galveston's behavior because it merely directed Galveston to continue with a process that it had voluntarily begun and to refrain from actions that Galveston had repeatedly asserted that it would not do. If anything, the injunction affirmed Galveston's conduct.

The Plaintiffs counter that the District Court's issuance of the injunction is enough proof of its necessity. (Resp. at 26.) But this *res ipsa loquitor* argument is not supported by any District Court finding, and there is insufficient evidence to support any equivalent implied finding. Plaintiffs next argue that the evidence presented to the District Court "clearly sets out that elections were proceeding pursuant to un-precleared plans." (Resp. at 22.) The Plaintiffs' argument is bereft of citations to the record. Instead, the record belies the Plaintiffs' suspicions and exposes the clear error of the District Court's ruling.

The second issue before the Court is narrower than the first. It asks whether the District Court erred in awarding attorneys' fees for the Plaintiffs' lobbying efforts at the DOJ. The Fifth Circuit has consistently rejected claims for such fees when the party cannot show

that its attorneys' services changed the DOJ's position relative to the administrative matter. As proof, the Fifth Circuit requires evidence of the attorneys' particularly astute criticism or creative legal argument. Plaintiffs, however, provided no evidence of what their attorneys said or did while lobbying the DOJ. Accordingly, the District Court erred in awarding administrative lobbying fees to the Plaintiffs.

In their Response, the Plaintiffs counter that their attorneys' DOJ-related activities were tied qualitatively to the lawsuit. (Resp. at 32-34.) For support, Plaintiffs rely on a declaration from the Doyle Plaintiffs' attorney, Jose Garza, as proof of the substance of their lobbying work. (Resp. at 33.) However, Garza's declaration is nothing more than a string of conclusory statements and does not provide a sound basis from which the court could award fees for administrative activities. Rather, Garza's conclusory statements force the Court to assume that, since Garza billed his clients for lobbying the DOJ, he must have been effective. The Fifth Circuit requires more than such bald assertions of "necessity."

REPLY ARGUMENTS

I. The Plaintiffs did not obtain judicial relief that altered the parties' legal relationship or modified Galveston's behavior.

Galveston argued in its opening brief that the Plaintiffs did not meet the standard required by the Fifth Circuit post-*Buckhannon*: i.e., Plaintiffs did not obtain judicial relief that both altered the parties' legal relationship and modified Galveston's behavior. *See Dearmore v. City of Garland*, 519 F.2d 517, 521 (5th Cir. 2008). Plaintiffs' counter-arguments are (1) the record does not support Galveston's argument because Galveston was actually planning to implement un-precleared maps, and (2) the Plaintiffs achieved the relief that they sought. As described more fully herein, both of the Plaintiffs' arguments are infirm.

A. The Record confirms that Galveston sought DOJ preclearance early and often and never sought to implement un-precleared maps.

The central theme of Plaintiffs' Response is that Galveston "clearly" and "obviously" planned to implement election maps regardless of whether they were precleared and approved by the DOJ. An examination of the record—especially the evidence cited by Plaintiffs—exposes Plaintiffs' mistaken position.

For example, Plaintiffs cite pages 502 and 958 of the Record to imply that Galveston was preparing to enforce un-precleared plans and "continued to proceed with the unprecleared plans." (Resp. at 8, 10.) But page 502 of the Record is the beginning of a letter brief from Galveston to the District Court in which Galveston explains specifically that the election would proceed under *different* maps, not the un-precleared maps, if the DOJ would not give preclearance. (R. 502, "a new plan will be prepared.") Likewise, page 958 does not support Plaintiffs' claim. Page 958 is Plaintiffs' Motion for Reconsideration of their request for a preliminary injunction, and the only pertinent "evidence" attached to it was the DOJ's letter requesting more information from Galveston. (R. 975.) This DOJ letter does not suggest that Galveston was proceeding with unprecleared maps; it is merely a request for more information. Plaintiffs' reliance on these documents is confusing at best.

Plaintiffs next claim that they presented evidence and argument that Galveston was proceeding with unprecleared maps "at the hearing" on January 10, 2012. (Resp. at 10.)[1] Not surprisingly, this statement is without citation to the record because the actual evidence is, once again,

[1] A transcript of the hearing was not available.

contrary to Plaintiffs' argument. Indeed, the evidence "at the hearing" included an affidavit from the Chief Deputy Clerk of Elections, William Sergent, who testified that he had "taken no action to implement the 2011 redistricting maps [the unprecleared plans] … ." (R. 1020.) Plaintiffs presented an e-mail from Sergent in which he had inquired of polling locations, taking into consideration the possible changes in the election maps. (R. 1044.) But Sergent's affidavit put this e-mail into context, explaining that his office had only considered possible polling locations that would comply with all election regulations—regardless of the maps used—and that his office would make no commitment to move forward in planning until further order from the District Court. (R. 1020.) Galveston presented similar affidavits from the Galveston County Clerk and the Voter Registrar. (R. 1022, 1023.) The Plaintiffs did not rebut Galveston's evidence.

