

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

No. 3:08-CV-02117-P

TEXAS DEMOCRATIC PARTY

Plaintiff

v.

DALLAS COUNTY

Defendant

Before PRADO, Circuit Judge, and SOLIS and O'CONNOR, District Judges.
PRADO, Circuit Judge:

The Texas Democratic Party ("TDP") brought this suit under Sections 2 and 5 of the Voting Rights Act, alleging that Defendant Dallas County's use of an electronic voting machine in a particular manner violates the Act. *See* 42 U.S.C. §§ 1973(a), 1973c(a). Judge Solis dismissed the Section 2 claim and dismissed some of the parties for lack of standing. Thus, the only issue that remains for this three-judge panel is the TDP's motion for summary judgment on its Section 5 claim.

Section 5 requires "covered jurisdictions," including Dallas County, to "preclear" any voting changes with the Attorney General of the United States or the United States District Court for the District of Columbia. 42 U.S.C. § 1973c(a). Dallas County obtained approval from the Attorney General for its initial use of the iVotronic touchscreen voting machine in 1998 and again in 2006

when it added a screen upon which voters could review their selections. The TDP argues that the preclearances Dallas County received in 1998 and 2006 were not sufficient because Dallas County did not discuss how the iVotronic counts a voter who picks the “straight ticket” option but also selects an individual candidate. Our three-judge panel must decide whether Dallas County enacted a voting change without obtaining this required preclearance. For the reasons stated below we find that it did. Accordingly, we grant the TDP’s motion for summary judgment.

I. BACKGROUND

Before 1998, Dallas County used computer punch-card paper ballots. One option on the paper ballot was a straight ticket vote. If a voter marked straight ticket, then all of his or her votes would go to the designated party’s nominees. If the voter marked straight ticket and also selected the same party’s nominee in a particular race (that is, marked straight ticket Democratic but also selected a specific Democratic candidate), the County would count the vote for that party’s nominee once, construing the selection of the individual candidate as an “emphasis” vote.

In 1998, Dallas County began using the iVotronic, which works somewhat differently than the punch-card ballots. If a voter marks straight ticket, then, just as before, the machine tabulates a vote for all nominees of that party. However, if the voter marks straight ticket and also selects one of the same party’s nominee in a race, the selection of the individual candidate *deselects* that candidate. Moreover, if a voter marks straight ticket, the review screen the voter sees before casting his or her ballot shows a straight ticket vote and no selection for any individual candidates, and the machine tabulates a vote for all candidates of that party. If the voter marks straight ticket and also selects a

particular candidate, however, the review screen says that the voter is voting straight ticket and shows no selection for the individual candidate, but it does not tabulate a vote for the candidate selected. In other words, the review screen appears the same regardless of whether the voter attempts to cast an “emphasis” vote.

The TDP also challenges the manner in which Dallas County counted straight ticket votes during a recount of a 2008 state representative election. The TDP alleges that in the recount, Dallas County printed out votes from the electronic voting machines and counted a vote which showed a straight ticket selection and a selection of a particular candidate as no selection for the individual candidate, contrary to its prior practices. The TDP seeks an injunction prohibiting Dallas County from using this recount method in any future elections unless it first receives preclearance.

II. DISCUSSION

Summary judgment is appropriate “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.” FED. R. CIV. P. 56(c); *Burge v. Parish of St. Tammany*, 187 F.3d 452, 465 (5th Cir. 1999). There are no disputes regarding the material facts at issue in this case.

To determine if Section 5 requires preclearance in this case, we do not consider whether the challenged voting practice actually discriminates on the basis of race. *See Morse v. Republican Party of Va.*, 517 U.S. 186, 216–17 (1996). Our inquiry is limited to determining “(i) whether a change [is] covered by § 5, (ii) if the change [is] covered, whether § 5’s approval requirements were satisfied,

and (iii) if the requirements were not satisfied, what remedy [is] appropriate.” *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983).

A. Whether Dallas County’s Use of Electronic Voting Machines Constitutes a “Change” With Respect to Voting

The Supreme Court has explained that Congress intended the Voting Rights Act to have “the broadest possible scope.” *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969). “The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way.” *Id.* at 566. There is no dispute that Dallas County’s vote tabulation method is a “standard, practice, or procedure with respect to voting” under the Voting Rights Act, *see* 42 U.S.C. § 1973c(a), and because Dallas County is a covered jurisdiction, Section 5 requires it to preclear any changes it makes to its vote counting procedure.

