

NO. 08-50581

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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LULAC OF TEXAS, ET AL,

*Plaintiff-Appellants,*

v.

STATE OF TEXAS and TEXAS DEMOCRATIC PARTY,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Western District of Texas – San Antonio Division

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**BRIEF FOR THE TEXAS DEMOCRATIC PARTY -- APPELLEE**

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## STATEMENT OF FACTS

The Texas Democratic Party (“TDP”) is a member organization of the National Democratic Party. The TDP is governed by the State Democratic Executive Committee (“SDEC”) but its rules are adopted every two years by the delegates at the State Convention. See Tex. Election Code § 163.004. (R. Vol. 1, p 104). Because this is an election year, the Texas Democratic Party’s State Convention was set for June 5-7, 2008 in Austin, Texas at the Austin Convention Center. (R. Vol. 1, p. 95). The Texas Delegate Selection Plan for 2008 was adopted by the State Democratic Executive Committee on April 28, 2007 following a 30-day public comment period and, pursuant to the Rules of the Democratic National Committee (“DNC”), was submitted for DNC approval. (R. Vol. 1, p. 101). The DNC’s Rules and Bylaws Committee approved the plan October 18, 2007 after requesting some revisions. *Id.* However, the general delegate selection plan has been in place since 1988. (R. Vol. 1, p. 100).

The Texas Delegate Selection Plan has for the last two decades provided a three-step process in determining the identities of the persons who will attend the Democratic National Convention from the State of Texas. The first process, sometimes referred to as the “Texas Two-Step” by the press, occurred on March 4, 2008. (R. Vol. 1, pp. 99-101). On that day, a general primary election was held. Because this is a presidential year, the Democratic voters also made a selection for

Nominee for the Office of President of the United States. See *Id.* Later that day, Democrats who voted in the Primary gathered around the state at precinct conventions and elected delegates to State Senate and County Conventions set to occur on March 28, 2008. See *Id.* These delegates were divided by presidential preference based upon the level of support each presidential candidate had at that individual precinct convention. (R. Vol. 1, p. 100). By all estimates, the March 4, 2008 precinct conventions were by far the most attended conventions in Texas history. This high attendance was the result of a vigorous campaign between two Democrats, Senator Barack Obama and Senator Hillary Clinton, for selection as the Democratic Party's Nominee for President.

The delegates selected at the precinct convention attended the Senate District and County Conventions on March 28, 2008.<sup>1</sup> See App. generally. As the delegates arrived, they signed in to the convention roll by stating a preference for the presidential nominee. (R. Vol. 1, pp. 99-102). The division of this preference was calculated and state convention delegates were selected in equal proportion to the presidential support of the delegates as reflected by the sign-in. See *Id.* The number of delegates a particular County or Senate District Convention could elect

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<sup>1</sup> When a county lies wholly within a State Senate District, that county party has its own convention. When a county is divided into more than one State Senate District, the residents of that county divide up and hold Senate District Conventions in the county. As a result, urban counties such as Bexar, Harris and Dallas hold Senate District Conventions and rural counties such as Llano, Gillespie, and Gonzales hold county conventions.

was decided by determining the number of Democrats who resided within that geographic region based upon voter turnout in the most recent gubernatorial election. (R. Vol. 1, pp. 100-101). The purpose of this provision was to reward areas of the state where Democrats turned out for local, statewide candidates every two years instead of every four years for President. See *Id.* This rule strengthens the local state party, the central goal of the Defendant TDP. It also ensures party growth at the local and not just national level. See *Id.*

LULAC'S only complaint is how the Defendant TDP allocates these delegates.

The manner in which the Defendant TDP allocates its delegates is consistent with the Rules of Delegate Selection as adopted by the Democratic National Committee. (R. Vol. 1, p. 234). Indeed, the national system and local systems mirror each other in terms of rewarding regions where more Democrats reside with more delegates. See *Id.* The DNC provisions require delegates to be allocated pursuant to the following:

8. NATIONAL CONVENTION DELEGATE APPORTIONMENT

A. Apportionment of district-level delegates within state shall be based on one of the following:

1. A formula giving equal weight to total population and to the average vote for the Democratic Candidates in the two most recent Presidential elections;

2. A formula giving equal weight to the vote for the Democratic candidates in the most recent presidential and gubernatorial elections;
3. A formula giving equal weight to the average of the vote for the Democratic candidates in the two most recent presidential elections and to the Democratic Party registration or enrollment as of January 1, 2008; or
4. A formula giving one-third (1/3) weight to each of the formulas in items (1), (2), and (3).

B. Apportionment for each body selecting delegates to state, district, and county conventions shall be based upon population and/or some measure of Democratic strength.

*Id.* In other words, delegates must be allocated to the National Convention by paragraph A. Delegate allocation to earlier conventions is governed by paragraph B which leaves the issue to state parties so long as the system considers “some measure of Democratic strength.”

LULAC is not satisfied with how the delegates to biennial State Conventions have chosen to allocate delegates for the last two decades.

LULAC, in seeking to avoid the democratic processes of the Democratic Party, does so in the name of a statute that was adopted to prevent racial discrimination. This is not the typical racial Voting Rights Act case and the Texas Democratic Party has turned the page on the despicable behavior of its earlier party members in excluding minority participation. See, for example, the “*White*

*Primary Cases*” and *Smith v. Allright*, 321 U.S. 649 (1944), in particular. There is no evidence and there has been no allegation that Defendant Texas Democratic Party *intentionally* designed the challenged delegate allocation formula to injure minority voting rights.

One could not reasonably claim that the Texas Democratic Party of today has intentional, built-in racial biases against minority groups. The following outlines provisions in the Defendant TDP Rules (R. Vol. 1, pp. 104-150) that ensure participation of minority interests:

#### **Art I.B. - Declarations**

- Art I.B.1 - No membership tests/loyalty oaths to the Texas Democratic Party shall be required or used if it has the effect of requiring prospective/current members of the Democratic Party to acquiesce in, condone, or support discrimination on the grounds of race, sex, sexual orientation, age, color, creed, national origin, religion, ethnic identity, economic status or disability.
- Art I.B.2 - The Democratic Party at all levels shall support the broadest possible voter registration and participation without discrimination on the grounds of race, sex, age, color, creed, national origin, religion, ethnic identity, economic status or disability.
- Art I.B.3 - Duty of the State Chair and Party Officers at all levels to take affirmative steps to encourage young people, women and minorities to seek selection as Delegates to Party Conventions and as members of Party Committees.

### **Article III - Executive Committees**

- Art III.D.2.(a) - Membership. The SDEC shall be composed of two members elected from every senatorial district and the following additional members:
  - two from the Texas Democratic County Chairs Association,
  - two from the Texas Young Democrats,
  - one from the Senate Democratic Caucus (nonvoting),
  - one from the House Democratic Caucus (nonvoting),
  - two from the Texas Democratic Women,
  - two from the Texas Coalition of Black Democrats,
  - two from the Hispanic Caucus,
  - two from the Non-Urban/Agriculture Caucus,
  - two from the Stonewall Democrats,
  - two from the Texas Environmental Democrats,
  - and two from the Asian American Democrats of Texas.

