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June 25, 2014

The Honorable Patrick J. Leahy
Chair
Senate Committee on the Judiciary
224 Dirksen
Washington, D.C. 20510

The Honorable Charles E. Grassley
Ranking Member
Senate Committee on the Judiciary
224 Dirksen
Washington, D.C. 20510

Dear Chairman Leahy, Ranking Member Grassley and Members of the Senate Judiciary Committee:

On behalf of The Campaign Legal Center, we applaud the United States Senate Judiciary Committee's decision to hold today's hearing on the Voting Rights Amendment Act of 2014 (S. 1945), and we appreciate the opportunity to submit a statement into the hearing record. Given the consequences of the U.S. Supreme Court's decision in *Shelby County v. Holder* last year, we strongly urge the U.S. Senate to advance and pass this Act without delay.

The Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization that works in the areas of voting rights, campaign finance, and government ethics. CLC offers nonpartisan analyses of these issues and represents the public interest in various administrative, legislative, and legal proceedings. CLC is committed to promoting a healthy democracy, and an important part of that mission is protecting all Americans' fundamental right to vote.

One year ago today—June 25, 2013—a narrow 5-4 majority of the Supreme Court struck a significant blow to those rights. The Court held that the Section 4(b) coverage formula of the Voting Rights Act of 1965 was unconstitutional. That formula covered states and jurisdictions with histories of racial discrimination in election laws and procedures. Before *Shelby County*, these covered jurisdictions were required to obtain “preclearance” from the U.S. Department of Justice (DOJ) or a three-judge panel of the U.S. District Court for the District of Columbia before implementing any changes in voting laws or practices. For decades, this preclearance regime stopped hundreds of discriminatory voting practices from going into effect and it was critical in advancing the voting rights of all Americans.

Importantly, in *Shelby County*, the Court struck down Section 4(b) because the coverage formula did not reflect “current conditions.” The Court then explained that “Congress may draft another formula based on current conditions.”

Over the last twelve months, members of Congress have accepted the Court's invitation and have moved swiftly to propose common-sense, modern-day fixes to the Voting Rights Act of 1965. The Voting Rights Amendment Act of 2014 (VRAA), which has bipartisan support, will help ensure that our democracy's most cherished right—the right to vote—is guaranteed for every American citizen. It is time for Congress to take action and enact the VRAA now.

Without a doubt, the Voting Rights Act has been one of the most successful civil rights laws in American history. It has helped Congress enforce the protections of the 14th and 15th Amendments, eradicating the literacy tests, grandfather clauses, and violent intimidation tactics of the Jim Crow era. But while the VRA has resulted in significant progress, new tactics exist today to impede the opportunity of minorities to elect candidates of their choice. Writing for the majority in *Shelby County*, Chief Justice John Roberts stated: “[V]oting discrimination still exists; no one doubts that.”

The continuing need for the Voting Rights Act and preclearance is clear from recent events in formerly covered jurisdictions. Take, for example, what is happening in Beaumont, Texas. For decades, Beaumont used single-member districts to select its seven-member school board. In four of the districts, black voters were able to elect the candidates of their choice. Then, in an apparent attempt to dilute black votes and regain control of the school board, certain segments of the white community proposed a change in the method of electing the school board that reduced the number of single-member districts to five and converted two district seats to citywide (or at-large) elections. At-large elections have traditionally been used as a tool to dilute black voting strength, by making it more difficult in a racially polarized electorate for minority voters to elect candidates of their choice.

In 2011, voters in Beaumont approved the new 5-2 voting scheme in a racially polarized election. Whites predominantly voted in favor of the change, and blacks predominantly voted against the change. At the time, because Beaumont was one of the political subdivisions included in the VRA's preclearance regime, the federal government had to pre-clear the change before it could go into effect. The DOJ denied preclearance, finding that the proposed 5-2 redistricting plan would impede the ability of minority voters to elect candidates of their choice. A federal court in Washington also enjoined the change when the white community obtained a state court order requiring the 5-2 plan to go into effect. As a result, Beaumont maintained its seven single-member districts, but this victory was only temporary. Almost immediately after the Supreme Court's decision in *Shelby County*, the white community returned to state court and obtained a decision requiring the school board to implement the 5-2 plan in the next election. Thus, as a direct result of the *Shelby County* decision, the Beaumont school board will use the 5-2 plan that was previously found to impede the ability of minority voters to elect their candidates of choice, unless a lawsuit can stop this discrimination.

