

a contemporary of Maury Maverick, Jr. and Carlos Cadena as they successfully advocated against segregated law schools and sporting events. Sweatt v. Painter, 339 U.S. 629 (1950); Harvey v. Morgan, 272 S.W.2d 621 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.).

Notwithstanding some legal progress, vestiges of a not too distant past included signs excluding from public parks Americans of color or Latino heritage and other notices which if enforced would have required some of our friends to sit in the theater balcony or use separate water fountains. On one occasion, those attitudes lead to the prevention of future United States Congressman Henry B. Gonzalez and his family from having a picnic. Their crime was being Latino. Ironically, my sister is married to the Congressman's nephew and lives in the very area from which the Gonzalezes were excluded.

Because of poll taxes, literacy tests and historical oppression and intimidation of some Americans, the Voting Rights Act of 1965 became law. In one of the first challenges to the constitutionality of certain sections of the VRA by South Carolina, the Supreme Court explained its historical and legislative history. South Carolina v. Katzenbach, 383 U.S. 301 (1966). In holding the sections of the VRA being challenged were “an appropriate means for carrying out Congress’ constitutional responsibilities and are consonant with all other provisions of the Constitution,” the Court explained:

The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects. Before enacting the measure, Congress explored with great care the problem of racial discrimination in voting. The House and Senate Committees on the Judiciary each held hearings for nine days and received testimony from a total of 67 witnesses. More than three full days were consumed discussing the bill on the floor of the House, while the debate in the Senate covered 26 days in all. At the close of these deliberations, the verdict of both chambers was overwhelming. The House approved the bill by a vote of 328-74, and the measure passed the Senate by a margin of 79-18.

Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by a insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

Id. at 308-09. The Court then provided a summary of the reports of the House and Senate Committees which detailed the factual basis in support of Congress' reaction as follows:

The Fifteenth Amendment to the Constitution was ratified in 1870. Promptly thereafter Congress passed the Enforcement Act of 1870, which made it a crime for public officers and private persons to obstruct exercise of the right to vote. The statute was amended in the following year to provide for detailed federal supervision of the electoral process, from registration to the certification of returns. As the years passed and fervor for racial equality waned, enforcement of the laws became spotty and ineffective, and most of their provisions were repealed in 1894. The remnants have had little significance in the recently renewed battle against voting discrimination.

Meanwhile, beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting. Typically, they made the ability to read and write a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write. At the same time, alternate tests were prescribed in all of the named States to assure that white illiterates would not be deprived of the franchise. These included grandfather clauses, property qualifications, "good character" tests, and the requirement that registrants "understand" or "interpret" certain matter.

The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in Guinn v. United States, 238 U.S. 347, 35 S. Ct. 926, 59 L. Ed. 1340 and Meyers v. Anderson, 238 U.S. 368, 35 S. Ct. 932, 59 L. Ed. 1349. Procedural hurdles were struck down in Lane v. Wilson, 307 U.S. 268, 59 S. Ct. 872, 83 L. Ed. 1281. The white primary was outlawed in Smith v. Allwright, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987, and Terry v. Adams, 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152. Improper challenges were nullified in United States v. Thomas, 362 U.S. 58, 80 S. Ct. 612, 4 L. Ed. 2d

535. Racial gerrymandering was forbidden by Gomillion v. Lightfoot, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110. Finally, discriminatory application of voting tests was condemned in Schnell v. Davis, 336 U.S. 933, 69 S. Ct. 749, 93 L. Ed. 1093, Alabama v. United States, 371 U.S. 37, 83 S. Ct. 145, 9 L. Ed 2d 112, and Louisiana v. United States, 380 U.S. 145, 85 S. Ct. 817, 13 L. Ed. 2d 709.

Id. at 310-12 (footnotes omitted).

In establishing federal voting protection for Latinos and others, the VRA does not however dictate to political parties how to choose nominees, so long of course that all people have a right to participate. A patchwork of processes has evolved in the various states and political parties.