### **Art IV. – Party Conventions**

- Art.IV.9 - Balancing Delegations (a) In selecting Delegates and Alternates at all levels, the Nominations Committee and the Convention itself shall make every effort to select persons so that the delegation as a whole shall reasonably reflect...the proportion of women, young people, and minorities present in the district or state.
- Art.IV.D.5(c) - Temporary Credentials Committee for the State Convention - A Temporary Credentials Committee composed of members shall be appointed by the State Chair. The State Chair shall ensure that the Temporary Credentials Committee is broadly representative of the state's population in terms of geography, age, sex, ethnic identity, race, and philosophical persuasion.

The following outlines provisions in the Defendant TDP' Delegate Selection

Plan that ensure participation of minority interests (R. Vol. 1, pp. 250-305):

**Section II.C - Presidential Candidates** - Each presidential candidate (including uncommitted status) shall use his or her best efforts to ensure

that his or her respective delegation within the state delegation achieves the affirmative action goals established by this Plan and is equally divided between men and women

**Section III.D - State Conventions and the Selection of National Delegates** - Any person eligible to participate in the delegate selection process may qualify as a candidate for National Convention delegate and alternate by filing a Statement of Candidacy with the Texas Democratic Party State Chair. Statements of Candidacy must contain the individual's name, mailing address, residence address, day and night phone numbers, email address, a pledge of support to the Democratic nominee for president, and a pledge of support to the individual's presidential preference (or uncommitted status) or an oath that the individual is currently uncommitted. To aid in meeting affirmative action and inclusion goals, the Statement of Candidacy or other application shall contain a statement to allow an individual to voluntarily indicate their status in groups historically underrepresented.

## **Section VII - Affirmative Action, Outreach and Inclusion Plan**

A. Statement of Purpose and Organization - In order that the Democratic Party at all levels be an open Party which includes rather than excludes people from participation, a program of effective affirmative action is hereby adopted by Texas (Del. Sel. Rule 5.A.).

Consistent with the Democratic Party's commitment to including historically underrepresented individuals in the Democratic Party's affairs (underrepresented by virtue of their race, ethnicity, age, sexual orientation, gender identity or expression, or disability), Texas has developed Party outreach programs. Such programs include recruitment, education and training in order to achieve full participation by such groups and diversity in the delegate selection process – and at all levels of Party affairs – in 2008 (Del. Sel. Rule 5.C & Reg. 4.7.).

In order to encourage full participation by all Democrats in the delegate selection process and in all Party affairs, the Texas Democratic Party has adopted and will implement programs with specific goals and timetables for African-Americans, Hispanics, Native Americans, Asian/Pacific Americans and women (Del. Sel. Rule 6.A.). The goal of the programs

shall be to encourage participation in the delegate selection process and in Party organizations at all levels by the aforementioned groups, as indicated by their presence in the Democratic electorate. (Del. Sel. Rule 6.A.).

In order to achieve full participation of other groups that may be underrepresented in Party affairs, including members of the LGBT community and persons with disabilities, the Texas Democratic Party has adopted and will implement Inclusion Programs (Del. Sel. Rule 7).

If it is true that Latinos have a diminished representation at the State Convention, that consequence is a direct result of the lower voter turnout for Latinos during gubernatorial elections; a fact the District Court specifically found. (R. Vol. 2, p. 394). What makes this case different than any other Voting Rights Act case is that the harm, if any, Latinos suffered was self-inflicted. LULAC asks this Court to grant them a benefit in delegate allocation despite the fact the communities they claim to represent do not turn out for statewide candidates as heavily as do other parts of the state.

Even if LULAC could show a claim under the Voting Rights Act, granting injunctive relief, essentially stopping the State Convention would have caused irreparable harm. A part of the record was the affidavit of the Convention Director for the Texas Democratic Party that describes in detail the enormous economic and political damage that will be caused by granting LULAC the relief they seek. (R. Vol. 1, pp. 94-96).

## STANDARD OF REVIEW

### **I. Motion to Dismiss Pursuant to Fed. Rule Civ. Pro. 12(b)(6).**

The District Court correctly described the Standard of Review for Motions to Dismiss pursuant to Fed. Rule of Civ. Pro. 12(b)(6). (R. Vol. 2, pp. 387-389). LULAC also correctly described the standard of review. (LULAC Brief at 6). As a result, it will not be repeated here. The Court should Affirm the dismissal because the District Court correctly found that LULAC could prove no set of facts that would entitle it to relief. See *Joelson v. U.S.*, 86 F.3d 1413, 1416 (6<sup>th</sup> Cir. 1996).

### **II. § 5 of The Voting Rights Act.**

LULAC urged in their Complaint before the District Court, causes of action under §§ 2 and 5 of the Voting Rights Act. LULAC essentially abandoned their § 2 claims in the District Court and only sought the injunction pursuant to § 5. LULAC's Brief before this Court similarly does not address the § 2 claims. Thus, this Appeal is properly limited to issues raised in § 5. A court, when faced with both §§ 2 and 5 claims should decline to consider whether the challenged provision violates the Voting Rights Act under § 2 and instead should only determine whether the challenged provision was subject to pre-clearance under § 5 of the Act. See *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32, 36 (1978). The court should "confine[] its review to the preliminary issue whether [the delegate

allocation system] had the ‘potential’ for discrimination and hence was subject to § 5.” *Id.* citing *Georgia v. United States*, 411 U.S. 526, 534 (1973). If the court determines that pre-clearance was required, the ultimate issue should be left to the Attorney General of the United States or the District Court for the District of Columbia as to whether the provision is in compliance with § 2 of the Voting Rights Act. See *Id.* See also *Perkins v. Matthews*, 400 U.S. 379, 384-85 (1971).

The Supreme Court has set out a four-step process of inquiry for resolving cases such as this. First, whether the challenged provision is a “standard practice or procedure with respect to voting” within the meaning of § 5 of the Voting Rights Act. See *Dougherty County Bd. of Ed.*, 439 U.S. at 34. Second, the Court should consider whether the Texas Democratic Party is a “state or political subdivision” within the purview of the Act. See *Id.* Third, if both of those questions are answered in the affirmative, the Court should undertake a limited review of whether the challenged provision has the “potential” for discrimination leaving the ultimate issue for the Attorney General or the United States District Court for the District of Columbia to resolve in the event § 5 pre-clearance is required. See *Id.* Fourth, if, and only if the Court has affirmatively answered the first three inquiries, the Court should craft a remedy that ensures § 5 pre-clearance is sought, but does so in the least damaging and destructive manner. See *Berry v. Doles*, 438 U.S. 190 (1978).

## ARGUMENT

### **I. The District Court, acting with a single judge, did not err by dismissing LULAC's case for failure to state a claim.**

In this Appeal, LULAC claims, for the first time, that a three-judge panel of the District Court was required to decide this matter.<sup>2</sup> LULAC does not deny that it never requested a three-judge panel from the District Court. In fact, conspicuously missing from LULAC's Brief to this Court is mention that LUALC actually fought the appointment of a three-judge court below. (R. Vol. 1, pp. 32-33).