Similarly, in other jurisdictions such as Galveston County, Texas, and Pasadena, Texas, officials are implementing or have announced plans to implement discriminatory voting changes that were prohibited before the *Shelby County* decision. In Galveston County, for example, officials acted after the *Shelby County* decision to reduce the number of justice of the peace and constable districts, a plan that had been blocked in the pre-*Shelby County* era. The Department of Justice had found in 2012 that there was “sufficient credible evidence that precludes the

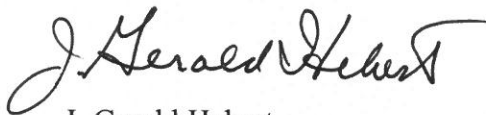
county from establishing that . . . the reduction in the number of justice of the peace/constable districts as well as the redistricting plan to elect those officials will not have a retrogressive effect, and were not motivated by a discriminatory intent.” Nevertheless, in spite of this finding, the County instituted the discriminatory changes almost immediately in the wake of *Shelby County*. We have attached the DOJ’s objection letters in Beaumont and Galveston County for the Judiciary Committee’s reference.

These present instances of discrimination, and other instances that will be submitted for the record, underscore the value of what was lost when the Supreme Court struck down Section 4(b) of the Voting Rights Act – and emphasize the importance of advancing the VRAA today.

Failure to update and amend the Voting Rights Act will make it difficult to fully combat voting discrimination. Although Section 2 of the Act gives voters the opportunity to challenge discriminatory laws, those laws can take effect quickly – often before voters and potential litigants know these laws even exist. Section 2 cases can also take years to litigate, meaning that discriminatory laws may be in effect for several elections before courts can determine whether those laws are valid. Moreover, without federal review, private citizens must shoulder the heavy financial burden of lawsuits to try to block discriminatory laws. The VRAA offers a modern, flexible, and bipartisan approach in line with the letter and spirit of the Supreme Court’s decision in *Shelby County* that will protect minority voters.

Our country has truly come a long way since the Freedom Summer murders fifty years ago this month, when three brave men – James Earl Chaney, Andrew Goodman, and Mickey Schwerner – were murdered by white supremacists after trying to register black Mississippians to vote. But the fight for voting rights is not over. Present instances of discrimination persist and they emphasize the need for Members of Congress to advance and pass the Voting Rights Amendment Act of 2014. Today’s hearing in the Senate Judiciary Committee is a good start, and we again appreciate Chairman Leahy’s efforts to renew the conversation to protect minority voting rights. Although we cannot undo the damage that the Court’s decision in *Shelby County* has already caused in a short twelve months, we can again strengthen protections for voting rights to ensure that all Americans have the opportunity to exercise their fundamental right to vote.

Sincerely,

A handwritten signature in black ink that reads "J. Gerald Hebert". The signature is written in a cursive, flowing style.

J. Gerald Hebert
Executive Director
Campaign Legal Center



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

December 21, 2012

Ms. Melody Thomas Chappell, Esq.
Wells, Peyton, Greenberg & Hunt
P.O. Box 3708
Beaumont, Texas 77704-3708

Dear Ms. Chappell:

This refers to the change in the method of election from seven single-member districts to five single-member districts with two at-large positions, and the 2012 board of trustee districting plan, for Beaumont Independent School District in Jefferson County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your response to our October 1, 2012, request for additional information on October 22, 2012, and additional information was received through December 10, 2012.

We have carefully considered the information you have provided, as well as census data, comments, and information from other interested parties. Under Section 5 of the Voting Rights Act, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed changes “neither [have] the purpose nor will have the effect” of denying or abridging the right to vote on account of race, color, or membership in language minority group. *Georgia v. United States*, 411 U.S. 526 (1973); *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. 51.52. The voting changes at issue must be measured against the benchmark practice to determine whether they would “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Beer v. United States*, 425 U.S. 130, 141 (1976).

According to the 2010 Census, the district had a total population of 132,225 persons, of whom 60,581 (45.8%) were African American and 19,459 (14.7%) were Hispanic. Its voting age population was 101,912, of whom 44,085 (43.3%) were black, and 13,734 (13.5%) were Hispanic. The vast majority of the district’s population resides in the City of Beaumont, which has a similar demographic profile.

Prior to 1985, five of the seven board members were elected from single-member districts and two were elected at large. In 1985, a federal court devised a single-member district plan for the election of all seven board members. *United States v. Texas Education Agency (Beaumont*

Independent School District), Cause No. 6819-CA (E.D. Tex. Apr. 22, 1985). That method of election has been used continuously since then and is the benchmark for our analysis here. It provides African American voters with the ability to elect four members to the district's board.

