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. _____
DALLAS COUNTY, TEXAS; BRUCE SHERBERT, in his capacity as Election Administrator for Dallas County, Texas; JAMES FOSTER, in his capacity as Recount Supervisor for the Recount of the Election for District 105 of the Texas House of Representatives; and TONI PIPPINS-POOLE, in her capacity as Recount Chair for the Recount of the Election for District 105 of the Texas House of Representatives	§	
Defendants.	§	

PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Plaintiffs, TEXAS DEMOCRATIC PARTY, BOYD L. RICHIE, in his capacity as Chairman of the Texas Democratic Party, FRANK JOSEPH, and BRETT ROSENTHAL (hereinafter collectively referred to as "Plaintiffs"), and files this Original Complaint complaining of Defendants DALLAS COUNTY, TEXAS; BRUCE

SHERBERT, in his capacity as Election Administrator for Dallas County, Texas; JAMES FOSTER, in his capacity as Recount Supervisor for the Recount of the Election for District 105 of the Texas House of Representatives; AND TONI PIPPINS-POOLE, in her capacity as Recount Chair for the Recount of the Election for District 105 of the Texas House of Representatives (hereinafter referred to as "Defendants"), and in support thereof would show the Court as follows:

I.

FACTUAL ALLEGATIONS

1. Dallas County, Texas has for many decades utilized voting technology that relied upon paper ballots.

2. When a voter made selections on a paper ballot, they performed a physical act toward the candidate or political party for whom they wished to cast a vote.

3. When a paper ballot, whether tabulated mechanically or manually, revealed a straight-ticket vote, votes were recorded for all nominees of the selected political party.

4. The only circumstance where a straight-ticket selection was not tabulated as a vote for the nominee of the selected political party was when a selection had also been made for the nominee of another political party, an independent candidate or a write-in candidate.

5. If a paper ballot indicated a straight-ticket choice and no selection in any given individual race, the ballot, whether tabulated mechanically or manually, during the

standard count or a recount, would be recorded as a vote for the nominee of the selected political party in that race despite the lack of an individual selection.

6. Thus, a ballot that appeared as follows would be counted as a vote for the nominees of the selected political party:

Contest	**Selected**
Straight-Party	Democrat
United States Senator	No Selection
United States Representative	No Selection
Governor	No Selection
Lt. Governor	No Selection
Attorney General	No Selection
* * *	***

7. If a paper ballot indicated a straight-ticket choice and a selection of a nominee of that same political party in a given race, the ballot, whether tabulated mechanically or manually, during the standard count or a recount, would be recorded as a vote for the nominee of the selected political party in that race.

8. Thus, a ballot that appeared as follows would be counted as a vote for Johnson as well as all other nominees of the Democratic Party:

Contest	**Selected**
Straight-Party	Democrat
United States Senator	Johnson
United States Representative	No Selection
Governor	No Selection
Lt. Governor	No Selection
Attorney General	No Selection
* * *	***

9. Thus, the paper ballot always recorded the physical act of selecting a candidate or political party as a vote for that candidate or political party.

10. The election practice and procedure described above was in existence prior to application of the Voting Rights Act, 42 U.S.C. § 1973c, to Texas.

11. TEX. ELEC. CODE § 65.007 mandates straight-ticket votes be tabulated as described in the paragraphs above.

12. The substance §65.007 was in existence prior to application of the Voting Rights Act, 42 U.S.C. § 1973c, to Texas.

13. The substance of §65.007 was also pre-cleared along with the entire codification of Texas election statutes in or around 1986.

14. The election practices or procedures described above are the baselines for any pre-clearance analysis.

15. As recently as October 31, 2008, the Texas Secretary of State has confirmed in a written memorandum that straight-ticket selections must be tabulated as described in the Paragraphs above. *See* http://www.sos.state.tx.us/elections/laws/advisory2008-12.shtml (accessed Nov. 30, 2008). The memorandum states:

> B. An individual vote for a candidate in the same column as a straight-party mark is regarded as an "emphasis" vote and does not invalidate the straight-party mark. If the only individual votes are emphasis votes, the vote is tallied the same as a straight-party vote without regard to the emphasis votes.

