

**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 TEXAS
DEMOCRATIC PARTYS' MOTION TO DISMISS**

Defendant Texas Democratic Party (TDP) has filed a motion to dismiss this action asserting: first, that since Plaintiffs have a cause of action under Section 5 of the Voting Rights Act, this Court does not have jurisdiction to hear Plaintiffs' Section 2 Voting Rights Act claim and should therefore be dismissed; and second, that the TDP is not covered under Section 5 of the Voting Rights Act, and should therefore be dismissed as well. (TDP's Brief in Support of Motion to Dismiss, p. 8) The TDP's pleadings on this matter border on the ridiculous are frivolous and should be denied.

Standard of Review

The TDP asserts that Plaintiffs Section 2 cause of Action should be dismissed because “this court lacks subject matter jurisdiction. Declaratory Judgment actions concerning a voting procedure’s compliance with the Voting Rights Act lie solely with the United States District Court for the District of Columbia.” (TDP’s Motion to Dismiss, p. 2) The Defendant TDP appears to making a facial attack on Plaintiffs’ Section 2 claims, since it asserts that only the District Court for the District of Columbia may hear a Section 2 challenge. As such, this Court should accept all material allegations in the complaint as true and construe them in the light most favorable to the nonmovant. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) *overruled on other grounds*, *Harlow v. Fitzgerald*, 457 U.S. 802 (1982).

The TDP also asserts that Plaintiffs’ claims should be dismissed under Rule 12(b)(6). A motion to dismiss pursuant to 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.

Undisputed Material Facts

The following material factual allegations have not been disputed by either of the Defendant’s in this action:

1. The defendant State of Texas is a political jurisdiction that is covered by the preclearance provisions of Section 5 of the Federal Voting Rights Act, 42 U.S.C, Sec. 1973c as well as Section 2 of the Voting Rights Act, 42 U.S.C. §1973;
2. The Texas Democratic Party is authorized by the State of Texas and is acting under the authority of the State of Texas in conducting its nominating primary and nominating conventions;
3. 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);
4. 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);
5. Under authority of the State of Texas, the Texas Democratic Party adopted rules to govern the conduct of its nominating precinct conventions. (See: Tex. Election Code, § 163.002 et seq.);
6. 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.);

7. 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.

Additional Material Facts Alleged by Plaintiffs

The Plaintiffs have alleged facts that support its claims under the Voting Rights Act. The Plaintiffs have alleged that the manner used to allocate the delegates to be elected from the precinct, senatorial/county and state 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. Plaintiffs also assert that the seven Latino majority Senate districts all gave the Democratic nominee for Governor in 2006, a plurality support in a four person race, and all vote overwhelmingly for Democratic candidates, yet the Democratic Party rules used to allocate delegates resulted in an average of only 3.5 delegates for these Senatorial districts. Moreover, Plaintiffs assert that 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 based on population, the allocation would have resulted in a distribution that rewarded Democratic loyalty without punishing Latino voters. In short, Plaintiffs have alleged that 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.

Instead, Plaintiffs point out that the manner used to allocate the delegates to be elected from the senatorial district caucus at the State Convention 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. For example, Senate District 6, in Harris County is over 53% Spanish Surnamed of registered voters. In the critical election used by the Democratic Party to calculate the allocation of delegates, Senate District 6 voted for Mr. Bell at about 51%. Conversely, Senate District 25 in Bexar County is only about 19% Spanish Surname of registered voters. In the critical election used by the Democratic Party to calculate the allocation of delegates, Senate District 25 gave the Republican nominee for Governor, Mr. Perry about 40% of its votes, and Mr. Bell, the Democratic nominee only about 26% of its votes. Yet, in allocation of delegates, the majority Latino Senate District 6 is rewarded for its loyalty to the Democratic Party with 3 delegates to the National Convention. The Anglo majority Senate District 25 is rewarded for its loyalty to the Republican Party with an award of 6 delegates to the Democratic National Convention.

Finally, Plaintiffs allege that elections in Texas primaries and general elections are racially polarized and Latino voters are politically cohesive and that Latino voters continue to suffer from the effects of historical discrimination in that over a number of socio-economic and educational factors, the Latino community fares poorly when compared to the Anglo population of Texas.

This Court has Subject Matter Jurisdiction

Defendant TDP first asks that this cause be dismissed because this Court lacks subject matter jurisdiction since Section 2 of the Voting Rights Act actions “... lie solely with the United States District Court for the District of Columbia.” (TDP’s Motion to Dismiss, p. 2) Yet, the TDP’s brief in support of their motion offers no authority for this ludicrous proposition. Instead, the TDP presents Section 5 cases that set out the proper order of reviewing claims in actions that either raise both Section 5 and Section 2 violations or where courts overstepped their authority in reviewing strictly Section 5 cases. The cases do not involve the district court’s authority to entertain Voting Rights Act cases. Moreover, Plaintiffs have never suggested that this Court first hear its Section 2 claims. In fact, Plaintiffs’ Motion for Temporary Restraining Order seeks relief only under Section 5 and only to the issues that should properly be heard in a Section 5 context, *i.e.*, whether the Defendants are covered under Section 5, whether a voting procedure has been adopted, and whether the voting procedure has been precleared. Once the Section 5 issues are resolved and even if the challenged election changes are precleared, this Court has the authority to hear Plaintiffs’ Section 2 claims. *See: Major v. Treen*, 574 F. Supp. 325 (E. D. La. 1983). Section 2 and Section 5 provide very different vehicles for challenging discriminatory election practices. The two sections are drafted with different language, serve very different functions, and differ as to the allocation of the burden of proof.

