

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

LULAC OF TEXAS, MEXICAN §
AMERICAN BAR ASSOCIATION OF §
HOUSTON, TEXAS (MABAH), ANGIE §
GARCIA, BERNARDO J. GARCIA, §
ELVIRA RIOS, ROGER ROCHA, §
ROSARIO VERA, and RAYMUNDO §
VELARDE, §
PLAINTIFFS §

SA 08 CA 0389 FB

v. §

STATE OF TEXAS and §
TEXAS DEMOCRATIC PARTY §
DEFENDANTS §

**PLAINTIFFS' MOTION AND MEMORANDUM FOR TEMPORARY
INJUNCTION**

This action was brought pursuant to the Section 5 Voting Rights Act of 1965, (as amended), 42 U.S.C. §1973c, challenging the failure of the Defendants to secure the necessary preclearance required by the Act. Plaintiff challenges the manner in which the State and the State Democratic Party distribute and allocate delegates for participation in the Party's precinct, senatorial or county, and state primary election conventions. The challenged practice of allocating delegates based on raw voter turnout results in restricting participation in high concentrated Latino Senatorial districts and rewarding Senatorial Districts with high Anglo population, and high Republican participation. This allocation system thus does not allow Latino voters an equal opportunity to participate in the electoral process and select candidates of their choice. Moreover, the current allocation system was adopted in 1988 and been periodically modified to their current status for use in 2008 election process and these changes have not been submitted for, nor

have they received the required preclearance pursuant to Section 5 of the Voting Rights Act.

Facts

Under authority of the State of Texas, the Texas Democratic Party conducted its primary election on March 4, 2008. (See: Tex. Election Code, § 191.004). Under authority of the State of Texas, the Texas Democratic Party conducted its nominating precinct conventions on March 4, 2008. (See: Tex. Election Code, § 174.022). Under authority of the State of Texas, the Texas Democratic Party adopted rules to govern the conduct of its nominating precinct conventions, including the manner for selection and allocation of delegates. (See: Tex. Election Code, § 163.002 et seq.). Pursuant to rules adopted for the conduct of its nominating precinct conventions, the Texas Democratic Party allocated the number of delegates each precinct convention would be allowed to elect to attend its Senatorial and County conventions according to the raw vote cast in each such precinct for the Democratic nominee for governor in 2006. (See: Rules of the Texas Democratic Party 2006-2008, Article IVB8.). The adoption of rules for the conduct of Texas Democratic Party precinct conventions, including rules establishing the allocation of delegates to be elected to attend the Senatorial or County conventions has not be precleared pursuant to Section 5 of the Voting Rights Act. The manner used to allocate the delegates to be elected from the precinct conventions under-values Latino Democratic voters and does not provide Latino voters with an equal opportunity to participate in the nominating process and to elect candidates of their choice and has not been submitted for nor has it received preclearance pursuant to Section 5.

Under authority of the State of Texas, the Texas Democratic Party conducted its nominating senatorial and county conventions on March 29, 2008. (See: Tex. Election Code, § 174.063) Pursuant to rules adopted for the conduct of its nominating senatorial and county conventions, the Texas Democratic Party allocated the number of delegates each Senatorial and County convention would be allowed to elect to attend its State convention according to the raw vote cast in each Senate District for the Democratic nominee for governor in 2006. (See: Rules of the Texas Democratic Party 2006-2008, Article IVC8.) The adoption of rules for the conduct of Texas Democratic Party senatorial and county conventions, including rules establishing the allocation of delegates to be elected to attend the State convention has not be precleared pursuant to Section 5 of the Voting Rights Act. The manner used to allocate the delegates to be elected from the senatorial and county conventions under-values Latino Democratic voters and does not provide Latino voters with an equal opportunity to participate in the nominating process and to elect candidates of their choice.

Under authority of the State of Texas, the Texas Democratic Party will conduct its nominating State convention on June 5-7, 2008. (See: Tex. Election Code, § 174.093). Pursuant to rules adopted for the conduct of its nominating State convention, the Texas Democratic Party allocated the number of delegates each Senatorial delegation would be allowed to elect to attend the Democratic national convention according to the proportion of vote cast in each such district of the total state-wide vote for the Democratic nominee for governor in 2006. (See: Rules of the Texas Democratic Party 2006-2008, Article VII, 8(b)). The rules adopted for the conduct of Texas Democratic Party State convention, including rules establishing the allocation of delegates to be elected from the Senatorial

District caucus' to attend the Democratic National convention have not been precleared pursuant to Section 5 of the Voting Rights Act. (See Exhibit No. 1, Affidavit of Luis R. Vera.) Department of Justice regulations governing the enforcement of Section 5, explicitly include changes to rules governing the selection of delegates as a covered change requiring preclearance. (*See*: 28 CFR §51.7)

