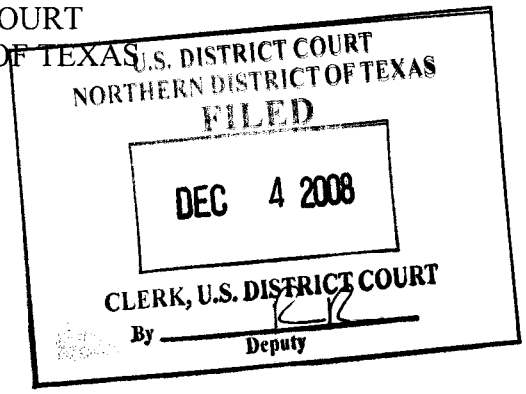
p w/o to Judge

ORIGINAL

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, v. 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.	§	Cause No. 08-CV-02117-P

THE HONORABLE LINDA HARPER-BROWN'S MOTION TO INTERVENE AS PARTY DEFENDANT AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE DISTRICT COURT JUDGE:

COMES NOW, the HONORABLE LINDA HARPER-BROWN (hereinafter "Intervenor"), in the above-entitled and numbered cause and files this Motion to Intervene as Party Defendant and Brief in Support Thereof and, in support of same, respectfully shows as follows:

I.
FACTS

1. Intervenor files this Motion to Intervene as Party Defendant and Brief in Support Thereof in the above action pursuant to Rule 24(a)(2) and 24(b)(1)(B)of the Federal Rules of Civil Procedure.

2. Intervenor is the current State Representative for Texas House District 105. On November 4, 2008, Intervenor defeated the challenger, Robert S. Romano (hereinafter "Romano"), and was re-elected to another term as State Representative for House District 105.

3. On November 10, 2008, the Provisional and Late Ballot Review Board reviewed the provisional ballots from the Election Contest and, despite the Election Judge whiting-out affidavits and accepting illegal ballots, Intervenor remained the winner of the election.

4. On November 21, 2008, Romano filed a Request for a Recount, pursuant to the Texas Election Code §211.001 *et seq.* seeking a recount of the ballots cast in the Election Contest. The last day for such recount is December 1, 2008.

5. Instead of conducting the recount using the same counting procedures for votes cast on direct record electronic (DRE) voting machines that were used in all other Dallas County races, the Plaintiffs now request this court to enjoin the use of those procedures and mandate the application of different rules, effectively asking this Court to order the Dallas County Elections Department to count votes even though the voter, after receiving numerous instructions and education on the issue, intentionally de-selected a vote for a candidate in a particular contest. The effect of Plaintiffs' request is that the Elections Department would be required to pretend that a "no-vote" was in fact a vote for a particular candidate. Plaintiffs' position is in direct contradiction to the statewide policy, procedure and standard established by federal law, the

Secretary of State and the holding of the United States District Court for the Western District of Texas. *See Tex. Democratic Party v. Williams*, No. A-07-CA-115-SS (W.D. Tex. Aug. 16, 2007) (J.Sparks) (not designated for publication).

II.
MOTION TO INTERVENE AND BRIEF IN SUPPORT

6. A motion to intervene under Rule 24(a)(2) is proper when: (1) the motion to intervene is timely; (2) the intervenor asserts an interest that is related to the property or transaction that forms the basis of the controversy in the case into which she seeks to intervene; (3) the disposition of that case may impair or impede the potential intervener's ability to protect her interest; and (4) the existing parties do not adequately represent the potential intervener's interest. *Ross v. Marshall*, 426 F.3d 745, 753 (5th Cir. 2005) (citing *Saldano v. Roach*, 363 F.3d 545, 551 (5th Cir. 2004)).

7. Plaintiff's Original Complaint was filed December 1, 2008. Therefore, this motion is timely.

8. As the prevailing candidate in the election for State Representative for Texas House District 105, Intervenor has a justiciable interest in the subject matter of this lawsuit, as more fully described in her proposed Motion to Dismiss, Motion to Join Necessary Parties, Answer and Counterclaim for Declaratory Relief, a copy of which is attached as Exhibit "A".

