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. DALLAS COUNTY, TEXAS; and BRUCE SHERBET, in his capacity as Election Administrator for Dallas County, Texas, *Defendants*.	§ § § § § § § § § § § § § § § §	Cause No. 08-CV-02117-P

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

TO THE HONORABLE JUDGE OF SAID COURT:

COMES 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 their Reply to Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment on Section 5 Claims, and would respectfully show the Court as follows:

I.

INTRODUCTION

Plaintiffs' filed a Motion for Summary Judgment urging that no genuine issue of material fact exists concerning Plaintiffs' claim the Defendants are in violation of Section 5 of the Voting Rights Act. In response, the Defendants offer no evidence that creates a fact issue. The reason Defendants produce no evidence is because the Chief Election Officer for Dallas County, Bruce Sherbet, has already admitted to each and every element of the Section Five claim Plaintiffs urge.

The lack of evidence is as important as the lack of explanation of the harm in pursuing preclearance under Section 5. As stated in Plaintiffs' original brief, courts, including the United States Supreme Court, require the Voting Rights Act to be given the broadest scope. Changes must be specifically described to the Department of Justice for any preclearance to be effective. Bruce Sherbet and Plaintiffs agree these changes were not described to the Department of Justice. Not only have Defendants failed to produce any evidence showing the appropriate preclearances were obtained, the Defendants fail to explain to the Court what harm would result in requiring such a preclearance prior to the next election.

In short, Plaintiffs have met their burden to offer evidence proving each and every element of Section 5 of the Voting Rights Act. There is no genuine issue of material fact and judgment should issue.[1]

II.

ARGUMENT

A. The Defendants' test for Section 5 claims is wrong.

The Defendants attempt to convince the Court of a different test to employ in Section 5 claims. *See* Br. at 3-5. For example, the Defendants attempt to convince the Court that proof on a Section 5 claim requires evidence of "discrimination." Br. at 5. The requirement to prove discrimination and any other allegations of additional requirements for Section 5 claims as alleged by the Defendants are not supported by the extensive history of Section 5 cases. For example, on February 17, 2009, the Fifth Circuit stated very specifically the analysis used in a Section 5 claim:

> (1) Whether the delegate allocation method is a 'standard, practice, or procedure with respect to voting' within the meaning of Section 5;
>
> (2) Whether the method constitutes a "change" to the covered jurisdictions baseline, i.e., "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 (2008) (internal citation omitted); and
>
> (3) Whether the party is a "political subdivision" subject to Section 5.

[1] In most cases, preclearance submission eliminates the need for further action on the Section 2 claims because the Department of Justice or the U.S. District Court for the District of Columbia will consider the discrimination question on preclearance.

LULAC v. State of Texas, 08-50581, p. 2-3 (5th Cir. February 17, 2009). In other words, there is no requirement for a plaintiff in a Section 5 case to prove the possibility for discrimination.[2] The Fifth Circuit held that a district court on a Section 5 case has no authority to make decisions with regards to discrimination. *See id*. at pp. 203. In fact, the San Antonio District Court was reversed for performing exactly the analysis Defendants request this Court make in this case. *See id*. *See* also *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996).

According to the Fifth Circuit, Plaintiffs must prove (1) a standard practice or procedure with respect to voting, (2) that was changed, and (3) the change was implemented by a jurisdiction covered by Section 5. With regard to the last element, there is no dispute Dallas County is subject to the terms of Section 5. With regard to the second element, there is no dispute that the punch card balloting system used by Dallas County prior to the launch of the iVotronic in 1998 was precleared. With regard to the first element, there is no doubt that the iVotronic is a standard practice or procedure with respect to voting.

The only question that could remain is whether the use of the iVotronic resulted in a change. With regard to this question, there is no dispute, at least if one believes the Chief Election Officer for the Defendants. The Chief Election Officer testified as follows:

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[2] Nevertheless, the ballots attached to the Brief in Support of Summary Judgment clearly show that the votes not counted as a result of the voting machine defect alleged in this case occur significantly more often in minority precincts. Plaintiffs are prepared to obtain expert testimony to prove such discrimination in support of their Section 2 case and also in support of their Section 5 case, in the event the Court requires such a showing.