Though amused by the 2008 “discovery” of the Texas Democratic Party convention delegate selection process and the current consternation created thereby, it is nothing new. I began attending such neighborhood and Bexar County Democratic conventions in elementary school, following election day campaigning for various candidates, including my father who was our Democratic precinct chairman. He and St. Mary’s University professor Bill Crane would come to a reasonable compromise on how to allocate delegates. At the county convention, I watched Chairman John Daniels, Bill Sinkin in his bow tie, Henry B. Gonzalez in his white suit and Bruzzy Reeves in his wheelchair work the crowd, reportorially covered by Kemper Diehl and Jim McCrory.

The present delegate controversy surfaced because the 2008 presidential nominating process has been close, and therefore Texas counts for the first time in many years. As a practical political matter, the question may be moot if the pundits are correct about the nomination process coming to a close. (Notes of full disclosure: Senator Clinton’s husband nominated me to the federal bench, and I hope to shoot baskets some day with Senator Obama. One of the lawyers representing the Texas Democratic Party was once a Texas highway patrol trooper in the Seguin area. As I returned to college one night, he stopped me for speeding. I represented myself in Justice of Peace Court.

I lost.)

Plaintiffs' Original Complaint and Motion for Preliminary Injunction²

Plaintiffs filed their complaint on May 9, 2008, as an enforcement action under Section 5 of the VRA, 42 U.S.C. § 1973c, and an action pursuant to Section 2 of the VRA, 42 U.S.C. § 1973. Plaintiffs challenge the manner in which the State of Texas and the Texas Democratic Party distribute and allocate delegates for participation in the Party's precinct, senatorial or county, state and national nominating conventions. Plaintiffs contend 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." Plaintiffs' Original Complaint, docket #1 at page 1. Plaintiffs maintain the current allocation system "does not allow Latino voters an equal opportunity to participate in the electoral process and select candidates of their choice, in violation of Section 2 of the Voting Rights Act." Id. In addition, "the current allocation system was adopted in 1988 and has been periodically modified to their current status for use in the 2008 election process and these changes have not been submitted for, nor have they received the required pre-clearance pursuant to Section 5 of the Voting Rights Act." Id. at page 1-2. As a result, plaintiffs "seek to enjoin the Defendant [sic] and their successors from conducting elections pursuant to the non pre-cleared changes and illegal delegate allocation plan." Id. at page 2.

As set forth in plaintiffs' statement of facts, the primary election and Texas Democratic Party nominating precinct conventions were held on March 4, 2008. Pursuant to its own rules, the Texas Democratic Party (TDP) allocated the number of delegates each precinct convention would be

² Although plaintiffs' pleading is styled as a request for a temporary injunction, this Court noted in its Order and Advisory filed May 16, 2008 (docket #8), that pursuant to rule 65 of the Federal Rules of Civil Procedures, the correct nomenclature for such relief in federal court is a preliminary injunction.

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. The TDP conducted its nominating Senatorial and County conventions on March 29, 2008. Again, pursuant to TDP rules, the TDP 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. None of these rules have been pre-cleared pursuant to Section 5 of the VRA, and these allocation methods, plaintiffs contend, under-value Latino Democratic voters and do not provide Latino voters with an equal opportunity to participate in the nominating process and to elect candidates of their choice. Likewise, plaintiffs say the allocation method used to elect the delegates to attend the Democratic National Convention suffers from the same failures as set forth above.

Plaintiffs assert Texas will send 228 delegates and 32 alternates to the National Democratic Convention. Of those delegates and alternates, the Senatorial District delegations to the State Convention will elect 126 delegates and 21 alternates, chosen and allocated pursuant to the non-pre-cleared and discriminatory rules adopted by the TDP. Plaintiffs complain that “[m]ore delegates are allocated to Republican Senatorial districts than to the Democratic Senatorial districts even though more than 60% of the Hispanic voting age population lies in the Democratic districts. While the seven Latino majority Senatorial districts all gave the Democratic nominee for Governor in 2006, plurality 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 for the Latino majority districts.” Complaint, docket #1 at page 6. Plaintiffs claim that “[h]ad 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.” Id.

In their request for a preliminary injunction, plaintiffs note the TDP will conduct its nominating State convention on June 5-7, 2008. Plaintiffs believe they are entitled to injunctive relief and seek to “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.” Plaintiffs’ Motion and Memorandum for [Preliminary] Injunction, docket #3 at page 6. Plaintiffs believe they satisfy the requirements needed for a preliminary injunction. Those requirements are:

- (1) a substantial likelihood of success on the merits,
- (2) a substantial threat that plaintiffs will suffer irreparable injury if the injunction is not granted,
- (3) that the threatened injury outweighs any damage that the injunction might cause the defendant[s], and
- (4) that the injunction will not disserve the public interest.³

Planned Parenthood v. Sanchez, 403 F.3d 324, 329 (5th Cir. 2005). Because a preliminary injunction

³ Plaintiffs believe there is a substantial likelihood they will succeed on the merits of their claim because 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 VRA. The substantial threat of irreparable harm is satisfied, plaintiffs believe, because irreparable harm will occur unless the defendants are enjoined from proceeding with the State Democratic Party convention pursuant to rules which place an unfair burden on Latino voters of Texas. Plaintiffs also contend the public interest will be served by the granting of injunctive relief because fair and equitable elections will be conducted and the constitutional rights of voters will be vindicated.

is considered an “extraordinary remedy,” it “should only be granted if the plaintiffs have ‘clearly carried the burden of persuasion’ on all four requirements.” Id.

The State of Texas Motion to Dismiss

The State of Texas moves to be dismissed from this lawsuit based on a lack of jurisdiction because plaintiffs lack standing. The State contends plaintiffs have failed to plead facts demonstrating either causation by the state or redressability by means of an injunction or other court order against the state. Dismissal is also based on rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted because the only complaint by plaintiffs about the State of Texas is that the Texas Democratic Party is organized under Texas statutes. In other words, the State maintains it has no authority over the Democratic Party, other than to promulgate laws governing the organization of all political parties in the State, analogous to the formation of a corporation. The State asserts:

This is akin to filing a lawsuit against a Texas corporation claiming discrimination and including the state as a defendant because the corporation is organized under Texas business statutes. It is clear that a corporation may discriminate by its own internal work rules against its employees, yet no one would argue that the corporations [sic] actions against its employees created liability on the part of the state by virtue of a corporate charter. Similarly a political party may discriminate by means of its internal governing rules, and yet no state liability is thus created.

Defendant State of Texas’ Motion to Dismiss with Brief in Support, docket #6 at pages 5-6. Stated another way, the State might well have invoked a favorite quote of my late appellate court colleague, Chief Justice Alfonso Chapa explaining the legal concept of lack of standing to sue: “Ellos no tienen vela en este entierro” (i.e. the Defendant has no candle in this funeral).

In response to the motion, plaintiffs contend the motion should be denied because it is based on a misunderstanding of the State’s obligation under Section 5 of the VRA and because plaintiffs’

pleadings, read in a light most favorable to the non-movant, show both causation and “redressability.” Likewise as to the State’s request for dismissal based on rule 12(b)(6) for failure to state a claim, plaintiffs again assert the State misunderstands its obligations under the Act.

Plaintiffs contend the State of Texas is authorized to make a submission for preclearance when the enacted voting procedures affect more than one county. As a result, 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.” Plaintiffs’ Response in Opposition to Defendant State of Texas’ Motion to Dismiss, docket #10 at page 4. Plaintiffs allege they have suffered injury due to the inaction by the State of Texas in securing preclearance of the party rules. This injury may be redressed by an order directing the State of Texas to submit the rules for preclearance, an action the State is clearly authorized to do under Section 5 of the VRA.

