No. 10-755

In the Supreme Court of the United States

DALLAS COUNTY, TEXAS, ET AL.,
Appellants,
v.
TEXAS DEMOCRATIC PARTY, ET AL.,
Appellees.

On Appeal from the United States District Court for the Northern District of Texas

MOTION TO DISMISS OR AFFIRM

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COUNTER STATEMENT OF QUESTIONS PRESENTED

This case involves a Voting Rights Act challenge to electronic voting machines utilized by Dallas County beginning in 1998. Although the equipment was pre-cleared in 1996 and 2006 by the Attorney General, the pre-clearance submissions did not describe significant changes regarding vote tabulation for citizens who cast a straight ticket vote and also made individual race selections on their ballot. The new electronic voting machines tabulated votes exactly opposite of the punch card system previously employed. The three-judge panel, after reviewing extensive testimony taken at a state court injunction proceeding, granted TDP's Motion for Summary Judgment and issued an injunction. In response to the injunction, Dallas County subsequently sought, and obtained, preclearance from the Attorney General. The questions presented are:

1. Whether this case is moot because Dallas County submitted the subject election changes to the Department of Justice for preclearance in response to the three-judge court's injunction.

2. Whether long-standing precedents should be disturbed, and now require a three-judge court to consider the discriminatory purpose or effect of an election change in § 5 coverage cases.

3. Whether a jurisdiction's admission of election changes, coupled with other written testimony and internal procedure memoranda are sufficient to support a three-judge court's finding of an "election, practice, or procedure" change.

4. Whether a change in recount procedure adopted 10 years after implementation of a voting system requires preclearance.

LIST OF PARTIES

Appellees agree with the list of parties in the Jurisdictional Statement.

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INTRODUCTION

In 1998, Dallas County, Texas began utilizing an electronic voting system that tabulated ballots where the voter selected a straight ticket, and also made selections in individual races, differently than the paper ballot system used before. In response to a complaint under § 5, a three-judge court issued an injunction requiring Dallas County to pre-clear changes regarding how its electronic voting system handled these votes, the County complied and submitted the disputed changes for preclearance.

The Justice Department granted preclearance on March 22, 2010. Although the County's compliance with the judgment and the government's subsequent preclearance would seem to end the matter, the County nonetheless appeals the order requiring the preclearance to this Court. This Court should dismiss this appeal as moot. There is no continuing case or controversy between the parties, and no meaningful relief could be granted Dallas County now that preclearance has occurred. Accordingly, the case is no longer justiciable and the appeal should be dismissed. Why the County believes there is something remaining for the parties to litigate is not addressed in its Jurisdictional Statement.

In the event this Court reaches the merits of the County's appeal, it should affirm. Dallas County argues that the three-judge court should have determined whether the changes at issue discriminate against minority voters, but this would upend long-established precedent reserving that question for the Attorney General or the United States District Court for the District of Columbia. The court below properly

limited its inquiry to whether the changes should have been precleared before implementation. Moreover, the court also found ample evidence of potential harm to minority voters in light of proof they emphasis vote in larger numbers and are therefore at greater risk of having their votes wrongfully discarded. This Court should therefore affirm the decision below.

STATEMENT

The election changes at issue here were pre-cleared by the Attorney General on March 22, 2010. *See* Doc. 59. The submission made to secure preclearance was subsequent to the three-judge court's injunction requiring the submission. Below is a description of the issue involved in this case prior to the granting of pre-clearance.

Appellees' complained that when Dallas County changed from paper ballots to the ES&S iVotronic electronic voting machine, it changed the way certain types of votes were tallied and the effect of information shown on a cast vote ballot record[1] during a manual recount. Specifically, TDP complained that the new iVotronic tallies votes differently in the instance where a voter selects a particular political party and also selects the name of an individual nominee of that party. In those circumstances, the iVotronic records no vote for that party nominee. In contrast, the paper ballot system used before and since records a vote for

[1] A "cast vote ballot record" is a computer generated image of a particular ballot cast by an anonymous voter on a direct record electronic voting machine. The record is supposed to reveal the desires of a particular voter. Though the voter is not identified, the precinct where the vote is cast is shown on the record.

that nominee and all other party nominees. Furthermore, TDP complained that Dallas County began using a different recount procedure in the 2008 General Election that now results in votes being tallied differently than in past elections, before and after implementation of the iVotronic.

