

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,	§	CIVIL ACTION NO. SA 08 CA 0389 FB
<i>Plaintiffs,</i>	§	
v.	§	
	§	
STATE OF TEXAS and	§	
TEXAS DEMOCRATIC PARTY,	§	
<i>Defendants.</i>		

**DEFENDANT STATE OF TEXAS’  
MOTION TO DISMISS WITH BRIEF IN SUPPORT**

TO THE HONORABLE FRED BIERY:

COMES NOW the State of Texas and in response to Plaintiff’s Original Complaint, files this  
its Motion to Dismiss and shows respectfully as follows:

**I.  
BACKGROUND**

Plaintiffs are LULAC, a civil rights organization, the Mexican American Bar Association,  
Houston Chapter, an association of Latino lawyers, and individuals who are citizens of and voters  
in Texas. Many of the individual Plaintiffs are active members of LULAC. They are complaining  
to this court concerning the effects of rules of the Texas Democratic Party (“TDP”) governing the  
allocation of delegates from precinct conventions to attend the Party’s Senatorial and County  
conventions. They complain that the TDP’s rules concerning delegate allocation to these  
conventions undervalues Latino Democratic voters and denies them the equal opportunity to  
participate in the nominating process and to elect candidates of their choice. (Plaintiffs’ Original

Complaint, ¶¶ 12, 14.)

As a first cause of action, Plaintiffs complain that the TDP's rules concerning delegate allocation to Senatorial and County conventions have not been pre-cleared with the Department of Justice, in violation of Section 5 of the Voting Rights Act. Plaintiffs' second cause of action is that the rules used by the TDP to allocate delegates undervalues Latino voters and denies them an equal opportunity to participate in the nominating process and to elect candidates of their choice, in violation of Section 2 of the Voting Rights Act. They seek a declaratory judgment that the Democratic Party's rules for delegate allocations violate Section 5 pre-clearance requirements, a declaratory judgment that the Democratic Party's rules for delegate allocations dilutes Latino voting strength in violation of Section 2 of the Voting Rights Act, injunctive relief preventing Defendants from taking action to proceed with nominating conventions using the discriminatory delegate allocation system that is the subject of this suit<sup>1</sup>, and an order requiring Defendants to comply with

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In an apparent attempt to demonstrate that the State of Texas has actually taken part in causing their alleged injuries, Plaintiffs have carefully worded paragraphs A and B and C on page 9 of their Original Complaint to read that they are requesting the court to declare that the "Defendants' actions regarding use of the Democratic Party's rules....," and that they are requesting an injunction to stop Defendants from proceeding with a nominating convention. By this and other references to "Defendants," Plaintiffs anticipate the State of Texas' defense that there is no jurisdiction because the state has not caused Plaintiffs' alleged injuries and that Plaintiffs have failed to state a claim because the actions of which they complain are the actions of the TDP, and not of the state.

Despite this attempt to show by the use of inclusive wording that the state belongs in this lawsuit, Plaintiffs' mere statement that the "Defendants' actions regarding use of the Democratic Party's rules..." does nothing to change the fact that the State of Texas does not use the Democratic Party's rules on delegate allocation to do anything, nor does the State of Texas intend to proceed with the Democratic Party's nominating convention using the delegate allocation currently in place, since the State of Texas does not hold nominating conventions.

Section 5 pre-clearance requirements.<sup>2</sup>

The State of Texas moves for dismissal based on lack of jurisdiction because Plaintiffs lack standing, having failed to plead facts demonstrating either causation by the state or redressability by means of an injunction or other court order against the state. The state also moves for dismissal 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. No statute is claimed to be unconstitutional, and no injury to Plaintiffs is alleged to have been caused by a Texas statute.

In addition, Plaintiffs' pleadings concerning the elections that the Defendants are conducting (Plaintiffs' Original Complaint, ¶ 2) make it appear that they may be seeking an injunction to halt the November election. This is so because the only election that the state will be conducting is the November election. A fair reading of the remainder of the Original Complaint, however, suggests that Plaintiffs are attempting to halt only the elections incident to the Democratic Party's state convention. Defendant is interpreting Plaintiffs' Original Complaint as being addressed only to those elections held in conjunction with the TDP's state convention; however, to whatever extent Plaintiffs are seeking such an extraordinary remedy as an injunction preventing the November election, Defendant would seek leave to amend their Motion to Dismiss to show that Plaintiffs cannot show their right to such extraordinary relief.

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The remainder of Plaintiffs' requested relief consist of non-case specific requests for attorney's fees and costs, that the court retain jurisdiction, and for such other relief as the court deem just and proper.