In reply to the plaintiffs’ response, the State contends plaintiffs’ argument they are being harmed by the State’s failure to preclear is illogical. The harm is not being caused by the failure to preclear but the way in which the rule allocates delegates. Had the rule been precleared, plaintiffs’ argument would remain the same - they are being under-represented. To the extent plaintiffs claim that had the State of Texas submitted the TDP’s rule for preclearance, it would not have been precleared and implemented, that allegation is purely speculative and insufficient to support causation and redressability in this case. The State also responds that in order for it to be liable in this case, it must have had a duty to submit the rules and failed in that duty. Plaintiffs have not argued the State of Texas has such a duty or obligation and have not cited any authority requiring the State to do so. Moreover, there is no basis for the claim the State was authorized to submit the

rules of a completely different entity - the TDP - which further supports the State's position it had no duty.

In addition to failing to cite authority in support of their duty argument, the State maintains it is "highly questionable whether a political party's rules must be submitted for preclearance by the Party itself, much less by a state acting on behalf of a Party." Defendant State of Texas' Reply to Plaintiffs' Response to Defendant's Motion to Dismiss, docket #13 at page 3. The State points out "[t]he plain language of Section 5 [42 U.S.C. § 1973c] governing submission for preclearance refers to a 'state or political subdivision,'" and "[p]olitical parties are not political subdivisions of the state." The State also notes it is questionable whether Section 5 of the VRA is applicable to political parties, because the Supreme Court in Morse v. Republican Party, 517 U.S. 186 (1996), failed to reach a clear conclusion other than to hold an attendance fee at a state convention must be precleared.

The State also contends the plaintiffs' claim it had authority to submit the TDP's rules based on 28 C.F.R. § 51.23 is without merit. That section provides:

(a) Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the submitting authority or by any other authorized person on behalf of the submitting authority. When one or more counties or other political subunits within a State will be affected, the State may make a submission on their behalf. Where a State is covered as a whole, State legislation (except legislation of local applicability) or other changes undertaken or required by the State shall be submitted by the State.

The State argues this section does not give it authority to submit the rule of a political party to the Department of Justice and does not impose a duty to make a submission. The regulation, according to the State, "requires submission by a state only when there is state legislation or other changes covering the whole state that the state undertakes or requires. Rules by political parties are not

changes that the state undertakes or requires.” Defendant State of Texas’ Reply to Plaintiffs’ Response to Defendant’s Motion to Dismiss, docket #13 at page 5. The State reasserts its position it has not harmed the plaintiffs, the plaintiffs injury cannot be redressed by an order against the State, and therefore, plaintiffs lack standing to sue the State of Texas. Without a showing of causation, plaintiffs have failed to state a claim upon which relief may be granted, and the State of Texas should be dismissed from this case.

Standard of Review

The standard of review to be applied to motions to dismiss has recently been revisited by the Supreme Court. In Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007), the Court explained the standard as follows:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligations to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

. . . . And of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and “that recovery is very remote and unlikely.”

(Citations omitted). The Court continued its explanation of this standard with reference to the often cited Conley v. Gibson opinion:

Justice Black’s opinion for the Court in Conley v. Gibson, spoke not only of the need for fair notice of the grounds for entitlement to relief but of “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove not set of facts in support of his claim which would entitle him to relief.” This “no set of facts” language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read Conley in some such way when formulating its understanding of the proper pleading standard.

On such a focused and literal reading of Conley's "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. It seems fair to say that this approach of pleading would dispense with any showing of a "reasonably founded hope" that a plaintiff would be able to make a case. . . .

Seeing this, a good many judges and commentators have balked at taking the literal terms of the Conley passage as a pleading standard, and [i]n practice, a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory. . . ."

We could go on, but there is no need to pile up further citations to show that Conley's "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the Conley Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete negative gloss on an accepted pleading standard: *once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.*

Id. at 1968-69 (citations omitted, italic emphasis in original; bold and italic emphasis added). In addition to this standard, this Court, generally, may not consider matters outside of the pleadings in deciding a motion to dismiss for failure to state a claim, and if those matters are considered, the motion should be treated as a motion for summary judgment. In re Katrina Canal Breaches Litigation, 495 F.3d 191, 205 (5th Cir. 2007). However, documents attached to the motion may be considered if they are central to the claim and referred to in the complaint. Id. To withstand dismissal for lack of standing, plaintiffs have the burden to prove by a "preponderance of the evidence the existence of an actual controversy." Hosein v. Gonzales, 452 F.3d 401, 404 (5th Cir.