Texas will send 228 delegates and 32 alternates to the National Democratic Convention. Of those the Senatorial District delegations to the State Convention will elect 126 delegates and 21 alternates, chosen and allocated pursuant to the unprecleared and discriminatory rules adopted by the Texas Democratic Party under authority of the State of Texas. While the seven Latino majority Senate districts all gave the Democratic nominee for Governor in 2006, a plurality (and in some cases majority) support in a four person race, and all vote overwhelmingly for Democratic candidates, the Democratic Party rules used to allocate delegates resulted in an average of only 3.5 delegates per district. Had the State Democratic Party employed an allocation plan based on proportion of support for the Democratic candidate for governor, or the proportion of vote for Democratic candidates, or even on an even distribution for each district, the allocation would have resulted in a distribution that rewarded Democratic loyalty without punishing Latino voters. Numerous options existed that would have provided all Democratic voters with a fair opportunity to participate, and a fair allocation of delegates without diluting Latino voter participation.

TRO Requirements

Plaintiffs are entitled to temporary injunctive relief. First, there is a substantial likelihood that Plaintiff will succeed on the merits of their claim. The defendants, have

conducted and are in the process of conducting primary nominating conventions pursuant to rules never approved as required and are proceeding with these voting changes without the requisite approval under Section 5 of the Voting Rights Act. Second, there is a substantial threat of irreparable harm unless the Defendants are enjoined from proceeding with State Democratic Party convention pursuant to rules that place an unfair burden on Latino voters of Texas. Third, the threatened injury far outweighs any potential harm to the Defendants. Finally, the public interest is served by the granting of injunctive relief in this case. *Williams v. Austin I.S.D.*, 796 F. Supp. 251 (W.D. Tex., 1992).

Plaintiff is Likely to Succeed on the Merits of this Case.

As noted above the Texas Democratic party has adopted rules for the conduct of primary nominating precinct, state, county, and state conventions, including the allocation of delegates. These voting changes have not yet received preclearance as required by Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. Yet, the Defendants have and are proceeding with enforcement of these changes without the required federal approval. The United States Supreme Court has on numerous occasions demanded that election changes in covered jurisdiction receive the required federal approval before the changes may be implemented. *See: Lopez v. Monterrey County, California*, 519 U.S. 9 (1996). In addition, the Supreme Court has made clear that changes adopted and enforced by Political Parties, when done under authority of the State, are covered under the Voting Rights Act and must secure the required Section 5 approval. *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996).

Clearly, Plaintiff is likely to succeed on the merits of his claim.

Likelihood of Irreparable Harm

An injunction may properly be granted where Plaintiff's injuries cannot be redressed by the application of a judicial remedy after hearing on the merits. *Canal Authority of the State of Florida v. Callaway*, 489 F. 2d 567,573 (5th Cir. 1974). An injury is irreparable "if it cannot be undone by monetary remedies." *Dillard v. City of Greensboro*, 707 F. Supp. 1031, 1035 (M.D. Ala. 1994) quoting *Cate v. Oldham*, 707 F. 2d 1176, 1189 (5th Cir. 1983). "Given the fundamental nature of the right to vote, monetary remedies would be inadequate compensation for the plaintiffs" *Dillard*, 870 F. Supp. at 1035, citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Moreover, the Supreme Court has recognized that a court should normally issue injunctive relief where voting rights violations are implicated. *Lopez v. Monterrey County, California*, 519 U.S. 9 (1996).

Injunctive Relief Will Serve the Public Interest.

The public interest here is served by the fair and equitable conduct of elections and by the vindication of constitutional rights of the voters.

The Defendants have staked a course meant to thwart the protections of the Voting Rights Act by abandoning efforts at securing a valid plan of conduct of primary conventions that does not reduce minority voting rights and instead has chosen to proceed under a plan that clearly violates the Voting Rights Act. The Voting Rights Act was designed to "shift the advantage of time and inertia from the perpetrators of the evil to the victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). With Section 5, "Congress expressly indicated its intention that the State and subdivisions, rather than citizens seeking to exercise their rights, bear the burden for delays." *Perkins v. Matthews*,

400 U.S. 379, 369 (1971). The Voting Rights Act was extended to and applicable in Texas since 1975. Defendants have been exposed to the requirements of the Voting Rights Act for over 33 years and been engaged in countless legal battles involving the requirements of the Act. On many occasions, attorneys for the Defendant Democratic Party or individuals representing Democratic Party interests have urged the Federal Courts to enjoin such unprecleared changes. The Federal Courts have consistently enjoined the uses of such unprecleared changes. Yet today, the Defendants seek to continue to violate the federal Voting Rights Act and proceed with elections procedures that have not been precleared and that bear a disproportionate and negative impact on Latino voters.

The Defendants have failed to even submit much less convince the Department of Justice to approve its election procedures, that will clearly cause a retrogression of Latino voters ability to participate and to elect candidates of their choice. The enforcement of the Voting Rights Act serves the public interest. In addition, with the election activities days away, an injunction ordering a halt to discriminatory practices and forbidding an illegal one, would insure the orderly conduct of elections and would benefit not only minority voters, but all voters.