Finally, under the facts of this case, and on the issues and causes of action raised by the Plaintiffs here, it is well settled that private citizens can bring actions “seeking a declaratory judgment that a new state enactment is subject to the approval requirements

of § 5, and that these actions may be brought in the local district court pursuant to 28 U.S.C. §1343 (4).” *Allen v. State Board of Elections*, 393 U.S. 544, 563 (1969).

Plaintiffs Have Stated A Claim Upon Which Relief May be Granted

Defendant TDP next claims that the voting changes challenged by this action are not covered by the Act and that even if they are, the TDP is not a covered jurisdiction under Section 5. The TDP’s position is grounded on its argument that the decision of the United States Supreme Court in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), should be ignored or overruled by this Court. Most of the authority offered by the TDP in support of its position is inapposite to the issues involved in this case. The cases offered by the TDP essentially, discuss the intrusion of the state into affairs of the political parties or examine whether party rules constitute “state action” for §1983 purposes. However, on the issue before this Court, whether delegate selection rules adopted by the TDP, under authority of detailed State statutes, is subject to the preclearance requirements of the Voting Rights Act, the case the Defendant most relies on interpreting the meaning of *Morse*, is clear:

“The result in *Morse* **precludes** defendants’ contention that because the state party actions of which LaRouche complains occurred at party caucuses or conventions rather than at state-run party primaries, section 5 preclearance “obviously” was not required: *Morse* too, involved a convention system. *Morse* also poses difficulties for defendants’ contention that the claims against Fowler and the DNC are frivolous because neither is listed as a “covered jurisdiction” under section 5: the defendant in *Morse*, the Virginia Republican Party, also was not listed. Nor can we distinguish *Morse* on the ground that it did not concern delegates to a national political convention: as Justice Stevens noted, ‘the impetus behind the addition of the term ‘party office’ to § 14 was the exclusion of blacks to the Mississippi delegation to the National Democratic Convention in 1964’” (citations omitted)

LaRouche v. Fowler, 152 F.3d 974, 984-5 (D. C. Cir. 1998). The D. C. Circuit also noted that a three-judge court in *MacGuire v. Amos*, 343 F. Supp. 119 (M.D. Ala. 1972), held that rules promulgated by the Alabama Democratic and Republican Parties governing the election of national delegates required preclearance, despite the fact that the rules were not passed by ‘the State’s legislature or by a political subdivision of the State. *Id.*

Not only is the *Morse* decision controlling, DOJ regulations are consistent with the Supreme Courts ruling:

§ 51.7 Political parties.

Certain activities of political parties are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the change relates to a public electoral function of the party and (b) If the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5. For example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement.

Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5. Where appropriate the term “jurisdiction” (but not “covered jurisdiction”) includes political parties.

28 CFR § 51.7 (emphasis added) The Attorney General’s intimate involvement with the enforcement of Section 5 of the Voting Rights Act, has allowed courts to rely on and defer to the interpretation of the Act as embodied in the regulations promulgated by the Department of Justice. *Georgia v. United States*, 411 U.S. 526, 536-7 (1973). In addition, these rules clearly have the potential to discriminate. The Supreme Court has

determined that with respect to the reach of Section 5 “ [t]he legislative history on the whole support the view that Congress intended to reach any state enactment which altered the election law in even a minor way.” *Allen v. State Board of Elections*, 393 U.S. 544, 566 (1969). As described in the factual allegations in Plaintiffs’ Original Complaint and detailed above, the allocation system employed by the TDP, not only has the potential of but actually does adversely affecting Latino voters,

Clearly, the TDP and its adoption and changes to rules on the selection of delegates to its primary conventions are subject to the requirements of Section 5. Defendant’s Motion to Dismiss should be denied.

This Court Should Issue an Order Enjoining the Defendants from Enforcing Unprecleared Election Procedures

The Defendant TDP also asks this Court to refrain from issuing any injunctive relief regarding the clear violations of Section 5 affecting the June 6-7 State party convention. The TDP relies on the authority of *Berry v. Doles*, 438 U.S. 190 (1978). However, *Berry* involved a request to undo an election that had already occurred. 438 U.S. at 192-193. More recently, the Supreme Court has made clear that a jurisdiction subject to Section 5’s preclearance requirement, such as the TDP and the State of Texas, must obtain preclearance **prior** to implementing a change. *Lopez v. Monterrey County*, 519 U.S. 9, 20 (1996); *Clark v. Roemer*, 500 U.S. 646 (1991); *United States v. Board of Supervisors of Warren County*, 429 U.S. 642; *Connor v. Waller*, 429 U.S. 656 (1975)(*per curium*); Section 5 Procedures, 28 CFR § 51.49. No voting practice is enforceable unless the covered jurisdiction has first succeeded in obtaining preclearance. *Id.* If a voting practice or procedure subject to Section 5 is adopted and has not been precleared, Section

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Certificate of Service

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

_____/S/_____
Jose Garza