The worst example of Plaintiffs' misciting and misstating the Record is on Page 22 of their Brief, where Plaintiffs contend that Galveston's proposed election maps "are effective on January 1, 2012." (Resp. at 22.) Plaintiffs rely on Galveston's initial submission letter to the DOJ (filed before the lawsuit) and purport to quote from the

submission letter where it says "effective January 1, 2012 or when preclearance is obtained." (R. 78.) But missing from the quote is the key phrase: "the later of," which is yet another unambiguous admission from Galveston that its election maps, even though approved by the County Commissioner, would not be implemented without Section 5 preclearance from the DOJ. (R. 78.)

These are just a few examples of the biggest problem for the Plaintiffs, which is that their position is inconsistent with the Record. In all, Plaintiffs cannot escape Galveston's well-documented position that it always intended to obtain Section 5 preclearance, and it would not implement new election maps without approval.

Moreover, even assuming that Galveston's employees had made some contingent and preliminary plans to implement the yet-to-be-precleared maps, Plaintiffs never established that the result of this litigation changed the legal relationship between the parties. And one stubborn fact prevents them from establishing that critical fact: Galveston sought pre-clearance *before* Plaintiffs filed their lawsuit, and the resulting injunction merely required it to continue that process. This inconvenient truth is completely ignored in Plaintiffs' Brief, and

expectedly so. Plaintiffs cannot credibly argue that their lawsuit *caused* Galveston to do something (seek pre-clearance) that it had already done. Any injunction that required Galveston to obtain DOJ preclearance for the 2012 primary election did not and could not have altered the legal relationship of the parties or modified Galveston's behavior. For this reason, Plaintiffs cannot be prevailing parties for purposes of awarding attorneys' fees.

B. The Plaintiffs never achieved the relief that they sought and, instead, obtained relief that preserved the *status quo*.

After a January 10, 2012 hearing, the District Court enjoined Galveston from implementing an un-precleared plan. The District Court made no finding that Galveston was implementing un-precleared maps. In fact, by this point, Galveston had repeatedly assured the Court that it had not and would not implement an un-precleared plan. (R. 493, 1841-45, 1018-23, 1142.) The resulting injunction (and, by extension, the final judgment) preserved that *status quo*. The injunction and judgment were unobjectionable to Galveston because they merely confirmed the position Galveston had taken all along: Galveston would not implement un-precleared election maps for the 2012 primary election. (R. 493, 1841-45, 1018-23, 1142.) As Plaintiffs well know, this order was

uncontroversial at the time it was entered and changed nothing with respect to Galveston's plans going forward.

Despite Plaintiffs' position that they achieved the relief sought in this lawsuit, Plaintiffs' Response ignores the fact that the actual relief Plaintiffs sought at the time of the hearing was the issuance of court-imposed maps removing minority voters from District 3 and placing them in District 1. (*See* R. 973.) ("This Court should reconsider the adoption of the interim Court ordered plan for Commissioner precincts … ."). Plaintiffs even submitted a post-hearing brief defending their proposed maps. (R. 1024.) The District Court rejected the Plaintiffs' call for court-imposed maps and instead preserved the *status quo* with the temporary injunction. (The DOJ too eventually rejected the Plaintiffs' proposed maps, as the DOJ ultimately requested Galveston reform its proposed maps to place more minority votes into Precinct Three, not fewer. In other words, the eventual DOJ-approved maps rejected the racial and ethnic breakdown that Plaintiffs had sought all along.)

As a final point, the adverse and unjust consequences of Plaintiffs' position, if correct, are clear. If the law were to reflect Plaintiffs'

position, it would mean that every time a jurisdiction sought Section 5 pre-clearance, an enterprising Plaintiff and its attorney could show up late to the party, file suit telling the governmental body to do what it had already done, and, no matter the result of the DOJ's Section 5 analysis, the Plaintiff and its counsel would recover their attorney's fees from the government. This is inherently unfair, and it is what Plaintiffs have done in this case. Instead, the Fifth Circuit and Supreme Court have required more: the Plaintiff must obtain a result that changes the legal relationship and alters the defendant's behavior.[2] That relationship never changed here, and Galveston's behavior never changed. Plaintiffs, therefore, are not prevailing parties and should not have been awarded fees.