The district proposes to elect two of its members at large and five members from single-member districts. Our analysis shows that a fairly-drawn districting plan with five districts will provide African American voters with the ability to elect candidates of choice in three of the districts. Accordingly, to meet its burden that the change does not result in impermissible retrogression, the district must establish that the at-large method for the two remaining seats does not preclude African American voters from electing a candidate of choice to office. For the reasons discussed below, the district has failed to do so.

Aside from various tax elections, the May 2011 referendum is the only recent school district election in which the electorate would be identical to that of an at-large position on the school board. There is overwhelming evidence that both the campaign leading to the election as well as the issue itself carried racial overtones with the genesis of the change and virtually all of its support coming from white residents. A statistical analysis of the election confirms the extreme racial polarization that the issue created. Black voters cohesively voted to maintain the current method of election and white voters voted cohesively for the proposed change. We estimate over 90 percent of white voters, but less than 10 percent of black voters, supported the change.

An examination of at-large elections for the Beaumont City Council also proved informative because of the overlap in population and the similarity in demographics. There, we found racial cohesion among black voters at levels similar to those identified in the school district election. More significantly, we found significant racial polarization and the same unwillingness of white voters to support a black-preferred candidate, with little evidence of crossover voting by white voters in the city's at-large council races.

In the past ten years, numerous black-preferred candidates have sought municipal office in the city. With the sole exception of one candidate, African Americans have been unable to elect candidates of choice to the city's at-large council positions. Our analyses showed that this candidate only received about eight percent of the non-black vote in both the 2007 and 2011 elections, placing second to last among non-black voters in 2011. And anecdotal evidence suggests that even this minimal level of crossover voting was the result of an out-of-the-ordinary public endorsement and television appearance by white voters on behalf of this candidate; other black-preferred candidates have failed to achieve more than three percent of the non-black vote in at-large city council elections. In addition, our analyses demonstrate that this candidate's election was dependent on single-shot voting, in which black voters withheld their votes for the second at-large city council seat in both 2007 and 2011, voting only for this candidate. The statistical and anecdotal evidence therefore confirm that this one candidate's experience is not indicative of black-preferred candidates' prospects for success in at-large elections. *See Texas v. United States*, 2012 WL 3671924, at *22-23 (D.D.C. Aug. 28, 2012) (three-judge court) (isolated electoral success by one candidate is insufficient to demonstrate that minority voters have the consistent ability to elect their preferred candidates of choice).

The school district has failed to establish that implementing the proposed method of election will offer the same ability to African American voters to exercise the electoral franchise that they enjoy currently. Black voters now have the ability to elect four of the seven board members; the proposed plan provides that ability for only three positions. In order for black voters to maintain their current level of voting strength under the new configuration, they must be able to elect a candidate of choice from one at-large position. The evidence, however, offers little, if any, support for that conclusion.

We note as well that this is not the first occasion on which the school district has proposed the use of at-large elections in a manner that would cause a retrogression in black voting strength; on October 20, 1983, the Attorney General objected to the proposed consolidation of the Beaumont and South Park school districts on the ground that the change would "have a significant adverse impact on the ability of blacks to elect representatives of their choice to the surviving school board under an at-large election system."

As detailed above, it is not likely that a black-preferred candidate would successfully be elected in an at-large contest. Based upon that analysis I cannot conclude, as I must under Section 5, that the district has met its burden of establishing the absence of a retrogressive effect. Accordingly, I must interpose an objection to the proposed change in method of election for the Beaumont Independent School District from seven single-member districts to five single-member districts with two at-large positions. Because the district has failed to meet its burden of demonstrating that this proposed change will not have a retrogressive effect, we do not make any determination as to whether the district has established that the proposed change was adopted with no discriminatory purpose.

Because the adoption of the districting plan is dependent upon the objected-to proposed change in method of election, it would be inappropriate for the Attorney General to make a determination on this related change. 28 C.F.R. 51.22.

Under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. 28 C.F.R. 51.45. However, unless and until the objection is withdrawn or a judgment from the federal district court is obtained, the changes continue to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 05 2012

James E. Trainor III, Esq.
Beirne, Maynard & Parsons
401 West 15th Street, Suite 845
Austin, Texas 78701

Dear Mr. Trainor:

This refers to the 2011 redistricting plan for the commissioners court, the reduction in the number of justices of the peace from nine to five and the number of constables from eight to five, and the 2011 redistricting plan for the justices of the peace/constable precincts for Galveston County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your response to our December 19, 2011, request for additional information on January 4, 2012; additional information was received on February 6, 2012.

