IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TEXAS DEMOCRATIC PARTY; BOYD L. RICHIE, in his capacity as Chairman of the Texas Democratic Party; FRANK JOSEPH; and BRETT ROSENTHAL,	§	
Plaintiffs,	§	
vs.	§	Cause No. 3:08-CV-02117-P
DALLAS COUNTY, TEXAS; BRUCE SHERBET, in his capacity as Election Administrator for Dallas County, Texas,	§	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS'
FIRST AMENDED ORIGINAL COMPLAINT AND BRIEF IN SUPPORT

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Pursuant to Federal Rule of Civil Procedure 12, Defendants Dallas County, Texas and Bruce Sherbet, in his capacity as Election Administrator for Dallas County, Texas, file this Motion To Dismiss Plaintiffs' First Amended Original Complaint and Brief in Support, as follows:

I.
INTRODUCTION

More than ten (10) years after Dallas County implemented the use of electronic voting machines and precleared such use with the U.S. Department of Justice, the Texas Democratic Party brings at least its third suit to enjoin the use of such machines. Plaintiffs' claims brought under section 5 and, in the alternative, section 2 of the Voting Rights Act ("VRA") should be dismissed for multiple reasons. First, Plaintiffs lack standing to bring either a section 5 or section 2 claim. Second, Plaintiffs' section 5 claim is moot. Third, Plaintiffs' section 5 claim is untimely. Fourth, Plaintiffs have failed to plead any entitlement to relief under either section 5 or section 2.

II.
FACTUAL AND PROCEDURAL BACKGROUND

On December 1, 2008, Texas Democratic Party ("TDP"), Boyd L. Richie ("Richie"), in his capacity as Chairman of the Texas Democratic Party, Frank Joseph ("Joseph") and Brett Rosenthal ("Rosenthal") (collectively, "Plaintiffs") sued Dallas County, Bruce Sherbert, James Foster, and Toni Pippins-Poole. *See* Plaintiffs' Original Complaint (doc. 1). Plaintiffs' Original Complaint primarily related to a recount in the House District 105 race between Democratic Nominee Robert S. Romano and Republican Nominee Linda Harper-Brown. *See id.* at 6-8, ¶¶ 23-38; *see also* Plaintiffs' and Defendant Linda-Harper Brown's Joint Stipulation of Dismissal (doc. 17) at 2.

On December 23, 2008, this Court granted Plaintiffs leave to file an Amended Complaint. The Amended Complaint dismissed Foster and Pippins-Poole from this action and alleged claims pursuant to section 5 and section 2 of the VRA with respect to how certain straight-party ticket votes[1] are counted on direct record electronic voting machines called the iVotronic. *See* Amended Complaint (doc. 16).[2]

As set forth below, Defendants move this Court to dismiss the Amended Complaint on the grounds of lack of standing and failure to state a claim upon which relief can be granted.[3]

III.
STANDARDS FOR MOTIONS TO DISMISS

A. Standard for a Rule 12(b)(1) Motion to Dismiss.

An action must be dismissed if it appears the court does not possess subject matter jurisdiction over the plaintiff's claims. *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997); *see also* FED. R. CIV. P. 12(b)(1). A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction must be considered before any other challenge because the

[1] Straight party votes are those votes cast for every candidate of a particular party in a given election by simply selecting one straight party choice, *e.g.*, Democrat or Republican. In the context of *paper* ballots, a voter can mark a straight party choice and then also select a particular candidate within the same party in a given race, thereby "emphasizing" his vote for the candidate of a particular party in a given race. *See* Plaintiffs' Original Complaint ¶¶ 7-9; *see also* Brief of the Secretary of State of Texas as *Amicus Curiae* (doc. 12) at 3.

[2] This is the third time TDP has filed a lawsuit attempting to invalidate the electronic voting systems used throughout Texas. One lawsuit was dismissed for lack of jurisdiction. *See Texas Democratic Party v. Recount Supervisor for the Recount of the Election for Dist. 105 of the Texas House of Representatives*, Cause No. 08-14678, filed in the 160th District Court of Dallas County, Texas. In the other, the United States District Court for the Western District of Texas's rejection of TDP's constitutional and statutory arguments was affirmed by the 5th Circuit. *See Texas Democratic Party v. Williams*, Case No. A-07-CA-115-SS (W.D. Tex. Aug. 16, 2007) *aff'd*, No. 07-851064, 2008 WL 2916349 (5th Cir. July 30, 2008).

[3] Plaintiffs did not name the Texas Secretary of State as a party in this action. *See* Original Complaint; Amended Complaint. The Texas Secretary of State "is the chief election officer of the state." *See* TEX. ELEC. CODE § 31.001(a); *see also* Brief of the Secretary of State of Texas as *Amicus Curiae* at 2 n.1. ("[T]he Secretary has a substantial interest in this case as the State's chief elections officer responsible for ensuring the application of Texas election law.") Because the Secretary is a necessary and indispensible party to this action, if the motion to dismiss is not granted on all of Plaintiffs' claims, Defendants intend to file a motion to join the Secretary as a necessary party. *See* FED. R. CIV. P. 19.

court must find jurisdiction before determining the validity of a claim. *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994).

Once jurisdiction is challenged, the burden rests upon the party seeking to invoke the court's jurisdiction to prove jurisdiction is proper. *Boudreau v. United States*, 53 F.3d 81, 82 (5th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996). "Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief." *Ramming v. United States*, 281 F.3d 158,161 (5th Cir. 2001) (citation omitted).

On a Rule 12(b)(1) motion to dismiss, which "concerns the court's very power to hear the case . . . [,] the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *MDPhysicians & Assoc., Inc. v. State Bd. of Ins.*, 957 F.2d 178, 181 (5th Cir.) *cert. denied*, 506 U.S. 861 (1992). In ruling on a Rule 12(b)(1) motion to dismiss, the court may rely on: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts and the court's resolution of disputed facts." *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 176 (5th Cir. 1990) (citation omitted). "It is incumbent on all federal courts to dismiss an action whenever it appears that subject matter jurisdiction is lacking." *Stockman v. Federal Election Comm's*, 138 F.3d 144, 151 (5th Cir. 1998) (citation omitted).

B. Standard for a Rule 12(b)(6) Motion to Dismiss.

The Federal Rules of Civil Procedure also authorize the dismissal of a complaint if the face of the pleadings reflects that the plaintiff has failed to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, the court must accept all well-pleaded facts in the pleadings as true and view them in the light most favorable to the plaintiff. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). To

avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). A court need not accept conclusory allegations or unwarranted deductions of fact as true. *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994).

The Supreme Court has instructed that "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964-65 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *see also Norris v. Hearst Trust*, 500 F.3d 454, 464 (5th Cir. 2007) (same). Instead, "factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965 (citation omitted).

In considering a Rule 12(b)(6) motion to dismiss, this Court may consider the complaint and any documents attached to it. *Collins*, 224 F.3d at 498-99. This Court may also consider matters of which judicial notice may be taken. *United States ex rel. Willard v. Humana Health Plan of Tex., Inc.* 336 F.3d 375, 379 (5th Cir. 2003) (citation omitted). The Federal Rules of Evidence allow a court to take judicial notice of a fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201. Furthermore, "it is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record." *Cinel v. Connick,* 15 F.3d 1338, 1343 n.6 (5th Cir.), *cert. denied*, 513 U.S. 868 (1994).

IV.
ARGUMENT AND AUTHORITIES

A. Section 5 of the Voting Rights Act

Section 5 requires a "covered jurisdiction," such as the State of Texas, to refrain from implementing any new voting qualification or prerequisite to voting, or standard, practice, or procedure unless it first obtains preclearance for the change from the United States Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. § 1973c; s*ee* Appendix to 28 C.F.R. Part 51. Any voting change adopted by a covered jurisdiction must be precleared before implementation. 42 U.S.C. § 1973c*; see also Presley v. Etowah County Comm'n*, 502 U.S. 491, 501 (1992). The Supreme Court has identified four traditional categories of covered voting changes: (1) changes in the manner of voting; (2) changes in candidacy requirements and qualifications; (3) changes in the composition of the electorate that may vote for candidates for a given office; and (4) changes affecting the creation or abolition of an elective office. *Presley*, 502 U.S. at 502-03. A voting change will be precleared if the jurisdiction proves that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. *See* 42 U.S.C. §§ 1973c, 1973b(f)(2).

If a covered jurisdiction implements a new voting practice or procedure without first obtaining preclearance, a party may commence an action in a local district court for a declaratory judgment that a new voting practice or procedure was not precleared and seek an injunction enjoining the covered jurisdiction from implementing the unprecleared changes. *B.C. Foreman v. Dallas County, Tex.*, 990 F. Supp. 505, 512 (N.D. Tex. 1998); *Allen v. State Bd. of Elections*, 393 U.S. 544, 557-60 (1969). However, a local federal district court does not have jurisdiction to grant or deny preclearance of the voting change. *Lopez v. Monterey County, Cal.*, 519 U.S. 9,

12 (1996). Section 5 expressly reserves that determination for the U.S. District Court for the District of Columbia or the Department of Justice ("DOJ"). 42 U.S.C. § 1973c(a). The only questions in an enforcement suit before a local district court are: (1) whether the jurisdiction is covered by section 5; (2) whether preclearance of the voting change has been obtained; and (3) if preclearance is required but has not been obtained, what remedy is appropriate. *Lopez*, 519 U.S. at 12. A section 5 court sitting outside the District of Columbia exceeds its jurisdiction when it strays beyond those three issues. *See id.*[4]

1. The Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Claims Because Plaintiffs Lack Standing.

"Because standing is an element of the constitutional requirement of 'case or controversy,' lack of standing deprives the court of subject matter jurisdiction." *Lang v. French*, 154 F.3d 217, 222 n.28 (5th Cir. 1998). "The 'essence' of standing is 'whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" *Mississippi State Democratic Party v. Barbour*, 529 F.3d 538, 544 (5th Cir. 2008) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

To establish standing at the pleading stage, each plaintiff must allege that: "(1) it has suffered, or imminently will suffer, a concrete and particularized injury-in-fact; (2) the injury is fairly traceable to the defendant's conduct; and (3) a favorable judgment is likely to redress the injury." *See id.* (quoting *Houston Chronicle Publ'g Co. v. City of League City, Tex.*, 488 F.3d 613, 617 (5th Cir. 2007)). Moreover, each plaintiff "must 'clearly and specifically set forth facts

[4] Although "[o]nly a three-judge district court has jurisdiction to determine whether a voting change is covered by § 5 . . . a single district court judge can 'determine that three judges are not required.'" *Bone Shirt v. Hazeltine*, 444 F. Supp. 2d 992, 995 (D.S.D. 2005) (quoting 28 U.S.C. § 2284(b)(1)). For this reason, a single district court judge may examine "threshold jurisdictional challenges" prior to convening a panel. *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 262 (D.D.C. 2002). A three-judge panel is unnecessary where a plaintiff lacks standing, *see id.*, or where a plaintiff's claims are "wholly insubstantial." *Bone Shirt*, 444 F. Supp. 2d at 997-98 (finding both exceptions applied); *Moseley v. Price*, 300 F. Supp. 2d 389, 394-96 (E.D. Va. 2004) (finding claim "wholly insubstantial").

to satisfy Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Trinity Indus., Inc. v. Martin*, 963 F.2d 795, 798 (5th Cir. 1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 55-56 (1990)).

To establish an injury in fact, a plaintiff must plead "an invasion of a legally protected interest which is 'actual or imminent, not conjectural or hypothetical.'" *Barbour*, 529 F.3d at 544 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). This injury "must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is 'distinct and palpable,' as opposed to '[a]bstract' . . ." *Trinity Industries*, 963 F.2d at 798 (quoting *Whitmore*, 495 U.S. at 155).

(a) Plaintiffs lack standing under section 5 of the VRA.

Where a plaintiff's lone grievance is "that the law . . . has not been followed," the plaintiff lacks constitutional standing. *Lance v. Coffman*, 549 U.S. 437, 439 (2007) ("We have consistently held that a plaintiff raising only a generally available grievance about government-claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.") (quoting *Lujan*, 504 U.S. at 573-74). A plaintiff cannot establish Article III standing if he merely claims harm to "his and every citizen's interest in proper application of the Constitution and laws," and pursues "relief that no more directly and tangibly benefits him than it does the public at large." *Lance*, 549 U.S. at 439-42. Such grievances are "precisely the kind of undifferentiated, generalized grievance about the conduct of government" that the Supreme Court "refuse[s] to countenance" and are "quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where [the Court] ha[s] found standing." *Id.* at 442 (citation omitted).

A "generalized grievance" can no more confer standing under section 5 than it could any other claim. Plaintiffs merely contend that Defendants failed to obtain preclearance of the iVotronic's method of calculating emphasis votes, and that "[u]nless enjoined by this Court, Defendants will continue to enforce the aforementioned changes without obtaining the requisite pre-clearance in violation of section 5." Amended Complaint ¶¶ 48-50, 52.

