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.	§	Civil Action No. 3:08-CV-02117-P
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*.	§	

BRIEF OF THE SECRETARY OF STATE OF TEXAS AS *AMICUS CURIAE*

A paramount objective of the Secretary of State is to vindicate the clear intent of all lawful voters—including the intention to abstain from voting in a particular race. That objective is reflected in electronic voting systems used throughout Texas, and further reinforced in the November 20, 2008 opinion letter issued by the Secretary of State.

This is the third time that the lead Plaintiffs have filed suit attempting to invalidate these systems as unlawful. Last year, the Western District of Texas rejected the numerous constitutional and statutory theories brought by Plaintiffs in that court, and that ruling was summarily affirmed on appeal a few months ago. A second action brought in state court was dismissed for lack of

jurisdiction. Now, in this Court, Plaintiffs allege violations of the Voting Rights Act.

The Secretary of State thus files this *amicus* brief in response.[1] The electronic voting system at issue in this case plainly complies with the Voting Rights Act. It has been precleared for use by the U.S. Department of Justice. App. 1-33. It follows established law governing straight-ticket voters who affirmatively abstain from voting in particular races, consistent with the treatment of paper ballots. And it eliminates both the need and ability of voters to engage in so-called "emphasis votes," because—unlike in the paper ballot context—when a voter expresses a party preference on an electronic ballot, the system automatically highlights that party's candidate in every race on the ballot, in color and in clear view of the voter. Plaintiffs' claims are thus legally meritless.

What's more, as Plaintiffs admit, for this Court to invalidate the Secretary's opinion letter and retroactively change the rules by which electronic votes shall be counted would cause inevitable harm to numerous voters, by forcing them to vote for candidates that they have affirmatively refused to support. Nothing in the Voting Rights Act requires, or indeed permits, this result.

* * *

The intent of the voter enjoys a privileged status in our election law, so much so that even failure to mark a ballot in strict conformity with the Texas Election Code does not necessarily invalidate that ballot. TEX. ELEC. CODE § 65.009(a). Instead, "[a] vote on an office or measure shall be counted if the voter's intent is clearly ascertainable" (unless some other provision of Texas law prohibits counting the vote altogether). *Id.* § 65.009(c). State courts have historically upheld this

[1] In accordance with Local Rule 7.2(b) of the Northern District of Texas, the Secretary has a substantial interest in this case as the State's chief elections officer, responsible for ensuring the uniform application of Texas election law. Additionally, the Secretary has an interest in bringing to the court's attention a similar lawsuit recently rejected by the Western District of Texas and the Fifth Circuit. A petition for writ of certiorari is currently pending before the United States Supreme Court in that matter.

settled principle of Texas election law, refusing to allow technical arguments to eviscerate clear voter intent. *See, e.g.*, *Mitchell v. Jones*, 361 S.W.2d 224, 233-34 (Tex. Civ. App.—Texarkana 1962, no writ); *Vicars v. Stokely*, 296 S.W.2d 599, 604 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.). The Secretary of State is responsible for establishing and certifying election systems that accurately ascertain the voter's clear intent. TEX. ELEC. CODE § 122.001(3).

Historically, the lead Plaintiffs have alleged that paper ballots cause confusion for some straight-ticket voters, for one essential reason: When a paper ballot voter begins the voting process by expressing a generic party preference, only that generic party preference is marked—every individual ballot race remains unmarked. As a result, some voters, Plaintiffs allege, may be concerned that their votes for some reason may not be counted in individual races. In response, they may cast votes for their preferred party's candidate in individual races in order to emphasize their support. The existence of such emphasis votes on paper ballots raises questions about how to interpret voter intent with respect to other races in which the voter has taken no specific action. Additional controversies over voter intent may arise when the straight-ticket voter casts votes for candidates of different parties in different races, while leaving other races blank. The Legislature has acted to resolve such controversies over potentially ambiguous voter actions by making clear that the straight-ticket preference shall remain operative for all other individual races in which the voter has taken no specific action. TEX. ELEC. CODE § 65.007(c).