A. The First Election Change

Prior to 1998, Dallas County used punch card paper ballots. From 1998 until the present, Dallas County has employed iVotronic machines during Early Voting and optical scan paper ballots on Election Day. Prior to 1998 and presently, when Dallas County utilizes paper ballots, a voter who chooses a straight-party and also selects one or more individual nominees from that same political party, a vote is recorded for all the nominees of the party selected, including the individual candidate(s) selected. This tabulation method is mandated by state law. TEX. ELEC. CODE § 65.007. The only statutory method to opt out of, or "de-select," an individual from the selected party is for the voter to affirmatively choose a candidate from another party. *See id*.

The manner in which the iVotronic tabulates votes departs from the statutory method. With the iVotronic, when a voter touches a straight-party selection and then also touches the name or names of nominees of his chosen party, no vote is recorded in the races where individual selections are made. If the voter, after choosing a straight-party, touches all the names of nominees from the selected political party, a blank ballot is cast. This tabulation result is exactly opposite the result if the same actions were taken on

a paper ballot.[2] *See* J.S.App. 20a. Furthermore, a voter who chooses a political party but also selects one or more individual nominees of the same party is shown a review screen that instructs the voter a straight-party ticket will be tallied when in fact one will not. *See id*.[3]

In 1998 and again in 2006, Dallas County made submissions concerning the iVotronic to the United States Department of Justice which did not address the confusing selection/de-selection issue. *See* J.S.App. 24a. It is undisputed these preclearance documents

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[2] In their jurisdictional statement, Dallas County attempts to create confusion on behalf of the three-judge court where none existed. *See* J.S. App. 9, fn. 2. The three-judge court was correct in stating "in other words, the review screen appears the same regardless of whether the voter attempts to cast an "emphasis" vote." Whether a voter intends to select an individual candidate of the same party of a straight ticket selection in order to "emphasize" that vote or the voter chooses the nominee of the same party of a straight ticket selection in order to "de-select" that vote, the review screen shown is the same. Furthermore, the iVotronic permits de-selection even though TEX. ELEC. CODE § 65.007 does not permit or authorize the "de-selection" of straight ticket votes. Dallas County has yet to explain why the review screen shows a straight-ticket vote will be counted when, in fact, it will be ignored.

[3] A partial example of this ballot screen is shown in Appendix F to the Jurisdictional Statement. Notice how this review screen shows, in the first section of the left column, a straight- ticket for the Democratic Party will be tabulated. On a paper ballot, such a choice would have been tabulated. With the iVotronic, that straight party selection is ignored and only the individual selections are tabulated. *See* J.S.App. 39a. Therefore, some Democratic Party nominees would not have received a vote if this electronic ballot was tabulated.

were the only submissions from Dallas County in relation to the use of the iVotronic. *See id*. Dallas County's long time Election Administrator, Bruce Sherbet, agreed in his testimony that the preclearance documents make no reference to the system "de-selecting" a vote when a candidate's name is touched. *See* Doc. 28 App. 125. Furthermore, Mr. Sherbet testified the preclearance documents make no reference to a review screen that displays a confirmation of a straight-party vote when in fact no such vote will be tallied. *See id*. Based upon Mr. Sherbet's testimony and the Judges' own review of the preclearance submissions, the three-judge court determined 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." J.S.App. 27a.

B. The Second Election Change

Until 2008, the Texas Secretary of State advised counties to tabulate votes in accordance with TEX. ELEC. CODE § 65.007. According to written Secretary of State directives, Dallas County tabulated a straight-ticket vote as a vote for all individual nominees of that party regardless of whether the voter made marks on or near the names of the individual nominees of that same party in each race. Thus, when an iVotronic cast vote record was printed and tabulated in a manual recount, the straight-ticket choices were tabulated as a vote for each individual nominee of that party. In contrast, TEX. ELEC. CODE § 65.007 requires those votes be tallied separately and then added to the individual vote tally. In response to a memorandum from the Texas Secretary of State changing this policy, Dallas County performed a recount in a 2008 state

representative race exactly opposite from its practice in the past. Under the new procedure, a straight ticket selection shown on a printed cast vote record was ignored and only the individual selections were tabulated. *See* J.S.App. 23a-24a. It is undisputed this recount procedure was not submitted for preclearance and the three-judge court found that Dallas County made "no cogent argument as to why the counting method for the recount was not a change." *Id*.