16. Beginning in 1998, Dallas County, Texas utilized direct record electronic (DRE) voting machines manufactured by ES&S called the iVotronic to record some votes in the county. Paper ballots were also used in some circumstances.

17. The iVotronic for the first time would, in some circumstances, record a physical act toward a particular political party or candidate as no vote for said political party or candidate.

18. A voter who cast their vote on the iVotronic and who made a physical act toward a particular political party and who also made a physical act toward the name of a nominee for that political party would de-select their vote for the candidate who was also individually selected.

19. A voter who cast their vote on the iVotronic and who made a physical act toward a particular political party and who also made physical acts toward the names of the nominees for that political party would be shown a "review screen" that more or less resembles the following:

Contest	**Selected**
Straight-Party	Democrat
United States Senator	No Selection
United States Representative	No Selection
Governor	No Selection
Lt. Governor	No Selection
Attorney General	No Selection
* * *	***

20. The review screen above, despite the reference to a straight-party selection, would be recorded automatically as a blank ballot. No votes for any candidates would be recorded.

21. A voter who cast their vote on the iVotronic and who made a physical act toward a particular political party and who also made physical acts toward the first two nominees for that same political party would be shown a "review screen" that more or less resembles the following:

Contest	**Selected**
Straight-Party	Republican
United States Senator	No Selection
United States Representative	No Selection
Governor	John Adams
Lt. Governor	Ben Franklin
Attorney General	Sam Adams
* * *	***

22. In the example above, no votes would be recorded for United States Senator or Representative despite the voter receiving confirmation immediately before casting his or her vote that a Republican straight-party selection had been made.

23. On November 4, 2008, a General Election was held for federal, state and local officess in Dallas County, Texas.

24. One of the offices voted upon in the November 4, 2008 General Election was Texas House of Representatives, District 105.

25. In this election, Dallas County, Texas permitted early voting by personal appearance on the iVotronic. Mail-in voting was conducted using paper ballots. Election Day voting was conducted using paper ballots except disadvantaged persons were permitted to cast Election Day ballots on the iVotronic.

26. Plaintiffs Texas Democratic Party and Boyd Richie, their Nominees and members spent hundreds of thousands of dollars urging voters in Dallas County, Texas to cast votes for its candidates. Members of Plaintiff, The Texas Democratic Party, expended enormous resources to ensure the election of Democratic Candidates. Members of the Plaintiff, The Texas Democratic Party, ran as Democrats in the election.

27. One of the candidates the above named Plaintiffs and their members worked to elect was Robert S. Romano.

28. Robert S. Romano is and was a member of the Texas Democratic Party.

29. Robert S. Romano is the 2008 Democratic Nominee for Texas House of Representatives, District 105.

30. Linda Harper-Brown is the incumbent and the 2008 Republican Nominee for Texas House of Representatives, District 105.

31. The official vote totals for House District 105, as canvassed by the Dallas County Commissioners Court, indicates Linda Harper-Brown as the winner by 20 votes.

32. Robert S. Romano has timely requested a manual recount in this race and it is set to begin December 1, 2008.

33. During this recount, cast vote records will be printed from the iVotronic and will be manually counted pursuant to Tex. Elec. Code § 213.001, *et. seq.*

34. Cast vote records for voters who made a physical act toward the Democratic Party and also toward the name of Robert S. Romano will show the straight-party selection and will list no information for Texas House District 105.

35. Despite the clear notation of straight-ticket choice, Defendants have confirmed any such ballot will not be recorded as a vote for Robert S. Romano.

36. Defendants instead are relying upon a November 20, 2008 non-binding advisory guidance from the Texas Secretary of State in direct contradiction with the Secretary of State's October 31, 2008 written directive, that opines the disputed cast vote records should not be counted as a vote for the nominee of the selected political party. *See* Exhibit A.

37. Cast vote records that show a straight-ticket choice for the Democratic Party and reveal no selection in House District 105 could be so numerous that were they properly tabulated, the winner of the race would change.

38. Alternatively, should such records be properly tabulated, the rights and benefits of the nominees under state election contest procedures would be substantively changed.