Electronic voting systems avoid such controversies—and eliminate voters' need (and ability) to cast emphasis votes—by including an elegant feature not available in paper balloting: When a voter expresses a generic party preference, the system responds by automatically marking default party-line votes in every partisan election on the ballot, and by clearly displaying those default votes

to the voter through color-highlighted boxes. App. 34-35. Voters who express such a generic party preference can then determine whether they wish to maintain or depart from that default preference in individual ballot races—either by selecting a candidate of another party, or by abstaining from voting in that particular race altogether. What's more, electronic voters can do so without adding any ambiguous, confusing marks to the ballot, as would exist in the paper context—the final electronic ballot will appear as if the voter had made individual decisions to vote or abstain in every single race. The system also provides clear instructions and robust safeguards to ensure that voters understand how to express their wishes.

The benefits of this system are clear: The electronic voting system challenged here is among the most user-friendly and accurate yet to be implemented in the State of Texas. Such systems capture the intent of the voter more precisely, more efficiently, and with much less ambiguity than ever before. And they respond to Plaintiffs' historic allegations of voter confusion in the paper ballot context, by reassuring citizens that straight-ticket voting works. Emphasis votes are neither needed nor permitted in this context, because the system responds to voters who express a generic party preference by automatically casting default party-line votes in every race on the ballot, and by clearly displaying those default votes to the voter. In short, electronic voting systems eliminate voter ability to cast emphasis votes, and their need to do so in the first place.

In particular, electronic voting systems should help election officials avoid unnecessary legal controversies, because the intent of the voter who affirmatively abstains from voting in a particular race is quite clear. As the Western District of Texas recently observed in a similar context: "It is hard to imagine the voter who is so unsophisticated that he . . . cannot tell the difference between a color-highlighted box and an empty box." *Tex. Democratic Party v. Williams*, Case No. A-07-CA-

115-SS (W.D. Tex. Aug. 16, 2007), slip op. at 10 n.7, App. 36-48, *aff'd*, App. 49-50. Plaintiffs nevertheless contend that an apparent act of abstention should *always* be recharacterized as an emphasis vote. But as noted by the Western District of Texas, "[i]f a voter works his way through . . . and still leaves a particular race with no selection, it is equally if not more plausible that the voter intended to make no selection for that race." *Id.* at 8. Even Plaintiffs themselves concede that "it is impossible to tell whether voters meant to emphasize particular candidates or just didn't want to vote in that particular race." Brandon Formby, *Bob Romano, Democratic Party sue over recount in heated Texas House race*, Dallas Morning News, Nov. 22, 2008.

Not surprisingly, then, as noted above, the Western District of Texas confirmed the validity of a similar electronic voting system just last year, rejecting claims that the system violated either the federal Constitution or various provisions of Texas and federal law by permitting straight-ticket voters to abstain in individual races. App. 36-48. The decision was summarily affirmed on appeal a few months ago by the U.S. Court of Appeals for the Fifth Circuit. *Id.* at 49-50. Notably, that litigation was initiated by several of the same plaintiffs and counsel present here. And another lawsuit brought in state court by several of the same plaintiffs and counsel was dismissed just last week on jurisdictional grounds. *Dallas County Democratic Party, et. al. v. The Recount Supervisor for the Recount of the Election for District 105 of the Texas House of Representatives*, Cause No. 08-14678, 160th Judicial District Court of Dallas County, Nov. 25, 2008.

Plaintiffs now attempt to argue in this Court that the electronic system challenged here somehow violates the Voting Rights Act. Specifically, they theorize that the systems use voting procedures that depart from those incorporated in Texas Election Code § 65.007, and that that departure has not been precleared pursuant to Section 5 of the Voting Rights Act. Plaintiffs

apparently did not see fit to present such a claim in their previous federal court litigation—and no wonder: The systems challenged here do not depart from established law. To the contrary, Texas election law has never, as Plaintiffs claim, commanded Texas election officials to override the intent of voters who take affirmative action to abstain from voting in particular ballot races, in violation of their constitutional right *not* to vote. And the system has been precleared by the Justice Department accordingly.

