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' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON SECTION 5 CLAIMS

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Subject to and without waiving their Motion to Dismiss Plaintiffs' First Amended Original Complaint (doc. 24) *and* Motion for Stay or, in the Alternative, Rule 56(f) Motion (doc. 35), Defendants Dallas County, Texas ("Dallas County") and Bruce Sherbet ("Sherbet"), in his capacity as Election Administrator for Dallas County, Texas (collectively "Defendants") file this Response in Opposition to Plaintiffs' Motion for Summary Judgment on Section 5 Claims ("Motion") and Brief in Support ("Plaintiffs' Brief"), as follows:

I. INTRODUCTION

Plaintiffs Texas Democratic Party ("TDP"); Boyd L. Richie, in his capacity as Chairman of the Texas Democratic Party ("Richie"); Frank Joseph ("Joseph"); and Brett Rosenthal's ("Rosenthal") (collectively "Plaintiffs") Section 5 claims concern straight-party voting on the iVotronic touch-screen voting machine. When a voter presses the straight party button on the iVotronic screen, the iVotronic *automatically* selects, highlights, and places a check-mark next to the name of every candidate in the selected party on the ballot. A voter can de-select an individual candidate in a particular race by touching a pre-selected candidate's name, which removes the highlight and check-mark next to the candidate's name. Plaintiffs argue that Dallas County's policy to not assign a vote to a de-selected candidate, either on the machine itself or through a manual recount, constitutes a "change" in voting procedure which was not precleared by Dallas County's Section 5 submission of the iVotronic to the Department of Justice.[1]

Plaintiffs' Motion for Summary Judgment on Section 5 Claims should be denied for the following reasons. First, Plaintiffs lack standing to bring their Section 5 claim because they lack evidence of a particularized injury in fact that is fairly traceable to the complained-of policies. Second, Plaintiffs cannot demonstrate a change in voting under Section 5 because they lack

[1] Plaintiffs allege four "changes," but each concerns the tabulation of straight-party votes with deselected candidates. *See* Plaintiffs' Brief at 16-17.

evidence of Dallas County's baseline voting practices. Third, because Plaintiffs lack evidence that the complained-of policies create the potential for discrimination, Plaintiffs failed to prove that preclearance was necessary. Fourth, Plaintiffs have failed to show their entitlement to the relief requested.

II. ARGUMENTS AND AUTHORITIES

A. Summary Judgment Standard

Summary judgment is appropriate only if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Gale v. Carnrite*, --- F.3d ---, 2009 WL 335919, at *2 (5th Cir. Feb. 12, 2009) (quoting FED. R. CIV. P. 56(c)). A dispute is "genuine" if the evidence could lead a reasonable jury to find for the nonmoving party. *Myers v. Mothers Work, Inc.*, No. H-07-0409, 2009 WL 513916, at *1 (S.D. Tex. Mar. 2, 2009) (citing *In re Segerstrom*, 247 F.3d 218, 223 (5th Cir. 2001)). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). The Court views all facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

As the movant, Plaintiffs have the initial burden to prove there are no genuine issues of material fact for trial. *Myers*, 2009 WL 513916, at *1 (citing *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001)). The pleadings, depositions, admissions, and affidavits, if any, must demonstrate that no genuine issue of material fact exists. FED R. CIV. P. 56(c). Critically, "[i]f the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the nonmovant's response." *Veldekens v. GE HFS Holdings, Inc.*, No. H-06-3296, 2008 WL 4425363, at *7 (S.D. Tex. Sept. 24, 2008) (citing *Baton Rouge Oil and Chem. Workers Union v. ExxonMobil Corp*., 289 F.3d 373, 375 (5th Cir. 2002)); *see also Martinez v. Porta*, --- F. Supp. 2d ---, 2009 WL 453302, 6 (N.D. Tex. Feb. 19,

2009) (denying plaintiff's motion for summary judgment because the case was "rife with fact issues precluding summary judgment").

B. Summary Judgment Should be Denied Because Plaintiffs Lack Standing.

Standing is "the threshold question in every federal case." *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). A 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).

On January 20, 2009, Defendants filed a Motion to Dismiss for lack of subject matter jurisdiction. *See* Defendants' Motion to Dismiss Plaintiffs' First Amended Original Complaint and Brief in Support (doc. 24).[2] The Motion to Dismiss shows that Plaintiffs Joseph and Rosenthal lack standing because, among other things, they lack a personal injury that is fairly traceable to the complained of conduct. *See* Motion to Dismiss (doc. 24) at 7-10; Reply in Support of Motion to Dismiss (doc. 33) at 2-3. In addition, the TDC and its Chairman lack standing (including specifically associational standing) to assert claims under Section 5 of the VRA. *See* Motion to Dismiss (doc. 24) at 7-10; Reply in Support of Motion to Dismiss at 4-6. Thus, the Court should dismiss those claims and deny Plaintiffs' Motion for Summary Judgment.[3]

C. Plaintiffs Lack the Necessary Evidence to Prove Their Section 5 Claims.

Plaintiffs must prove each of the following elements to prevail on their section 5 claims: (1) that a "change" in voting (2) required preclearance; (3) that preclearance was not obtained;

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[2] Pursuant to Federal Rule of Civil Procedure 10(c), Defendants incorporate herein their Motion to Dismiss (doc. 24) and the Reply in Support of that Motion (doc. 33).