C. The State Court Litigation

The three-judge court considered uncontested evidence secured in an extensive state court injunction hearing. This evidence included admissions by Dallas County employees to all the elements of a § 5 claim.

TDP, along with a democratic nominee for state representative, filed suit in state court to enjoin an ongoing manual recount. In 2008, the Texas House of Representatives was evenly divided between Democrats and Republicans. Determination of a recount for a state house seat in Dallas County would determine political control of that chamber. It was during this manual recount that Appellees became aware Dallas County had changed its vote tabulation system. It was also during this manual recount that Dallas County, for the first time, ignored straight-ticket votes shown on a cast vote record and instead tabulated only the individual selections.

Appellees filed suit in state court seeking a mandamus and/or injunction of Dallas County election officials to comply with TEX. ELEC. CODE § 65.007. Specifically, Appellees sought to prohibit the new manual recount tabulation practice.

The state court injunction hearing included approximately two days of testimony. This testimony concerned the operation of the iVotronic system as well as the historical and current manual recount procedures. There was also testimony concerning Dallas County's § 5 submissions. During this testimony, Dallas County's Chief Election Officer, Bruce Sherbet testified as to the baseline practices in Dallas County, the iVotronic changes, the manual recount changes and the preclearance submissions. *See* Doc. 28 App. 123-25. Mr. Sherbet admitted both the iVotronic's handling of straight-ticket votes coupled with individual selections and the 2008 manual recount procedure had not been submitted for preclearance. *See id*.

The federal three-judge court relied upon this extensive state court record, including the hearing exhibits and the actual preclearance submissions, in determining Dallas County had implemented two election changes without complying with § 5.[4]

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[4] Dallas County intimates in its Jurisdictional Statement, at the Questions Presented, that the lack of discovery in the federal courts has somehow caused it harm. First, in over a year, Dallas County never requested any specific discovery it wished to undertake. Second, Dallas County complained about the lack of discovery to the three-judge district court in its Motion to Reconsider, but again did not identify any particular discovery. Next, given the extensive testimony in the underlying state court injunction hearing, including the direct admissions by Dallas County's Chief Election Officer and Assistant Election Officer, additional discovery would not have been informative. Finally, Dallas County, being the Defendant, has access internally to all the evidence relevant to a § 5 enforcement proceeding. What outside discovery could have benefited Dallas County's defense?

D. The Decision Below

The three-judge court determined that the iVotronic's handling of voters who make individual selections after making a straight party ticket selection constituted an election practice or procedure change. In fact, the Court correctly noted that the iVotronic handles these votes exactly opposite from the paper ballots used before.

Next, the three-judge court considered the 1998 and 2006 preclearance submissions. The court correctly noted that any ambiguities in the pre-clearance submissions were construed against pre-clearance. *See* J.S. App. 27a *citing McCain v. Lybrand*, 465 U.S. 236, 257 (1984). The three-judge court stated, "we find that the submissions did not sufficiently put the attorney general on notice of the changes to the way iVotronic tabulates straight ticket and emphasis votes." J.S. App. 27a.

With regard to the manual recount election change, the three-judge court considered the testimony of Dallas County Chief Election Administrator, Bruce Sherbet. J.S. App. 23a. The court also considered the clear evidence of a change from the conflicting Secretary of State memoranda issued during the last several years. *See id*. Based upon this and the lack of a "cogent argument" by Dallas County, the three-judge court concluded the recount procedure was an election practice or procedure change. *See* J.S. App. 24a.

Finally, the court considered Dallas County's argument that there was insufficient evidence to support a finding of discriminatory impact for these election changes. The three-judge court correctly

noted that "whether a voting change actually discriminates is irrelevant to whether preclearance is required." J.S. App. 28a *citing NAACP v. Hampton County Election Com'n*, 470 U.S. 166, 181 (1985). The court concluded that ballot images offered by Plaintiffs showing a greater incidence of emphasis votes in minority precincts, was sufficient to show the "potential for discrimination." *Id*. Dallas County offered no evidence to rebut this material.