TDP agrees with LULAC's statement before the District Court that "where § 5 claims or defenses are wholly insubstantial and completely without merit, such as where the defenses or claims offered are frivolous, essentially fictitious or determined by prior case law, a single judge may rule on the claims without convening a three-judge court, *citing Broussard v. Perez*, 572 F.2d. 113, 118-119 (5<sup>th</sup> Cir. 1978), *cert. denied*, 439 U.S. 1002 (1978). (R. Vol. 1, pp. 32-33). The District Court found the claims made in LULAC's Complaint were essentially fictitious in so far as they sought to obtain relief for a class of voters who were only damaged as a consequence of their failure to vote. In other words, the District

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<sup>2</sup> In the interest of full disclosure, it should be noted at the outset that the undersigned counsel are in a precarious position in this Appeal. Counsel argued forcefully to the District Court that a three-judge court should be empanelled to hear this case. (R. Vol. 1, pp. 32-33). Counsel for LULAC argued the reverse, claiming they were entitled to relief from one judge. Apparently LULAC did not consider the possibility the one judge would disagree with their legal and factual position. Now, on appeal, the roles are reversed and TDP is left defending the authority of one judge while LULAC protests.

Court exercised its proper authority to serve as gatekeeper and prevent the unnecessary expense of judicial resources by disposing of a baseless claim without convening a three-judge court. The fact that LUALC did not request the three-judge court should not be overlooked.

The Supreme Court has frequently cautioned that statutory provisions summoning three-judge federal district courts are to be strictly construed. See *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974); *Allen v. State B.D. of Elections*, 393 U.S. 544, 561-62 (1969); and *Phillips v. United States*, 312 U.S. 246, 251 (1941). Moreover, a single judge district court has the authority to determine if a three judge court is required. See *United States v. Saint Landry Parish Sch. Bd.*, 601 F.2d 859, 863 (5<sup>th</sup> Cir. 1979).

Congress has also enacted the procedures involved in composing three-judge courts:

Three-judge court; when required; composition; procedure

- (a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.
- (b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

- (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.
- (2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.
- (3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

28 U.S.C. § 2284. Thus, Congress requires a request for a three-judge panel be made to the District Court. Here, LULAC made no such request and therefore

cannot, for the first time on appeal, request the appointment. Even if LULAC were attempting to rely upon the request made by TDP for a three-judge court, there is no support for that position in the statute. The error, if any in the District Court's failure to appoint a three-judge court, can only be raised by the TDP, which it declines to do.

LULAC's argument on appeal suffers from another inconsistency. This Court's jurisdiction is limited by the jurisdiction of the District Court when it decided the case. A Court of Appeals can not review the merits of a claim made to the District Court if the District Court lacked jurisdiction to hear the claims sitting with a single judge. See *Page v. Bartels*, 248 F.3d 175, 184 (3<sup>rd</sup> Cir. 2001) citing *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715-16 (1962) (per curiam). Thus, if this Court finds the District Court should have convened a three-judge court, then this Court lacks jurisdiction over any substantive issues. Any review of the substantive issues must be decided in the first instance by the three-judge court and that decision can only be reviewed by the Supreme Court. If the Court determines a three-judge court was required, no further consideration of the issues presented by LUALC's appeal should be made. The Court should remand to the District Court to convene a three-judge court in order to hear the substantive issues. However, in order to determine if the District Court erred in failing to

convene the three-judge court, this Court must make a “preliminary” review of the merits to LULAC’s claims as the District Court correctly did.

**II. The District Court did not err in finding LULAC’s claims under § 5 of the Voting Rights Act insubstantial.**

§ 5 of the Voting Rights Act codified at 42 U.S.C. § 1973c provides in relevant portion:

- (a) Whenever a state or political subdivision...shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect....such state or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure neither had the purpose nor will have the effect of denying or bridging the right to vote on account of race or color, or in contravention of the guarantees set forth in § 4(f)(2) [42 U.S.C. § 1973b(f)(2)], and unless and until the court enters such judgment, no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *provided*, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal office or any other appropriate official of such state or subdivision to the Attorney General and the Attorney General has not interposed an objection within 60 days after such submission, or upon good cause shown, to facilitate an expedited approval within 60 days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General’s failure to object, nor declaratory judgment entered under this section shall bar a subsequent action to enjoin the enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney

General affirmatively indicates that no objection will be made within the 60 day period following receipt of a submission, the Attorney General may reserve the right to re-examine the submission if additional information comes to his attention during the remainder of the 60 day period which would otherwise require objection in accordance with the section any action to this section will be heard and determined by a court of three judges in accordance with the provision of § 2284 of Title 28 of the United States Code and any appeal shall lie to the Supreme Court....

42 U.S.C. § 1973c.

LULAC urges that TDP is a “state or political subdivision” within the meaning of the Voting Rights Act and therefore was required to obtain pre-clearance from the office of the United States Attorney General or otherwise obtain a declaratory judgment from the United States District Court for the District of Columbia. Alternatively, without statutory basis, LULAC argues that the State of Texas should submit TDP Rules for pre-clearance.

The plain language of the statute does not list political parties and therefore, under the statute’s plain language, Defendant TDP was not required to seek pre-clearance of its delegate selection plan. The only authority LULAC cites to support application of § 5 to political parties is the divided and restricted opinion of *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996).

**A. The United States Supreme Court’s decision in *Morse* left unresolved whether and under what circumstances a political party is required to obtain pre-clearance under the Voting Rights Act.**

In *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), the United States Supreme Court considered the application of the Voting Rights Act to political parties. The resulting opinion did not resolve the question as a matter of precedent for lower courts. See “*Morse v. Republican Party of Virginia: Political Costs or Benefits?*,” 6 Geo. Mason L. Rev. 397 (Winter 1998).

Fortis Morse and two other law students filed suit against the Republican Party of Virginia alleging, *inter alia*, that the Virginia Republican Party’s adoption of an entrance fee to its State Convention was an election procedure change that required pre-clearance under the Voting Rights Act. See *Morse*, 517 U.S. at 190-92. The Virginia Republican Party decided to select delegates and vote on matters at its State Convention rather than conduct a primary election. See *Id.* Anyone could participate in the State Convention so long as they signed a pledge to support the Republican Nominees and paid a registration fee of \$35 or \$45, depending upon the date of certification. See *Id.* Morse and others sought an injunction preventing the requirement of the fee on the basis it had not received pre-clearance pursuant to § 5 of the Voting Rights Act. See *Id.* A three-judge district court was convened to consider these claims. See *Morse v. Oliver North for U.S. Senate Comm., Inc.*, 853 F. Supp. 212 (W.D.VA. 1994). The District Court in *Morse* concluded that although § 5 of the Voting Rights Act generally applied to political parties, the activities of the party with regard to conventions were not subject to the

rule. See *Id.* Furthermore, the District Court relied upon the Supreme Court’s summary affirmance of a District Court’s holding in *Williams v. Democratic Party of Georgia*, Civ. Action No. 16286 (N.D.GA. Apr. 6, 1972), *affirmed* 409 U.S. 809 (1972), which the Court described as on point with its holding.

On direct appeal, the Supreme Court considered the merits of the case. Justice Stevens announced the judgment of the Court and delivered an opinion that was joined by Justice Ginsburg. Justice Breyer filed an opinion concurring in the judgment which was joined by Justices O’Conner and Souter. Justice Scalia filed a dissenting opinion that was joined by Justice Thomas. Justice Kennedy filed a dissenting opinion which was joined by Justice Rehnquist. Justice Thomas filed his own dissenting opinion which was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. Because of the numerous opinions and the restrictions each placed on its own analysis, including the “majority opinion,” the only legal clarity from *Morse* was that five Justices agreed the fee the Virginia Republican Party charged should be enjoined. The *Morse* opinions are considered here in the ordered released.

**1. The “Majority Opinion” by Justices Stevens and Ginsburg.**

In finding that the Voting Rights Act pre-clearance requirements apply to political parties, Justices Stevens and Ginsburg made three points. First, the Justices explained the Virginia statutory scheme that permitted political parties to

determine their own nominees and guarantee the political party's nominee a place on the ballot, thereby making the political parties "political subdivisions" of the state and thereby subject to pre-clearance review. See *Morse*, 517 U.S., at 195-99. Second, the Justices further concluded that deference to the Attorney General's regulation that requiring pre-clearance of political party rule changes affecting the conduct of primary elections required pre-clearance was in order. See *Id. at 200-01 and 28 C.F.R. § 51.7 (1997)*.<sup>3</sup> Finally, Justices Stevens and Ginsburg presented the history of the adoption of the Voting Rights Act which they concluded supported its application to political parties. See *Morse*, 517 U.S. at 204-208. The Justices further concluded that because the imposition of the fee by the Virginia Republican Party so closely resembled a poll tax, that pre-clearance review was necessary. See *Id.* at 210.

Despite the use of broad language that virtually any party activity, election, convention, caucus, or delegate selection process could be subject to the Voting Rights Act, the Court's "majority opinion" severely restricted its holding in several paragraphs. The Court, in responding to the dissent filed by Justice Kennedy (*Id.* at 223), characterized its holding as follows:

We hold that political parties are covered under § 5 under limited circumstances: here, only in so far as the party exercises delegated

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<sup>3</sup> LULAC has similarly claimed these regulations are entitled to deference.

power over the electoral process when it charges a fee for the right to vote for its candidates.

The “majority opinion” further backtracked when it addressed the serious concerns of the dissenting Justices that application of the Voting Rights Act would violate the political parties’ First Amendment Rights to Speech and Association. See *Id.* at 223-230. Calling the dissenters’ concerns “hypothetical,” the “majority opinion” did not rule on considerations of the parties’ First Amendment Rights because the litigants in *Morse* did not claim that blocking the imposition of the fee would violate their Associational Rights, but instead claimed other actions by political parties that would be made subject to the Voting Rights Act and would, in the future, hinder the political party’s important constitutional rights. Justices Stevens and Ginsburg stated “We leave consideration of hypothetical concerns for another day.” See *Id.* at 223. Thus, by the plain language of the Court’s “majority opinion” the holding that § 5 pre-clearance applies to political parties is limited to the instance when a political party charges an entrance fee to vote for the party’s candidates. The “majority opinion” left the remaining pre-clearance matters, including the issues raised in this suit, for another day.

**2. The concurrence of Justices Breyer, O’Conner and Souter.**

Justices Breyer, O’Conner and Souter agreed with the “majority opinion” analysis of the legislative history of § 5 and concluded that if the pre-clearance

requirement did not apply to political party activity it “would have opened a loophole in the statute the size of a mountain. And everybody [in Congress] knew it.” See *Id.* at 235. However, the concurring Justices were seriously concerned about a political party’s First Amendment Associational Rights. See *Id.* at 237-240. The Justices stated “...nor need we go forward to decide just which party nominating convention practices fall within the scope of the Act. There are already substantial limits as to which voting-related ‘practices and procedures’ must be cleared.” See *Id.* at 238, citing *Presley v. Etowah County Comm’n*, 502 U.S. 491 (1992). The concurring Justices noted that lower courts only applied § 5 to a small subcategory of party rules. See *Morse*, 517 U.S. at 239 citing *Hawthorn v. Baker*, 950 F. Supp. 1090 (M.D. Ala. 1990) (3-Judge Court), vacated as moot, 499 U.S. 933 (1991); *Fortune v. Kings County Democratic County Committee*, 598 F. Supp. 761, 764-65 (E.D. N.Y. 1984) (3-Judge Court) (*per curiam*); and *MacGuire v. Amos*, 343 F. Supp. 119, 121 (M.D. Ala. 1972) (3-Judge Court) (*per curiam*).

The concurring Justices further limited the holding of the Court by stating:

...I recognize that some of the First Amended concerns raised by the dissents may render these limits yet more restrictive in the case of Party Conventions. But the practice challenged here – the fee – lies within the act, and well outside the area of greatest “Associational” concern. Like the more obvious evasive “all-white” devices, it is of a kind that is the subject of specific Constitutional Amendment. U.S. Const. Amdt. 24, § 1 (banning poll tax).

We go no further in this case because as the dissents indicate, First Amendment questions about the extent to which the Federal Government, through pre-clearance procedures, can regulate the workings of a political party convention, are difficult ones, as are those about the limits imposed by the state-action cases. Those questions, however are properly left for a case that squarely presents them.

*Morse*, 517 U.S. at 239 (citations omitted).

Therefore, a thorough review of the two opinions that formed the majority's conclusion in *Morse* reveals that application of § 5 of the Voting Rights Act to political party activities is an unresolved matter. One need not even review the substantial and well-reasoned dissents to observe the "murky law" left by the *Morse* "majority." What one can say with certainty after *Morse* is that a political party that chooses to charge an entrance fee to participate in its convention and that convention is the only procedure allowed in order to have a say in the selection of the party's candidates, that procedure must be pre-cleared under the Voting Rights Act because it amounts to an unconstitutional poll tax. As a result, the *Morse* opinion, contrary to LULAC'S claim, is not binding authority for the Court to find application of the pre-clearance requirements under the facts of this case. In fact, there is other Supreme Court authority and persuasive authority from other state and federal courts that urge the Court to find that the Voting Rights Act pre-clearance requirements do not apply under these facts.

### 3. The Justice Scalia and Justice Thomas Dissent.

Justice Scalia began his critique of the “majority opinion” by complaining that the “majority opinion” left “consideration of hypothetical concerns for another day” and that the concurring Justices “reserve such ‘difficult’ questions ‘for a case that squarely presents them’.” See *Id* at 241. Justice Scalia chided: “That is a luxury our precedents do not allow. It has been a constant of our free-speech jurisprudence that claimants whose First Amendment rights are affected may challenge a statute, not merely on the grounds that its specific application is unconstitutional, but also on the grounds that its application is void in a substantial number of other contexts that arguably fall within the scope. This principle of “over-breach” has been applied not only to the context of freedom of speech narrowly speaking, but also in the context of the freedom to associate for the purposes of political speech.” *Id.* at 241-42 (citations omitted).

Justice Scalia went on to state “thus, to satisfy oneself that the particular practice challenged [the fee] here lies “well outside the area of greatest ‘associational’ concern” is to take only the first and smallest step in treating the weighty constitutional question posed by application of § 5 to political parties.” *Id.* at 242.

Justice Scalia saw the present case and others making their way through federal court: “besides flouting the doctrine of over-breach, the opinions’ refusal to

provide “[f]urther definition” of § 5’s application to political parties...leaves political parties without guidance as to “when [their] activities are in effect, substitute for state nominating primaries”...and as to “which party nominating convention practices fall within the scope of the Act.” See *Id.* at 242-43.

Addressing the First Amendment Associational question, Justices Scalia and Thomas sorted through the Court’s authorities on First Amendment Associational Rights. See *Id.* at 244-247. Finding that requiring political parties to submit their activities to pre-clearance is a violation of the political party’s First Amendment Associational Rights, Justice Scalia declared:

**This is the most outrageous tyranny. A freedom of political association that must await the government’s favorable response to a “mother, may I?” is no freedom of political association at all.**

*Id.* at 245. (emphasis added)

Justices Scalia and Thomas scolded the majority for failing to construe § 5 of the Voting Rights Act in such a way to avoid substantial constitutional questions. See *Id.* Justice Scalia urged that a determination could have been made that would not have interfered with a political party’s associational rights. The dissent then turned to an analysis of the textual language in the Act and ultimately Justices Scalia and Thomas concluded that though some portion of the Voting Rights Act may apply to political party’s conduct, “*nothing* in the text nor anything in the assumption that Congress must have addressed political party activity,

compels the conclusion that Congress addressed political-party activity *in the pre-clearance, prior-restraint scheme of § 5*, which is of course the only question immediately before us.” *Id.* at 247 (emphasis in original). In other words, Justices Scalia and Thomas treated the pre-clearance requirements of § 5 of the Voting Rights Act as a prior restraint on a political party’s First Amendment Associational Rights. The same important and overriding concerns that the Texas Democratic Party raises in this case is the constitutional concern the five Justices who concurred in the *Morse* judgment did not decide.

**4. The Justice Kennedy and Chief Justice Rehnquist Dissent.**

Justice Kennedy and the Chief Justice Rehnquist joined in part two of Justice Thomas’ dissent (discussed next) dealing with whether § 10 of the Voting Rights Act created a private cause of action. One of the few cohesive statements of law delivered by the majority in *Morse* is that the Voting Rights Act provides a private cause of action.

The two Justices went on to conclude that the plain language of § 5 of the Voting Rights Act does not apply to political parties. See *Id.* at 248-49. The Justices found “sensitive consideration to the rights of speech and association counsels much restraint before finding that a political party is a state actor for purposes of all pre-clearance requirements.” *Id.* at 1221. The two Justices cited an early case in what has become a well developed line of opinions by the Supreme

Court that political parties retain the “freedom to identify the people who constitute the association, and to limit the association to those people only.” *Id.* at 251, citing *Democratic Party of the United States v. Wisconsin Ex. Rel. La Follette*, 450 U.S. 107 (1981). Because of the party’s important associational rights, the Justices concluded that there is a “sound basis for construing an ambiguous reference to the term ‘state’ to avoid constitutional difficulties.” *Id.* at 251.

**5. Justice Thomas’ Dissent Joined by the Chief Justice Rehnquist, Justice Scalia and Justice Kennedy, in part.**

Justice Thomas submitted a dissent that was joined by Chief Justice Rehnquist, Justice Scalia and Justice Kennedy. Justice Kennedy joined only with regard to part two – the section considering whether § 10 of the Voting Rights Act provides a private cause of action. With regard to the issues raised in this case, Justices Thomas, Scalia, Kennedy and Chief Justice Rehnquist agreed.

The analysis began with a detailed consideration of the statutory language used in the Voting Rights Act and compared it with that language used in other similar statutes. The four Justices also considered the Court’s authorities concerning state action with regard to other bodies of law. See *Id.* at 253-257. The Justices addressed the Attorney General’s regulation at 28 C.F.R. § 51.7 (1995), rejecting it as non-persuasive since congress had itself “expressed its intent with respect to the question.” *Id.* at 258. On the textural issue, the four Justices held “a

political party is simply not a ‘state’ regardless of the particular activity in which it might be engaging. Congress has conveyed its intent to limit § 5 to the states themselves and their political subdivisions. Accordingly, the Attorney General’s regulation (28 C.F.R. §51.7) warrants no judicial deference.” *Id.*

The four dissenting Justices considered the concern raised in the “majority opinion” that failure to apply the Voting Rights Act pre-clearance provisions to political parties would create a hole in the Act “the size of a mountain.” The Justices explained that a political party’s activities could still be questioned under 42 U.S.C. § 1983 in accordance with the long held precedents of state action under the 14<sup>th</sup> and 15<sup>th</sup> Amendments to the United States Constitution. See *Id.* at 265-67. The dissenting Justices further rejected the regulation adopted by the Attorney General on the basis that the Attorney General was relying upon the court’s definition of state action as it applied under § 1983 and not under the Voting Rights Act.

The four dissenting Justices analyzed the actual text in § 5 of the Voting Rights Act. In this analysis, the Justices concluded first that political parties are not subject to the Act and second, even if they were, the fee involved for a convention did not amount to voting and therefore would not be governed under the Act. The Justices explained that the convention processes are different than primary elections in part because the state typically funds the primary election and

the conventions are typically funded by the party. See *Id.* at 279. The four Justices concluded that the decision to include convention activity under the Act was a matter of policy and therefore was left to Congress. *Id.* at 279. Because Congress did not choose to incorporate political parties in its clear language, the Court should similarly be unwilling to do so. See *Id.*

The four Justices noted that §§ 2 and 5 of the Voting Rights Act appear to be designed to work in tandem. *Id.* at 281. If that were true, the four dissenting Justices questioned why § 2 of the Act specifically refers to “the political process leading to underlying nomination or election.” *Id.* (emphasis added). Conversely, § 5 of the Voting Rights Act, the pre-clearance provision, merely refers to voting and leaves out any mention of “nomination.” The four dissenting Justices concluded their extensive and lengthy statutory construction analysis by justifying the effort in order to “avoid constructions of a statute that create [constitutional] difficulties.” *Id.* at 282-83.

Next, the four dissenting Justices cited a long line of United States Supreme Court precedents defining the scope of a political party’s First Amendment Right of Association by quoting:

The party’s determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.

*Id.* at 284, quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986); also citing *Democratic Party of the United States v. Wisconsin ex. Rel. La Follette*, 450 U.S. 107, 124 (1981). The dissenting Justices quoted the Court of Appeals for the District of Columbia:

A party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interest, deserves the protection of the Constitution...[T]here must be a right to not only form political associations but to organize and direct them in a way that will make them the most effective.

*Id.* at 284, citing *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 585 (1975) (en banc) *cert. denied* 424 U.S. 933 (1976) (emphasis deleted). The dissenting Justices criticized the “majority opinion” for failing to subject its construction of § 5 to the level of scrutiny required for legislative enactments that infringe upon the First Amendment. *Id.* at 285, citing *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). The dissenting Justices raised the concern that application of § 5 pre-clearance requirements to a political party would not survive a First Amendment challenge. See *Id.* at 285.

## **B. Divided Supreme Court Opinions Have Limited Precedential Value**

The two opinions by the Justices who concurred in the judgment limited the scope of the Voting Rights Acts' application. Regardless, general Supreme Court precedent concerning the controlling nature of such a divided decision prevents the

*Morse* “majority” analysis from controlling in this case. The Supreme Court has held:

“When a fragmented court decides a case and no single rationale explaining the result enjoys ascent of five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds...” *Marks v. United States*, 430 U.S. 188 (1977) quoting *Cregg v. Georgia*, 428 U.S. 153 (1976).

At least one three-judge district court has found that the *Morse* opinion did not state a single rationale and therefore was not binding authority. See *LaRouche v. Fowler*, 77 F. Supp.2d 80, 85 (D.D.C. 1999). See also “The Precedential Value of Supreme Court Plurality Decisions,” 80 Colum. L. Rev. 756 (1980). Even had the Justices in *Morse* not limited the scope of their opinions, because of the deep division, the opinion has little mandatory precedential value. Therefore, the District Court was not in error in refusing to convene a three-judge court by finding that *Morse* and subsequent cases did not clearly bring TDP’s rules into the purview of § 5 when the statute’s plain language limited its application to “states and political subdivisions.”

**C. The District Court was correct in relying upon decisions after *Morse* that did not support broad application of § 5 pre-clearance requirements to political parties.**

The District Court in its opinion cited a case more recent than *Morse* to support its conclusion that the issues in this case were insubstantial. (R. Vol. 2,

p. 396). In *Nelson v. Dean*, 528 F. Supp 1271 (N.D. Fla. 2007), the court held that the Democratic National Committee's decision whether to seat or exclude delegates from Florida and/or Michigan were not likely subject to the Voting Rights Act or that if the Act applied, it would impermissibly burden the political party's First Amendment association rights. The court ultimately concluded that the constitutional rights of a political party extend so far that the political party may prevent representation of entire states at its highest political convention when those state delegations failed to comply with party rules. In *Nelson*, the local parties held their primary elections earlier than permitted under the national rules.

The District Court also relied upon *LaRouche v. Fowler*, 77 F.Supp. 2d 80 (D D.C. 1999). (R. Vol. 2, p. 396). Linden H. LaRouche, Jr. sued the Democratic National Committee and various state Democratic parties, arguing that procedures adopted by the Democratic National Committee had not been pre-cleared despite being enforced by state democratic parties subject to the Voting Rights Act. Specifically, the Democratic National Committee, through its Chairman, sent a letter to state parties advising the parties not to seat delegates in support of Mr. LaRouche notwithstanding the votes recorded in favor of him through primaries, caucuses, and conventions, because Mr. LaRouche had not shown himself to be a qualified Presidential Candidate and that he did not "possess a record affirmatively demonstrating that he is faithful to, or has at heart, the interest, welfare and

successes of the Democratic Party of the United States.” *LaRouche v. Fowler*, 152 F.3d 974, 976 (D.C. Cir. 1998). The state parties complied without seeking pre-clearance.

Mr. LaRouche’s claims were first submitted to a three-judge court of the United States District Court for the District of Columbia, where they were dismissed. The United States Court of Appeals for the District of Columbia considered the dismissal and affirmed save and except the application of § 5 of the Voting Rights Act claims that were then remanded back to the District Court for a three-judge panel to consider. See *Id.* at 975. Before concluding remand was necessary, the Court of Appeals questioned the controlling nature of the *Morse* opinion. See *Id.* at 992-93. Because the Court was uncomfortable with the judiciary defining the terms by which a political party may choose the qualifications for its members, and in this case its nominee, the Court was uncomfortable construing *Morse* to require pre-clearance of party rules. See *Id.*

The court made that very analysis and delivered its opinion in November of 1999, the decision relied upon by the District Court in this case. See *LaRouche v. Fowler*, 77 F.2d 80 (D.D.C. 1999). (R. Vol. 2, p. 396). This opinion remains the central post-*Morse* case addressing the application of § 5 of the Voting Rights Act to the activities of a political party. In addressing *Morse*, the *LaRouche* Court began by citing Supreme Court authorities (discussed more thoroughly herein) that

limit the precedential value of divided Supreme Court opinions. The Court further summarized the various opinions in *Morse* and then turned to the Supreme Court opinion of *Lopez v. Monterey County*, 525 U.S. 266 (1999) which the Court described as instructive on the issue presented. Ultimately, the Court found the DNC not subject to § 5.

After discussing issues of personal jurisdiction, the *LaRouche* Court turned its attention to the application of pre-clearance to local parties. The court plainly recognized they were faced with the unanswered questions raised in *Morse*. See *Id.* at 87. Recognizing that the fragile majority in *Morse* found application of the pre-clearance requirements to some party activity, the court noted that the party’s associational rights must be considered and that “all nine Justices in *Morse* recognized that the First Amendment Right of Association is implicated by the application of the Act to political parties.” *Id.* After summarizing numerous Supreme Court authorities (many discussed below) the District Court concluded that the state democratic parties were not subject to the pre-clearance requirements of § 5 of the Voting Rights Act. Doing so “would interfere with core associational rights; specifically here, internal national party rules as followed by state parties and in a covered jurisdiction.” *Id.* at 89. The court described its holding as follows:

In reaching this conclusion we are guided by the principle that we should construe statutes so as to avoid constitutional questions. To hold as *LaRouche* seeks would unnecessarily implicate First Amendment Rights. By holding that the pre-clearance requirement does not apply to the political party rules at issue here, we avoid the implication of the First Amendment Rights of Association. When faced with two constructions of a statute, it is “our plain duty to adopt that construction which will save the statute from constitutional infirmity.”

*Id.* at 89, citing *United States Ex. Rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) and *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trade Council*, 485 U.S. 568 (1988). Again, distinguishing the *Morse* opinion, the three-judge court stated “the prevailing Justices in *Morse* did not find this rule of construction implicated on the facts of that case, but held that the practice challenged [charging a fee] was ‘well outside the area of greatest ‘associational’ concern’.” *Id.* at 89, citing *Morse*, 517 U.S. at 239.

The twin *LaRouche* cases and *Nelson* remain the most thorough treatment of the application of § 5 to political party activities since the divided *Morse* opinion. It was not error for the District Court to determine this case presented unsubstantial issues that did not justify empanelling a three-judge court.

**III. The District Court was correct in holding that application of § 5 to the Texas Democratic Party Rules would be invidious to the political party’s First Amendment Associational Rights.**

Most recently, in *New York State Bd. of Elections v. Lopez-Torres*, \_\_\_ U.S. \_\_\_, 128 S.Ct. 791 (January 16, 2008), the Supreme Court, in a rare unanimous opinion, addressed the scope of a political party’s important Constitutional rights. In *Lopez-Torres*, the party nomination procedure (employed by Democrats and Republicans) for candidates who desire to be elected as a judge was challenged on the contention that party members not blessed by “party bosses” did not have a fair shot at the party’s nomination. See *Id.* at 795. The nomination procedure, a creature of state law, required nominations be made by convention. See *Id.* *Lopez-Torres* claimed the conventions were tightly controlled and prevented nomination of any party member not in good stead with the party leadership. See *Id.* She further alleged that since the Democratic Party exclusively prevailed in New York City judicial elections, individuals desiring that party’s nomination had a Constitutional right to a fair process.

Justice Scalia, in the Court’s opinion, began the analysis by recognizing a limited right by the state (through its legislative enactments) to interfere in a party’s nomination process to ensure fairness. See *Id.* at 796. However, the opinion further concludes that it is the role of the state legislature and not the courts to deliberate upon and enact laws governing the nomination process. See *Id.* at 799-780. The opinion held:

None of our cases establishes an individual's constitutional right to have a "fair shot" at winning the party's nomination. And with good reason. What constitutes a "fair shot" is a reasonable enough question for legislative judgment, which we will accept so long as it does not too much infringe upon the party's associational rights. But it is hardly a manageable constitutional question for judges — especially for judges in our legal system, where traditional electoral practice gives no hint of even the existence, much less the content, of a constitutional requirement for a "fair shot" at party nomination.

*Id.* at 798-99. In short, though the Court shared the serious concerns of *Lopez-Torres* that the New York election scheme violated all notion of fairness, the Court left the system intact rather than infringe upon the political parties' important Constitutional rights.

*Lopez-Torres* was but the latest in a highly developed line of cases that recognize political parties' associational rights. The following United States Supreme Court opinions decided over the last century all contain holdings supporting the Defendant TDP's associational rights in this case. Each case re-asserts, as the central constitutional issue, the right of party members to determine the terms of their political association and the District Court was correct in finding that application of § 5 to the TDP would violate the constitutional rights of TDP and its members:

- *Ray v. Blair*, 434 U.S. 214 (1952). Affirming an Alabama political party's right to require an oath to support the party's nominees in the general election.
- *Williams v. Roads*, 393 U.S. 23 (1968). Invalidating an Ohio statute that made the formation of a third party more difficult because the state had not shown a sufficient interest to justify infringing associational rights.
- *Rosario v. Rockefeller*, 410 U.S. 752 (1973). Upheld state statute requiring voters to register thirty days before the general election with a particular party if they desired to vote in that party's political primary the next cycle.
- *Storer v. Brown*, 415 U.S. 724 (1974). Found that state was within its right to prevent a candidate from running as an independent if the candidate voted in a party primary or registered in a party in the last year.
- *Cousins v. Wigoda*, 419 U.S. 477 (1975). Lower court unconstitutionally interjected into the political party's right to seat delegates as it saw fit even if the delegates seated were not the delegates the Court would seat.
- *Democratic Party of the U.S. v. Wisconsin*, 450 U.S. 107 (1981). State may not require a political party to permit persons who refuse to declare their party affiliation to vote in their primary election.

- *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). State law cannot prevent a political party from permitting independent voters from voting or participating in their primary elections.
- *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). Holding that California ban on primary endorsements suffocate freedom of association and that state laws regulating party governance unjustifiably burdens strong associational rights.
- *California Democratic Party v. Jones*, 530 U.S. 567 (2000). Primary permitting voters to make choices for both major political parties violates a party's First Amendment Right of Freedom of Association.

**IV. Even if the District Court erred, this Court should follow other Supreme Court Cases related to delegate selection and find this case not justiciable.**

This is not the first case to challenge delegate selection rules. It is important to note that the delegate selection rules are adopted by the political party's membership through democratic processes. For the national party, the Democratic National Committee adopts the rules and bylaws. For the Texas Democratic Party, the rules are adopted by the party membership at the State Convention and the State Democratic Executive Committee can only adopt temporary rules that lose their force and effect if they fail to survive a vote at the State Convention. See Tex. Elec. Code § 163.004. Because party rules are adopted by the party

membership, federal courts have been reluctant to intervene in intra-party disputes. LULAC is unhappy with the rules the party adopted. This means that LULAC either failed to engage in the rule-making process by voicing their complaints and convincing a majority of the membership to change the rules, or they did so engage and failed to convince a majority. Either way, LULAC is asking this Court to sanction their inaction or their inability to persuade fellow Democrats to their point of view. The District Court was correct to reject LULAC's request.

The United States Supreme Court addressed this very issue in *O'Brien v. Brown*, 409 U.S. 1 (1972). In *O'Brien*, the plaintiffs filed suit seeking declaratory judgment and injunctive relief, preventing the Democratic National Convention from adopting and complying with the Credentials Committee report regarding the seating of certain delegates. In two paragraphs, the Supreme Court, in a *per curiam* opinion, described the "grave doubts" it had in courts intervening in the delegate process.

We must also consider the absence of authority supporting the action of the Court of Appeals in intervening in the internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates. No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do relationships of great delicacy that are essentially political in nature. *Cf. Luther v. Borden*, 7 How. 1 (1849). Judicial intervention in this area traditionally has been approached with great caution and restraint. See *Irish v. Democratic-Farmer-Labor Party of*

*Minnesota*, 399 F.2d 119 (CA8 1968), affirming 287 F. Supp. 794 (Minn. 1968), and cases cited; *Lynch v. Torquato*, 343 F.2d 370 (CA3 1965); *Smith v. State Exec. Comm. of Dem. Party of Ga.*, 288 F. Supp. 371 (ND Ga. 1968). *Cf. Ray v. Blair*, 343 U.S. 214 (1952). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability, whether the action of the Credentials Committee is state action and, if so, the reach of the Due Process Clause in this unique context. Vital rights of association guaranteed by the constitution are also involved. While the Court is unwilling to undertake final resolution of the important constitutional questions presented without full briefing and argument and adequate opportunity for deliberation, we entertain grave doubts as to the action taken by the Court of Appeals.

In light of the availability of the convention as a forum to review the recommendations of the Credentials Committee, in which process the complaining parties might obtain the relief they have sought from the federal courts, the lack of precedent to support the extraordinary relief granted by the Court of Appeals, and the large public interest in allowing the political processes to function free from judicial supervision, we conclude the judgments of the Court of Appeals must be stayed.

See *Id* at 4-5. The Supreme Court further bolstered their holding in *O'Brien* in *Cousins v. Wigoda*, 419 U.S. 477 (1975) decided a few years later.

The Courts of Appeal presented with these issues have similarly refused to inject themselves into the delegate selection process. In *Wymbs v. Republican St. Exec. Comm. Of Fla.*, 719 F.2d 1072 (11<sup>th</sup> Cir. 1983), the Eleventh Circuit rejected the notion that political parties decisions regarding the seating and allocation of

delegates could present a justiciable controversy or that it could amount to state action. See *Id.* at 1077. As was the case in *O'Brien, Wymbs* was a lawsuit seeking to change the delegate seating on the eve of the convention – precisely what LULAC sought in this case. Both courts refused to interject themselves into party politics because of a last-minute lawsuit.

The Court of Appeals for the District of Columbia has similarly been faced with a last minute plea for the federal courts to intervene in a political party's delegate allocation formula. See *Ripon Society v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*) *cert. denied* February 23, 1976. The D.C. Circuit sitting *en banc*, in a near unanimous opinion with regard to the result, found “for the third time in four years, a litigant was seeking federal court action to change delegate allocation formulas on the eve of the convention.” *Id.* at 570. The *Ripon Society* case has been cited approvingly by numerous circuit and district courts, including the Fifth Circuit. See *Latin Am. Citizens Counsel No. 4434 v. Clements*, 914 F.2d 620 (5<sup>th</sup> Cir. 1990) and *Wymbs v. Republican State Exec. Comm. of Fla.*, 658 F.2d 324 (5<sup>th</sup> Cir. 1981). (The *Wymbs* case was filed in the District Court and the first appeal went to the Fifth Circuit in 1981. The Fifth Circuit remanded the case for additional consideration and the second appeal was handled by the Eleventh Circuit after the Fifth Circuit was divided geographically. Further discussion of the Eleventh Circuit case is made herein.) Furthermore, the

United States Supreme Court has cited the *Ripon Society* case approvingly, including in the case of *Democratic of US v. Wisconsin*, 450 U.S. 107 (1981). Because there is an absence of clarity in the *Morse* opinion, the Court should be guided by the crystal clear and long line of cases from the Supreme Court and the Courts of Appeal refusing to intervene in the delegate selection and allocation process on the eve of a large political convention.

**V. The District Court did not err in finding that TDP's Rules do not have the "potential" to harm minority voting rights.**

Even if this Court disagrees with the District Court and decides that the § 5 applies to the TDP, the Court must still consider whether the complaints alleged amount to at least a minimal infringement on minority voting rights. Such a threshold showing is required of LULAC to avoid dismissal. LULAC's argument is that a delegate allocation system awards delegates to certain geographic regions based upon the turnout of Democrats in that region for party nominees and that certain geographic regions thereby receive less delegates than other geographic regions in the state. Furthermore, LULAC claims that because the areas in the state where there is lower Democratic turnout that may include significant number of Latino voters, that the system therefore damages the value of their vote. The nature of this allegation makes this case vastly different than other Voting Rights Act cases – a fact the District Court correctly noted. (R. Vol. 2, pp. 393-395).

Here, the District Court found and LULAC essentially conceded that the harm they allegedly suffered is caused by their own failure to turnout at the same rate as other populations in the state. The District Court found that TDP did not enact a policy that had at its purpose to disenfranchise Latino voters. Indeed, the rules of TDP would not injure the rights of Latino voters if only Latino voters turned out in equal numbers as other voters in the state. The District Court noted, “no vote, no voice.” (R. Vol. 2, p. 394). In other words, the harm, if any, LULAC suffers is the result of their own actions (or inactions).

LULAC sought an injunction preventing TDP from complying with its own governance procedures and instead asked the Court to micromanage the rule making of a political party. This is precisely the First Amendment associational concern that the various opinions referenced above addressed. Adoption of a new delegate allocation system on the eve of the convention was unfair to the candidates, because it would have changed the allocation of their delegates.

The Democratic National Committee and the Texas Democratic Party have decided as a matter of policy that delegates should be awarded in a manner that rewards regions that turn out voters for Democratic candidates in past elections. Not unlike our representative democracy, the Democratic Party rules give delegates (representatives) to the areas where the Democrats (Voters) are located. Houston, Dallas, and San Antonio have more congressional districts than do

Beaumont, Lubbock or Corpus Christi because those areas are more populous. The Democratic Party rules allocate more delegates to the locales where more Democrats reside by using voting numbers in the most recent and high profile state election, Governor. The Democratic National Committee requires similar delegate allocation from the State to National Convention.

The delegate allocation rules complained of were adopted by the Democratic National Committee and by the State Democratic Executive Committee, two Democratic organizations that contain excellent representation from the Latino community. A forum exists for Latino voters to express concern over the allocation of delegates and that forum is the governing bodies of the Democratic Party. It is a violation of the members of the Texas Democratic Party's Constitutional Associational Rights, for the Courts to intervene. As Justice Scalia foretold in the *Morse* opinion, local parties requesting approval for each of their rule changes from the Attorney General is tantamount to a "mother, may I?" If such fundamental matters required pre-clearance, the associational rights of the members to any political party would have been eviscerated.

**VI. The District Court was correct to find LULAC's claims untimely.**

When the District Court considered this case, Texas Democratic Party State Convention was scheduled to convene in Austin, June 5-7, 2008. It was expected to be, and in fact was, one of the largest, if not the largest, convention in the Texas

Democratic Party history and therefore the nation. All of the arrangements had been made. There would have been severe economic harm to the TDP, not to mention the numerous delegates to the convention who had made nonrefundable travel arrangements, if the event had not gone forward as planned.

Because injunctive relief is fundamentally relief granted in equity, the District Court was correct to let equitable principles control. See *Allen v. State Board of Elections*, 393 U.S. 544, 571-72 (1969). It was undisputed that the system employed by the TDP to select and allocate delegates had been in use since 1988. Accordingly, LULAC had ample time to raise their concerns in this case. Even if the delegate allocation rules had only recently been adopted, the 2008 rules have been available for over a year. LULAC did not file suit after they learned of the rules specifically adopted for this cycle and, more importantly, after two thirds of the process was complete. Further, LULAC did not file suit when the candidates filed their applications for consideration on the ballot. Nor did the LULAC file suit after the March 4, 2008 primary and precinct conventions that by most estimates were the most attended political events in the history of the state. Furthermore, LULAC did not file suit after the County and Senate District Conventions convened on March 28, 2008 that were similarly attended in historical numbers. Instead, this lawsuit was filed May 9, 2008.

This was two months after the TDP learned through press reports that LULAC had concerns over the system in place, though no specific details had been released. The Texas Democratic Party requested by letter a description of LULAC's complaints. (R. Vol. 1, pp. 307-309). No response was received.

The District Court was correct to deny LULAC's claim, in equity, that they were entitled to an injunction stopping the State Convention when they had known the rules for at least the last two decades and their legal complaints for at least two months.

Furthermore, the United States Supreme Court has held that such drastic and damaging injunctions are not required by the Voting Rights Act. See *Berry v. Doles*, 438 U.S. 190 (1978). In *Berry*, the Supreme Court affirmed the District Court's finding of a § 5 violation, but only required the local governmental unit to submit the proposed election change for approval under § 5 within 30 days. The Court allowed the results of elections to stand that had already occurred under the voting change until the pre-clearance requirements had been met. In the event pre-clearance was denied, the Supreme Court held that the Plaintiffs were free to renew their request for a re-do of the contested elections. See *Id.* at 192-193. The *Berry* court cited the opinions of *Perkins v. Matthews*, 400 U.S.379 (1971) as support for its holding. The *Perkins* opinion summarized the considerations to be made when fashioning a remedy as follows:

...we recognize that, and determining the appropriate remedy, other factors may be relevant, such as the nature of the changes complained of, and whether it was reasonably clear at the time of the election that the changes were covered by § 5. In certain circumstances, for example, it might be appropriate to enter an order affording local authorities an opportunity to seek federal approval and order a new election only if local officials fail to do so or if the required federal approval is not forthcoming. Since the District Court is more familiar with the nuances of the local situation than are we, and has heard the evidence in this case, we think the question of the appropriate remedy is for that court to determine, in the first instance, after hearing the views of both parties.

*Id.* at 396-97.

The equities in this case and the Supreme Court authorities dealing with remedies weighed heavily in favor of the District Court denying LULAC's request for injunctive relief.

### **CONCLUSION**

For the foregoing reasons, this Court should affirm the opinion of the District Court.

Dated this 25<sup>th</sup> day of August, 2008.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Chad W. Dunn, certify that today, August 25, 2008, a copy of the above Brief for The Texas Democratic Party -- Appellee, was served upon the following persons at the following addresses by first class mail and e-mail.

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## CERTIFICATE OF COMPLIANCE

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