## II. BRIEF IN SUPPORT OF MOTION TO DISMISS

### A. Lack of Jurisdiction–Standing

The requirements for standing to sue are well established. They are injury in fact, causation, and redressability.

The “irreducible constitutional minimum of standing” contains three requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 505, 560, 112 S.Ct. 2130, 2136 (1992). First and foremost, there must be alleged (and ultimately proved) an “injury in fact”-a harm suffered by the plaintiff that is “concrete” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1723 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)). Second, there must be causation-a fairly traceable connection between the plaintiff’s injury and the complained-of conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-1926, (1976). And third, there must be redressability-a likelihood that the requested relief will redress the alleged injury. *Id.*, at 45-46, 96 S.Ct., at 1927-1928; see also *Warth v. Seldin*, 422 U.S. 490, 505, 95 S.Ct. 2197, 2208, 45 L.Ed.2d 343 (1975). This triad of injury in fact, causation, and redressability constitutes the core of Article III’s case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 607-608, 107 L.Ed.2d 603 (1990).

*Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-104, 118 S.Ct. 1003, 1016-1017 (1998).

Defendant State of Texas does not contest whether there is an injury in fact for purposes of this motion. However, as between Plaintiffs and the state, neither the second element of causation nor the third element of redressability has been met.

Plaintiffs’ complaints under the Voting Rights Act are, by Plaintiffs’ own judicial admissions, being caused by the manner in which convention delegates are allocated within the

Democratic Party. (Plaintiffs' Original Complaint, ¶¶ 1, 14, 18, 20, 24, 25). They also complain that the TDP's rules governing allocation of delegates have not been pre-cleared under Section 5 of the Voting Rights Act. (Plaintiffs' Original Complaint, ¶¶ 13, 17, 21.) The only allusions to state statutes are that the Democratic Party adopted their rules under authority of the state of Texas. (Plaintiffs' Original Complaint, ¶¶ 9, 10, 11, 15, 19.) No Texas statute is alleged to have caused the dilution of Plaintiffs' votes.

Plaintiffs quite clearly trace all of the harm that they allege to rules of the Democratic Party, and then attempt to involve the state as a Defendant merely by references to the fact that the Party is organized under state law.<sup>3</sup> 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

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The state laws cited by Plaintiffs are laws governing all political parties in the state. In paragraph 9, Plaintiffs cite to Texas Election Code § 191.004. (For the convenience of the court, all of these statutes are provided in the Addendum to this Motion to Dismiss.) This statute prescribes the form of the ballot in a party's presidential primary. In paragraph 10, Plaintiffs cite to Texas Election Code § 174.022, which prescribes the time and place of precinct conventions. In paragraph 11, Plaintiffs cite to § 163.002 et. seq., providing that political parties must adopt rules on quorums, casting and counting votes, operations of executive committees, and presentation of matters before a convention. Tex. Elec. Code § 163.002 (1) (2). Other required rules pertain to the method of selecting presidential elector candidates, selection of party officers, convention delegates, convention alternates, and convention officials, and provide for their representative apportionment based on population, party strength, or both, within appropriate territorial units, provide for publication of the rules and the manner of adopting and amending those rules. Tex. Elec. Code §§ 163.002 (3)-(6). In addition, these statutes require that a party's rules be consistent with state law, that the rules may be adopted only by state convention unless it is a temporary rule, that a party's rules must be filed with the Secretary of State, and provides deadlines for filing of certain rules. Tex. Elec. Code §§ 163.004-163.006. In paragraph 15, Plaintiffs cite to Texas Election Code § 174.063, governing the time and place of the county and senatorial conventions, and in paragraph 19, Plaintiffs cite to Texas Election Code § 174.093, governing notice of the time and place of the state convention.

Of all of the statutes cited, only § 163.002 (3) and (4) even touch on the subject of allocation of delegates, and those statutes require only that a political party must make a rule concerning how delegates will be selected and that a party must make a rule for representative apportionment that is based on population, party strength, or both, within the appropriate territorial limits. Tex. Elec. Code § 163.002 (3)-(4). The rules that political parties make under these statutes are within the sole purview of the party. The state requirement is that a rule exists. Once that requirement is met, the state has no more involvement, and Plaintiffs have not alleged otherwise.

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 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.