On October 7, 2010, Dallas County filed its Notice of Appeal of the order granting summary judgment and the injunction as well as the order concerning its Motion to Reconsider. This Appeal was subsequently docketed.[5]

ARGUMENT

A. This Direct Appeal is Moot.

Dallas County admits that the election changes alleged were precleared by the Department of Justice on March 22, 2010. *See* J.S. 10, fn. 3. Dallas County's only mention of this critical fact seems to imply their submission of the election changes to the Department of Justice was voluntary. *See id*. In fact, the

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[5] On January 24, 2011, Dallas County filed a Second Notice of Appeal to this Court concerning orders awarding attorneys' fees. At the time of printing, this appeal had not yet been docketed. TDP intends to file a motion to dismiss this second appeal for lack of subject matter jurisdiction. Appeals concerning orders regarding attorneys' fees are heard in the circuit courts. *See Castro County v. Crespin*, 101 F.3d 121 (D.C. Cir. 1996) *citing Franklin v. Lawrimore*, 116 S. Ct. 42 (1995) (mem.).

submission was made after the three-judge court issued its injunction requiring same.

Whatever Dallas County's motivation for finally making the submission to the Department of Justice, the fact the submission was made moots this appeal. Once preclearance was granted, this dispute became "an abstract dispute about the law, unlikely to affect these [parties] any more than it affects other [] citizens." *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009) (holding a case challenging state law permitting warrantless private property seizure is moot once the law is no longer in effect). *Cf. Murphy v. Hunt*, 455 U.S. 478 (1982) (holding that an appeal concerning a criminal defendant's bail is moot once the criminal defendant has been convicted of the underlying offense."

"Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). A federal court lacks jurisdiction unless "a litigant [has] suffered, or [is] threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id*. "To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks omitted). Voluntary compliance with an injunctive order moots an appeal if the court cannot grant the complying appellant relief. *Burnett v. Kindt*, 780 F.2d 952, 955 (11th Cir. 1986); *Newman v. Alabama*, 683 F.2d 1312, 1317 (11th Cir. 1982). *See also, Am. Book Co. v. Kan. Ex rel. Nichols*, 193 U.S. 49,

52 (1904) (Compliance with judgment rendered case moot.) ("It makes no difference that plaintiff in error 'felt coerced' into compliance. A judgment usually has a coercive effect, and necessarily presents to the party against whom it is rendered the consideration whether it is better to comply or continue the litigation.").

Once election changes challenged under § 5 are granted preclearance, the § 5 case is moot. *White v. State of Alabama*, 922 F. Supp. 552 (1996) (three-judge court) (M.D. Ala.) relying upon *NAACP v. Hampton County Election Com'n*, 470 U.S. 166, 183 (1985) (finding that a § 5 case where preclearance was granted was not moot insofar as the three-judge court still needed to determine whether an election held under the unpre-cleared rule was void.). *See also State of Georgia v. Holde*r, No. 10-1062 (ESH), 2010 WL 4340346 (D.D.C. Nov. 2, 2010) (three-judge court) (finding a § 5 enforcement case moot once preclearance was granted).

This case also does not survive the mootness doctrine because it is "capable of repetition, yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). This exception has two elements: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected the same action again." *Id*.[6] Here, the challenged action was not too short in its duration. In fact, this case was pending before the district court for over a year. Furthermore,

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[6] Dallas County bears the burden of proving both elements. *See Davis v. FEC*, 554 U.S. 724 (2008).

Dallas County sought preclearance of the election changes in response to the three-judge court's injunction. Because the three-judge court did not issue a deadline to its injunction, Dallas County had time to seek appellate review. Also, Dallas County could have sought a stay of the injunction to allow it time to pursue its appellate rights. Instead, Dallas County simply complied with the injunction.

Moreover, there is not a reasonable expectation that Appellees would be subjected to the same action again. This case involves particular election changes to voting equipment in Dallas County. Though Dallas County may refuse to seek preclearance of election changes in the future, any such changes are merely "abstracted from any concrete actual or threatened harm." *Alvarez*, 130 S.Ct. at 580. In other words, the Court cannot analyze the scope and import of the election changes in the future without knowing what those potential changes are. Therefore, Dallas County cannot meet its burden of proving the elements of the mootness exception. *See Lopez v. City of Houston*, 617 F.3d 336, 340 (5th Cir. 2010) (holding a § 5 case moot because plaintiffs could not meet two-part test.).