We have carefully considered the information you have provided, as well as census data, comments and information from other interested parties, and other information, including the county's previous submissions. Under Section 5, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed changes have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color or membership in a language minority group. *Georgia v. United States*, 411 U.S. 526 (1973); *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. 51.52(c). For the reasons discussed below, I cannot conclude that the county's burden under Section 5 has been sustained as to the submitted changes. Therefore, on behalf of the Attorney General, I must object to the changes currently pending before the Department.

According to the 2010 Census, Galveston County has a total population of 291,309 persons, of whom 40,332 (13.8%) are African American and 65,270 (22.4%) are Hispanic. Of the 217,142 persons who are of voting age, 28,716 (13.2%) are black persons and 42,649 (19.6%) are Hispanic. The five-year American Community Survey (2006-2010) estimates that African Americans are 14.3 percent of the citizen voting age population and Hispanic persons comprise 14.8 percent. The commissioners court is elected from four single-member districts with a county judge elected at large. With regard to the election for justices of the peace and constables, there are eight election precincts under the benchmark method. Each elects one

person to each position, except for Precinct 8, which elects two justices of the peace. The county has proposed to reduce the number of election precincts to five, with a justice of the peace and a constable elected from each.

We turn first to the commissioners court redistricting plan. With respect to the county's ability to demonstrate that the commissioners court plan was adopted without a prohibited purpose, the starting point of our analysis is the framework established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). There, the Court provided a non-exhaustive list of factors that bear on the determination of discriminatory purpose, including the impact of the action on minority groups; the historical background of the action; the sequence of events leading up to the action or decision; the legislative or administrative history regarding the action; departures from normal procedures; and evidence that the decision-maker ignored factors it has otherwise considered important or controlling in similar decisions. *Id.* at 266-68.

Based on our analysis of the evidence, we have concluded that the county has not met its burden of showing that the proposed plan was adopted with no discriminatory purpose. We start with the county's failure to adopt, as it had in previous redistricting cycles, a set of criteria by which the county would be guided in the redistricting process. The evidence establishes that this was a deliberate decision by the county to avoid being held to a procedural or substantive standard of conduct with regard to the manner in which it complied with the constitutional and statutory requirements of redistricting.

The evidence also indicates that the process may have been characterized by the deliberate exclusion from meaningful involvement in key deliberations of the only member of the commissioners court elected from a minority ability-to-elect precinct. For example, the county judge and several – but not all – of the commissioners had prior knowledge that a significant revision to the pending proposed map was made on August 29, 2011, and would be presented at the following day's meeting at which the final vote on the redistricting plans would be taken. This is particularly noteworthy because the commissioner for Precinct 3, one of two precincts affected by this particular revision, was one of the commissioners not informed about this significant change. Precinct 3 is the only precinct in the county in which minority voters have the ability to elect a candidate of choice, and is the only precinct currently represented by a minority commissioner.

Another factor that bears on a determination of discriminatory purpose is the impact of the decision on minority groups. In this regard, we note that during the current redistricting process, the county relocated the Bolivar Peninsula – a largely white area – from Precinct 1 into Precinct 3. This reduced the overall minority share of the electorate in Precinct 3 by reducing the African American population while increasing both the Hispanic and Anglo populations. In addition, we understand that the Bolivar Peninsula region was one of the areas in the county that was most severely damaged by Hurricane Ike in 2008, and lost several thousand homes. The county received a \$93 million grant in 2009 to provide housing repair and replacement options for those residents affected by the hurricane, and has announced its intention to spend most of the grant funds restoring the housing stock on Bolivar Peninsula. Because the peninsula's population has historically been overwhelmingly Anglo, and in light of the Census Bureau's

estimated occupancy rate for housing units in the Bolivar Census County Division of 2.2 persons per household, there is a factual basis to conclude that as the housing stock on the peninsula is replenished and the population increases, the result will be a significant increase in the Anglo population percentage. In the context of racially polarized elections in the county, this will lead to the concomitant loss of the ability of minority voters to elect a candidate of choice to office in Precinct 3. *Reno v. Bossier Parish School Board*, 528 U.S. 320, 340 (2000) (“Section 5 looks not only to the present effects of changes but to their future effects as well.”) (citing *City of Pleasant Grove v. United States*, 479 U.S. 462, 471 (1987)).