9. The disposition of this action and the granting of the relief requested by Plaintiffs may impair or impede Intervenor's ability to protect her interest because her interest is not adequately represented by the existing parties.

10. Alternatively, Intervenor should be allowed to intervene pursuant to Rule 24(b)(1)(B). She is the candidate who prevailed in the election and holds the office of State Representative for Texas House District 105. It is patently clear that she shares a claim or defense with the main action a common question of law or fact and her motion is timely.

III.
PRAYER

WHEREFORE, PREMISES CONSIDERED, the HONORABLE LINDA HARPER-BROWN prays that the Court grant her Motion to intervene in this matter, and also prays for all other and further relief, both general and specific, at law and in equity, to which she has shown herself to be justly entitled.

Date: December 4, 2008

BURFORD & RYBURN, L.L.P.

By: _____
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ATTORNEYS FOR THE HONORABLE LINDA HARPER-BROWN

CERTIFICATE OF CONFERENCE

I hereby certify that on this date a conference was held with the following attorneys of record in this action and this motion is opposed as follows:

Chad W. Dunn
Attorney for Plaintiffs ~~Oppose~~ AGREE DUE by 4

Leon Carter
Attorney for Defendants Agree

Dated: December 4, 2008.

WADE EMMERT

CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing document was served upon all attorneys of record in this proceeding with said service being effectuated by the following method:

X Certified Mail, Return Receipt Requested
X Telecopy
X Email
____ Hand Delivery

Dated: December 4, 2008.

WADE EMMERT

Exhibit "A"

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,	§	
v.	§	Cause No. 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,	§	
AND	§	
THE HONORABLE LINDA HARPER-BROWN,	§	
Intervenor.	§	

THE HONORABLE LINDA HARPER-BROWN'S MOTION TO DISMISS, MOTION TO JOIN NECESSARY PARTIES, ORIGINAL ANSWER AND COUNTERCLAIM FOR DECLARATORY RELIEF

TO THE HONORABLE DISTRICT COURT JUDGE:

COMES NOW, the HONORABLE LINDA HARPER-BROWN (hereinafter sometimes referred to as "Intervenor"), in the above-entitled and numbered cause and files this Motion to Dismiss, Motion to Join Necessary Parties, Original Answer and Counterclaim for Declaratory Relief,

answering Plaintiff's Original Complaint and, in support thereof, would respectfully show as follows:

I.
INTERVENTION

1. Pursuant to Rule 24 of the Federal Rules of Civil Procedure, the HONORABLE LINDA HARPER-BROWN intervenes and files this Motion to Dismiss, Motion to Join Necessary Parties, Original Answer and Counterclaim for Declaratory Relief as a party defendant in the above action. Intervenor has a justiciable interest in this lawsuit, in that she was the prevailing candidate in the election contest at issue and the new method of counting "no-votes" advocated by Plaintiffs could affect the total number of votes she received during the election.

II.
FACTUAL BACKGROUND

2. The State of Texas, *via* its chief election officer, has implemented a uniform, non-discriminatory, statewide standard, practice, and procedure for the counting of votes cast on an iVotronic DRE. The U.S. Supreme Court has held that "[t]he formulation of uniform rules to determine intent [of voters] based on . . . recurring circumstances is practicable and . . . necessary." *Bush v. Gore*, 531 U.S. 98 (2000) (*per curiam*). Moreover, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *See id.* (referencing *Harper v. Virginia Bd. Of Elections,* 383 U.S. 663, 665 (1966)).

3. Texas is a covered jurisdiction under the Federal Voting Rights Act of 1965. 42 U.S.C. § 1973b(f) (2006). As such, the election standards, practices, and procedures in Texas are frozen and cannot be changed until any proposed new procedure, standard or practice, has been

subjected to administrative review and approval by the U.S. Department of Justice, or after a lawsuit before the United States District Court for the District of Columbia. 42 U.S.C. § 1973c.