2006). The three required elements for Article III standing are:

- (1) that the plaintiff have suffered an “injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent”; (2) that there is “a causal connection between the injury and the conduct complained of”; and
- (3) that the injury is likely to be redressed by a favorable decision.

Id. at 403-04.

The Court concludes the State of Texas’ analysis and arguments are correct. The State’s Motion to Dismiss (docket #6) is GRANTED.

Plaintiff’s Request to Enjoin the Texas Democratic Party Convention

The Court first observes the allocation rules about which plaintiffs complain have been in effect since 1988 and were applied for allocation purposes following the 2006 elections.⁴ Now late

⁴ The affidavit of the Texas Democratic Party Deputy Primary Director, Stephanie Leavitt, explains the genesis of these rules:

The Rules of the Texas Democratic Party (hereinafter “Rules”) prescribe the formulas for calculating the number of delegates a particular political subdivision (e.g. precinct, county/Senate District) is entitled to elect to their relevant convention. With respect to the precinct convention (wherein members of a precinct gather to elect delegates to their County/Senate District Convention), the formula allows for the election of one delegate for every 15 votes cast in the precinct for the Democratic gubernatorial candidate in the last General Election (here, 2006). Rules, Art. IV.B.8(a)(1). With respect to the County/Senatorial District Convention (wherein delegates elected from the precinct convention will attend and run for election to the State Convention), the formula provides for the election of one delegate and one alternate for every 180 votes (or major fraction thereof) cast in the county for the Democratic gubernatorial candidate in the last General Election (here, 2006). Rules, Art. IV.C.8(a).

The specific formulas used at both the precinct and county/senatorial district levels were passed by the State Democratic Executive Committee (SDEC) as temporary rule changes to accommodate the expected turnout. The Rules provide for this temporary change to the State Party Rules between State Conventions by 3/4-vote of the members of the SDEC at a meeting called for this purpose and with appropriate notice to members. (Rules, Art. VI.B.2). Importantly, these temporary rule changes must be presented before this year’s State Convention for approval, as State Party Rules specify that the rules themselves may only be amended by a majority vote of the State Convention Delegates (Rules, Art. VI.B.1); however, the changes are still in effect in the interim (Rules, Art. VI.B.2).

The use of the raw votes cast for the Democratic gubernatorial candidate in the last General Election in order to calculate and allocate delegates and alternates has been in effect since at least 1988. The intent in utilizing the votes cast for the Democratic gubernatorial candidate as the

gauge by which to calculate delegate allocations is to encourage participation among Democratic voters in the General Election and to reward political subdivisions based on their turnout for the Democratic nominee in the non-presidential years. This helps grow the local state party.

The Rules governing the election of Delegates to the National Convention is governed by a combination of the Rules of the Democratic National Committee (hereinafter "DNC Rules"), the Call for the 2008 Democratic National Convention (hereinafter "Call") and the Texas Delegate Selection Plan for the 2008 Democratic National Convention (hereinafter "DSP"). The formula which apportions 75% of our base delegation through the results of the presidential primary within each of the 31 Senate Districts and the other 25% through an at-large nominations process is enumerated with the DNC Rules (DNC Rules, 8.C). Texas is allocated 168 "base delegates" - defined as those elected from a combination of Senate District caucus elections and at-large election (Call, Appendix B). The balance of Texas' 228 National Delegates are comprised of Party Leader/Elected Official (or "PLEO's"); Democratic Members of Congress, members of the DNC Texas delegation; Distinguished party leaders, Democratic Governors (as applicable) and "Add-on's" (Call, Appendix B).