Q. Okay. In other words, with paper and Scantron and punch card ballots, when a voter made a physical act toward an individual name, the machine recorded that as a vote for that name?

A. Yes.

Q. When we went to the ES&S, in some circumstances when a voter made a physical act toward a name, it was not recorded as a vote for that person?

A. On touch screen, yes, that's correct.

Q. And that's a change in how election practice and procedure occurred in Dallas County, is that right?

A. It's a change in how you count the recorded votes on the two different voting methods.

Q. That's a yes?

A. Yes.

Q. All right.

A. I'm not sure I understood it completely, that's why I was trying to say it back to see if that's what you were asking me.

Q. All right. Now, I want to turn to this review screen portion. On paper ballot, whether it was punch card, or a bubbled in ballot, you didn't have the review screen to review, you had the actual ballot, is that right?

A. Yes.

Q. As we talked about yesterday, if the ballot shows a straight ticket choice, and also reflects a physical effort toward an individual name of the same party, that ballot is going to be recorded as a vote for that nominee, is that true?

A. Yes.

Q. And when the voter reviews that ballot before slipping it into the box, they confirm that they're going to record a vote for that nominee, is that right?

A. I don't know if the voter confirms when they're putting it through the box, but by shading that in –

Q. They have the opportunity to review the ballot before they cast it to confirm what it is going to do?

A. Yes, they do.

Q. On the ES&S machine their opportunity to review the ballot to see what they're going to do is on the review screen is that right?

A. On electronic it's on the review screen, yes.

…

Q. Sure. On the ES&S machine, when the voter reviews the review screen before they cast their vote, and they observe the straight Democratic ticket at the top, and they observe no selection for a particular Democratic nominee, that was a different type of image for the voter to interpret and determine how their vote would be recorded than had been done on paper ballot, is that right?

A. It is different, yes.

Q. Okay. And that would be a different election practice and procedure used in Dallas County, is that right?

A. Yes, if you're using two different voting methods, yes.

Q. Now, I want to move on to the recount. In a recount, under paper ballot and optical scan and punch card ballots, when a recount was performed, and a recount committee observed a ballot where a straight party ticket was selected, as was also the name of the particular nominee of the same party, the recount committee counted that as a vote for the nominee, is that right?

A. Yes.

Q. When we got to the ES&S machine, now when a recount is performed of these printed review screens, as I understand it, your office's policy when that vote is counted, even thought it shows straight Democrat at the top, if it doesn't list anything in the particular race, then no vote is counted for that nominee, is that right?

A. That's correct.

Q. And that similarly was a change in election practice and procedure in Dallas County when that began to occur?

A. That's the direction of the Secretary of State so, yes.

…

Q. All right. But just so I'm clear, there is nothing those [preclearance] submissions that say, we're going to present the voter with a review screen that shows a straight ticket option will be recorded, but in fact not record a straight ticket option?

A. I don't see anything on here that addresses it the way you've asked.

Q. Now, turning to the recount, is there anything in those documents that says that when we do a recount, and we see a printed cast vote record from the ES&S machine that shows a straight ticket choice, we're not going to count that, we're only going to count the individual selection?

A. I'm sorry, could you ask it one more time?

Q. Sure. Is there anything in those submissions that you see that tells the Department of Justice that in a recount when the cast vote records from the ES&S are printed, and they show a straight ticket choice, that straight ticket choice will not be recorded if no selection is shown in the individual race?

A. I don't see anything addressing that.

Q. Do you see anything in the DOJ submission where there is an explanation to the Department of Justice how the three changes I've been talking about might affect minority voting rights?

A. I don't see anything in there addressing this.

App. at 123-25.

Furthermore, Defendants' Chief Election Officer admits that all of the changes described in the testimony above, and not described in the preclearance document submitted to the Department of Justice, became effective when the iVotronic was adopted in 1998. *See* App. at 107-08. Therefore, the record is complete as to what the baseline was (paper ballot method) and as to the changes to such procedure that have not been precleared. Plaintiffs have thoroughly met their burden of proof under Section 5.