4. Intervenor is the current State Representative for Texas House District 105. On November 4, 2008, Intervenor defeated the challenger, Robert S. Romano (hereinafter "Romano"), and was re-elected to another term as State Representative for House District 105 (hereinafter the "Election Contest").

5. On November 10, 2008, the Provisional and Late Ballot Review Board reviewed the provisional ballots from the Election Contest and, despite the Election Judge whiting-out affidavits and accepting illegal ballots, Intervenor remained the winner of the election.

6. On November 21, 2008, Romano filed a Request for a Recount, pursuant to the Texas Election Code § 211.001 *et seq.* seeking a recount of the ballots cast in the Election Contest. However, instead of conducting the recount using the same counting procedures that were used in all other Dallas County races, Romano, assisted by the TEXAS DEMOCRATIC PARTY; BOYD L. RICHIE, in his capacity as Chairman of the Texas Democratic Party; FRANK JOSEPH; and BRETT ROSENTHAL (hereinafter "Plaintiffs"), now request this court to change the rules.

7. Plaintiffs essentially ask this Court to order the Dallas County Elections Department to count votes even though the voter, after receiving numerous instructions and education on the issue, intentionally de-selected a vote for a candidate in a particular contest. The effect of Plaintiffs' request is that the Elections Department would be required to pretend that a "no-vote" was in fact a vote for a particular candidate.

8. By their complaint, Plaintiffs ask this Court for declaratory relief and to enjoin the Defendants from counting the votes in the legally-prescribed manner, essentially ordering

Defendants to count votes that were never cast. Plaintiffs' position is in direct contradiction to the statewide policy, procedure and standard established by federal law, the Secretary of State, who, pursuant to the Texas Elections Code, is the chief election officer in the State of Texas, and the holding of the United States District Court for the Western District of Texas. *See Tex. Democratic Party v. Williams*, No. A-07-CA-115-SS (W.D. Tex. Aug. 16, 2007) (J.Sparks) (not designated for publication).

III.
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

9. Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, Intervenor files this Motion to Dismiss for Lack of Subject Matter Jurisdiction on the grounds that this Court lacks jurisdiction to hear or consider election contests for state representative races in a situation such as the present case.

A. THE ISSUE IS NOT RIPE AND THERE IS NO JUSTICABLE CONTROVERSY, PURSUANT TO ARTICLE III, SECTION 2 OF THE UNITED STATES CONSTITUTION

10. Complaining about events that occurred nearly a month ago and a ballot that they themselves approved, Plaintiffs have filed this suit on the very day that the recount was to occur; failed to name as a party the very person most affected by the outcome of this lawsuit, *i.e.*, Intervenor, the HONORABLE LINDA HARPER-BROWN; served process on no one; and requested a Temporary Restraining Order at the eleventh hour.

11. The obligation to conduct a recount is spelled out by law and assigned by law to the Recount Supervisor, and Plaintiffs make no allegation that the recount will not, in fact, take place. Instead, they make a broad and obscured allegation that the Defendants have been violating the Texas elections laws for the last 10 (ten) years, and that when she later undertakes

the recount, the Recount Supervisor will adhere to the same alleged misinterpretation of such laws. On the basis of those assumptions, Plaintiffs assert that they might, at some point be harmed, by the method of the recount. In fact, the Plaintiffs appear to challenge the voters' decision to de-select (*i.e.*, to affirmatively remove the "X" from the name of the particular candidate) after they have selected all of the democratic candidates for office and to compel the vote to count as a so-called "emphasis" vote for that candidate and, one would presume, for any other de-selected candidates for whom the voter removed the "X." Whatever the problems with the merits of this argument – and there are many – the Plaintiffs first have the burden of affirmatively establishing the Court's subject matter jurisdiction and, in particular, showing that this action is not merely a request for an advisory opinion in advance of an actual justiciable controversy. *See El Paso Elec. Co. v. Fed. Energy Reg. Comm'n*, 667 F.2d 462, 466 (5th Cir. 1982) (holding that questions of mootness, standing, ripeness and political questions are all threshold questions and part of the concept of "justiciability").