B. The Unique Circumstances of this Case do not Justify the Court Reconsidering the Extent to Which the Discriminatory Effect of an Election Change Should be Considered by a Three-Judge Court.

Dallas County attempts to convert this § 5 enforcement action into a constitutional case, even though no such arguments were advanced to the three-judge district court. Dallas County goes so far as to argue that unless this Court alters its § 5

jurisprudence to add an evidentiary showing of discrimination as a prerequisite to § 5 relief, "§ 5 becomes loosed from its constitutional mooring." J.S. 14. The Court should refuse plenary review on this subject because the issue was not sufficiently raised below. Though it is true Dallas County generally alleged in its Answer to Plaintiffs' First Amended Original Complaint that, "§ 5 of the Voting Rights Act is unconstitutional," such allegation was never argued or briefed below. Compare Doc. 43 and Doc. 38 (Doc. 38 is Dallas County's response to the Motion for Summary Judgment; it includes no discussion of § 5's constitutionality.) "'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed,'" *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) (quoting *Duignan v. United States*, 274 U. S. 195, 200 (1927)). Dallas County has not, and cannot, show this is such an exceptional case.

Also, Dallas County has not justified plenary review to consider revising § 5 law. The court stated in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), that the only issue in a § 5 enforcement case "is whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement." *Id*. at 558-59. Two years later, the court held in *Perkins v. Matthews*, 400 U.S. 379 (1971):

> What is foreclosed to [a three-judge court] is what congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General -- the determination whether a covered change does or does not have the purpose or effect "of

> denying or abridging the right to vote on account of race or color."

Id. at 385 (quotations in original).

More recently in *Lopez v. Monterrey County*, 519 U.S. 9 (1996) the court held "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." *Id*. at 23. The court also held "on a complaint alleging failure to pre-clear election changes under § 5, that court lacks authority to consider the discriminatory purpose or nature of the changes." *Id. citing City of Lockhart v. United States*, 460 U.S. 125, n.3 (1983); *United States v. Board of Supervisors of Warren Cnty.*, 429 U.S. 642, 645-647 (1977) (*per curiam*); *Perkins*, *supra*, at 385; *Allen*, *supra*, at 558-559.

Dallas County correctly notes in footnote 4 to its Jurisdictional Statement that this Court held in its most recent opinion on preclearance that, "Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been pre-cleared by federal authorities in Washington, D.C." *Northwest Austin Mun. Utility District Number One v. Holder*, 557 U.S. __, 129 S. Ct. 2504, 2511 (2009).

Dallas County has not justified review of these extensive authorities. The current test for § 5 claims sets a sensible rule that limits the scope of issues considered by a three-judge court. Three-judge courts

have had no trouble adjudicating § 5 enforcement claims under this Court's framework. These courts properly avoid determination of discriminatory effect. *See Little v. King*, No. 10-1216, 2011 WL 198152 (D.D.C. Jan. 20, 2011) (three-judge court); *Boxx v. Bennett*, 50 F. Supp. 2d 1219 (M.D. Ala. 1999) (three-judge court); and *North Carolina State Board of Elections v. United States,* 208 F. Supp. 2d 14 (D.D.C. 2002) (three-judge court).

Dallas County has not only asked this Court to ignore its own considerable precedents, but short-circuit the congressionally-created system for preclearance by reading in a "harmless error" rule. In other words, a covered jurisdiction's failure to pre-clear will be ignored if the three-judge court determines the change does not cause racial discrimination. As this Court properly noted in *Perkins*, such a new addition to § 5 enforcement jurisprudence would render meaningless the congressional commandment that issues of discrimination only be considered by the Attorney General or the United States District for the District of Columbia.

For over 40 years, the Court has held § 5 constitutional without imposing upon plaintiffs the requirement to show discriminatory effect. "The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen v. State Board of Elections*, 393 U.S. 544 (1969). Proving an election change was designed to harm minority voters proved difficult in the time leading up to enactment of the Voting Rights Act. *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966). The purpose of the act was to raise and protect

minority voter participation. Whether the change was designed to harm minority voting strength is immaterial; the question is whether it does. Given that the Fourteenth and Fifteenth Amendments gave Congress authority to enact legislation protecting voting rights, § 5 is justified insofar as covered jurisdictions can seek fast-track review from the Attorney General, seek declaratory judgment from the D.C. District Court or can seek bailout from § 5 altogether. *Id*. at 334-35.