Plaintiffs' section 5 claim fails to allege an injury or interest that differs in any way from the injury or interest of any Dallas County voter, and none of the Plaintiffs seek a remedy that would benefit them more than any other Dallas County voter. In *Bone Shirt*, the Court concluded that the State of South Dakota lacked standing to bring a section 5 claim where it "suffered nothing more than a generalized grievance" that a remedial order violated the VRA preclearance requirement. 444 F. Supp. 2d at 996. The *Bone Shirt* Court explained that "[a]t most, the State alleges that the Remedial Order violates the VRA; however, the State fails to establish how it 'personally has suffered some actual or threatened injury. . . .'" *Id.* (citing *Tarsney v. O'Keefe*, 225 F.3d 929, 934 (8th Cir. 2000)). Accordingly, Plaintiffs lack standing for failure to allege more than an "undifferentiated, generalized grievance." *Lance*, 549 U.S. at 442; *see also Bone Shirt*, 444 F. Supp. 2d at 996.

Not only do Plaintiffs lack standing because their section 5 allegations amount to nothing more than generalized grievances, Plaintiffs also lack standing under the VRA for the additional reasons detailed *infra* at IV.B.1.

(b) Plaintiffs' section 5 claims are moot because the iVotronic was precleared.

The purpose of section 5 is to "prevent[] jurisdictions from enacting or seeking to administer voting changes that have a discriminatory purpose or effect." *B.C. Foreman*, 990 F. Supp. at 511 (citing *Lopez*, 519 U.S. at 12). Courts lack jurisdiction to consider section 5 claims

if the challenged voting practice or procedure has already been precleared by the Attorney General or the District Court of the District of Columbia. *Morris v. Gressette*, 432 U.S. 491, 502-03 (1977). Indeed, "[o]nce the State has successfully complied with the section 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by section 5." *Id.* (quoting *Allen*, 393 U.S. at 549-50). As the Supreme Court has explained, the "extraordinary remedy" provided by section 5 ends once the Attorney General preclears the challenged practice or procedure. *Id.* at 504-05 ("Although there was to be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be 'no dragging out' of the extraordinary remedy beyond the period specified in the statute.") (citation omitted); *see Posada v. Lamb County, Tex.*, 716 F.2d 1066, 1073 (5th Cir. 1983) (concluding that private parties could not recover attorneys' fees in a preclearance proceeding, distinguishing section 5 preclearance as "independent of private remedies for the enforcement of the [VRA]").

Section 5 and the DOJ's regulations provide that a voting change may be submitted to the DOJ by the chief legal officer or other appropriate official of the covered jurisdiction or by any other authorized person on behalf of the covered jurisdiction. 28 C.F.R. § 51.23(a) (2000). On August 18, 1998, Dallas County submitted its proposed voting change in the early voting system used in the county to the DOJ. *See* Brief of the Secretary of State of Texas as *Amicus Curiae* (doc. 12) at App. 1-33. After review of the proposed change, the DOJ determined the proposed voting change – implementation of the iVotronic in Dallas County – did not violate section 5, and on October 9, 1998, the DOJ precleared Dallas County's use of the iVotronic. *Id.* at App. 33.

Accordingly, Plaintiffs' section 5 challenge is nonjusticiable and should be dismissed. *Dallas v. United States*, 482 F. Supp. 183, 186 (D.D.C. 1980) ("Nothing in the Act . . . vests this court with jurisdiction to retain a moot case to accommodate the intervenor's quest for a forum in which to test a voting plan that has already been approved by the Attorney General under § 1973c."). For this additional reason, this Court should dismiss Plaintiffs' section 5 claim under Federal Rule of Civil Procedure 12(b)(1).

2. This Court Should Dismiss Plaintiffs' Section 5 Claim Because Plaintiffs Fail to State a Claim Upon Which Relief Can be Granted.

(a) Plaintiffs seek section 5 relief that is unavailable to them.

In deciding a motion to dismiss, a court must accept as true the *factual* allegations in the complaint and any inference reasonably deducted therefrom, but the court is not required to accept mere legal conclusions. To the extent that Plaintiffs are incorrectly claiming Defendants failed to obtain the requisite preclearance, such allegation is an unwarranted legal conclusion that this Court need not accept as true. Additionally, this Court may take judicial notice of the *Amicus Curiae* Brief filed by the Texas Secretary of State and the documents attached thereto. *See supra* § IV.1.b.