12. Federal Courts do not exist to decide hypothetical claims. *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 545 (5th Cir. 2008) (citing *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003)) ("A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical"). This bedrock principle is grounded in the separation of powers provisions of both the State and Federal Constitutions, which assign the power to make abstract declarations of law to other branches of the government. *Halder v. Std. Oil Co.*, 642 F.2d 107, 110 (5th Cir. 1981); UNITED STATES CONST. Art III, sec 2; TEX. CONST. Art. II, sec. 1. Whenever a case relies on the hypothetical occurrence of facts or events that have not yet come to pass, the litigant seeks an advisory ruling that is beyond the Court's jurisdiction. *See Halder*, 642 F.2d at 110.

13. Far from carrying their burden of showing a presently ripe, justiciable controversy, it is clear that Plaintiff's putative action here is a quintessential example of a request for an advisory opinion. Plaintiffs intend to prove that the officials conducting the recount will, in the future, make an interpretation of the law that they disagree with and, as to which, they hope this Court will render an opinion in advance of the recount itself. Worse yet, Plaintiffs have not even properly alleged that they will suffer any harm in the absence of the court's intervention, *i.e.*, that they will lose unless the Court accepts their novel interpretation of Texas law or, conversely, that the Court's adoption of their legal theory would change the result. Thus, they do not – and cannot – suggest that there is any harm that they seek to avoid or that the remedy they seek will have any effect.

14. It is hardly surprising, that the courts have seen premature efforts like this as unripe and/or requests for advisory opinions beyond their judicial power. In *Nat'l Park Hospitality Ass'n v. Dept. of Interior,* 538 U.S. 803, (2003) for example, the plaintiffs hoped to challenge the an administrative regulation. *Id.* at 807-08 ("Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties"). The United State Supreme Court articulated the test: "Determining whether administrative action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Id.* at 808. The Court concluded that the case was not yet ripe when it was filed because the anticipation of some harm failed to meet the "hardship" requirement of the test. *See id.* (holding that the issue is not ripe until some "concrete action

applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him" occurs).

15. As proponents of this proceeding for injunctive relief, Plaintiffs have the burden of establishing the Court's subject matter jurisdiction. They have not even attempted to do so. More importantly, at this stage of the proceedings, they cannot possibly do so.

B. CONCLUSION

16. The issues raised in Plaintiffs' Original Complaint are not ripe for determination. Therefore, Intervenor's Motion to Dismiss for Lack of Subject Matter Jurisdiction should, in all things, be granted.

IV.
MOTION TO JOIN NECESSARY PARTIES AND BRIEF IN SUPPORT THEREOF

17. Pursuant to Rule 19 of the Federal Rules of Civil Procedure, Intervenor, files this Motion to Join Necessary Parties and Brief in Support Thereof on the following grounds, the facts of which are established from the face of Plaintiffs' pleadings:

a. There exists a defect in the parties in that the Texas Secretary of State is a required party and this matter should not proceed until such time as Plaintiffs properly join the Secretary of State.

b. There exists a defect in the parties in that the Libertarian candidate, James G. Baird, is a required party and this matter should not proceed until such time as Plaintiffs properly join him.

Accordingly, this matter should be abated until such time as the foregoing defects have been corrected by Plaintiffs.

18. Both the Texas Secretary of State and the Libertarian candidate, James G. Baird, are required parties to this matter. Federal Rule of Civil Procedure 19 provides, in relevant part:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> (1) in that person's absence, the court cannot accord complete relief among existing parties, or
>
> (2) that person claims an interest relating to the subject of the action and is so situated that disposition of the action in that person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect that interest or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FED. R. CIV. P. 19(a)(1) (2008).

19. The Texas Secretary of State is the chief election officer of the State. TEX. ELEC. CODE § 31.001. The Secretary of State is responsible for all aspects of the election process. *See* TEX. ELEC. CODE § 31.002, *et seq.* The Secretary of State is also the party to take appropriate action for the protection of voting rights. TEX. ELEC. CODE § 31.005. As such, the Secretary of State should be a party to this election dispute which directly impacts her official duties.

