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Via Electronic Mail
William A. Brewer III
Brewer Storefront PLLC
1717 Main Street, Suite 5900
Dallas, Texas 75201

Re: Humble Independent School District's At-Large Election System

Dear Mr. Brewer:

Humble ISD respects the rights of all voters, and encourages all eligible voters to fully participate in the democratic process. As you know, absent the creation of single-member districts under section 11.052 of the Texas Education Code, elections for school board trustees are, by default, at-large. At-large districts are the most popular form of electing school board trustees among Texas school districts, by a significant majority. The popularity of at-large districts stems in no small part from the fact that districtwide elections result in trustees who are accountable to *all* of the district's constituents, whereas single-member districts can result in trustees who are only focused on the constituents of their geographic areas. Simply put, there are numerous non-race-based policy reasons for maintaining at-large voting systems.

Your letter concludes that Humble ISD's election system violates Section 2 of the Voting Rights Act because the demographic composition of the Board of Trustees "does not represent the community." Even setting aside the discriminatory assumption that elected officials cannot (or will not) serve the best interests of all of their constituents regardless of race, your contention is contrary to the plain language of the statute:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any [] political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the [] political subdivision are **not equally open to participation** by members of a class of citizens protected by subsection (a) **in that its members have less opportunity than other members of the electorate to participate in the political process** and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the [] political subdivision is one circumstance which may be considered: ***Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.**

52 U.S.C. § 10301 (emphasis added).

Instead of arguing for proportionate representation, a Section 2 plaintiff asserting a vote dilution claim must prove that: (1) they are a member of a minority group that is sufficiently large and compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) majority bloc-voting usually defeats the minority group's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30 (1986). The "evidence" cited in your letter does not demonstrate these threshold requirements, nor does it demonstrate that voters of a certain race have less opportunity than others to participate in Humble ISD's elections. Voting is not only a right—it is a choice—and not every citizen chooses to exercise their right in every election. A lack of voter participation, while unfortunate, does not give rise to an entitlement to race-based redistricting.

In fact, the U.S. Circuit Courts of Appeals are currently split on whether Section 2 even confers a private right of action. *Compare Robinson v. Ardoin*, 86 F.4th 574, 587–88 (5th Cir. 2023) (discussing existence of implied right of action) *with Arkansas St. Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1206–07 (8th Cir. 2023) ("Did Congress give private plaintiffs the ability to sue under § 2 of the Voting Rights Act? Text and structure reveal that the answer is no . . . ."). Given this uncertainty in the law, at least one district court has stayed the trial of a Section 2 vote dilution claim against an area school district. *See* Civil Action No. 4:21-cv-001997, *Elizondo v. Spring Branch Indep. Sch. Dist.*; In the United States District Court for the Southern District of Texas, Houston Division (Lake, J.).

Additionally, to the extent that your discussion of both Hispanic and African American candidates and students within Humble ISD signals an intent to assert a coalition claim on behalf of Hispanic and African American voters, a panel of the Fifth Circuit recently questioned the validity of the court's precedent allowing plaintiffs to aggregate distinct minority groups for purposes of proving vote dilution claims, and expressly called for *en banc* reconsideration of the issue. *Petteway v. Galveston Cnty, Tex.*, 86 F.4th 214, 216–18 (5th Cir. 2023) ("[T]he court's decisions in this respect are wrong as a matter of law . . . [M]embers of the panel agree that this court's precedent permitting aggregation should be overturned. We therefore call for this case to be reheard *en banc*."). The panel also noted that "decisions of the Supreme Court over the past two decades have undermined the validity of minority-coalition claims"—most notably *Bartlett v. Strickland*, 556 U.S. 1 (2009), in which a plurality held that "nothing in [Section] 2 grants special protection to a minority group's right to form political coalitions." *Id.* at 217–18.

The Fifth Circuit granted *en banc* review in *Petteway* on November 28, 2023, and oral argument is scheduled for the week of May 13, 2024. *Petteway v. Galveston Cnty., Tex.*, 86 F.4th 1146 (5th Cir. 2023). Meanwhile, the *en banc* Fifth Circuit has already issued rulings in the case that expressly cast doubt on the continued viability of coalition claims. *See Petteway v. Galveston Cnty., Tex.*, 87 F.4th 721, 725 (5th Cir. 2023) ("At the end of the day, plaintiffs would read § 2 to require race-based redistricting with no logical endpoint. The County has shown a likelihood of success arguing that is unlawful.") (Oldham, J., joined by Jones, Smith, Barksdale, Elrod, Willett, Duncan, Engelhardt, and Wilson, J.J., concurring) (citations and quotations omitted). It has also demonstrated a strong preference for resolving the viability of Section 2 claims before interfering with local elections. *See id.* (staying the enforcement of judicially drawn maps because "[a]s the Supreme Court has made clear, we must be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers"). This is precisely why a district court recently abated yet another Section 2 lawsuit against an area school district. *See* Civil Action No. 3:22-cv-00387, *Shafer et al. v. Pearland Indep. Sch. Dist.*; In the United States District Court for the Southern District of Texas, Galveston Division (Brown, J.).

In light of the legal uncertainty surrounding a private citizen's ability to enforce Section 2 of the Voting Rights Act, we will ask that any lawsuit filed against Humble ISD in the near future be abated until the United States Supreme Court resolves the above-referenced circuit split and/or the *en banc* Fifth Circuit resolves the viability of coalition claims.

Finally, your complaints about the timing of Humble ISD's election lacks merit. "An election for trustees of an independent school district **shall** be held on the same date as: (1) the election for the members of the governing body of a municipality located in the school district; [or] (2) the general election for state and county officers . . ." TEX. EDUC. CODE § 11.0581(a) (emphasis added). The City of Humble holds elections in May; Harris County holds local elections in May; and Montgomery County holds local elections in May. Accordingly, Humble ISD's decision to jointly hold its school board elections in May is consistent with the requirements of the Texas Education Code, and nothing in your letter demonstrates that the timing of Humble ISD's elections diminishes voter turnout among minorities due to a lack of awareness, decreased voter engagement, or conflicting priorities. It also appears that you have overlooked the statutory limitations on changing election dates. *See, e.g.,* TEX. ELEC. CODE § 41.0052(a) ("The governing body of a political subdivision [] that holds its general election for officers on a date other than the November uniform election date may, **not later than December 31, 2016**, change the date on which it holds its general election for officers to the November uniform election date.") (emphasis added).

In conclusion, Humble ISD is committed to free and fair elections. It is also committed to the best interests of the entire district, and continuously strives to improve the lives of all of its students—and the community as a whole—without regard to race. Any suggestion to the contrary is expressly denied.

Very truly yours,

THOMPSON & HORTON LLP

Stephanie A. Hamm

cc: Client