Section 65.007 of the Texas Election Code must be construed in light of the bedrock principle that election officials should generally count votes based on whether "the voter's intent is clearly ascertainable." TEX. ELEC. CODE § 65.009(c). This may be so even where a voter has "fail[ed] to mark a ballot in strict conformity" with the Texas Election Code. *Id.* § 65.009(a).

Section 65.007 is easily reconciled with these governing principles. The provision vindicates voter intent by establishing certain guidelines for interpreting voter behavior when the intent is arguably ambiguous—such as a voter who expresses a generic party preference on a paper ballot, but then casts a vote for an opposing party candidate in one or more individual ballot races, while taking no action one way or another in other races. *Id.* § 65.007(c).

There is no reason to believe, as Plaintiffs essentially contend, that the Legislature, in adopting § 65.007, also intended to *override* clear voter intent by *forbidding* voters from abstaining in individual races as a condition of expressing a generic party preference. No apparent government interest would be served by such an absurd rule. Plaintiffs identify none. And a number of considerations specifically counsel against such an awkward construction.

To begin with, nothing in the text of Section 65.007 refers to straight-ticket voters who wish to exercise their constitutional rights by affirmatively abstaining from voting in individual races. Nor

is there any discussion anywhere in the statute of voters who take affirmative action to de-select a vote that is automatically cast by the electronic voting system in response to the voter's designation of a default party preference.

The Legislature's myopia is easy to understand: The enactment of Section 65.007 in 1985 predates the current use of electronic voting systems. The provision was thus adopted before voters could cast default votes in a number of distinct races through a single click of a button, and then toggle back and forth between candidates in individual races with ease.

Moreover, even in the paper ballot context, election officials have long construed Section 65.007 not to forbid voters from abstaining in individual races after stating a generic party preference. As the Secretary of State's office has traditionally understood, a voter who initially expresses an intention to vote a straight party ticket at the top of the paper ballot, but then subsequently writes "abstain" or "none of the above" in connection with a particular race (or takes some other affirmative step to abstain from that race), must be construed as intending not to vote for any candidate in that race. Affidavit of Ann McGeehan, App. 51-52.

In sum, there has been no change in Texas election practice. Plaintiffs' suit wrongfully conflates emphasis votes with abstention votes, and mistakenly argues that electronic systems count such votes differently from paper ballots. In fact, electronic systems count ballots in precisely the same manner as paper ballots. In either context, voters may select the straight-ticket option and then affirmatively abstain from voting in particular races—and in the electronic context, emphasis votes

are neither possible nor necessary. Notably, Plaintiffs have presented no authority to support their contrary interpretation of Section 65.007, nor have they cited any jurisdiction that has adopted it.[2]

Finally, Plaintiffs cannot prevail on their Section 5 claim for an additional reason: the U.S. Department of Justice was well aware that electronic voting systems follow established law when it precleared the use of the system at issue here. As explained in one of the documents submitted for the Department's review, electronic voting systems "accommodate[] straight-party voting. . . . Selecting a straight-party vote causes selection of all candidates of that party." App. 23. The same document also confirms that "[p]ressing the box again removes the check mark, indicating that the candidate has been deselected." App. 21. In granting preclearance, the Department expressed no concerns or objections about established Texas law. App. 29. Plaintiffs' challenge under Section 5 of the Voting Rights Act is therefore meritless.[3]

* * *

For the reasons stated herein, the November 20, 2008 opinion is consistent with established Texas law and does not violate the Voting Rights Act.

[2] Plaintiffs' reference to the Secretary's October 31, 2008 memorandum does not further their cause. That memorandum contemplates the possibility of emphasis votes, but only in the paper balloting context.

[3] In addition, Plaintiffs separately allege that the electronic voting systems violate Section 2 of the Voting Rights Act, but they have presented no evidence of disparate effect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Brief of the Secretary of State of Texas as *Amicus Curiae*** has been served via electronic notification on this 4th day of December, 2008, to:

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