Convening Three Judge Court

Generally, actions by private individuals seeking declaratory and injunctive relief against violations of §5 must be referred to a three-judge court for the determination of whether the political subdivision has adopted a change covered by § 5 without first obtaining preclearance. *Allen v. State Board of Elections*, 393 U. S. 544, 554-63 (1969). However, 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. *See, e.g. Broussard v. Perez*, 572 F2d 1113, 1118-1119 (5th Cir. 1978), cert. denied, 439 U.S. 1002 (1978). Here the only defense raised is the issue of whether Section 5 requires a state political party to submit changes to its rules governing selection of delegates. The United States Supreme Court has made it clear, however, that all elements of the election process enacted by state parties under authority of the State, are covered changes and must be approved before they may be implemented. *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996).

Conclusion

This Court should vigorously enforce the protections of the Voting Rights Act and enjoin the Defendants from any further enforcement of the current illegal conduct of primary nominating conventions, unless and until Section 5 preclearance is secured and instead order that the nominating conventions proceed under a delegate allocation system that is fair and equal and that has been approved, in compliance with the Voting Rights Act.

DATED: May 14, 2008

Respectfully submitted,

_____/S/_____
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Motion for Temporary Restraining Order has been served pursuant to the Federal Rules of Civil Procedure on counsel for Defendants.

_____/S/_____
Jose Garza

AFFIDAVIT OF LUIS ROBERTO VERA, JR.

STATE OF TEXAS)
)
COUNTY OF BEXAR)

BEFORE ME, the undersigned authority, personally appeared Luis Roberto Vera, Jr., who, being by me duly sworn, deposed as follows:

"My name is Luis Roberto Vera, Jr. I am over 18 years of age and of sound mind and capacity, hereby declare under penalty of perjury that the foregoing is true and correct.

On or about March 6, 2008 I called the Voting Rights Section of the Department of Justice to inquire about submissions made by the State of Texas and/or the Texas Democratic Party (TDP). I was told, as is the usual practice, to submit a request pursuant to the Freedom of Information Act (FOIA). On or about March 6, 2008 I sent a FOIA request electronically to Sarabeth Donovan, civil rights analyst voting section. Specifically the FOIA request asked for,

‘1. All submissions by the Texas Democratic Party and/or the State of Texas for all presidential election primaries from the time the Voting Rights Act was extended to Texas.

We are specifically looking for the submission language in regards to the precinct convention (caucus) portion of the presidential primary conducted by the Texas Democratic Party. We are also looking for the submission language in regards to the Spanish language or bi-lingual provisions in compliance with the Voting Rights Act.’

On or about March 10, 2008 I received a call from Sarabeth Donovan to discuss the FOIA request. Ms. Donovan requested that I narrow the request. I had placed a call to the Texas Democratic Party in Austin, TX and spoke to Hector Nieto, communications director. Mr. Nieto confirmed that the dual primary/caucus used in the 2008 primary was last changed and adopted in 1988. I asked if the party had submitted for pre-clearance and I was told that I would need to speak to their attorney. After discussing this with Ms Donovan and that LULAC was looking for a submission by either the State of Texas or the Texas Democratic Party as to the combined primary and caucus system used by the TDP and adopted on or about the year 1988 or after, I submitted a narrower FOIA request to Sarabeth Donovan which stated,

‘1) 1988 or after - Submission by the Texas Democratic Party for changes to the Presidential primary including the Precicnt Convention process used in electing delegates.’

From March 10 through March 25, 2008 several phone calls and emails were made to Ms Donovan and I was told the voting rights section was researching the request. On March 24, 2008 I contacted Christopher Coates, acting chief of the voting rights section to ascertain as to why they could not answer the request. Mr. Coates called the next day with Sarabeth Donovan in his office. They both informed me that no submissions were located in their system by either the State of Texas or the Texas Democratic Party in response to my request and/or in regards to changes made in 1988. I requested a letter from Ms Donovan with any information available in their system. On March 25, 2008 Ms Donovan mailed the attached letter specifically answering my request. I also received a CD ROM containing all submission file numbers with a short description of each submission since 1975. There are over 500 pages. The changes made by the Texas Democratic Party in 1988 are not among the data files submitted for pre-clearance as required by sec. 5 of the VRA.

I have exercised due diligence by also contacting the archives section of the Texas Secretary of State in regards to submissions to the voting rights section of the Department of Justice. I was informed that no submissions exist in their system to any changes made by the Texas Democratic Party in 1988 to the combined primary/caucus.

Further affiant sayeth not.”

_____/S/_____

Luis Roberto Vera, Jr.

SWORN AND SUBSCRIBED before me, the undersigned authority, on this ____ day of May 2008.

_____/S/_____
Dolores Sheppard
Notary Public, State of Texas
County of Bexar
My commission expires _____

EXHIBIT 1