That this retrogression in minority voting strength in Precinct 3 is neither required nor inevitable heightens our concern that the county has not met its burden of showing that the change was not motivated by any discriminatory purpose. Both Precincts 1 and 3 were underpopulated, and it would have been far more logical to shift population from a precinct that was overpopulated than to move population between two precincts that were underpopulated. In that regard, benchmark Precinct 4 was overpopulated by 23.5 percent over the ideal, and its excess population could have been used to address underpopulation in the other precincts. Moreover, according to the information that the county supplied, its redistricting consultant made the change based on something he read in the newspaper about the public wanting Bolivar Peninsula and Galveston Island to be joined into a commissioner precinct; but a review of all the audio and video recordings of the public meetings shows that only one person made such a comment.

Based on these factors, we have concluded that the county has not met its burden of demonstrating that the proposed commissioners court redistricting plan was adopted with no discriminatory purpose. We note as well, however, that based on the facts as identified above, the county has also failed to carry its burden of showing that the proposed commissioners court plan does not have a retrogressive effect.

The voting change at issue must be measured against the benchmark practice to determine whether it would “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Beer v. United States*, 425 U.S. 130, 141 (1976). Our statistical analysis indicates that minority voters possess the ability to elect a candidate of choice in benchmark Precinct 3, and that ability has existed for at least the past decade.

As noted, the county’s decision to relocate the Bolivar Peninsula from Precinct 1 into Precinct 3 had the effect of reducing the African American share of the electorate in Precinct 3, while increasing both the Hispanic and Anglo populations. In specific terms, the county decreased the black voting age population percentage from 35.2 to 30.8 percent and increased the Hispanic voting age population 25.7 to 27.8 percent, resulting in an overall decrease of 2.3 percentage points in the precinct’s minority voting age population. There is sufficient credible evidence to prevent the county from establishing the absence of a retrogressive effect as to this change, especially in light of the anticipated and significant population return of Anglo residents to the Bolivar Peninsula, as discussed further above.

We turn next to the proposed reduction in the number of election precincts for the justice of the peace and constable, and the 2011 redistricting plan for the justices of the peace/constable precincts. With regard to the election for justices of the peace and constables, there are eight election precincts under the benchmark method. Each elects one person to each position, except for Precinct 8, which elects two justices of the peace. The county has proposed to reduce the number of election precincts to five, with a justice of the peace and a constable elected from each.

Our analysis of the benchmark justice of the peace and constable districts indicates that minority voters possess the ability to elect candidates of choice in Precincts 2, 3 and 5. With respect to Precincts 2 and 3, this ability is the continuing result of the court's order in *Hoskins v. Hannah*, Civil Action No. G-92-12 (S.D. Tex. Aug. 19, 1992), which created these two districts. Following the proposed consolidation and reduction in the number of precincts, only Precinct 3 would provide that requisite ability to elect. In the simplest terms, under the benchmark plan, minority voters in three districts could elect candidates of choice; but under the proposed plan, that ability is reduced to one.

In addition, we understand that the county's position is that the court's order in *Hoskins v. Hannah*, which required the county to maintain two minority ability to elect districts for the election of justices of the peace and constables, has expired. If it has, then it is significant that in the first redistricting following the expiration of that order, the county chose to reduce the number of minority ability to elect districts to one. A stated justification for the proposed consolidation was to save money, yet, according to the county judge's statements, the county conducted no analysis of the financial impact of this decision. The record also indicates that county residents expressed a concern during the redistricting process that the three precincts electing minority officials were consolidated and the precincts with white representatives were left alone. The record is devoid of any response by the county.

In sum, there is sufficient credible evidence that precludes the county from establishing, as it must under Section 5, that the reduction of the number of justice of the peace/constable districts as well as the redistricting plan to elect those officials will not have a retrogressive effect, and were not motivated by a discriminatory intent.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 526 (1973); 28 C.F.R. 51.52. In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the county's 2011 redistricting plan for the commissioners court and the reduction in the number of justice of the peace and constable districts as well as the redistricting plan for those offices.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. 28 C.F.R. 51.45. However, until the

objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, the submitted changes continue to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action that Galveston County plans to take concerning this matter. If you have any questions, you should contact Robert S. Berman (202/514-8690), a deputy chief in the Voting Section.

Because the Section 5 status of the redistricting plan for the commissioners court is presently before the United States District Court for the District of Columbia in *Galveston County v. United States*, No. 1:11-cv-1837 (D.D.C.), we are providing the Court and counsel of record with a copy of this letter. Similarly, the status of both the commissioners court and the justice of the peace and constable plans under Section 5 is a relevant fact in *Petteway v. Galveston County*, No. 3:11-cv-00511 (S.D. Tex). Accordingly, we are also providing that Court and counsel of record with a copy of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tom E. Perez', with a stylized flourish at the end.

Thomas E. Perez
Assistant Attorney General