Because section 5 preclearance for the use of electronic voting machines has already been obtained, no relief is available to Plaintiffs. *See Allen,* 393 U.S. at 549-550 ("Once the State has successfully complied with the section 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by section 5."); *see also Lopez,* 519 U.S. at 23 ("once a covered jurisdiction has complied with these preclearance requirements, section 5 provides no further remedy"); *Webber v. White,* 422 F. Supp. 416, 426 (N.D. Tex. 1976) (there is no relief under

§ 1973c where political body has successfully complied with section 5 preclearance requirements); 28 C.F.R. § 51.49.

(b) Plaintiffs' delay and lack of diligence preclude their claims.

For the alleged section 5 violation, Plaintiffs seek declaratory and injunctive relief.[5] *See* Amended Complaint ¶ 43. Yet, Plaintiffs failed to show they are entitled to the relief requested. Equitable remedies look to "principles of fairness and equity in determining whether to interject a court into a state's election processes." *Lopez v. Hale County, Tex.*, 797 F. Supp. 547, 549-50 (N.D. Tex. 1992), *aff'd*, 506 U.S. 1042 (1993). "The federal courts do not sua sponte enter injunctions proscribing election changes; instead, a party must file suit and demonstrate entitlement to favorable judicial intervention." *Id.* at 550. Laches plays an integral part in this determination. *Id.*

In *Lopez*, the plaintiff brought a section 5 suit seeking an order prohibiting the county from implementing voting changes without the requisite section 5 preclearance. *Id.* at 547. Although the court indicated that the purpose of the VRA is to facilitate citizens' rights to participate in the electoral process, the court denied any relief to plaintiff finding he failed to advance any reason why he could not have filed suit prior to the election. *Id.* at 550. The court further held the plaintiff failed to display any due diligence in challenging elections for the unprecleared changes. *Id.*

Very similar to the plaintiff in *Lopez*, Plaintiffs have not given any reason why they could not have brought their section 5 claim any sooner than they did. Plaintiffs allege in their First

[5] In passing, Plaintiffs claim to seek declaratory and injunctive relief under 42 U.S.C. § 1983 to enforce rights guaranteed under federal law and the Equal Protection and Due Process Clauses of the United States Constitution. *See* Amended Complaint ¶ 43. However, Plaintiffs have failed to allege any claims for constitutional violations. *See generally id.; see also* FED. R. CIV. P. 8(a). Moreover, fatal to Plaintiffs' constitutional claims is the recent opinion from the Fifth Circuit in which it affirmed the trial court's holding that electronic voting machines are non-discriminatory and not forbidden by the Constitution. *See Texas Democratic Party*, 2008 WL 2916349.

Amended Complaint that Dallas County began using the iVotronic as early as 1998. Amended Complaint ¶¶ 16, 48. Furthermore, TDP and Richie previously filed a similar lawsuit in Travis County, albeit related to a different brand of electronic voting machine, on February 13, 2007, but failed to raise a section 5 claim in that litigation.[6] Instead, Plaintiffs waited to file their complaint raising section 5 claims until *ten years later*. Furthermore, although Plaintiffs initially sought injunctive relief relating to the 2008 House District 105 race, Plaintiffs have stipulated that they are not seeking "relief relating to any race in the 2008 General Election." *See* Stipulation at 2, ¶ 1. Based on this delay and lack of diligence, this Court should dismiss Plaintiffs' section 5 claim.

B. Section 2 of the Voting Rights Act

The purpose of section 2 is to prevent political bodies from implementing election systems or practices which act to minimize, cancel, or dilute the voting strength or political effectiveness of minority groups. 42 U.S.C. § 1973. Stated another way, section 2 protects racial and language minorities' right to vote from majority conduct which would abridge that right. *Dutmer,* 937 F. Supp. at 590.

1. Plaintiffs Lack Standing Under Section 2 of the VRA

(a) Merely alleging non-compliance with section 2 of the VRA is insufficient to confer standing.