[3] "[M]ere allegations are insufficient to establish standing at the summary judgment stage." *Cahill v. Texas*, 48 Fed. Appx. 918 (5th Cir. 2002) (finding in absence of specific facts established by affidavit or other evidence, plaintiff lacked standing). "[S]tanding . . . requires, at the summary judgment stage, a ***factual showing of perceptible harm***." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565-66, 700 (1992). (emphasis added); s*ee also Central and South West Services, Inc. v. United States E.P.A.*, 220 F.3d 683 (5th Cir. 2000) (finding plaintiff "fail[ed] to establish any direct harm") (citation omitted).

and (4) that the sought-after injunctive relief is appropriate. *See Lopez v. Monterey County, Cal.*, 519 U.S. 9, 23 (1996) (citations omitted); *Foreman v. Dallas County, Tex.*, 990 F. Supp. 505, 513 (N.D. Tex. 1998) (citations omitted). Plaintiffs' Motion for Summary Judgment should be denied because Plaintiffs lack sufficient evidence to establish: (a) a "change" in voting; (b) that required preclearance; or (c) that preclearance was not obtained.

1. Plaintiffs lack proof of a change in voting.

To establish the existence of a "change" in voting, the Court "must compare the challenged practices with those in existence before they were adopted." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 495 (1992). The "baseline" used for comparison is "the most recent practice that was both precleared and 'in force or effect'—or, absent any change since the jurisdiction's coverage date, the practice that was 'in force or effect' on that date." *Riley v. Kennedy*, --- U.S. ---, 128 S. Ct. 1970, 1982-85 (2008) (engaging in detailed factual inquiry to establish whether a particular practice had in fact been "in force or effect" prior to the challenged practice). The comparison required by section 5 cannot be undertaken in the absence of evidence of the baseline practice. *See Foreman v. Dallas County, Tex.*, 521 U.S. 979, 981 (1997) ("Because the parties agree that the record is silent as to the procedure used by Dallas County for appointing election judges as of November 1, 1972, the date on which Texas became a covered jurisdiction under the Voting Rights Act, we cannot make a final determination here as to whether preclearance is in fact required."). Plaintiffs lack any evidence to support their allegations that that any particular practice was, in fact, the baseline. *See generally* Plaintiffs' Brief.

As aptly explained by the Texas Secretary of State in its Amicus Brief, (doc. 12), the materials Plaintiffs allege as the "baseline" with regard to "emphasis votes" pertain only to paper

ballots.[4] *See* Amicus Brief (doc. 12) at 3-4 (explaining that Texas Election Code Section 65.007 was drafted to address the inherent ambiguity regarding a voter's intent when a party casts a straight-party vote with emphasis votes or cross-over votes on a paper ballot—an ambiguity that does not exist with the iVotronic due to the fact that the iVotronic automatically selects every candidate of a particular party when that party is selected as a straight-ticket); *id.* at 6-8 (explaining that "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") (emphasis in original). The Texas Secretary of State's Amicus Brief additionally explains that the Secretary's October 31, 2008 memorandum "contemplates the possibility of emphasis votes, but only in the paper balloting context." Amicus Brief (doc. 12) at 8 n.2.[5]

2. Plaintiffs lack proof that the complained-of policy has the potential for discrimination.

"Whether a change in 'any . . . standard, practice, or procedure with respect to voting,' 42 U.S.C. § 1973c, must be precleared under § 5 depends . . . on 'whether the challenged alteration has the *potential* for discrimination.'" *Presley*, 502 U.S. at 513 n.4 (citation omitted) (emphasis in original). Plaintiffs have not proffered competent evidence that the challenged procedure creates potential for discrimination. Citing generally to an appendix that contains more than 10,000 pages of unauthenticated ballot images is insufficient to demonstrate a potential for

[4] See Plaintiffs' First Amended Original Complaint at ¶ 14 (describing the "baselines for any preclearance analysis" to be consistent with Tex. Elec. Code § 65.007).

[5] Contrary to Plaintiffs' assertion that "[t]he only method to opt out of or 'de-select' an individual from the selected party is for the voter to affirmatively choose a candidate from another party," (Plaintiffs' Brief at 3), the Texas Secretary of State explains that "election officials have long construed Section 65.007 not to forbid voters from abstaining in individual races after stating a generic party preference." Amicus Brief (doc. 12) at 7. Indeed, "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." *Id.*

discrimination. *See* Northern District Local Rule 56.5(c) ("A party whose motion . . . is accompanied by an appendix must include in its brief citations to each page of the appendix that supports each assertion that the party makes concerning the summary judgment evidence."); *Aspex Eyewear, Inc. v. E'Lite Optik, Inc.*, No. CIV. A. 398CV2996D, 2002 WL 1751381, at *9 (N.D. Tex. Apr. 4, 2002) ("The court . . . will not take into account summary judgment evidence that [the movant] has not cited in the manner required—that is, to each page of the appendix that supports each assertion that the party makes concerning the evidence. 'Otherwise, [Rule 56.5(c)] would not mean what [it] say[s].'") (quoting *Andrews v. CompUSA, Inc.*, 2002 WL 265089, at *3 (N.D. Tex. Feb. 21, 2002)) (alteration in original). Indeed, it is well settled that courts "will not undertake a search of the appendix for evidence that would be sufficient to grant summary judgment" because the court "is not required to 'comb the record' in search of summary judgment evidence." *Id.* (citing *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463 (5th Cir. 1996)).

