

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' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS  
PLAINTIFFS' FIRST AMENDED ORIGINAL COMPLAINT AND BRIEF IN SUPPORT**

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DALLAS COUNTY, TEXAS AND  
BRUCE SHERBET, IN HIS CAPACITY  
AS ELECTION ADMINISTRATOR  
FOR DALLAS COUNTY, TEXAS**

Defendants Dallas County, Texas (“Dallas County”) and Bruce Sherbet (“Sherbet”), in his capacity as Election Administrator for Dallas County, Texas (collectively “Dallas County”) file this Reply Brief in Support of Defendants’ Motion To Dismiss Plaintiffs’ First Amended Complaint (“Complaint”),<sup>1</sup> as follows:

## **I. INTRODUCTION**

Plaintiffs complain about the manner in which the iVotronic, a touch-screen voting machine, tabulates voter selections in the context of certain straight party votes. Plaintiffs’ Voting Rights Act claims should be dismissed because: (1) the iVotronic system was precleared with the Department of Justice over ten years ago; (2) Plaintiffs failed to identify anyone who has been injured as a result of the complained of method of tabulating votes; and (3) Plaintiffs’ Complaint lacks any factual allegations concerning any denial or abridgment of their right to vote by reason of their racial or language minority status.

## **II. ARGUMENTS AND AUTHORITIES**

### **A. This Court lacks subject matter jurisdiction because Plaintiffs lack standing.**

In their Response to Defendants’ Motion to Dismiss (“Plaintiffs’ Response”), Plaintiffs ask this Court to disregard the fact that the Complaint itself does not establish standing. *See* Response at 8-16. When a plaintiff’s pleading fails to establish standing, a plaintiff may either amend its complaint or submit affidavits, which are consistent with its pleading. *Warth v. Sedlin*, 422 U.S. 490, 501 (1975). Plaintiffs have failed to do either.

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<sup>1</sup> Despite the pendency of Defendants’ motion to dismiss, Plaintiffs have prematurely filed a motion for summary judgment with respect to their section 5 claim. Defendants will address Plaintiffs’ arguments regarding their section 5 claim in Defendants’ response to Plaintiffs’ motion for summary judgment. To the extent necessary, Defendants incorporate their response herein.

**1. The Court lacks subject matter jurisdiction to consider Plaintiffs' section 5 claims because they are moot.**

Plaintiffs do not dispute that the iVotronic machine was precleared pursuant to section 5 more than 10 years ago. The dispute between the parties is whether section 5 requires Dallas County to preclear every possible scenario that arises when using these machines after obtaining preclearance. To the extent Plaintiffs assert that every possible component of a precleared voting system must be precleared individually, this Court lacks subject matter jurisdiction. *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”).

**2. Joseph and Rosenthal lack standing under section 5 because they lack a personal injury that is fairly traceable to the complained of conduct.**

Plaintiffs acknowledge that the existence of their alleged injury is contingent on the occurrence of a series of events.<sup>2</sup> Yet, instead of amending their Complaint or submitting affidavits to establish such an injury, Plaintiffs incorrectly contend that Joseph and Rosenthal have standing simply because they are registered voters in Dallas County. Complaint ¶¶ 34-35. Plaintiffs' Complaint fails to allege that Joseph or Rosenthal used an iVotronic machine in the November 4, 2008 General Election, cast a straight party ballot, and proceeded to de-select the names of individual candidates while intending to cast “emphasis votes” for those candidates. *See generally* Complaint.<sup>3</sup> Because Joseph and Rosenthal have not suffered any injury that is

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<sup>2</sup> *See* Plaintiffs' Response at 13-14 (stating that voters “who do not vote straight party, those who vote straight party but do not use the “straight party” option or those who vote straight party using the “straight party” option but who do not also individually select nominees of the same party[] do not suffer” the particularized injury alleged in the Complaint).

<sup>3</sup> The cases cited by Joseph and Rosenthal are inapplicable reapportionment and at-large election cases. *See* Response at 11. The plaintiffs in those cases have standing based on their registration in a particular district because as racial or language minorities, they would experience vote dilution as a result of

fairly traceable to the complained of conduct, their section 5 claims should be dismissed. *See Segue v. State of La.*, No. 07-5221, 2007 WL 2900207, at \*1, 3-4 (E.D. La. Oct. 3, 2007) (concluding plaintiff lacked standing because she lacked an actual, particularized injury fairly traceable to the procedure alleged to be a 5 violation); *Bone Shirt v. Hazeltine*, 444 F. Supp. 2d 992, 996 (D.S.D. 2005) (same).<sup>4</sup>

**3. Joseph and Rosenthal lack standing under section 2 because they lack a personal injury that is fairly traceable to the complained of conduct.**

Plaintiffs fail to cite any authority for the assertion that the Court should defer dismissing Plaintiffs' section 2 claims until a three-judge panel has first decided whether a section 5 violation exists. Response at 13. Regardless of whether a section 5 violation exists, Plaintiffs still have the threshold burden to prove their standing to pursue a section 2 violation. *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (explaining that standing is "the threshold question in every federal case"). Because Joseph and Rosenthal fail to allege that their right to vote was denied or abridged on the basis of their status as a racial or language minority, Joseph and Rosenthal lack standing to bring a section 2 claim. *See, e.g., Casaburro v. Volusia County Corp.*, No. 6-07-cv-56-OLL-KRS, 2008 WL 1771774, at \*3 (M.D. Fla. April 15, 2008) (finding plaintiffs lacked standing because their complaint "fail[ed] to allege that the plaintiffs individually had their right

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reapportionment or conversion to an at-large system. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 555 (1969) (merely holding that a private right of action exists under section 5); *Bond v. White*, 508 F.2d 1397, 1400 (5th Cir. 1975) (concerning the ability of five Black residents, who challenged conversion from district voting to at-large voting to recover attorneys' fees); *Lopez v. Merced County, Cal.*, 473 F. Supp. 2d 1072, 1079-80 (E.D. Cal. 2007) (concerning Hispanic, Spanish-speaking voters' challenges to boundaries and annexations).

<sup>4</sup> In an attempt to diminish the holding of *Bone Shirt*, which Defendants cite in their Motion, Plaintiffs' Response cites *Quick Bear Quiver v. Nelson*, 387 F. Supp. 2d 1027, 1031 (D.S.D. 2005). *Quick Bear Quiver* concerned challenged redistricting; accordingly, its holding does not support standing in this factually inapposite case. *Id.* Furthermore, Plaintiffs' analysis wrongly focuses on the prudential limits on standing in *Bone Shirt* rather than the Article III standing requirements of an injury-in-fact causally linked to the complained of conduct—the holding for which *Bone Shirt* was cited.

to vote denied or abridged on account of race, color, or previous condition of servitude.”). Thus, this Court should dismiss Joseph and Rosenthal’s claims for lack of subject matter jurisdiction.<sup>5</sup>

#### **4. The TDP lacks associational standing under section 5 and section 2.**

The TDP’s assertion that its “strong interest in seeing Dallas County does not violate the voting laws,”<sup>6</sup> is insufficient to confer standing. *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) (“Our decisions make clear that an organization’s abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III.”). Plaintiffs agree that for an organization to have standing to bring suit on behalf of its members, the association must satisfy the three-prong inquiry set forth by the Supreme Court in *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1997): (1) the association’s members “would otherwise have standing to sue in their own right;” (2) “the interests it seeks to protect are germane to the organization’s purpose;” and (3) participation of individual members is not required. *See* Response at 9-10. Courts have interpreted the first prong of the *Hunt* test to require an association to specifically identify a member of the association who suffers an actual, particularized harm that is fairly traceable to the complained of conduct. *See, e.g., National Treasury Employees Union v. United States Dept. of the Treasury*, 25 F.3d 237, 242 (5th Cir. 1994).