II.

PARTIES

39. Plaintiff, TEXAS DEMOCRATIC PARTY, is a political party formed under the Texas Election Code, whose address is 515 West 12th Street, Austin, Travis County, Texas 78701.

40. Plaintiff, BOYD L. RICHIE, is Chairman of the Texas Democratic Party and a registered voter in Young County, Texas.

41. Plaintiff FRANK JOSEPH is a registered voter in Dallas County, Texas and District 105, Texas House of Representatives, specifically.

42. Plaintiff BRETT ROSENTHAL is a registered voter in Dallas County, Texas and District 105, Texas House of Representatives, specifically.

43. DALLAS COUNTY, TEXAS is political subdivision of the State of Texas and is the party who had the responsibility to pre-clear any election practices or procedures under the Voting Rights Act, 42 U.S.C. 1973c. DALLAS COUNTY, TEXAS may be served through the County Judge, James Foster, at 411 Elm Street, Dallas, Texas 75202.

44. BRUCE SHERBERT, in his capacity as Election Administrator for Dallas County, Texas is the person who has been appointed by DALLAS COUNTY, TEXAS to perform all acts related to administration of county elections including the acts of the Recount Supervisor. BRUCE SHERBERT may be served at 2377 N. Stemmons Fwy., Suite 820, Dallas, Texas 75207.

45. JAMES FOSTER, in his capacity as Recount Supervisor for the Recount of the Election for District 105 of the Texas House of Representatives is the County Judge of Dallas County and is appointed pursuant to Tex. Elec. Code § 213.001 as the Recount Supervisor for the recount to be conducted in the House District 105 Race. He has delegated all his official duties to BRUCE SHERBERT. JAMES FOSTER may be served at 411 Elm Street, Dallas, Texas 75202.

46. TONI PIPPINS-POOLE, in her capacity as Recount Chair for the Recount of the Election for District 105 of the Texas House of Representatives, is appointed pursuant to Tex. Elec. Code § 213.002 as the Recount Chair for the recount to be conducted in the House District 105 Race. TONI PIPPINS-POOLE may be served at 2377 N. Stemmons Fwy., Suite 820, Dallas, Texas 75207.

III.

JURISDICTION AND VENUE

47. The Court has jurisdiction over this matter under 28 U.S.C. §§ 1331 and 1343(3). The Court also has jurisdiction over this matter under 42 U.S.C. §§ 1973c and 1983.

48. Venue is proper in this district under 28 U.S.C. § 1391(b)(2) in that a substantial part of the events or omissions giving rise to these claims occurred in this district.

49. In accordance with 42 U.S.C. § 1973c and 28 U.S.C. § 2284, any determination of these claims, except consideration of a temporary restraining order, must be heard and made by three judges.

IV.

CAUSES OF ACTION

COUNT 1:

SECTION 5

50. Plaintiffs hereby incorporate the foregoing by reference.

51. This is an action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1973c, 28 U.S.C. §§ 2201-2202, 42 U.S.C. § 1983 and Federal Rule of Civil Procedure 65 to enforce rights guaranteed under federal law. This action is brought to prevent deprivation under color of law of the rights, privileges and immunities secured to Plaintiffs by the aforementioned statutes and constitutional provisions. Specifically, this is an action under the Voting Rights Act, 42 U.S.C. 1973c ("Section 5"), to enjoin the use of election practices or procedures not pre-cleared under the terms of the Act.

52. Section 5 requires that "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" different from that in force or effect in Dallas County on November 1, 1972 may not be lawfully implemented unless Dallas County obtains declaratory judgment from the United States District Court for the District of Columbia that the voting 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, except such change may be implemented

without such judgment if it has been submitted to the Attorney General and the Attorney General has not interposed an objection within sixty days. *See* 42. U.S.C. § 1973c.

53. As a political subdivision of the state and/or officers of that political subdivision, Defendants are subject to the pre-clearance requirements of Section 5.

54. The Defendants are enacting, administering or effectuating standards, practices or procedures with respect to voting different from those in force or effect on November 1, 1972 or that were subsequently lawfully pre-cleared under the terms of Section 5.