B. <u>Defendants have failed to meet their burden to prove an adequate preclearance submission</u>.

The Defendants argue in a few short paragraphs that the changes alleged were adequately precleared. First, none of the paragraphs point the Court to specific language in the preclearance submissions that explain the changes at issue. Nevertheless, even if Defendants had pointed to specific language, the Defendants' Chief Election Officer, Bruce Sherbet has already testified under oath that there are no provisions in the preclearance documents describing the changes at issue.

Defendants attempt to confuse the issue by noting that there were two preclearance submissions, one in 1998 and one in 2006. *See* BR. at p. 7. This is a fact Plaintiffs do not deny. Rather, Plaintiffs have reviewed both submissions, as did Mr. Sherbet on the witness

stand, and there is no language in either submission that relates to the changes at issue in this case. Defendants have failed to offer any evidence in that regard other than a general provision that speaks to over voting.

C. Plaintiffs are entitled to injunctive relief.

Section 5 of the Voting Rights Act contains the exclusive requirements for relief in this case. The Defendants attempt to persuade the Court to apply common law and injunction standards to this case. In other words, the Defendants urge the Court to add additional elements to the Section 5 analysis. *See* Br. at p. 8. These additional requirements are not supported by the case law. "We have reviewed the numerous cases in which a three-judge panel was convened pursuant to 42. U.S.C. § 1973c [Section 5] and 28 U.S.C. § 2284, and we have found no persuasive authority for the proposition that the traditional preliminary injunction test applies to claims for injunctive relief in the face of a Section 5 preclearance violation." *See U.S. v. State of Louisiana*, 952 F. Supp. 1151 (W.D.L.A. 1997) (three-judge court) (surveying numerous district court and United States Supreme Court opinions and concluding the traditional injunction test is inapplicable in Section 5 cases). "A fair reading of the cases in which Section 5 of the Voting Rights Act was the basis for injunctive relief justifies the conclusion that the traditional requirements for [obtaining a preliminary injunction] are not applicable." *See Puerto Rican Leg. Defense & Educ. Fund v. City of N.Y.*, 769 F. Supp. 74, 78 (E.D.N.Y. 1991) (three-judge court).

Furthermore, Defendants claim "Plaintiffs are not automatically entitled to injunctive relief", "even if Plaintiffs prevail on their Section 5 claims." Br. at p. 8. This statement is directly in contradiction to the United States Supreme Court precedent. "[i]f a voting change subject to Section 5 has not been precleared, Section 5 Plaintiffs are *entitled* to an injunction prohibiting implementation of the change." *See U.S. v. State of Louisiana* , 952 F. Supp. 1151 at 1162 quoting *Lopez v. Monterey County*, 526 U.S. 266 (1999)

The final additional requirement the Defendants attempt to add to Section 5 claims relates to laches. In Defendants response, no effort is made to explain the numerous cases cited in Plaintiffs' Brief that find laches inapplicable in the Section 5 context. Furthermore, as pointed out in Plaintiffs' Original Brief, the courts that do consider laches applicable to Section 5 claims have only done so in the context of a plaintiff requesting relief to undo an election that has already occurred. The Defendants have cited no authority to the Court that laches bars a Section 5 claim when only prospective relief is sought. Because the Plaintiffs request the Court order Defendants to seek preclearance before using the election practices and procedures in the *future*, laches does not apply. The Defendants have failed to meet their burden of proof on this affirmative defense.

II.

CONCLUSION

As a result of the foregoing and based upon the Briefs of the parties, the Plaintiffs request the Court grant this Motion for Summary Judgment because Defendants have failed

to raise a genuine issue of material fact and Plaintiffs have carried their burden to prove the elements of a Section 5 claim.

Dated this 20th day of March, 2009.

Respectfully submitted,

TEXAS DEMOCRATIC PARTY and
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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2009, I electronically filed the foregoing document with the Clerk of the United States District Court, Northern District of Texas, Dallas Division, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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