The DNC Rules provide for the apportionment of National Delegates elected from their respective senatorial districts caucuses at the Texas State Convention based on the selection and implementation of one of four prescribed formulas (DNC Rules, 8.A). The DNC Rules base their formulas on factors such as the number of votes for the Democratic presidential candidate and the Democratic gubernatorial candidate in their most recent elections and prescribed the weight given to each factor - e.g. giving equal weight to the factors (DNC Rules, 8.A). Of the four, Texas selected the formula giving equal weight to the vote for the Democratic candidates in the most recent presidential and gubernatorial elections (DSP, Section III.D.1). The intent in utilizing the votes cast for the Democratic presidential and gubernatorial candidates as the gauge by which to calculate National delegate allocations is to encourage participation among Democratic voters in the General Election and to reward higher performing areas turning their voters out for the Democratic nominees. These rules help grow the national and local parties.,

In order for a state to move forward with the election of its share of National Delegates, however, the State must first receive approval of its DSP by the DNC Rules and Bylaws Committee. Rule 1.A. of the DNC Rules dictates that a State Party must adopt a comprehensive DSP addressing all aspects of the state's delegate selection process. A model DSP is provided to the states; however, a state must work to revise and craft a DSP appropriate to the state's unique circumstances (e.g. Texas' use of Senate Districts, as opposed to Congressional Districts, when allocating delegates).

Texas submitted its plan to the Rules and Bylaws Committee in early 2007. The RBC considered the Texas Delegate Selection Plan on June 30, 2007. At that meeting, the RBC voted to find the Plan in "Conditional Compliance." According to Regulation 2.6, this finding meant the Plan complied with the spirit and generally the substance of the rules, the Call and the Regulations but had certain minor deficiencies or omissions that needed to be corrected. These minor deficiencies/clarifications were made to the plan, and the State Party resubmitted its plan on September 14, 2007. The RBC voted to find Texas' plan in full compliance on October 18, 2007. The Texas Democratic Party cannot now change the plan without approval of the RBC.

Texas' plan includes provisions for outreach to historically-underrepresented groups through the inclusion of affirmative action provisions which passed overwhelmingly by the SDEC at its April 28, 2007 meeting. At the meeting, a motion was made to adopt the Delegate Selection Plan, and the motion passed by more than 75%.

in the fourth quarter of the 2008 cycle, plaintiffs for the first time contend the Texas Democratic Party's rules violate Section 5 of the VRA.⁵ Section 5 of the VRA, 42 U.S.C. § 1973c provides:

- (a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect 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

Texas' plan also ensures significant representation of historically underrepresented groups in its National Delegation. For example, Minorities and African-Americans have actually gained in representational strength in the Delegate Selection Process over last year. While 4-5 seats were lost in Texas from last year's National Delegate allotment overall, African Americans and other minority groups now comprise more of the delegation - and thus increased numerically as compared to other groups/individuals under the terms of our Plan.

Finally, to my knowledge, and upon conferring with colleagues who have worked on previous National Delegate Plans for Texas, Texas has never been asked nor required to submit the Texas Plan for preclearance by the Department of Justice or the United States District Court for the District of Columbia.

⁵ As noted in Defendant, Texas Democratic Party's Brief in Support of Its Motion to Dismiss and In Opposition to Injunctive Relief, docket # 5 at page 31, "[i]t is undisputed that the present system employed by the Texas Democratic party to select and allocate delegates has been in use since 1988." The TDP argues the plaintiffs have had "ample time to raise the concerns they do in this case." Id. Noting that "[e]ven if the delegate allocation rules had only recently been adopted, the 2008 rules have been available for over a year," yet plaintiffs did not file suit when they learned of the rules adopted for this cycle and did not file suit after the March 4, 2008 primary and precinct conventions. Id. Despite the holding of the County and Senate District Conventions on March 28, 2008, no suit was filed. Id. at 32. Instead, plaintiffs waited some two months after the TDP "had learned through press reports that some of the Plaintiffs expressed concerns over the system in place, though no specific details had been released." The TDP responded to that "learning" as early as March 6, 2008, when general counsel for the TDP wrote to the general counsel for LULAC, in part, as follows:

As you know, the Texas Democratic Party rules, in effect this cycle, were adopted in the late 1980s. The rules have been in use for several cycles. No challenge was made to the rules prior to actual voting. As you know, the law look unfavorably on challenges to election procedures that occur after voting ends.

Having said that, the Texas Democratic Party is focused on presenting the cleanest, fairest, general election possible given the unprecedented turnout. Because the delegate selection process continues over time, the Texas Democratic Party is working out procedures to deal with the complaints we have received regarding the Precinct Conventions. The next step in the process are County and Senate District Conventions that will convene on March 29, 2008. The Texas Democratic Party is prepared to deal with the concerns raised during Tuesday's conventions in a fair and efficient manner within the rules of the Texas Democratic Party as well as State and Federal law.

As the TDP states in its brief, "No response was received" to this letter.

on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect 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 on November 1, 1968, or whenever a State or political subdivision with respect to the prohibitions set forth in section 1973b(b) of this title are in effect 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 on November 1, 1972, 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 has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, 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 officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty 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 a declaratory judgment entered under this section shall bar a subsequent action to enjoin 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 sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

- (b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of

or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

- (c) The term “purpose” in subsections (a) and (b) of this section shall include any discriminatory purpose.
- (d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

The TDP asserts the plaintiffs had ample time to raise the concerns they now raise and it would be inequitable for the Court to issue an injunction stopping the State Democratic Convention when plaintiffs have known the rules for at least the last two decades and their legal complaints for at least the last two months. Although the Court was unable to find VRA case law setting forth the time frame in which a VRA case must be brought, a discussion concerning the application of the doctrine of laches in such a case is instructive.

In Lopez v. Merced County, California, 473 F. Supp. 2d 1072, 1080-81 (E.D. Cal. 2007), the court found the doctrine of laches in and of itself could not bar the plaintiffs’ motion for preliminary injunction. After setting forth the elements required for such a showing, i.e. “Plaintiffs delayed inexcusably in the assertion of a known right and (2) that Defendants have been prejudiced as a result of that delay,” the court noted the plaintiffs asserted their delay in filing was excused because a “large number of historical, factual issues concerning boundary changes” had to be researched before being presented in their complaint. Id. However, the court found the plaintiffs failed to present evidence of “when their investigation began or what research was performed except for a reference to August 2006.” Id. at 1081. Additionally, “[p]laintiffs offered no explanation for why the inquiry and research did not commence until August 2006 when the alleged violations go back thirty-four years. Absent this explanation, questions arise about the necessity to present the court

with an eleventh-hour, last minute, 'urgent' request that has far-reaching consequences to the voting processes in the Defendant Cities." Id. The court was troubled by the "lateness of the filing of Plaintiffs' complaint," but found that "without a fully developed record, Plaintiffs' assertion that Federal Rule of Civil Procedure 11 dictated the extra time needed for factual and legal investigation is a colorable contention of excuse for delay. Absent a more complete record, we do not find that Plaintiffs' claim is barred by laches." Id. The plaintiffs in this case have not specifically addressed the timeliness issue or provided any sort of explanation of why the challenge to the TDP's allocation rules was not filed sooner. Although the Court does not find the suit is barred by laches, it will consider timeliness as a factor in determining the outcome of this litigation.

More important, however, than the issue of timely challenge to the Texas Democratic rules is the question of whether the letter or spirit of the VRA has been violated. The intent of Section 5 was to remedy past abuses which kept certain groups from voting.

My esteemed and learned colleague and friend, Judge Orlando Garcia, former Texas Democratic legislator is fond of observing, "There are those persons so civic minded that each Tuesday and Saturday they drive to their polling place to see if an election may be going on." On the other hand, some citizens choose not to vote.

Plaintiffs have not alleged Latinos were intimidated, threatened or otherwise kept from voting. Rather, plaintiffs inferentially say Latinos exercised their right not to vote. Consequences flow from voting or not voting. Had plaintiffs gone to the polls in greater number than other groups, the delegate allocation rules would have inured to their benefit and to the detriment of other non-Latino districts. The adage remains "no vote, no voice."

While the Court believes those protected by the VRA are squandering the legacy given them by Martin Luther King, Willie Velasquez, Lyndon Johnson and others by not participating, they

cannot be forced to govern themselves while placing a higher value on other endeavors. Rome was not built in a day, nor did it decline overnight, but its decay from within came in part because of its misplaced priorities. As Alexis de Tocqueville stated, "In a Democracy, the people get the government they deserve."