Even outside the context of racial discrimination, Congress "is not confined to * * * merely parrot[ing] the precise wording of the" constitutional prohibition itself. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000). Rather, it may "prohibit[] a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's test." *Id*. For example, Congress may "enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent." *Tennessee v. Lane*, 541 U.S. 509, 520 (2004).

Dallas County seeks to revive its case by considering weighty issues of constitutionality, long ago settled, even though the case presented below was not couched in such terms and the relief sought was granted and delivered. Other than convenience for Dallas County, no sufficient basis has been presented for disturbing this well-settled law. No significant basis has been given for the Court to address constitutional matters under these circumstances. The Court is bound to avoid these issues when the case can be resolved on other terms. *See Northwest Austin*, 129 S. Ct. at 2508.

Even if the Court were to consider the constitutional issues and determine § 5 would be endangered absent a showing of the "potential for discrimination," the three-judge court was correct in concluding Appellees met its "burden on this score." J.S. App. 28a. Dallas County correctly noted that Appellees alleged in their complaint the election changes had the effect of injuring minority voting rights. *See* J.S. 5 *citing* Doc. 1 at 13 and Doc. 16 at 12. In support of this allegation of the potential for discrimination, Appellees produced images of the cast vote records from the iVotronic for the 2008 state representative race at issue in the underlying state proceeding. *See* Doc. 29. In addition, these images include paper ballot records that revealed citizens making a straight party selection on a paper ballot and also bubbling the names of nominees for that same party.[7] TDP argued that these images revealed a greater incidence of emphasis voting in precincts with predominantly minority populations.[8]

Later, after Dallas County requested reconsideration of the three-judge court's order granting the Motion for Summary Judgment, TDP produced an analysis of these ballot images. *See* Doc.

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[7] Recall that Dallas County utilizes paper ballots on election day and the iVotronic for early voting. Therefore, in a given election there are votes cast on the iVotronic and on a paper ballot.

[8] Dallas County appears to object that the ballot images were not authenticated. *See* J.S. 15. This argument ignores that the ballot images were produced by Dallas County and that Dallas County made no specific objection as to the alleged unreliability of these images. Therefore this objection has been waived.

52, Exhibit A.[9] This analysis revealed that voters in precincts with the highest African American and Latino population were twice as likely as voters in precincts with the lowest African American and Latino population of casting an emphasis vote. Thus, minority voters were subjected to a greater risk of their votes being lost due to the iVotronic's change in tabulation of votes.

Although Appellees offered evidence to support their claim of the potential for discrimination, Dallas County failed to present the Court with any authority that such evidence is necessary. To the extent case law from varying courts requires a showing of "the potential for discrimination," none of these courts required evidentiary showing. Instead, plaintiffs are merely required to show a plausible explanation as to how the election change could impact minority voters. In this case, TDP not only presented such plausible explanation, it offered evidence to prove it. Dallas County offered no evidence in rebuttal. Dallas County's efforts to bootstrap a § 2 evidentiary burden to a § 5 enforcement case was correctly denied by the three-judge district court.

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[9] Dallas County incorrectly informs the Court that in the state house race at issue, there were only nine affected votes. *See* J.S. 16. In fact, there were 26 votes out of 41,264. Some of these votes were for Republican candidates and some were for Democratic candidates. If the votes were tabulated under the baseline practice, it would have resulted in a net nine vote increase for the Democrat who was losing by 17 votes. Though the change in election practices was not material in this one race, it is easy to imagine closer races, or races including more minority precincts, where such an election change would be determinative. Nevertheless, § 5 requires no showing of materiality.

C. None of Dallas County's Other Arguments Justify Noting Probable Jurisdiction.

The other arguments Dallas County raises in its attack of the three-judge court order are not substantial and therefore do not justify this Court noting probable jurisdiction.

Dallas County argues there was insufficient evidence to prove what the baseline election practices were prior to the alleged changes. *See* J.S. 18019. First, note that Dallas County does not directly state that the iVotronic tabulation method and the 2008 manual recount method were not election changes - it cannot since its Chief Election Officer so admitted in testimony before the state court. All Dallas County argues is that there was insufficient evidence of what constitutes the baseline. The three-judge court was correct in concluding Dallas County's argument "regarding the TDP's purported lack of evidence is without merit." J.S. App. 23a.