To determine whether Dallas County changed its vote tabulation method, we must look to Dallas County’s “baseline” practice. *See Riley v. Kennedy*, 128 S. Ct. 1970, 1982 (2008). “We have defined the baseline as the most 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.” *Id.* (citing *Young v. Fordice*, 520 U.S. 273, 282-83 (1997)).

1. iVotronic Tabulation Method

The “baseline” here depends on whether Dallas County precleared the way in which the machines tabulate straight ticket and emphasis votes. Dallas County asserts that it precleared its use of the iVotronic machines, whereas the TDP claims that the previous preclearance did not specify the voting changes at issue here. If the prior preclearance included these procedures, then that becomes the baseline, there was no further change, and additional preclearance

is not required. If the prior preclearance did not include these vote counting methods, however, then there was a change as compared to Dallas County's prior baseline practice (tabulating straight-ticket votes on paper ballots).

Dallas County argues that the TDP did not present sufficient evidence of Dallas County's baseline practice, requiring this court to deny summary judgment. However, Dallas County acknowledges that it departed from its baseline practice (paper ballots) when it began using iVotronic machines in 1998, and that Section 5 required it to preclear the use of these machines. Dallas County therefore admits there was a change in 1998. The only question is whether Dallas County approved its method of tabulating straight-ticket votes under its 1998 and 2006 preclearance submissions. Given its concessions, Dallas County's argument regarding the TDP's purported lack of evidence is without merit.

2. Manual Recount Procedure

Dallas County does not assert that the alleged new recount procedure was part of any preclearance submission. Prior to 2008, during a recount Dallas County deemed a paper ballot that showed a straight ticket vote and a selection of a particular candidate as a vote for that candidate. During the recount for a state representative race in 2008, however, Dallas County counted the same scenario as a deselection of that particular candidate. In a lawsuit involving that recount, Dallas County Elections Administrator Bruce Sherbet testified that he followed the Texas Secretary of State's advice on how to count these ballots. The TDP submitted evidence showing that the Secretary of State's advice was contrary to its prior guidance on this topic. This evidence demonstrates that Dallas County's recount procedure constituted a change with respect to voting. Dallas County makes no cogent argument as to why the counting method for the

recount was not a change. We conclude that Dallas County changed the way it conducts recounts and did not preclear the change.

B. Whether Dallas County Already Obtained Preclearance

We now ask whether the preclearance Dallas County obtained in 1998 and 2006 encompassed the iVotronic vote tabulation at issue. While the Attorney General gave preapproval for Dallas County's use of the machines, we must ask whether the Dallas County's preclearance submissions notified the Attorney General of its methods for tabulation of straight ticket votes when there is also an emphasis vote and the resulting review screen for this type of ballot.

A covered jurisdiction must seek preclearance for each specific change it makes to its voting process:

A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices. Of course, a State may include earlier unprecleared changes as a specific submission along with its preclearance request for contemporary legislation. *But it must identify with specificity each change that it wishes the Attorney General to consider.*

Clark v. Roemer, 500 U.S. 646, 658 (1991) (internal quotation marks and citation omitted) (emphasis added). If a covered jurisdiction only submits certain changes for preclearance, then the Attorney General is not deemed to have considered the non-submitted changes. *See McCain v. Lybrand*, 465 U.S. 236, 257 n.28 (1984). Any ambiguities in the scope of the preclearance request are construed against the covered jurisdiction. *Id.* at 257. This presumption against the covered jurisdiction stems from the Department of Justice's limited resources in independently investigate the specific contours of every voting change. *See id.*

Dallas County argues that its 1998 and 2006 preclearance submissions covered all uses of the iVotronic machines. The TDP contends that Dallas County did not include the specific manner in which the iVotronic tabulates straight ticket and emphasis votes. Because the submissions are before us, there are no disputed facts; we simply analyze what exactly the preclearance submissions entailed.