II. Plaintiffs do not meet the required showing to recover attorneys' fees incurred for lobbying efforts at the Department of Justice.

If fees incurred for administrative lobbying efforts are recoverable under Section 5 of the Voting Rights Act, the parties agree that the test to recover those fees is whether the administrative activities are tied

[2] *See Craig v. Gregg County*, 988 F.2d 18, 21 (5th Cir. 1993) ("A civil rights plaintiff would not be entitled to receive attorneys' fees for demanding that Gregg County do something that it was going to do anyway. Late arrivers cannot jump the train as it leaves the station and hope to seize prevailing plaintiff status.") (citing *Posada v. Lamb County*, 716 F.2d 1066, 1071-72 (5th Cir. 1983)).

both qualitatively and timely to the lawsuit such that the administrative work was performed on the litigation. *Leroy v. City of Houston*, 831 F.2d 576, 582 (5th Cir. 1987). But Plaintiffs' argument ultimately ignores the fact that the test is not disjunctive: Both elements must be met before a plaintiff can recover attorneys' fees for administrative activities. *See id.* As no evidence supports the first requirement, that administrative work be tied qualitatively to the underlying lawsuit, the trial court had no discretion to award the Plaintiffs any fees incurred for their lobbying work before the DOJ. *See id.*

A. No evidence demonstrates that the DOJ work was qualitatively tied to the litigation.

As Galveston previously argued, absent from the record is any evidence revealing the substance of the Plaintiffs' DOJ activities. The Plaintiffs' response points only to Jose Garza's declaration.[3] (R. 1603-04.) Garza's declaration recites that his lobbiyng of the DOJ occurred contemporaneously with the underlying litigation (in which he

[3] Garza submitted his Declaration as counsel for the Doyle Plaintiffs alone. (R. 1600.) Notably, the Plaintiffs' Response does not cite any evidence that the Petteway attorneys expended time lobbying before the DOJ that was timely and quantitatively tied to this litigation.

represented only the Doyle Plaintiffs): "The Section 5 preclearance process in this case proceeded on dual track with the litigation." (R. 1600, 1603-04.) But Garza's declaration, like the record on appeal, is devoid of any information concerning the particulars of the work itself. By way of example, Garza's declaration fails to describe the Plaintiffs' substantive position before the DOJ or disclose the contents of their December 2011 expert report. (R. 1553.) Without the disclosure of any substantive information concerning Plaintiffs' position before the DOJ, Garza's declaration is not probative of this Court's requirement that administrative work be "qualitatively" tied to the underlying litigation as a prerequisite to recovering attorneys' fees attributable to administrative lobbying efforts. *See Leroy*, 831 F.2d at 582.

Even assuming that Garza's declaration could be read to qualitatively connect his DOJ-work with this litigation, the conclusory statements in the declaration do not satisfy the high evidentiary burden required under *Arriola v. Harville*, 781 F.2d 506, 509 (5th Cir. 1986) (quoting *Posada v. Lamb County*, 716 F.2d 1066, 1074 (5th Cir. 1983). The only potentially relevant sentence in Garza's declaration reads, "Some of the time I spent on this case was for advocating before the

[DOJ] during the Section 5 submission of the challenged election changes in a successful attempt to secure a letter of objection to the challenged enacted plans." (R. 1601.) This naked assertion does not demonstrate that the fees incurred were qualitatively tied to the underlying litigation. *See Lechuga v. Southern Pacific Transp. Co.*, 949 F.2d 790, 798 (5th Cir. 1992); *Galindo v. Precision American Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985) ("affidavits setting forth 'ultimate or conclusory facts ...' are insufficient to either support or defeat a motion for summary judgment").

Moreover, Garza's declaration is insufficient to establish that the fees incurred for the work done at the DOJ were "legally required or necessary" to resolve the litigation, i.e. that Garza's lobbying efforts were so "astute and creative" that the DOJ would not have come to the same result by itself (or without such lobbying by Garza). *See Arriola*, 781 F.2d at 509 (quoting *Posada*, 716 F.2d at 1074). The Fifth Circuit has never accepted naked claims of causation; instead, it has imposed formidable procedural and legal obstacles as prerequisites to recovering attorneys' fees that are not expended on litigation itself. *See Leroy*, 831 F.2d at 581. Garza's declaration does not provide a basis for awarding

the Plaintiffs $48,637 in fees attributable solely to DOJ work. (See Appellants' Brief, Tab J.)