20. Furthermore, the Secretary of State is the Recount Coordinator for the recount requested by Romano. Pursuant to section 211.002(6) of the Texas Election Code, the "Recount Coordinator" means the authority to whom a petition for an initial recount or an expedited recount is submitted under section 212.026 or 212.082. It is undisputed that the Texas Secretary of State was the authority to whom the recount petition was submitted. As the Recount Coordinator, the Secretary of State is a required party to a legal dispute involving the recount process.

21. Finally, the Texas Secretary of State is a necessary party because it is the Secretary of State's ruling that forms the basis of Plaintiffs' complaint. By their Original

Complaint, Plaintiffs seek to have this Court invalidate the Secretary of State's statewide policy, procedure and standard. That being the case, Plaintiffs should be required to name the Secretary of State and give her the opportunity to participate in this dispute.

22. The Secretary of State and the Libertarian candidate, James G. Baird, both claim an interest relating to the subject matter of the action and are so situated that the disposition of the action in their absence may as a practical matter impair or impede their ability to protect those interests. Accordingly, pursuant to Rule 19, the Court should order that the Secretary of State and the Libertarian candidate, James G. Baird be named as parties to this action.

V.
INTERVENOR'S ORIGINAL ANSWER

23. Intervenor admits the allegations in Paragraph 1 of Plaintiffs' Original Complaint (hereinafter the "Complaint"), except to the extent that such paragraph appears to suggest that Dallas County, Texas currently utilizes voting technology which relies exclusively on paper ballots.

24. Intervenor denies the material allegations in Paragraph 2 of the Complaint.

25. Intervenor denies the material allegations in Paragraph 3 of the Complaint.

26. Intervenor denies the material allegations in Paragraph 4 of the Complaint.

27. Intervenor admits the material allegations in Paragraph 5 of the Complaint.

28. Intervenor denies the material allegations in Paragraph 6 of the Complaint.

29. Intervenor admits the material allegations in Paragraph 7 of the Complaint.

30. Intervenor denies the material allegations in Paragraph 8 of the Complaint.

31. Intervenor denies the material allegations in Paragraph 9 of the Complaint.

32. Intervenor denies the material allegations in Paragraph 10 of the Complaint.

33. Intervenor denies the material allegations in Paragraph 11 of the Complaint.

34. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the allegations asserted in Paragraph 12 of the Complaint and, therefore, denies same.

35. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the allegations asserted in Paragraph 13 of the Complaint and, therefore, denies same.

36. Intervenor denies the material allegations in Paragraph 14 of the Complaint.

37. Intervenor denies the material allegations in Paragraph 15 of the Complaint.

38. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the allegations asserted in Paragraph 16 of the Complaint and, therefore, denies same.

39. Intervenor denies the material allegations in Paragraph 17 of the Complaint.

40. Intervenor denies the material allegations in Paragraph 18 of the Complaint.

41. Intervenor denies the material allegations in Paragraph 19 of the Complaint.

42. Intervenor denies the material allegations in Paragraph 20 of the Complaint.

43. Intervenor denies the material allegations in Paragraph 21 of the Complaint.

44. Intervenor denies the material allegations in Paragraph 22 of the Complaint.

45. Intervenor admits the material allegations in Paragraph 23 of the Complaint.

46. Intervenor admits the material allegations in Paragraph 24 of the Complaint.

47. Intervenor admits the material allegations in Paragraph 25 of the Complaint.

48. In Paragraph 26 of the Complaint, Intervenor is without knowledge or information sufficient to form a belief as to the truth of the amount of money or resources Plaintiffs spent in the election. Intervenor admits that members of the Texas Democratic Party ran as Democrats in the election.

49. Intervenor admits the material allegations in Paragraph 27 of the Complaint.

50. Intervenor admits the material allegations in Paragraph 28 of the Complaint.

51. Intervenor admits the material allegations in Paragraph 29 of the Complaint.

52. Intervenor admits the material allegations in Paragraph 30 of the Complaint.

53. Intervenor denies the material allegations in Paragraph 31 of the Complaint.

54. Intervenor admits the material allegations in Paragraph 32 of the Complaint.

55. Intervenor admits the material allegations in Paragraph 33 of the Complaint.

56. Intervenor denies the material allegations in Paragraph 34 of the Complaint.

57. Intervenor denies the material allegations in Paragraph 35 of the Complaint.

58. Intervenor denies the material allegations in Paragraph 36 of the Complaint.

59. Intervenor denies the material allegations in Paragraph 37 of the Complaint.

60. Intervenor denies the material allegations in Paragraph 38 of the Complaint.

61. Intervenor admits the material allegations in Paragraph 39 of the Complaint.

62. Intervenor admits the material allegations in Paragraph 40 of the Complaint.

63. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the allegations asserted in Paragraph 41 of the Complaint.

64. Intervenor is without knowledge or information sufficient to form a belief as to the truth of the allegations asserted in Paragraph 42 of the Complaint.

65. Intervenor admits the material allegations in Paragraph 43 of the Complaint.

66. Intervenor admits the material allegations in Paragraph 44 of the Complaint.

67. Intervenor admits the material allegations in Paragraph 45 of the Complaint.

68. Intervenor admits the material allegations in Paragraph 46 of the Complaint.

69. Intervenor denies the material allegations in Paragraph 47 of the Complaint and refers the Court to Intervenor's Motion to Dismiss set forth above.

70. Intervenor denies the material allegations in Paragraph 48 of the Complaint.

71. In Paragraph 49 of the Complaint, Intervenor admits that any determiniation of this case must be heard and made by a panel of three judges. Intervenor denies that a three-judge panel is not necessary to consider and issue a temporary restraining order.

72. Paragraph 50 of the Complaint requires no response.

73. Intervenor denies the material allegations in Paragraph 51 of the Complaint.

74. Intervenor denies the material allegations in Paragraph 52 of the Complaint.

75. Intervenor admits the material allegations in Paragraph 53 of the Complaint.

76. Intervenor denies the material allegations in Paragraph 54 of the Complaint.

77. Intervenor denies the material allegations in Paragraph 55 of the Complaint.

78. Intervenor denies the material allegations in Paragraph 56 of the Complaint.

79. Intervenor denies the material allegations in Paragraph 57 of the Complaint.

80. Intervenor denies the material allegations in Paragraph 58 of the Complaint.

81. Intervenor denies the material allegations in Paragraph 59 of the Complaint.

82. Paragraph 60 of the Complaint requires no response.

83. Paragraph 61 of the Complaint requires no response.

84. Intervenor denies the material allegations in Paragraph 62 of the Complaint.

85. Paragraph 63 of the Complaint requires no response.

86. Paragraph 64 of the Complaint requires no response.

87. Paragraph 65 of the Complaint requires no response.

88. Intervenor denies the material allegations in Paragraph 66 of the Complaint.

89. Intervenor denies the material allegations in Paragraph 67 of the Complaint.

90. Paragraph 68 of the Complaint requires no response.

91. Paragraph 69 of the Complaint requires no response.

92. Paragraph 70 of the Complaint requires no response.

93. Intervenor denies the material allegations in Paragraph 71 of the Complaint.

94. Intervenor denies the material allegations in Paragraph 72 of the Complaint.

95. Paragraph 73 of the Complaint requires no response.

VI.
INTERVENOR'S COUNTERCLAIM FOR DECLARATORY RELIEF

A. PLAINTIFFS' PROPOSED RELIEF VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION

96. Intervenor incorporates by reference herein paragraphs 1 through 22, inclusive, as if set forth verbatim.

97. The United States Constitution, Amendment V, provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." In numerous decisions, the United States Supreme Court has held "that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws. *Davis v. Passman*, 442 U.S. 228, 236 (1979) (citing *Vance v. Bradley*, 440 U.S. 93, 95 n. 1, (1979); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, (1976); *Buckley v. Valeo*, 424 U.S. 1, 93, (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2, (1975); *Bolling v. Sharpe*, 347 U.S. 497, 500, (1954)). However, if Plaintiffs are granted the remedy that they seek, the HONORABLE LINDA HARPER-BROWN, along with every voter in Texas House District 105, will be treated substantially disparately than other voters within Dallas County and the rest of the State of Texas. Specifically, their votes will be counted in a different manner from every other voter within Dallas County or the State of Texas who voted on an iVotronic DRE.[1]