The 1998 preclearance submission asked for preapproval for Dallas County to switch from punch-card paper ballots to electronic computer touch-screen voting machines. Dallas County asserted in its preclearance submission that it sought to update its voting technology, and attached as an exhibit an evaluation of the iVotronic system. The exhibit included some discussion of straight ticket voting. Specifically, the evaluation discusses what happens when a voter selects and then deselects a straight ticket vote. However, the submission does not mention what happens when a voter selects a straight ticket vote and then selects a candidate of the same party, nor does it discuss the iVotronic's review screen.

The 2006 submission relates to Dallas County's efforts to update the electronic voting machines to comply with the Help America Vote Act, 42 U.S.C. §§ 15301–15545. The submission details Dallas County's implementation of a required review screen for voters to review their selections, but does not discuss the interplay between the review screen and straight ticket or emphasis votes.

Based on these submissions, the Attorney General had no reason to consider the change in how the machines construed emphasis votes after a straight ticket vote. Although Dallas County provided an evaluation of its electronic voting machines that discussed straight ticket voting generally, it did

not detail this specific change from paper ballot voting in any way. Especially given that ambiguities are resolved against the covered jurisdiction that submits the preclearance request, Dallas County's prior preclearance submissions—which sought preclearance for the use of the electronic voting machines as a general matter—do not cover the specific change at issue here. *See Boxx v. Bennett*, 50 F. Supp. 2d 1219, 1227 (M.D. Ala. 1999) (three-judge panel) (concluding that a covered jurisdiction's preclearance of its electronic voting system did not include preclearance of recount procedures enacted pursuant to that system because the "state did not identify the recount provision in an unambiguous and recordable manner").

Given the content of the 1998 and 2006 preclearance submissions, and construing ambiguities against Dallas County, we find that the submissions did not sufficiently put the Attorney General on notice of the changes to the way the iVotronic tabulates straight ticket and emphasis votes. Because Dallas County changed its baseline practice, Section 5 required that it obtain preclearance. We also find that Dallas County never obtained preclearance for the change to its manual recount procedure described above.

C. What Remedy is Appropriate

"If a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change." *Lopez v. Monterey County*, 519 U.S. 9, 20 (1996). Dallas County did not preclear this specific change. Accordingly, the TDP is entitled to an injunction prohibiting Dallas County from using the iVotronic machines in this way until it obtains preclearance. The TDP is also entitled to an injunction prohibiting the way Dallas County counts ballots from the iVotronic machines during a manual recount.

D. Dallas County's Remaining Arguments

In its opposition, Dallas County makes several other arguments, all which lack merit. First, Dallas County suggests that the TDP failed to show that the use of the iVotronic machine has the potential for discrimination. The TDP's submission of ballots demonstrating the confusion among minority voters stemming from the iVotronic machines is sufficient to show a potential of discrimination. Whether a voting change actually discriminates is irrelevant to whether preclearance is required. *See, e.g., NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985) ("Our inquiry is limited to whether the challenged alteration has the *potential* for discrimination.") (emphasis in original) (citations omitted). Thus, although we are not concluding that Dallas County's use of the iVotronic machines actually discriminates, the TDP has met its minimal burden on this score.

Second, Dallas County suggests that the TDP waited too long to file suit given that it brought this lawsuit ten years after Dallas County began using the iVotronic machines. However, Judge Solis already rejected Dallas County's laches argument. Finally, Judge Solis also previously rejected Dallas County's standing argument.

III. CONCLUSION

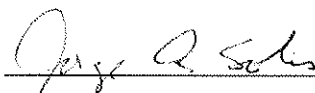
Dallas County's previous preclearance submissions did not include the precise change that the TDP challenges. Moreover, Dallas County did not preclear the way in which it counts the printouts from the iVotronic machines during a manual recount, and this counting method constitutes a change from Dallas County's previous practice. TDP is entitled to summary judgment and to an injunction prohibiting Dallas County from using these vote counting

methods until it obtains preclearance under Section 5 of the Voting Rights Act. Accordingly we GRANT the TDP's motion for summary judgment.

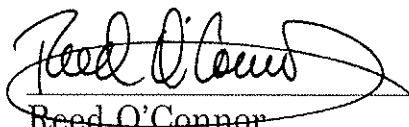
SIGNED this 17th day of December, 2009.



Edward C. Prado
United States Circuit Judge



Jorge A. Solis
United States District Judge



Reed O'Connor
United States District Judge