Without proof of their position before the DOJ, the Plaintiffs rely on a circular argument: contemporaneous work is *ipso facto* qualitatively tied to the outcome of the underlying litigation. (See Resp. at 32.) While that argument is convenient, it isn't the law. A showing that administrative work is contemporaneous with ongoing litigation is insufficient to recover fees incurred for DOJ lobbying. *See Leroy*, 831 F.2d at 582. Work must also be qualitatively tied to the litigation; counsel's preclearance lobbying must be so "astute and creative" that the DOJ would not have come to the same result without the Plaintiffs' input. *See Arriola*, 781 F.2d at 509 (quoting *Posada v. Lamb County*, 716 F.2d 1066, 1074 (5th Cir. 1983)).

Plaintiffs' proposed rule for this case, requiring only evidence that DOJ lobbying occurred "on a dual track" with the underlying litigation, would create perverse incentives for attorneys and lead to an absurd result. If the test required only timeliness, then an attorney could incur fees for time and travel to appear before the DOJ and recover those fees from an opposing party without regard to whether the attorneys'

lobbying concerned the underlying litigation in any fashion and had an actual effect on the DOJ's ultimate decision. The Fifth Circuit has required much more of litigants seeking to recover attorneys' fees not expended directly on the underlying litigation, and the Plaintiffs present no compelling reason to depart from that precedent.

B. Plaintiffs' attorneys' lobbying did not result in the maps sought by Plaintiffs.

As a practical matter, the Plaintiffs' lobbying could not have been so "astute and creative" as to cause the DOJ to interpose any objection to Galveston's maps because the DOJ's objection to the commissioner maps did not mirror the Plaintiffs' position in the trial court. The DOJ initially objected to Galveston's maps because of potential minority retrogression in Precinct Three. (R. 1404, 1476-78, 1795.) The DOJ did not object to Precinct One's composition. (R. 1403-04, 1795.) Conversely, the Plaintiffs sought the creation of a new "minority influence district" in District One, while preserving the minority coalition district in Precinct Three (yet reducing the overall percentage of minority voters). (R. 543-44, 675-77, 1029-1037.) Galveston addressed the DOJ's objection by changing the commissioner boundary lines so that minority voters were moved from Precinct One to Three. (R. 1477, 1794.) The DOJ

approved Galveston's solution and expressed no objection to its effect on Precinct One. (R. 1795-97.) In other words, Plaintiffs did not get the maps and racial composition of Precincts One and Three that they sought. (*See also* Appellants' Brief, p. 31, n. 5.)

III. Galveston preserved its challenge to the fee award.

The Plaintiffs make much of Galveston County's election to not attack the substance of the injunction on appeal. Plaintiffs would have the Court hold that Galveston County waived its appeal of the attorneys' fee award for failure to challenge the trial court's injunctive relief. (Resp. at 21.) But Galveston does not maintain that the trial court erred in enjoining Galveston to essentially obey the law because Galveston was acting in accord with the injunction before this litigation even commenced.

There is no requirement that a party challenge a trial court's injunction as a prerequisite to complaining of an award of attorneys' fees on appeal. *See e.g., Dearmore*, 519 F.3d at 520 (considering whether trial court properly award attorneys' fees although defendant did not appeal merits of injunction). In *Dearmore*, this Court considered an appeal from a fee award after the trial court issued an injunction. *Id.*

The appellants in *Dearmore* did not appeal the merits of the injunction but instead maintained that the relief ordered did not support the court's subsequent award of attorneys' fees to the Plaintiffs as prevailing parties. *Id.* As *Dearmore* evinces, there is no requirement that a party challenge each and every order potentially undergirding an erroneous award of attorneys' fees in order to complain on appeal that the fee award is nevertheless improper.

As stated above, Galveston raised no objection to trial court's injunction because the injunction did not and would not alter Galveston's conduct: it enjoined Galveston County to take statutorily required steps under Section 5 (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. Since the injunction maintained only the *status quo*, Galveston had no reason to contest it.

Galveston County opposed the trial court's order awarding attorneys' fees, and it moved to reform the court's judgment to remove the improper award. (R. 1655.) Galveston County now appeals from the

trial court's fee award, raising many of the objections it presented below. Accordingly, Galveston County has preserved its arguments on appeal.

CONCLUSION AND PRAYER FOR RELIEF

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 reform the judgment and attorneys' fees award so that it subtracts these fees (assuming the Court awards any fees at all).

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,

/s/ John K. Broussard, Jr.

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Dated: March 25, 2013