Section 2 provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to

[6] TDP and Richie filed suit alleging violations of the Texas Election Code and Help America Vote Act in the United States District Court for the Western District of Texas contending the similar eSlate electronic voting machine, which the Texas Secretary of State certified for use, did not allow voters to emphasize their votes. *See Texas Democratic Party v. Williams*, Case No. A-07-CA-115-SS (W.D. Tex. Aug. 16, 2007).

vote on account of race or color" or "because he is a member of a language minority group." 42 U.S.C. §§ 1973(a), 1973b(f)(2). Plaintiffs' Amended Complaint alleges that "Defendants use of the described changes has the effect of denying or abridging the right to vote on account of race, color, or membership in a language majority group." Amended Complaint at ¶¶ 53-55. Plaintiffs' section 2 count conspicuously fails to allege that *Plaintiffs'* right to vote was denied or abridged. *See id.* More importantly, Plaintiffs fail to allege that such denial was on "account of race or color" or "language minority group." *See id*.

In addition to Article III's standing requirements, citizens alleging injury merely *as voters of a particular district* lack constitutional standing. *Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1335 (11th Cir. 2007) (citing *Lance*, 549 U.S. at 437, 439-42, 127 S.Ct. 1194, 1196-1198). In *Dillard*, the alleged grievance brought by district voters was that certain laws—including section 2 of the VRA—had not been followed. *Id.* at 1335. The district voters failed to allege that the decree at issue "affected *their* voting power or subjected *them* to invidious racial classification or otherwise injured *them* directly." *Id.* (emphases in original). They only sought to "protect an asserted interest in being free of an allegedly illegal electoral system." *Id*. at 1333. The Eleventh Circuit concluded the injury "'[wa]s precisely the kind of undifferentiated, generalized grievance' that the Supreme Court has warned must not be countenanced." *Id.* at 1335.

Just as in *Dillard*, the Plaintiffs in this case lack standing because they failed to allege that the procedure at issue "affected *their* voting power or subjected *them* to invidious racial classification or other wise injured *them* directly." *Id*. (emphases in original). Plaintiffs merely seek to "protect an asserted interest in being free of an allegedly illegal electoral system." *Id.* at

1333. This is precisely the type of generalized injury the Supreme Court consistently rejects as insufficient to confer Article III standing. *Id.* at 1335; *Lance*, 549 U.S. at 442.

(b) The allegations concerning individual Plaintiffs are likewise insufficient to confer standing.

Plaintiffs Joseph and Rosenthal completely fail to allege an injury-in-fact. Although Joseph and Rosenthal are alleged to be registered voters in Dallas County, they are not alleged to have voted in Dallas County or to have any intention to vote in Dallas County in future elections. Amended Complaint ¶¶ 34-35. Furthermore, Joseph and Rosenthal have not alleged they voted using an iVotronic or have any intention to vote using an iVotronic. *See id.* Such allegations are insufficient to establish an injury-in-fact sufficient to confer standing to bring a section 2 claim. *See Landes v. Tartaglione*, No. Civ. A. 04-3163, 2004 WL 2415074, at *2 (E.D. Pa. Oct. 28, 2004) (finding that plaintiff failed to allege an injury in fact in suit challenging electronic voting machines where she alleged she was a registered voter but failed to allege that she intended to vote by electronic voting machine in upcoming election or that she had voted by machine or otherwise in earlier elections); *Barnett v. Daley*, 809 F. Supp. 1323, 1332 (N.D. Ill. 1992) (dismissing Barnett plaintiffs for lack of standing where they did not allege "any injury personal to *them*" as they failed to allege "that they were personally confused by the ballot" or that they even voted on the ballot at issue; any allegations the ballot was "ambiguous, illogical, and confusing to 'voters'" was insufficient to confer standing) (emphasis in original). Furthermore, as explained above, citizens who merely allege injury as voters of a particular district lack constitutional standing. *Dillard*, 495 F.3d at 1335 (citing *Lance*, 549 U.S. at 439-42. Accordingly, Joseph and Rosenthal lack constitutional standing because they have not pleaded an injury-in-fact.

Joseph and Rosenthal additionally failed to allege they were denied the ability to vote or otherwise participate in the election process *by reason of their race or language*. Amended Complaint ¶¶ 34-35. For this independent reason, Joseph and Rosenthal lack standing to bring suit under section 2. *Dutmer*, 937 F. Supp. 587 at 591 ("Because it is uncontroverted [plaintiff] is not a member of a group protected by the VRA, she cannot meet the standing requirements of having suffered an injury-in-fact."); *Alexander v. City of Pearland*, 945 F. Supp. 1069, 1071 (S.D. Tex. 1996) (noting the court's "very real apprehensions about *these* Plaintiffs' standing to assert a claim under section 2 because they do not have minority status and cannot vicariously assert the rights of minority voters") (emphasis in original); *Newman v. Voinovich*, 789 F. Supp. 1410, 1416 (S.D. Ohio 1992) (finding "no theory set forth by the plaintiff upon which this white male plaintiff may be permitted to advance the rights and interests of the minority population") (citation omitted). Accordingly, the Court should dismiss the section 2 claim brought by Joseph and Rosenthal.