55. Beginning in 1998, Defendants enacted, administered or effectuated the following standards, practices or procedures with respect to voting without the requisite Section 5 pre-clearance:

A. Employing a voting system for certain voters that does not record a vote for a particular political party or candidate despite the voter having made a physical act toward the particular political party or candidate.

B. Continuing to employ a voting system for other voters that does record a vote for a particular political party or candidate when the voter made a physical act toward the particular political party or candidate.

C. Employing a voting system that utilizes a "review screen" that informs certain voters a straight-party selection will be tabulated when in fact the machine records no such selection.

56. Beginning December 1, 2008, Defendants enacted, administered or effectuated the following standards, practices or procedures with respect to voting without the requisite Section 5 pre-clearance:

A. Counting a printed ballot record during a manual recount that shows a straight-ticket selection but no individual selection in a given race as no vote for that race.

57. None of the described changes above have received the required pre-clearance under Section 5.

58. Defendants failure to obtain pre-clearance of the changes described above renders the changes legally unenforceable. *See* 42 U.S.C. § 1973c.

59. Unless enjoined by this Court, Defendants will continue to enforce the aforementioned changes without obtaining the requisite pre-clearance in violation of Section 5.

COUNT 2:

SECTION 2

60. Plaintiffs hereby incorporate the foregoing by reference.

61. Plaintiffs allege this Claim only if Defendants are successful in obtaining pre-clearance of the described changes or otherwise the Court rules pre-clearance has been timely obtained.

62. 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 minority group.

V.

INJUNCTIVE RELIEF

A. Application for Temporary Restraining Order[1]

63. Plaintiffs hereby incorporate the foregoing by reference.

64. Plaintiffs ask this Court to enter a Temporary Restraining Order granting the following relief:

A. Defendants, in performing the recount for House District 105, refrain from implementing the new procedure described in the above.

B. Defendants, in performing the recount for House District 105, record a vote for all the nominees of a political party when the cast vote record from the iVotronic shows a straight-party selection even when no individual selection has been made.

C. Defendants, with regard to House District 105, certify election results that are calculated in conformity with the herein.

65. Alternatively, Plaintiffs ask the Court to void the 2008 Election Results for Texas House of Representatives, District 105 and instead order a new election performed utilizing only voting practices and procedures, including voting technologies, that have been fully pre-cleared under Section 5.

66. If the Plaintiffs' Application for Temporary Restraining Order and Injunctive Relief is not granted, irreparable harm is imminent because, on information and belief, Defendants intend to use the unlawful practices.

[1] A separate Application for Temporary Restraining Order, Preliminary Injunctive and Permanent Injunction will be filed with the Court in short order that includes a brief in support.

67. The Plaintiffs have no adequate remedy at law because the substantial damages and harm from Defendants' conduct are incalculable and a money judgment could not serve as adequate compensation for the wrong inflicted on the Plaintiffs, their members and the voters of the state.

B. Request for Preliminary and Permanent Injunction

68. Plaintiffs hereby incorporate the foregoing by reference.

69. The Plaintiffs ask the Court to set this request for preliminary injunction for hearing before three judges, and after the hearing, enter a preliminary injunction granting the relief requested above.

70. Furthermore, Plaintiffs request the court enjoin Defendants from administering an election utilizing the changes described herein.

VI.

ATTORNEYS FEES

71. Plaintiffs request award of their reasonable and necessary attorneys' fees for this action. *See, e.g.,* 42 U.S.C. § 1973l(e) and 42 U.S.C. 1988.

72. Defendants are not entitled to qualified or sovereign immunity because the only relief requested herein is declaratory and/or injunctive relief as well as an award of attorneys fees and court costs.

PRAYER

73. For the foregoing reasons, the Plaintiffs respectfully request that the Court enter judgment against Defendants consistent with the relief requested herein.

Dated this 1st day of December, 2008.

Respectfully submitted,

TEXAS DEMOCRATIC PARTY and
BOYD L. RICHIE, in his capacity as
Chairman of the Texas Democratic Party

By: */s/ Chad W. Dunn*

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