

**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), §
ANGELA GARCIA, BERNARDO J. §
GARCIA, ELVIRA RIOS, ROGER §
ROCHA, ROSARIO VERA, and §
RAYMUNDO VALVERDE, §
Plaintiffs, §

CIVIL ACTION NO. SA 08 CA 0389 FB

v. §
§
STATE OF TEXAS and §
TEXAS DEMOCRATIC PARTY, §
Defendants.

**DEFENDANT STATE OF TEXAS' RESPONSE TO
PLAINTIFFS' MOTION AND MEMORANDUM FOR TEMPORARY INJUNCTION**

TO THE HONORABLE FRED BIERY:

COMES NOW the State of Texas and files this its Response to Plaintiffs' Motion and Memorandum for Temporary Injunction¹, and respectfully shows the Court as follows:

**I.
INTRODUCTION**

Plaintiffs have asked the court to enjoin the Defendants from proceeding with the nominating convention of the Texas Democratic Party, and to enjoin the enforcement of rules adopted by the Democratic Party for the allocation of delegates. (Plaintiffs' Motion and Memorandum for Temporary Injunction, hereinafter referred to as "Plaintiffs' Motion.") This Response by the State of Texas addresses the issuance of an injunction against the state. Defendant State of Texas takes no position on the issues of this case as they relate to the Texas Democratic Party.

¹ This Response is filed subject to Defendant State of Texas' Motion to Dismiss, already on file with the court.

II. ARGUMENT AND AUTHORITIES

The requirements for a preliminary injunction are well established. An applicant seeking an injunction prior to trial must show: 1) that there is a substantial likelihood that they will succeed on the merits; 2) that there is a substantial likelihood of irreparable harm to the plaintiff unless the defendant is enjoined; 3) that the threatened injury far outweighs any potential harm to the Defendants; and 4) that the public interest is not disserved by the grant of injunctive relief. *Canal Authority of the State of Florida v. Callaway*, 489 F. 2d 567, 572-573 (5th Cir. 1974). Against the State of Texas, Plaintiffs can make none of these showings.

A. Substantial Likelihood of Success on the Merits

Plaintiffs are unlikely to succeed on the merits of their claims against the State of Texas because all of the harm that Plaintiffs are alleging comes directly from rules adopted and enforced by the co-Defendant, the Texas Democratic Party, and not from any statute or action of the State of Texas. Even a cursory view of Plaintiffs' complaint shows that it concerns only the effect of the rules of the Democratic Party for the allocation of delegates. For example, they claim that, "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 [sic] precleared pursuant to Section 5 of the Voting Rights Act." (Plaintiffs' Motion, p. 2.) They also claim, "The manner used [by the Democratic Party] 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...." (*Id.*)

These rules may or may not be valid. However, the validity of these claims will turn on the effect of rules adopted by the Democratic Party. The State of Texas does not adopt these rules for the Texas Democratic Party. In fact, the State of Texas does not adopt any rules of any political party. The state does require that political parties must adopt certain rules and file them with the Secretary of State. TEX. ELEC. CODE §§ 163.002, 163.005. Among the rules that political parties must adopt is one that provides for representative proportion of convention delegates and other party officials based on population, party strength, or both. TEX. ELEC. CODE § 163.002 (4). Thus, while state law may provide the framework under which the political parties operate, state law clearly gives the responsibility and authority for specific apportionment of party delegates to the individual parties, as long as the rules are based on population, party strength, or both. Once a party has adopted the rule or rules and has timely² filed with the Secretary of State, the State of Texas' requirements have been met and the State has no more authority in the matter of rules governing the allocation of delegates.

Plaintiffs have not attacked these sections of the Texas Election Code or any other state statutes. They have not alleged that any state law is causing the harm that they are attempting to prevent by means of an injunction. Their only claims against the state are that the Texas Democratic Party is organized and conducts its elections and conventions pursuant to state authority. Given that the Plaintiffs themselves are not claiming that any harm they are seeking to be redressed is being caused by the State of Texas, there is very little likelihood that they will succeed on the merits of their claims against the state.

² See TEX. ELEC. CODE § 163.006, regarding deadlines for filing of rules.

