



## B. Potential for Discrimination

Although a three-judge panel is not tasked with determining that a challenged method actually discriminates, a three-judge panel must, nonetheless, find a potential for discrimination for a section 5 claim to succeed. *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* for discrimination.’”) (citing, *inter alia*, *NAACP v. Hampton County Election Comm’n*, 470 U.S. 166, 181 (1985)).

Plaintiffs take issue with the fact that Defendants “only” cited a Supreme Court case—which in turn cites another Supreme Court case—in support of Defendants’ argument, Response at 3, ¶ 5, but Plaintiffs cite no Supreme Court authority to the contrary. Instead, Plaintiffs erroneously conflate the issue of whether a “potential for discrimination” exists with the issue of whether a challenged practice is, in fact, discriminatory. That a determination of discriminatory or retrogressive impact is reserved for the Attorney General or the District Court of the District of Columbia is not contrary to a requirement, imposed by the Supreme Court, that a potential for discrimination must exist for preclearance to be required.

The TDP’s response fails to address the central issue in Dallas County’s motion—namely that the Court’s December 17 Order cannot be harmonized with the Court’s April 17 Order with respect to the alleged ‘potential for discrimination.’ *Compare* April 17 Order [doc. 42] at 8 n.3 *with* December 17 Order [doc. 45] at 9. In its April 17 Order, the Court explained that “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.” April 17 Order at 8 n.3 (emphases added). “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." *Id.* 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 '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." *Id.* at 13.

In stark contrast, the Court wrote of the same unverified, unspecified ballot images that "[t]he TDP's submission of ballots demonstrating the confusion among minority voters stemming from the iVotronic machines is sufficient to show a potential of discrimination." December 17 Order at 9. In addition to the contradiction between the two Orders, the ballot images fail to show anything related to discrimination. They are simply an aggregate of the ballots from the House District 105 race. To this day, Plaintiffs have failed to show how "these ballot images prove a higher incident of de-selected candidates in minority communities." *See* Plaintiffs' Response to Defendants' Motion for Reconsideration [doc. 52] at 5.

Now, in response to Dallas County's motion for rehearing, which pointed out the TDP's lack of evidence, the TDP submitted an unverified Appendix, which was not part of the summary judgment record. Because the Appendix was not before the Court when it considered the TDP's motion for summary judgment, it cannot be considered now. *See* FED. R. CIV. P. 56(c)(2) (stating that a grant of summary judgment can only be granted "if the pleadings, the discovery and disclosure materials *on file*, and any affidavits show that there is no genuine issue as to any

material fact and that the movant is entitled to judgment as a matter of law) (emphasis added); *see also James ex rel. James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990) (“The standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the record evidence before the court.”).

The TDP, furthermore, failed to verify or authenticate its new Appendix. The TDP also does not state who gathered the data, the source of the data, or the qualifications and methods used to compile the data. *See, e.g., Texas Democratic Party v. Williams*, No. A-07-CA-115-SS, at 12-13 (W.D. Tex. Aug. 16, 2008) *aff’d* 285 Fed. Appx. 194 (5th Cir. 2008), *cert. denied sub nom. Texas Democratic Party v. Andrade*, 129 S. Ct. 912 (2009) (rejecting statement of former election official that the similar eSlate machine’s treatment of “straight-party and emphasis voters is likely to explain some or all of the undervote observed when comparing paper and eSlate voting systems” under FED. R. EVID. 702 because, among other things, the former election official’s opinion “[wa]s not the product of reliable principles and methods, and he has not applied any principles or methods to the facts of the case,” and additionally noting that the “unsupported statement simply does not tie undervotes to emphasis votes any more than to other possible explanations—e.g., a voter intentionally choosing not to vote in every race”).<sup>1</sup>

Even if the Appendix had been timely filed and admissible, the TDP’s “data” is not meaningful for the purpose of determining (i) whether the ability to de-select a candidate after making a straight-party ticket selection or (ii) the review screen generated under these circumstances creates a potential for discrimination.

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<sup>1</sup> A copy of the *Texas Democratic Party v. Williams* Order can be found in the record. *See* doc. 12-2 at 37-49.

First, this Appendix does not even state whether the “emphasis ballots” it tallied were cast on the iVotronic during early voting, or were instead cast on paper (i.e. by optical scan ballots on election day or by absentee ballot).

Second, absent any guidance from the TDP, the “2000 VA” figures seem to be estimated percentages of voting-aged individuals of various races in the year 2000. These “2000 VA” percentages do not purport to represent registered voters, much less voters who cast ballots during the early voting phase of the 2008 election. Although the TDP failed to provide any sourcing for these “2000 VA” percentages, if they represent ten-year-old census data, they are unreliable. *Sanders v. Dooly County, Ga.*, 245 F.3d 1289, 1290-91 (11th Cir. 2001).

Third, twenty-eight (28) “emphasis votes” out of a pool of 41,264 votes demonstrates that less than seven-one-hundredths of a percent (0.00068) of voters made de-selections. Furthermore, unverified data showing that 28 voters out of 41,264 de-selected Barack Obama is hardly evidence that the challenged de-selection mechanism creates a potential for discrimination. Any or all of these voters could have merely intended to de-select Barack Obama rather than cast an “emphasis vote” for Barack Obama. *See, e.g., Williams*, at 8 n.5 [doc. 12-2 at 44] (considering the TDP’s contention that de-selections on the similar e-Slate machine were attempted “emphasis votes” but concluding “[t]here are certainly other possible explanations for this phenomenon, including that some straight party voters simply do not want to vote in every race, for example because they do not like any of the candidates in certain races, and de-selecting the party candidate is the most efficient and accurate way for them to achieve this result.”). Moreover, the TDP failed to adduce any evidence that would indicate that these voters belong to a minority group. The TDP also presents no evidence that minority voters participate in early voting more than racial or ethnic majority voters and thus would have a

higher likelihood of voting with an iVotronic than with an optical scan ballot. Indeed, the inverse could just as easily be true. Thus, this Court correctly 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. . . . [and] does not allege that any minorities even cast a vote using iVotronic.” April 17 Order at 13.

Just as before, 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 even potentially have a disproportionate impact on minority voters. *See Presley*, 502 U.S. at 513 n.4 (citation omitted). Without this threshold showing, the Court made a manifest error of law in granting the TDP’s motion for summary judgment.

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

Rather than acknowledge that Rule 56(f) motions “are broadly favored and should be liberally granted,” *Culwell v. City of Ft. Worth*, 468 F.3d 868, 871 (5th Cir. 2006), the TDP asserts, without citing any authority, that “more than in other cases, Defendants, under Rule 56(f), carry a heavy burden to show why additional delay is necessary.”

With access to the discovery process, the Defendants could have gathered evidence to contradict TDP’s assertion that the challenged voting practice had any potential for discrimination. As demonstrated above, the TDP has now twice failed to provide any admissible evidence supporting the entry of summary judgment.

### **III. TDP’S REQUEST FOR EXPEDITED CONSIDERATION**

Defendants do not oppose the TDP’s request for expedited consideration but not for the flawed reasons cited by the TDP.

**IV. 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,

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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 1st day of February, 2010.

/s/ Laura A. Russell

Laura A. Russell