

their Motion for Summary Judgment on Section 5 claims.” *Id.* Finally, Plaintiffs request that the Court enter a permanent injunction after a full trial on the merits before three judges. *See id.* at 9, ¶ 37.

Because Defendants’ motion to dismiss is pending before the Court, no response or responsive pleading to Plaintiffs’ Application is required at this time. *See* FED. R. CIV. P. 12(a)(4). To the extent that any response is required, Defendants incorporate by reference herein their Motion to Dismiss Plaintiffs’ First Amended Original Complaint (doc. 24), Plaintiffs’ Motion to Stay and Rule 56(f) Motion, filed March 2, 2009, any response to Plaintiffs’ Motion for Summary Judgment, and their answer to Plaintiffs’ First Amended Original Complaint (to the extent one is ever required).

In addition to establishing their standing to bring a section 5 claim,¹ the Plaintiffs must prove the following elements to be entitled to injunctive relief under section 5: (1) that a “change” in voting (2) required preclearance; (3) that preclearance was not obtained; 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’ request for a permanent injunction should be denied because Plaintiffs lack proof of: (a) a “change” in voting; (b) that required preclearance; (c) which preclearance was not obtained; (d) that a “permanent” injunction is appropriate.

First, 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

¹ *See* Defendants’ Motion to Dismiss Plaintiffs’ First Amended Original Complaint (doc.24) filed 1/20/09; and Defendants’ Reply in Support of Defendants’ Motion to Dismiss Plaintiffs’ First Amended Original Complaint and Brief in Support (doc. 33) filed 2/24/09.

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, 1984-85 (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’ Application for Permanent Injunction.

Second, “[w]hether 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. 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 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)).

Third, it is premature to determine whether the State of Texas obtained preclearance of the challenged practices on behalf of Dallas County because Defendants have not answered Plaintiffs’ First Amended Original Complaint and no discovery has taken place. *See generally* Defendants’ Motion for Stay and Rule 56(f) Motion and Brief in Support, filed March 2, 2009.

Fourth, Plaintiffs provide no explanation as to why they contend a permanent injunction is appropriate. The Supreme Court describes the injunctive relief available under section 5 as “temporary.” *See Lopez*, 519 U.S. at 23 (citations omitted) (“The three-judge district court may determine only whether § 5 covers a contested change, whether § 5’s approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate.”).

II.

CONCLUSION

Considering the premises, Defendants Dallas County, Texas and Bruce Sherbet, in his capacity as Election Administrator of Dallas County, Texas respectfully request that the Court deny Plaintiffs’ Application for Permanent Injunction and grant Defendants any other relief to which they are justly 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 2nd day of March, 2009.

/s/ Jamil N. Alibhai
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