

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. 08-CV-02117-P

DALLAS COUNTY, TEXAS; and §
BRUCE SHERBET, in his capacity as §
Election Administrator for Dallas §
County, Texas, §
Defendants. §

PLAINTIFFS' APPLICATION FOR PERMANENT INJUNCTION

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 Application for Permanent Injunction complaining of Defendants DALLAS COUNTY, TEXAS and BRUCE SHERBET, in his capacity as Election Administrator for Dallas County, Texas (hereinafter referred to as "Defendant"), and in support thereof would show the Court as follows:

I.

FACTUAL ALLEGATIONS¹

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:

¹ The Factual Allegations herein more or less tract those made in Plaintiffs First Amended Original Complaint. Plaintiffs further incorporate by reference herein all the arguments and authorities, as well as the evidence attached in the Appendix, contained in Plaintiffs Brief in Support of their Response to Defendants' Motion to Dismiss and Plaintiffs Brief in Support of Their Motion for Summary Judgment on Section 5 claims.

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 of §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 offices in Dallas County, Texas.

24. 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.

25. A manual recount was requested concerning a particular race in the November 4, 2008 General Election.

26. The manual recount revealed paper ballot and cast vote records that showed a straight-ticket choice but no selection in that race.

27. For the first time, Dallas officials counted the ballot described in the paragraph above as no vote in the individual race.

28. 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.

29. Plaintiffs Texas Democratic Party and Boyd Richie, their Nominees and members will spend hundreds of thousands of dollars urging voters in Dallas County, Texas to cast votes for its candidates in future elections.

30. Plaintiffs Texas Democratic Party and Boyd Richie, their Nominees and members will expend countless resources training voters to cast effective ballots for Democrats.

31. The changes in election practices described herein will require Plaintiffs to expend untold resources educating the voting public how to cast an effective ballot.

II.

APPLICATION FOR PERMANENT INJUNCTIVE RELIEF

32. Plaintiffs ask this Court to enter a permanent injunction restraining the Defendants from continuing to implement changes in the election practices and/or procedures without first obtaining pre-clearance from the Attorney General of the United States or the United States District Court for the District of Columbia.

33. Specifically, Plaintiffs request Defendants be enjoined from implementing the following election practices or procedures until they have been pre-cleared:

- 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 and/or candidate.
- B. 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 tallies no such selection.
- C. 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.

34. It is probable that the Plaintiffs will prevail against the DefendantS on the merits and obtain permanent injunctive and mandamus relief precluding the violations of law alleged herein.²

35. If the Plaintiffs’ Application for Permanent Injunction is not granted, irreparable harm is imminent because, on information and belief, Defendants admit they intend to continue their unlawful actions.

36. 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

² Claims for injunctive relief under Section 5 of the Voting Rights Act do not need to prove the standard elements for injunctions. See *United States v. Louisiana*, 952 F. Supp. 1151, 1159-60 (W.D. La.) (three judge court) (four part test for preliminary injunction does not apply in action to enforce action brought under section 5 of Voting Rights Act), aff’d, 521 U.S. 1101 (1997). Nevertheless, Plaintiffs can meet these elements so they are recited here.

serve as adequate compensation for the wrong inflicted on the Plaintiffs and the voters of the state.

III.

THREE JUDGES

37. Plaintiffs request the Court schedule a trial before three judges. After a full trial on the merits, the Plaintiffs ask the Court to enter a permanent injunction granting the relief requested herein.

IV.

BOND

38. Plaintiffs are willing to post a reasonable bond.

V.

PRAYER

39. For the foregoing reasons, the Plaintiffs respectfully request that the Court enter orders against Defendant consistent with the relief requested herein.

Dated this 10th day of February, 2009.

Respectfully submitted,

TEXAS DEMOCRATIC PARTY and
BOYD L. RICHIE, in his capacity as
Chairman of the Texas Democratic Party

By: /s/ Chad W. Dunn
Chad W. Dunn – Attorney In Charge
State Bar No. 24036507
General Counsel
TEXAS DEMOCRATIC PARTY
BRAZIL & DUNN
K. Scott Brazil

State Bar No. 02934050
4201 FM 1960 West, Suite 530
Houston, Texas 77068
Telephone: (281) 580-6310
Facsimile: (281) 580-6362
duncha@sbcglobal.net

RANDALL BUCK WOOD
State Bar No. 21905000
Doug W. Ray
State Bar No. 16599200
RAY, WOOD, & BONILLA
2700 Bee Caves Road
Austin, Texas 78746
Telephone: (512) 328-8877
Facsimile: (512) 328-1156

CLAY LEWIS JENKINS
State Bar No. 10617450
JENKINS & JENKINS, P.C.
516 West Main Street
Waxahachie, Texas 75165
Telephone: (972) 938-2529
Facsimile: (972) 938-7676

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 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:

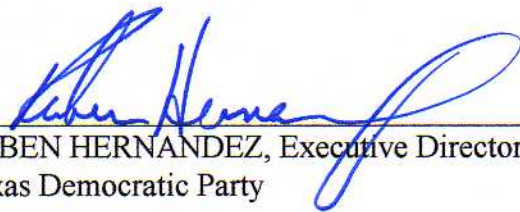
E. Leon Carter
Jamil N. Alibhai
Munck Carter PC
600 Banner Place
12770 Coit Rd.
Dallas, TX 75251
(Attorneys for Defendant Dallas County
and Bruce Sherbet)

/s/ Chad W. Dunn
Chad W. Dunn

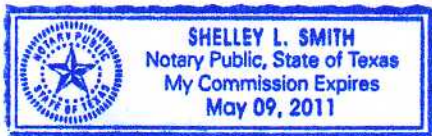
THE STATE OF TEXAS)

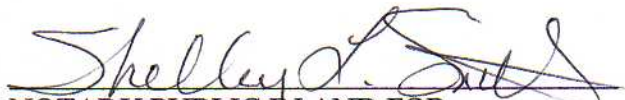
COUNTY OF TRAVIS)

BEFORE ME, the undersigned authority, on this day personally appeared RUBEN HERNANDEZ, Executive Director of the Texas Democratic Party, known to me to be the person whose name is subscribed to the foregoing instrument, who, after being by me duly sworn, upon his oath stated that he has read the foregoing Application for Permanent Injunction and knows the contents thereof, and states that it is true and correct to the best of his knowledge. He further stated that he has reviewed the Appendix attached to Plaintiffs' Brief in Support of their Response to Defendants' Motion to Dismiss and Plaintiffs' Brief in Support of their Motion for Summary Judgment on Section 5 claims and that the documents included therein are true and correct reproductions thereof to the best of his knowledge.


RUBEN HERNANDEZ, Executive Director
Texas Democratic Party

SWORN TO AND SUBSCRIBED BEFORE ME by the said RUBEN HERNANDEZ, Executive Director of the Texas Democratic Party on this the 10 day of February, 2009, to certify which witness my hand and seal of office.




NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS