

**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,	§	NO. SA 08 CA 0389 FB
	§	
v.	§	
	§	
STATE OF TEXAS and	§	
TEXAS DEMOCRATIC PARTY	§	
DEFENDANTS,	§	

**PLAINTIFFS’ RESPONSE IN OPPOSITION TO DEFENDANT STATE OF
TEXAS’ MOTION TO DISMISS**

Defendant, State of Texas has moved this Court for dismissal of Plaintiffs’ action as to the State of Texas. The State’s motion is premised on the assertion that Plaintiffs have “failed to plead facts demonstrating either causation by the state or redress ability by means of an injunction or other court order against the state.” (Def. State of Texas’ Motion to Dismiss, p. 3) The State Defendant’s motion should be denied because it is based on a misunderstanding of the State’s obligation under Section 5 of the Voting Rights Act and because the Plaintiffs’ pleadings, read in a light most favorable to the non-movant, show both causation and redress ability. The State Defendant also asserts that Plaintiffs have failed to state a claim upon which relief may be granted. Again, the Defendant misunderstands its obligations under the Act and when Plaintiffs’ complaint is viewed with all inferences in favor of the plaintiff, it clearly has set out a claim upon which relief may be granted.

Material Factual and Legal Pleadings

The Plaintiffs have pleaded that the State of Texas and the Texas Democratic Party are covered jurisdictions under the Voting Rights Act. See: Plaintiffs' Original Complaint, p. Plaintiffs have further pleaded that under authority granted to it by Texas statutes, the Defendant SDP has adopted rules for use in the conduct of and selection of delegates for the party conventions (precinct, county/senatorial, and state conventions) in the second phase of the 2008 presidential primary election. *Id. p.* Plaintiffs have also pleaded that these rules, by State statute, are required to be submitted to and filed with the Texas Secretary of State. *Id. p.* Finally, Plaintiffs' have asserted that the voting procedures used to conduct and allocate delegates at the Texas Democratic precinct, county/senatorial, and state conventions have not been submitted and precleared pursuant to the requirements of Section 5 of the Voting Rights Act. *Id. p.*

Legal Authorities

The State Defendant's motion to dismiss raises two issues. First, the State Defendant asserts that the Plaintiffs do not have standing to bring this action against the State defendant, because the harm alleged was not caused by the State and because no remedy exists against this Defendant. *See:* (State Def.'s Motion p. 3). For purposes of the motion the State Defendant does not contest whether there is an injury in fact.

A party has standing to file suit if it can demonstrate: an injury in fact, causation, and redress ability. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998). Initially, a plaintiff may meet its burden of establishing standing by alleging in its complaint the nature of the injury caused by Defendants action or inaction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-1, (1992)

The State Defendant also asserts that Plaintiffs' lawsuit should be dismissed for failure to state claim upon which relief may be granted, pursuant to FRCP, Rule 12(b)(6). A motion to dismiss under Rule 12(b)(6) is not appropriate unless the plaintiff's factual allegations do not show a right to relief that is plausible and above mere speculation. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007). Motions to dismiss for failure to state a claim are viewed with disfavor and rarely granted. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496,498 (5th Cir. 2000) In ruling on a Rule 12(b)(6) motion the court should assume that all the material facts contained in the complaint are true. *Bell Atlantic Corp.*, 127 S. Ct. at 1965. The court should also indulge all inferences in favor of plaintiff. *Collins*, 224 F3d at 498.

Plaintiffs Have Standing

In addressing these issues the court should first consider the State Defendant's obligations under the Voting Rights Act. In the Voting Rights Act, Congress enacted a complex scheme of remedies for racial discrimination in voting that were to be applied in areas where such discrimination had been most prevalent. *Morse v. Republican Party of Virginia*, 517 U.S. 186, 193-4 (1996) The Act prohibits the enactment or enforcement of any voting qualifications or procedures unless they have been precleared by the United States Attorney General or approved by the United States District Court for the District of Columbia. *Id.* Texas is one of several states covered by the Act. The United States Department of Justice has adopted regulations that set out the obligations for securing preclearance by the covered jurisdictions under Section 5. *See*: 28 CFR §51.1 et seq. These rules specify that the State is authorized to make a submission for preclearance when the enacted voting procedures affect more than one county. *See*: 28 CFR § 51.23 ("When one or more counties or other subunits within the State will be affected, the State may make a submission...") Thus, the State of Texas was authorized to make a submission of the unprecleared rules at issue here because they govern precinct conventions, county/senatorial conventions held all across the State, as well as the state convention. Moreover, the political party Defendant was obligated to file the adopted rules with the Texas Secretary of State. Tex. Election Code §163.005.

The State Defendant does not dispute injury in fact for purposes of its Motion to Dismiss. The Plaintiffs have alleged that they are injured by the Defendants failure to comply with the provisions of Section 5 and secure preclearance of the party rules. The Plaintiffs pleadings clearly set out the Defendants, including the State Defendant, failed

to submit and secure the perquisite approval of the adopted rules before they were used in the election process. *See*: Plaintiffs' Original Complaint, pp. Thus, not only have the Plaintiffs pleaded facts demonstrating an injury in fact, but one caused, at least in part, by the State Defendant's inaction. *Id.* Finally, Plaintiffs have requested this Court to order the Defendants, including the State Defendant, to comply with the Voting Rights Act and submit the change for preclearance, as they are clearly authorized to do under the Section 5 regulations. *Id. p.*

Clearly, the Plaintiffs have pleaded facts supporting the proposition that an injury in fact has been inflicted, that the State Defendant is a cause of that injury, and that the injury may be redressed by an order directed to the State Defendant. On the issue of standing, the State Defendant's Motion to Dismiss should be denied.

Plaintiffs Have Stated a Claim Upon Which Relief May Be Granted

The State Defendant also asserts “Plaintiffs have not named one statute or one act of the State of Texas that has affected the manner by which TDP is apportioning delegates at its state convention.” While that is true, it fails to answer the critical question in a motion to dismiss of the sort raised here. That is, does the Plaintiffs’ factual allegations show a right to relief that is plausible and above mere speculation. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007). As described above on this question the answer is clearly yes. As set out above the Plaintiffs have described a right to have enactments of the covered subunits of the State, including the Democratic Party of Texas in its conduct of the primary election process, precleared under the Voting Rights Act. The State of Texas is authorized to make just such a submission, and this Court may thus order this Defendant to comply with the Act. Relief is more than plausible and not just mere speculation. The Motion to Dismiss of the State Defendant should be dismissed.

DATED: May 19, 2008

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Response in Opposition to State Defendant's Motion to Dismiss has been served pursuant to the Federal Rules of Civil Procedure on counsel for Defendants.

_____/S/_____
Jose Garza