3. Plaintiffs' own evidence shows the iVotronic was precleared.

Plaintiffs do not dispute that the iVotronic machine was initially precleared pursuant to section 5 more than 10 years ago. *See* Plaintiffs' Brief at 3-4. Furthermore, Plaintiffs' appendix includes the 1998 section 5 submission, which disclosed the following details about the iVotronic: "Selecting a straight-party vote causes selection of all candidates of that party." Doc. 28-4 at 1 (TDP appendix at 51). "The screen is touch-sensitive, designed to be pressed with a stylus that is attached to the machine. Pressing the stylus in the box next to a candidate causes a check-mark to appear in the box, indicating that the voter has selected that candidate. Pressing the box again removes the check mark, indicating that the candidate has been deselected." Doc. 28-3 at 23-24 (TDP appendix at 48-49).

Plaintiffs mischaracterize Bruce Sherbet as being in agreement with the Plaintiffs that

"the preclearance documents make no reference whatsoever to the system 'de-selecting' a vote when a candidate's name is touched." Plaintiffs' Brief at 4. Plaintiffs overlook Mr. Sherbet's testimony, in which he reads the following language from the 1998 section 5 submission: "Pressing the stylus in the box next to a candidate causes a check mark to appear in the box, indicating that the voter has selected that candidate. Pressing the box again removes the check mark, indicating that the candidate has been deselected. Overvoting is impossible. If an office is vote-for-three, for example, then if a fourth candidate is selected, the first three are automatically deselected. . . . Votes can be changed at any time until the—until the lighted VOTE button, a physical button on top of the machine is pressed." *See* doc. 28-7 p. 2 at 100:2-100:24 (TDP appendix at 127).

Plaintiffs also incorrectly assert that the 1998 preclearance documents "were the only pre-clearance submissions from Defendants . . . in relation to the use of this system in Dallas County." Plaintiffs Brief at 3-4. Plaintiffs' own appendix demonstrates otherwise. *See* doc. 28-4, pp. 15-25 (TDP appendix at 65-75) and doc 28-5, pp. 1-9 (TDP appendix at 76-84) (both concerning section 5 submission concerning the iVotronic in 2006). In fact, one of the issues Plaintiffs raise—the review screen—was precleared as part of the 2006 section 5 submission, which was included in Plaintiffs' appendix. *See* doc. 28-4, pp. 15-19 (TDP appendix at 65-69).

Lastly, with regard to the ballot images generated by the iVotronic, those images accurately reflect a voter's deselection of a candidate. *See* Doc. 28-3 at 23-24 (TDP appendix at 48-49). Accordingly, no preclearance was necessary. *See White-Battle v. Moss*, 222 Fed. Appx. 304, 306 (4th Cir. 2007) (concluding that the "method of counting votes is implicit in the use of the touch-screen machines and logically did not need to be precleared separately").[6]

[6] Plaintiffs do not cite a single case that requires the granular level of detail in preclearance documents that they suggest is necessary to satisfy section 5.

4. Plaintiffs have not established that injunctive relief is appropriate.

Fourth, Plaintiffs have failed to show that injunctive relief is appropriate. As discussed in Plaintiffs' Response in Opposition to Defendants' Application for Permanent Injunction, which is incorporated herein, even if Plaintiffs prevail on their Section 5 claims after a trial on the merits, Plaintiffs are not automatically entitled to injunctive relief. Here, Plaintiffs have not shown as a matter of law that injunctive relief is proper. In addition, the factual issues regarding Plaintiffs' delay in filing suit and seeking injunctive relief ten years after Dallas County precleared and began using the iVotronic preclude the relief requested by Plaintiffs. Finally, because Plaintiffs have not shown any potential for discrimination, they are not entitled to injunctive relief. *See Presley*, 502 U.S. at 513 n.4.

III. CONCLUSION AND REQUEST FOR RELIEF

If the Court grants either Defendants' Motion to Dismiss *or* Defendants' Motion for Stay, or, in the alternative, Rule 56(f) Motion, then Plaintiffs' Motion for Summary Judgment should be denied as moot. Additionally, for the foregoing reasons, Defendants Dallas County, Texas and Bruce Sherbet, in his capacity as Election Administrator for Dallas County, Texas, respectfully request that this Honorable Court deny Plaintiffs' Motion for Summary Judgment on Section 5 Claims and grant Defendants 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 6th day of March, 2009.

/s/ Jamil N. Alibhai
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