Plaintiffs state at the beginning of their lawsuit that they “challenge the manner in which the State and the Democratic Party distribute and allocate delegates for participation in the Party’s precinct, senatorial or county, state, and national nominating conventions.” (Plaintiffs’ Original Complaint, ¶ 1.) However, when citing to the rules governing allocation of delegates, they cite only to the Rules of the Texas Democratic Party. (Plaintiffs’ Original Complaint, ¶¶ 12, 13, 16, 20.) Plaintiffs cannot cite to state statutes or rules governing the allocation of delegates to the precinct, senatorial or county, or state nominating conventions because there are none. These are internal party matters that are left up to individual political parties. Contrary to Plaintiffs’ conclusory allegations, the state neither prescribes these rules nor takes part in their enforcement.<sup>4</sup> Plaintiffs have made no allegations actually showing that the state distributes, allocates, or enforces the allocation of delegates within a political party because they cannot. The state takes no part in these internal matters of the various political parties. Thus, Plaintiffs have failed even to allege that their alleged injury was caused by the State of Texas.

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There is one statute that governs allocation of delegates to a national convention during a presidential election year. Section 191.007 of the Election Code provides that parties holding a presidential primary election must allocate delegates based on the names of candidates appearing on the party’s presidential primary ballot. This provision has not been complained of here and has no application to the injuries that Plaintiffs allege.

Likewise, Plaintiffs have failed to show that their alleged injuries are redressable through a declaration or injunction against the state. As the state plays no part in the allocation of delegates within political parties, a court order naming the state as the defendant will do nothing to redress the Plaintiffs' complaints. The state has no power to tell a political party how its delegates are to be allocated beyond the requirement in Section 163.002 (4) that rules must be adopted apportioning the party on population, party strength, or both. Once that requirement is met, the state has no authority or power to send government officials to attend political parties to change or to enforce the party's rules.

Plaintiffs have shown neither injury in fact nor redressability. They therefore lack standing to sue the state of Texas, and the state should be dismissed in accordance with Federal Rule of Civil Procedure 12 (b) (1) for lack of jurisdiction.

#### **B. Failure to State a Claim upon Which Relief May Be Granted**

Plaintiffs have not named one statute or one act of the State of Texas that has affected the manner by which the TDP is apportioning delegates at its state convention. As noted above, the only allegations concerning the state are that TDP is organized under Texas statutes, and there are conclusory allegations that the State of Texas distributes and allocates delegates at the Democratic Party's convention, and that the State of Texas enforces those allocations. (Plaintiffs' Original Complaint, ¶¶ 1, 29.) There are no facts supporting these conclusions. Furthermore, although Plaintiffs cite to Election Code provisions, they make no claim that any of these provisions is unlawful or unconstitutional in any way, either as written or as applied to them.

Just as with standing, liability requires causation by the defendant against whom the suit is brought. These Plaintiffs have alleged that they are being harmed by rules created by the Texas

Democratic Party. The state has no control over those rules and cannot be called in a lawsuit to answer and pay for them. Plaintiffs have failed to state a claim against the State of Texas upon which this court may grant relief, and the state is entitled to dismissal.<sup>5</sup>

### CONCLUSION

The Eleventh Amendment acts as a bar to this suit, Plaintiffs have failed to demonstrate either causation or redressability against the State of Texas, and Plaintiffs have failed to state a claim upon which relief may be granted. Defendant State of Texas respectfully requests that this court enter an order dismissing this suit and grant it further relief to which it justly shows itself entitled.

Respectfully submitted,

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First Assistant Attorney General

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Plaintiffs have also stated to the court that they “seek to enjoin the Defendant and their successors from conducting elections pursuant to the non-pre-cleared changes and illegal delegate allocation plan.” (Plaintiffs’ Original Complaint, ¶ 2.) Defendant State of Texas is interpreting Plaintiffs’ complaint as referring only to the elections that are to take place at the TDP’s state convention. This statement, however, could be construed as referring to the November election because, if the Defendant to which Plaintiffs refer here is the state, the November election is the only election that the state conducts. Although it is clear to Defendant Texas that the November election would not be taking place pursuant to any delegation plan, it is possible that the Plaintiffs may consider that the taint of the state convention carries over to the general election in November and that their complaint has adequately stated that they are seeking an injunction to halt the November election.

As stated, Defendant Texas does not interpret Plaintiffs’ Original Complaint in this way, but should Plaintiffs make clear they are seeking through this lawsuit to halt the November election, Defendant would respectfully request the opportunity to file an amended Motion to Dismiss addressing this remedy.



ROBERT B. O'KEEFE  
Chief, General Litigation Division

*/s/ Kathlyn C. Wilson*

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**ATTORNEYS FOR DEFENDANTS**

**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 15<sup>th</sup> day of May, 2008, on:

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*/s/ Kathlyn C. Wilson* \_\_\_\_\_

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