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<sup>5</sup> Plaintiffs’ cases provide no support for their standing argument. In each instance, the individual who alleged a section 2 violation was a racial or language minority who either pleaded use of the challenged voting system or pleaded vote dilution through redistricting or through an at-large process. *See White-Battle*, 222 Fed. Appx. at 305-06 (finding African-American voter had standing based on sworn statement that her vote was not counted); *United States v. Charleston County*, 316 F. Supp. 2d 268 (D.S.C. 2003) (finding registered voters had standing to challenge at-large method for electing city council); *Black v. McGuffage*, 209 F. Supp. 2d 889, 896-97 (N.D. Ill. 2002) (finding Latino and African-American voters had standing to allege vote dilution where they voted in minority districts that used deficient systems, namely punch card and optical scan machines lacking error notification, unlike the more accurate systems used in non-minority districts); *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (finding Hispanic and African-American voters had standing to challenge redistricting).

<sup>6</sup> Response at 11.

The TDP lacks associational standing for its section 5 and 2 claims because the TDP fails to identify a single member of its organization with an alleged injury fairly traceable to the complained of conduct. TDP further lacks standing under section 2 because Plaintiffs do not identify a single racial or language minority member of the TDP who, as a result of the complained of conduct, was denied or abridged his or her right to vote on the basis of his or her status as a racial or language minority.<sup>7</sup>

Plaintiffs' section 5 cases are factually inapposite. Unlike in this case, the challenged practices at issue would, by their nature, affect every racial or language minority voter in the district. *See LULAC of Tex. v. State of Texas*, 995 F. Supp. 719, 724 n.6 (W.D. Tex. 1998) (concerning change from elective to appointive method for judges); *Milwaukee Branch of the NAACP v. Thompson*, 935 F. Supp. 1419 (E.D. Wis. 1996) (challenging the at-large method for electing state circuit and appellate judges). Plaintiffs' other cases are distinguishable because those courts considered recent voting regulations whose effects might not be felt by a member of the organization until election day. *Florida State Conf. for the NAACP v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008); *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 422-23 (E.D. Mich. 2004). Accordingly, it was impossible to identify an individual member to

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<sup>7</sup> Plaintiffs' Response merely argues that "Plaintiffs specifically allege the operation of Dallas County's voting machine adversely affects straight-ticket voters." Response at 13. This is insufficient. *See Coalition for ICANN Transparency, Inc. v. Verisign, Inc.*, 542 F. Supp. 2d 924, 934 (N.D. Cal. 2006) ("CFIT's complaint contains a single cryptic sentence about its members' identities. This is insufficient."); *American Chemistry Council v. Department of Transp.*, 468 F.3d 810, 819 (D.C. Cir. 2006) (finding associations lacked standing where, among other things, they failed to establish "certainly impending dangers for any particular member of the petitioners' associations" reasoning that associations "should easily have access to information concerning whether one of their members has been harmed of faces a substantial probability of being harmed"); *American Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38 (D.D.C. 1998) ("Nowhere in their pleadings do plaintiffs identify one injured person by name, allege that the injured person is a member of one of plaintiff organizations . . . or allege facts sufficient to establish harm to that member."); *Maine Ass'n of Interdependent Neighborhoods v. Commissioner, Maine Dept. of Human Servs.*, 747 F. Supp. 88, 92 (allegation that plaintiff organization "has members" who are affected was inadequate to confer associational standing where complaint, *inter alia*, failed to "identify the member allegedly affected").

challenge the voter qualifications in advance. *Browning*, 522 F.3d at 1160; *Bay County*, 347 F. Supp. 2d at 423.<sup>8</sup> By contrast, the present case concerns a voting machine used by Dallas County for 10 years.

The Complaint does not allege that Joseph and Rosenthal are members of the TDP, but even if it had, Joseph and Rosenthal lack of standing themselves and, therefore, cannot confer standing on the TDP. *See Access 4 All, Inc. v. Wintergreen Commercial P'ship, Ltd.*, No. Civ. A. 3:05-CV-1307-G, 2005 WL 2989307, at \*6 (N.D. Tex. Nov. 7, 2005) (association lacked standing where sole member named in complaint lacked standing); *Texas Peace Officers' Ass'n v. City of Galveston, Tex.*, 944 F. Supp. 562, 563-64 (S.D. Tex. 1996) (finding association “fail[ed] to plead the most basic requirement of associational standing—that individual Plaintiffs are members of the organization,” and explaining that “an organization cannot sue under an associational standing theory if the aggrieved parties are not members of the organization”).