Moreover, based on the record before the Court, the plaintiffs' votes are not being diluted by the TDP rules but rather are diluted by the failure to vote. In their complaint and motion, the plaintiffs offer the following example as illustrative of their claim the allocation system in place "under-values Latino Democratic voters and does not provide Latino voters with an equal opportunity to participate in the nominating process and to elect candidate 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 the 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 6 delegates to the Democratic National Convention.

However, when one looks at the raw number of voters who turned out to vote in this election in Senate District 25, it shows 61,995 voters voted for the Democratic candidate despite being only 26.8% of the votes, as opposed to 26,209 voters (or 50.6%) voting for the Democratic candidate in Senate District 6. As the TDP has noted, it is rewarding actual voter turnout and not percentage turnout in allocating its delegates. If the Court were to decide plaintiffs' votes are undervalued as alleged and adopt the percentage of vote allocation plaintiffs seek, the converse argument could be made that the actual votes are being undervalued thereby violating the VRA and in essence rewarding, if not encouraging, low voter turnout. While a literal and hypertechnical reading of

Section 5 could find the TDP allocation system to be a "practice" requiring preclearance, the Court chooses not to make such a long reach given the spirit and original intent of the VRA and the absence of intimidation, threats, or monetary fee allegations. Additionally, the Court finds no violation of Section 2 of the VRA. "We have met the enemy and he is us."⁶

The Applicability of Morse v. Republican Party

Because the Court has found no violation or application of the VRA in this case and as a consequence, no preclearance requirement, there is no need to convene a three-judge panel nor under the concept of judicial restraint address the general applicability of the VRA to political parties based on Morse v. Republican Party, 517 U.S. 186 (1996). Both sides to this controversy have cited Morse, and its myriad of opinions. Barring future clarification from the 5th Circuit Court of Appeals or the United States Supreme Court, this Court interprets Morse to be limited to its particular facts: the requirement of a monetary fee reminiscent of the poll tax in order to participate in the political process, and therefore inapplicable here. See Nelson v. Dean, 528 F. Supp. 2d 1271, 1277 & 1281-82 ("The First Amendment right to freedom of association extends to parties and protects their internal affairs from undue government interference. Thus a political party ordinarily may decide for itself how delegates to its national convention will be chosen, and the party ordinarily need not comply with state laws purporting to restrict its options. The United States Supreme Court has repeatedly so held"; recognizing Congress passed the VRA to remedy racial discrimination in voting, the court stated, "It seems unlikely that either the DNC delegate selection rules or the DNC's decisions whether to seat or exclude delegates are subject to the Act at all. And if the Act applied at all, it of course would be constrained by the party's First Amendment association rights."); LaRouche v. Fowler, 77 F. Supp. 2d 80 (D. D.C. 1999) (holding preclearance requirement of VRA

⁶ "Pogo" was Walt Kelly's most famous creation. *Walt Kelly*, BUD PLANT ILLUS. BOOKS, available at <http://www.bpib.com/kelly.htm>.

did not apply to the Democratic National Party and state Democratic parties were not required to seek preclearance before administering DNC national convention delegate selection rules).

Conclusion


Based on the record before the Court, the Court denies plaintiffs' request for relief because:

- A. Untimely;
- B. Inapplicability of Morse v. Republican Party;
- C. The spirit and intent of the Voting Rights Act have not been violated.
- D. Plaintiffs' proposed allocation system would effectively encourage protected groups not to vote in order to benefit from the percentage allocation suggested by plaintiffs.

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' Motion for Temporary Injunction (docket #3) is DENIED; Defendant, Texas Democratic Party's Motion to Dismiss (docket #4) is GRANTED, and Defendant State of Texas' Motion to Dismiss (Docket #6) is GRANTED and this case is DISMISSED.

It is so ORDERED.

SIGNED this 22nd day of May, 2008.


FRED BIERY
UNITED STATES DISTRICT JUDGE