B. Substantial Likelihood of Irreparable Harm

The Plaintiffs have claimed irreparable harm from the application of the Texas Democratic Party's rules. They have claimed no harm that stems from any statute or action of the State of Texas. While it is true that Plaintiffs have included the state in their claims by inclusive wording such as, "The Defendants have...chosen to proceed under a plan that clearly violates the Voting Rights Act," (Plaintiffs' Motion, p. 6), this use of inclusive wording does nothing to show that the state is the entity that is proceeding with the plan for delegate allocation.

The State of Texas neither adopts delegate allocation plans nor does it proceed with them, and Plaintiffs' inclusive wording does not alter state law, which gives this authority to political parties. See TEX. ELEC. CODE § 163.002 (4), *supra*. Plaintiffs are clear that the harm they have made the basis of this suit derives solely from the rules governing delegate allocation adopted by the Texas Democratic Party, and the remedy they seek is an injunction against the enforcement of those rules. (See Plaintiffs' Motion, Proposed Order, p. 2.) Despite their attempt to trace their injury to the state by use of the word "Defendants," Plaintiffs have not shown any harm, much less harm that is irreparable, stemming from the state.

C. Threatened Injury Does Not Outweigh Any Potential Harm to Defendant

As there is no threatened injury from the state of Texas, it cannot outweigh the harm to the state, which, if an injunction issues against it, will be faced with the situation of being under court order to take actions within a state political party that state law gives the state no right to take. Questions would surround the issue of how to go about stopping the Democratic Party's enforcement of its rules and how to go about seeing to it that the Democratic Party changes its rules to conform to the court's order, and exactly who would be charged with those responsibilities. This level of

involvement in internal political party affairs would be unprecedented in the state of Texas and could be construed as the state's interference with First Amendment rights of political association. That the interference would be unwanted by the Democratic Party is quite probable.

Plaintiffs have not even made an argument concerning the balancing of the threatened injury to the potential harm to the state. Instead, they have merely made the conclusory statement that "the threatened injury far outweighs any potential harm to the Defendants." (Plaintiffs' Motion, p. 5.) They cannot make this showing against the state, and no injunction against the state of Texas should issue.

D. Grant of Injunction Will Disserve the Public Interest

Plaintiffs argue, "the public interest here is served by the fair and equitable conduct of elections and by the vindication of constitutional rights of voters." (Plaintiffs' Motion, p. 6.)³ However, an injunction against the state of Texas, which is not alleged to have engaged in any behavior or passed any laws that result in conducting unfair and inequitable elections or violating the constitutional rights of voters, will disserve the public interest by creating confusion in the electorate concerning the internal processes of state political parties. An injunction against the state will give the public the false impression that the state runs political party conventions, rather than the members of political parties, who have the right to their own voice in their political association. Furthermore, it would give this false impression during a presidential election year when interest, especially in the Democratic presidential race, has been unusually high.

³ The elections that are referenced here are apparently the election activities within the state Democratic Party convention. In Plaintiffs' Motion, at page 7, Plaintiffs include the phrase, "with the election activities days away." This cannot be a reference to the November election, which is the only election that the state of Texas conducts. Because the state of Texas does not conduct election activities within the Democratic Party, an injunction against the state will not serve the public interest in this way.

Plaintiffs claim that the public interest would be served by “ordering a halt to discriminatory practices and forbidding an illegal one.” (Plaintiffs’ Motion, p. 7.) However, as Plaintiffs have identified no discriminatory practice by the state, such an order would disserve the public interest by giving the public a false impression that the state has engaged in discriminatory practices, when the only discriminatory practice alleged in this lawsuit stems from operation of Democratic Party rules.

Plaintiffs have not shown that an injunction preventing the state from doing what it already cannot do and has no intention of doing could possibly be in the public interest.

CONCLUSION

Plaintiffs have asked this court for an order preventing the state from conducting political party elections, which is an activity in which the state does not participate. Plaintiffs are asking the court to administer an antidote for which there is no poison. Having failed to meet even one of the requirements for the issuance of a preliminary injunction, the Plaintiffs should be denied injunctive relief against the State of Texas, and the state respectfully requests that the court deny Plaintiffs’ motion insofar as it would run against the state.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument has been served via electronic notification, as required by the U.S.D.C. for the Western Division, on this 19th day of May, 2008, on:

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