

considered and granted.¹ Accordingly, Defendants respectfully request reconsideration of the Court's December 17, 2009 Order.

II. ARGUMENT AND AUTHORITIES

A motion for reconsideration is appropriate in the following circumstances: (1) to address an intervening change in controlling law; (2) to consider new evidence not previously available; (3) to correct a clear or manifest error of law or fact; or (4) to prevent manifest injustice. *Fisherman's Harvest, Inc. v. Post, Buckley, Schuh & Jernigan, Inc., et al.*, No. G-05-0151, 2008 WL 4277001, at *2 (S.D. Tex. Sept. 10, 2008) (citations omitted).

A. There Was No Evidence of Potential for Discrimination.

Based on the Court's April 17 Order [doc. 42], this Court erred in relying upon ballot images to establish a potential for discrimination. *Compare* April 17 Order at 8 n.3 with December 17 Order [doc. 45] at 9. The Court previously explained:

Other than the raw numbers that can be gleaned from the more than ten thousand ballot images submitted, *Plaintiffs have not provided the Court with any statistical information or cited to any specific ballot images or range of ballot images that support their position.* The Court will not cull through this voluminous raw data to determine whether Plaintiffs' conclusory representation is accurate. *It is incumbent upon Plaintiff, as the party that carries the burden of proof on this issue, to identify to the Court specific, competent evidence that resolves a disputed issue of fact and articulate how that evidence weighs in Plaintiffs' favor.* To that end, the Court notes that Plaintiffs have also failed to verify the authenticity of the ballot images.

April 17 Order at 13 (emphases added).

The Court further explained that the Plaintiffs failed to submit "*any evidence* to support their bald assertion that the failure of iVotronic to record votes for democratic nominees was

¹ See April 17 Order at 13 (referring Rule 56(f) Motion to this Court).

“most pronounced in minority precincts.” *Id.* at 8 (emphasis added). Furthermore, the Court observed that the TDP made “no allegation that racial or ethnic minorities used iVotronic, or cast emphasis votes thereon, in greater numbers than the racial or ethnic majority. Indeed, the Amended Complaint does not allege that any minorities even cast a vote using iVotronic.” April 17 Order at 13.

In contrast, this Court wrote of the same unverified, unspecified ballot images and the TDP’s “bald assertion” regarding their import, that “[t]he TDP’s submission of ballots demonstrating the confusion among minority voters stemming from iVotronic machines is sufficient to show a potential of discrimination.” December 17 Order at 9. Culling through the more than 10,000 ballot images reveals only a handful of instances of a voter casting a straight-party vote and also de-selecting a candidate within that party. *See* Plaintiffs’ Notice of Manual Filing [doc. 29].² Even so, and as this Court previously found, the ballot images alone do not show a potential for discrimination or any effect on racial or ethnic minorities. *See id.*

Thus, the TDP not only failed to present any evidence that a single minority voter cast a straight-party vote and de-selected an individual candidate but also failed to demonstrate in any way how the challenged voting practices could have a disproportionate impact on minority voters. *See Presley v. Etowah County Comm’n*, 502 U.S. 491, 513 n.4 (1992) (“Whether 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*

² *See also* Plaintiffs’ Brief in Support of their Response to Defendants’ Motion To Dismiss Plaintiffs’ First Amended Original Complaint and Plaintiffs’ Brief in Support of their Motion for Summary Judgment on their Section 5 Claims [doc 28 at 4 n.2] in which the Plaintiffs concede that their House District 105 candidate would have gained only nine (9) votes if de-selections had been counted as selections.

for discrimination.’”) (citation omitted). Without this threshold showing, the Court made a manifest error of law in granting the TDP’s motion for summary judgment. *See, e.g., Middlesex Ins. Co. v. PBC Operations, L.P.*, No. A-08-CA-305-SS, 2009 WL 3756842, at *6 (W.D. Tex. Nov. 5, 2009) (reversing summary judgment on Rule 59(e) motion where movant’s failure to carry its burden precluded a decision as a matter of law).

B. The Court Should Have Ruled On and Granted Dallas County’s 56(f) Motion.

A Rule 56(f) motion “‘should be granted almost as a matter of course’ unless ‘the non-moving party has not diligently pursued discovery of the evidence.’” *Wichita Falls Office Assocs. v. Banc One Corp.*, 978 F.2d 915, 919 n.4 (5th Cir. 1992) (quoting *International Shortstop, Inc. v. Rally’s, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991)); *see also Culwell v. City of Ft. Worth*, 468 F.3d 868, 871 (5th Cir. 2006) (noting that Rule 56(f) motions “are broadly favored and should be liberally granted”).

Dallas County explained that the TDP filed their motion for summary judgment prematurely—only seventy days after filing their lawsuit and only fifty-two days after filing their amended complaint. The parties had not engaged in any discovery, held a Rule 26 conference, or even exchanged initial disclosures, and no scheduling order had been entered. In these circumstances, the Court should have granted Defendants’ Rule 56(f) motion and allowed Defendants to conduct discovery. *See Phongsavane v. Potter*, No. 05CA0219-XR, 2005 WL 1514091, at *5 (W.D. Tex. June 24, 2005) (a grant of summary judgment is premature when basic discovery has not been completed, the case was filed three months before summary judgment was filed, there is no scheduling order directing a timetable for discovery, and the defendant has not filed an answer); *Blakely v. UNUM Life Ins. Co. of Am.*, No. 97-CV-1769G, 1998 WL 177970, at *1 (N.D. Tex. April 9, 1998) (holding that a motion for summary judgment

is premature when the nonmovant has not had the opportunity to develop his case); *Mont Belview Square Ltd. v. City of Mont Belview*, 27 F. Supp. 2d 935, 944-45 (S.D. Tex. 1998) (“Summary judgment should not . . . ordinarily be granted before discovery has been completed.”); *see also Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1145-46 (vacating summary judgment that was granted without allowing party to take discovery); *Valadez v. United Indep. Sch. Dist.*, No. L-08-22, 2008 WL 4200092, at *2 (S.D. Tex. Sept. 10, 2008) (holding that when discovery is still open, it is premature to grant summary judgment).

Had the Court allowed discovery, Defendants would have been able to introduce evidence that (1) the election system tallies votes in a manner that complies with precleared state law; (2) the Department of Justice received all the information necessary to preclear the iVotronic voting machine at issue in this litigation; and (3) the iVotronic received the requisite preclearance. *See, e.g., Hinojosa v. Johnson*, 277 Fed. Appx. 370, 377-78 (5th Cir. 2008) (finding that although no fact issue existed at that time, the movant’s requested discovery “may very well provide enough evidence to overcome [the non-movant’s] summary judgment motion” and explaining that denial of a “full and fair opportunity to discover information essential to [his] opposition to summary judgment” is reversible error) (citation omitted); *see also Edmonds v. Gilmore*, 988 F. Supp. 948, 952, 954 (E.D. Va. 1997) (citing as evidence of preclearance a letter from the Department of Justice stating that Virginia’s voting statutes and procedures were preapproved and an affidavit of the Secretary of the State Board of Elections stating that the statutory provisions at issue had been precleared). In addition, Defendants could have gathered evidence to contradict TDP’s assertion that the challenged voting practice had any potential for discrimination.

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 Court reconsider and deny the TDP's motion for summary judgment on its section 5 claim; grant Defendants' Rule 56(f) motion; 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 13th day of January, 2010.

/s/ Jamil N. Alibhai

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