(c) TDP and Richie lack standing.

Boyd Richie, suing in his capacity as Chairman of the TDP,[7] and the TDP both fail to allege injury-in-fact that is fairly traceable to Defendants' alleged violation of section 2 of the VRA because they fail to allege that the iVotronic's calculation of hypothetical and conjectural emphasis votes "affected *their* voting power or subjected *them* to invidious racial classification or other wise injured *them* directly." *Dillard*, 495 F.3d at 1335 (emphases in original).

The membership of the TDP includes "[a]ny qualified Texas voter 18 years of age or older who supports the foregoing 'Statement of Principles' of the Democratic Party . . . ." *See*

[7] Although Richie specifically states that he is suing in his capacity as chairman of the Texas Democratic Party, to the extent he also seeks to sue as an individual voter, he lacks an injury-in-fact because he is registered to vote in Young County. Amended Complaint ¶ 33; *see Muntaqim v. Coombe*, 449 F.3d 371, 376-77 (2d Cir. 2006) (finding inmate lacked standing to challenge New York's felon disenfranchisement law because he was not a New York resident).

Rules of the TDP at Article II-B, http://www.txdemocrats.org/the_party/tdp_rules/ last visited Jan. 20, 2009). Richie and the TDP have failed to allege that any member of the TDP, who is a racial or language minority, voted in Dallas County, and actually intended to cast an "emphasis vote" on the iVotronic by manually de-selecting a candidate's name that was already selected by reason of a straight-party selection. Amended Complaint ¶ 18. Likewise, Richie and the TDP have also failed to allege that *any* member of the TDP, who is a racial or language minority that voted in Dallas County, actually interpreted the iVotronic "review screen" to reflect an "emphasis vote" for an individual candidate where the review screen stated that "no selection" was made for that candidate. Amended Complaint ¶ 19.[8] Any assumption that the TDP will, in the future, have an unidentified member, who is a racial or language minority that will vote in Dallas County and intend to cast an "emphasis vote" by de-selecting a candidate's name, is even more speculative. Such speculative allegations are insufficient to confer standing under the VRA. *See, e.g., Conway Sch. Dist. v. Whilhoit*, 854 F. Supp. 1430, 1433 (E.D. Pa. 1994) (finding school district lacked standing under the VRA because its complaint lacked any allegation that "minority voters would have their voting rights impaired"); *see also Hoyle v. Priest*, 265 F.3d 699, 704 (8th Cir. 2001) (finding sponsors of initiative lacked standing under section 2 to challenge a state law provision that would subject ballot signatories to prosecution if they were not registered voters where none of the plaintiffs had been prosecuted under that provision) (citing *Lujan*, 504 U.S. at 560).

Moreover, Plaintiffs' allegation that unnamed members of the TDP "ran as Democrats" in an unspecified election is likewise insufficient to confer standing under section 2. Amended

[8] The District Court in *Texas Democratic Party v. Williams* described similar assumptions regarding the intent of voters to cast "emphasis votes" when they de-selected candidates on an electronic voting screen as "speculative to say the least." *Texas Democratic Party v. Williams*, Case No. A-07-CA-115-SS, at *8 (W.D. Tex. Aug. 16, 2007).

Complaint ¶ 28; *see Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989) (finding defeated candidate lacked standing to bring section 2 claim because his alleged injury was not the loss of his rights as a voter but instead "the loss of the votes that he claims he would have received if not for the allegedly disproportionate difficulties of black voters in coping with punch-card voting"); *Oh v. Philadelphia County Bd. of Elections*, Civ. Action No. 08-0081, 2008 WL 4787583, at *6 (E.D. Pa. Oct. 31, 2008) (finding defeated candidate lacked standing to challenge absentee ballot process under section 2); *Newman*, 789 F. Supp. at 1412 (finding failed non-minority candidate lacked standing to challenge judicial appointment based on allegation that minorities were reluctant to run against appointed individuals).[9]

2. Plaintiffs' Section 2 Claim Fails To State a Claim Upon Which Relief Can Be Granted.

Plaintiffs' section 2 claim is asserted in the alternative only if Defendants successfully obtain preclearance or if this Court determines "pre-clearance has been timely obtained." *See* Amended Complaint ¶ 54. In such circumstances, Plaintiffs allege that "use of the described changes has the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." *Id.* ¶ 55.

The Supreme Court has identified three threshold conditions for establishing a section 2 claim: (1) the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) the minority group "is politically cohesive;" and (3) the "majority votes sufficiently as a bloc to enable it—in the absence of special circumstance, such as the minority candidate running unopposed—usually to defeat the minority's preferred

[9] The allegation that unnamed members of the Texas Democratic Party "ran as Democrats" in an unspecified election is likewise insufficient to confer standing under section 5. Amended Complaint ¶ 28. *See Giles v. Ashcroft*, 193 F. Supp. 2d 258, 263-64 (D.D.C. 2002) (finding no standing for candidate to challenge continued application of Section 5 to Mississippi because, among other things, the candidate only alleged injuries that could have affected anyone under the jurisdiction of the VRA).

candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (citation omitted). Plaintiffs have not pleaded any facts to establish these threshold conditions. Instead, Plaintiffs merely allege that the "described changes have the effect of denying or abridging the right to vote on account of race, color, or membership in a language group." Amended Complaint ¶ 55. This sole allegation—while accurately stating the general rule of section 2(a)—ignores the analytical framework for determining whether that rule has been violated. Subsection 2(b) establishes that section 2 has been violated where the electoral structures and procedures deprive minority voters of an opportunity to participate effectively in the political process and elect representatives of their choice. *See Gingles*, 478 U.S. at 43-44.

The Amended Complaint pleads no facts which demonstrate Plaintiffs are minorities or, that because of their minority status, their vote has somehow been denied or abridged. Moreover, Plaintiffs did not allege the voting practices and procedures at issue were not equally open to minority citizens, or that minority citizens had fewer opportunities to participate in the political process. Because Plaintiffs failed to allege any facts to establish the threshold conditions for establishing a section 2 claim, this Court should dismiss the section 2 claim. *See White-Battle v. Moss*, 222 Fed. Appx. 304, 305, No. 06-2086, 2007 WL 737401, *1 (4th Cir. March 9, 2007) ("To show a violation of § 2 of the VRA, White-Battle must show that a voting standard, practice or procedure was imposed in a manner which resulted in denial or abridgement of the right to vote on account of race.")

C. Plaintiffs' Claims Against Sherbet Should Be Dismissed

Plaintiffs sued Sherbet in his official capacity as the Dallas County Elections Administrator for alleged violations of section 2 and section 5 related to the use of the iVotronic and the method for recounting ballots. Amended Complaint ¶¶ 47-52. Plaintiffs' claims against Dallas County are identical to Plaintiffs' claims alleged against Sherbet, in his official capacity

as Election Administrator of Dallas County. *See* Amended Complaint at ¶¶ 9-13. Because Dallas County is a party, Plaintiffs' claims against Sherbet are redundant and should be dismissed. *See Doe v. Eason*, No. Civ. A.3:98-CV-2454-P, 1999 WL 765645, at *2 (N.D. Tex. Sept. 23, 1999).

A suit against a governmental official in his official capacity is "only another way of pleading an action against an entity of which [the official] is an agent." *Monell v. Department of Soc. Serv. of N.Y.*, 436 U.S. 658, 691, n. 55 (1978). If the governmental entity receives notice and opportunity to respond, an "official-capacity suit" is treated as a suit against the entity. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Further, a suit against a governmental official in his "official capacity" is not a suit against the official personally because the real party in interest is the entity, of which the official is an agent. *Id.* at 166. Therefore, Plaintiffs' claims against Sherbet should be dismissed. *See Walton v. City of Milford, Tex.*, No. 3:06-CV-2291-L, 2008 WL 631240, at *5 (N.D. Tex. Feb. 28, 2008).

V.
CONCLUSION AND REQUEST FOR RELIEF

Considering the premises, Defendants Dallas County, Texas and Bruce Sherbet, in his capacity as Election Administrator for Dallas County, Texas, respectfully request that this Honorable Court dismiss Plaintiffs' First Amended Original Complaint and grant them any and all relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon on counsel of record via the Court's ECF Noticing System on this 20th day of January, 2009.

/s/ Jamil N. Alibhai
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