Finally, the TDP's submission of more than *ten thousand* ballot images does not establish standing. *See* Response at 14-15 & Plaintiffs' Appendix at 212. In fact, Plaintiffs' Response (1) does not cite to any specific ballots among the more than ten thousand proffered images; (2) fails to identify which districts Plaintiffs assert are minority districts; and (3) lacks any evidence to support their assumption that voters who selected the Democratic straight party option are in fact members of the TDP.

For all of the foregoing reasons, the TDP lacks associational standing to assert claims under section 2 or section 5 of the VRA.

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<sup>8</sup> Because TDP had direct standing, the Court in *Texas Democratic Party v. Benkiser* did not reach the issue of whether the TDP could sue on behalf of Democratic voters or the party's non-candidate members. 459 F.3d 582, 587 n.5 (5th Cir. 2006).

**5. TDP and Richie lack standing on their own under section 2.**

Boyd Richie, suing in his capacity as Chairman of the TDP, and the TDP both failed to allege an injury-in-fact that is fairly traceable to Dallas County' alleged violation of section 2 of the VRA. Absent an allegation that the iVotronic's calculation of votes "affected *their* voting power or subjected *them* to invidious racial classification or other wise injured *them* directly," Richie and the TDP lack standing under section 2. See *Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1335 (11th Cir. 2007).

**B. Plaintiffs fail to state a section 2 claim upon which relief can be granted.<sup>9</sup>**

Plaintiffs' Complaint lacks any allegation as to how Dallas County's treatment of manually de-selected straight party votes denies or abridges any plaintiff's rights as a race or language minority. Plaintiffs' Complaint lacks any allegation that the voting practices and procedures at issue were not equally open to racial or language minority citizens, or that such citizens had less opportunity to participate in the political process. Even if, as Plaintiffs contend, they are not required to allege each of the *Gingles* factors, Plaintiffs' Complaint must nevertheless sufficiently allege that their votes have been denied or abridged *because of their status as race or language minorities*. See *White-Battle*, 222 Fed. Appx. at 305 ("To show a violation of section 2 of the VRA, *White-Battle* must show that a voting standard, practice or procedure was imposed in a manner which resulted in denial or abridgement of the right to vote on account of race.").<sup>10</sup> Because the Court is limited to Plaintiffs' pleadings when considering a

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<sup>9</sup> Plaintiffs fail to cite any authority or proffer any reason for their assertion that the Court should postpone dismissing Plaintiffs' section 2 claim until a three-judge panel has first decided whether or not a section 5 violation exists. Response at 13.

<sup>10</sup> Plaintiffs' case, *Metts v. Murphy*, 363 F.3d 8, 9-10 (1st Cir. 2004), supports Defendants' contention; there, African-American voters and organizations challenged a state redistricting plan as having the effect of depriving African-Americans equal opportunity to elect candidates. *Id.*

12(b)(6) motion, Plaintiffs' Section 2 claim should be dismissed. *See Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996) (citing *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992)).

**C. Plaintiffs' Claims Against Sherbet Should Be Dismissed.**

Plaintiffs ignore the portion of Defendants' Motion to Dismiss based on the grounds that Plaintiffs' identical claims against Sherbet in his official capacity as the Dallas County Elections Administrator are redundant and should be dismissed. *See* Motion at 18-19. Accordingly, the claims against Sherbet should be dismissed. *See Doe v. Eason*, No. Civ. A.3:98-CV-2454-P, 1999 WL 765645, at \*2 (N.D. Tex. Sept. 23, 1999); *Walton v. City of Milford, Tex.*, No. 3:06-CV-2291-L, 2008 WL 631240, at \*5 (N.D. Tex. Feb. 28, 2008).

**III. CONCLUSION AND REQUEST FOR RELIEF**

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 dismiss Plaintiffs' First Amended Original Complaint and grant Defendants any and all relief to which they may be entitled.

Respectfully submitted,

/s/ Jamil N. Alibhai

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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 24th day of February, 2009.

/s/ Jamil N. Alibhai

Jamil N. Alibhai