Dallas County's jurisdictional statement neglected to inform this Court of the substantial testimony before the three-judge court when it determined the issues in this case. As stated above, there was approximately two days worth of testimony presented to the three-judge court. This testimony included Dallas County's Chief Election Officer, Bruce Sherbet and his first assistant, Tony Pippins-Poole. This testimony consisted of exhaustive explanation of the prior voting practices as well as the changes made by the iVotronic and the 2008 recount procedure. Given this evidence and the fact that Dallas County's election

employees admit to election changes, the three-judge court correctly found election changes had occurred.[10]

Finally, Dallas County argues that because its pre-clearance submissions, in its opinion, were sufficient to obtain effective preclearance for the iVotronic, additional preclearance was not necessary for the 2008 manual recount changes. *See* J.S. 22-23. Dallas County relies upon the Fourth Circuit's unpublished opinion of *White-Battle v. Moss*, 22 Fed. Appx. 304, 306 (4th Cir. 2007). First, the *Moss* case is distinguished from this dispute. The *Moss* court found that the manner in which an electronic voting system tabulates its votes is pre-cleared when the machine is pre-cleared. What is at issue in this case is how Dallas County tabulated cast vote records in a manual recount.

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[10] Dallas County Chief Election Officer, Bruce Sherbet, testified the iVotronic changed the method for tabulating votes of persons who made a straight party selection and also an individual candidate selection when it was put into service in 1998. *See* Doc. 28 App. 123–124 and Doc. 28 App. 123–124. Mr. Sherbet testified that the review screen shown by the iVotronic resulted in a different tabulation than a paper ballot showing the same selections—a change in 1998. *See id.* at 107-108. Mr. Sherbet testified that the manual recount employed when tabulating cast vote records changed in 2008. *See id.* at 124. Finally, Mr. Sherbet testified that neither of these changes had been presented to the Department of Justice for pre-clearance. *See id.* at 125. Generally, the court testimony of Bruce Sherbet extensively discusses the operation of the iVotronic, the historical operation of paper ballots, the historic incidents of voters casting emphasis votes, and a description of the § 5 submissions made concerning this case. Given that Appellees relied upon Dallas County's Election Officer's testimony in support of the summary judgment, the three-judge court was correct in determining no fact issue existed.

More importantly, what distinguishes *Moss* from this case is that the iVotronic was implemented in Dallas County in 1998, but the manual recount procedure was not adopted until 2008. Therefore, the preclearance obtained on the iVotronic could not have been effective for the manual recount procedure adopted ten years later. The three-judge court properly concluded, based upon the undisputed evidence of Secretary of State memoranda and Bruce Sherbet's testimony, that the 2008 election manual recount procedure was a change. *See* J.S. App. 23a-24a.

Finally, Dallas County claims the three-judge court erred by not following the unpublished opinion in *Texas Democratic Party v. Williams*, 285 Fed. Appx. 194, 2008 WL 2916349 (5th Cir. July 30, 2008), cert. denied 129 S. Ct. 912 (Jan. 12, 2009). In *Williams*, the TDP sued the Texas Secretary of State for wrongful certification of the Hart InterCivic eSlate direct recording electronic voting system. The *Williams* case was an Equal Protection and Due Process claim under *Bush v. Gore*, 531 U.S. 98 (2000). The Fifth Circuit affirmed the district court's ruling that the eSlate's handling of emphasis votes was not invidious to constitutional protections. Moreover, the eSlate voting system involved in *Williams* contained a written warning displayed to a voter in most circumstances when an emphasis vote was cast. The iVotronic contains no such warning. Though plaintiffs contended this warning was insufficient, the district court, as affirmed by the Fifth Circuit, found the warning sufficient to offset any constitutional injury.

Most importantly, *Williams* did not involve a claim under the Voting Rights Act. Dallas County has failed to show how the *Williams* case is relevant to the test

for three-judge courts to consider in § 5 enforcement cases. *Williams* involved a different machine, with a different interface and entirely different claims.

Dallas County has failed to justify plenary review of the three-judge court's opinion on the basis of these unique and limited issues.

CONCLUSION

For the reasons stated above, the TDP respectfully moves for dismissal of this direct appeal or, alternatively, summary affirmance of the order entered by the three-judge district court.

Respectfully submitted,

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