98. The State of Texas, *via* its chief election officer, has implemented a uniform, non-discriminatory, statewide standard, practice, and procedure for the counting of votes cast on an

[1] The counties of Angellina, Armstong, Bexar, Brewster, Briscoe, Caldwell, Chambers, Childress, Comal, Cottle, Crane, Dallas, Freestone, Grayson, Hall, Hidalgo, Hill, Hood, Howard, Hutchison, Jefferson, Jones, Kendall, Kleberg, Lavaca, Leon, Limestone, Midland, Montague, Moore, Morris, Navarro, Palo Pinto, Polk, Presidio, Rockwall, Rusk, San Jacinto, Scurry, Smith, Starr, Swisher, Upton, Victoria, Webb, Wichitia, and Williamson all used the iVotirnic DRE voting system in some manner during the November 2008 General Election. A list of the types of voting machines used by each County in Texas may be obtained at http://www.sos.state.tx.us/elections/laws/votingsystems.shtml (last visited on December 1, 2008).

iVotronic DRE. The U.S. Supreme Court has held that "[t]he formulation of uniform rules to determine intent [of voters] based on . . . recurring circumstances is practicable and . . . necessary." *Bush v. Gore*, 531 U.S. 98 (2000) (*per curiam*). Moreover, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *See id.* (referencing *Harper v. Virginia Bd. Of Elections,* 383 U.S. 663, 665 (1966)).

99. Intervenor respectfully requests a determination by this Court that Plaintiffs' Complaint and the relief Plaintiffs seek violate the right to equal protection afforded to the HONORABLE LINDA HARPER-BROWN, pursuant to the United States Constitution.

B. ATTORNEYS' FEES

100. Intervenor requests the recovery of her reasonable and necessary attorneys' fees for this action, pursuant to 42 U.S.C. § 1988 and 28 U.S.C. § 1920.

VII.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Intervenor, the HONORABLE LINDA HARPER-BROWN respectfully requests that this action be dismissed for lack of subject matter jurisdiction. Intervenor further prays that, in the alternative, the Court order that the Secretary of State, the Honorable Esperanza "Hope" Andrade and the Libertarian candidate, James G. Baird be named as parties to this action. Intervenor also prays that Plaintiffs take nothing by their Original Complaint. Intervenor further prays that the Court declare that Plaintiffs' Original Complaint violates the Equal Protection Clause of the United States Constitution. Intervenor further requests the recovery of the reasonable attorneys' fess necessarily incurred in this action.

Intervenor also prays for all other and further relief, both general and specific, at law and in equity, to which she has shown herself to be justly entitled.

Date: December 4, 2008

Respectfully submitted,

BURFORD & RYBURN, L.L.P.

By: _____
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ATTORNEYS FOR THE HONORABLE LINDA HARPER-BROWN

CERTIFICATE OF CONFERENCE

I hereby certify that on this date a conference was held with the following attorneys of record in this action and the Honorable Linda Harper-Brown's Motion to Join Necessary Parties is opposed as follows:

Chad W. Dunn
Attorney for Plaintiffs _____ Oppose _____

Leon Carter
Attorney for Defendants _____ Agree _____

Dated: December 4, 2008.

WADE EMMERT

CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing document was served upon all attorneys of record in this proceeding with said service being effectuated by the following method:

____ Certified Mail, Return Receipt Requested
____ Telecopy
____ Email
____ Hand Delivery

Dated: December ____, 2008.

WADE EMMERT

Exhibit "1"

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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