

Preclearance of Nominating Procedures

LULAC of Texas v. Texas
(Fred Biery, W.D. Tex. 5:08-cv-389)

Five days after the 2008 presidential primary elections in Texas, and at the beginning of further delegate selection through caucuses, Latino voters and organizations filed a federal complaint attacking how the Democratic Party picked delegates for national and local nominating conventions. The district court dismissed the action and determined that a claim that the nominating procedures had not received section 5 preclearance did not require resolution by a three-judge district court, but the court of appeals disagreed. In time, the case was mooted by the Justice Department's granting of preclearance. The court of appeals vacated an award of attorney fees.

Subject: Voting procedures. *Topics:* Section 5 preclearance; three-judge court; laches; party procedures; attorney fees.

Two months after the 2008 presidential primary elections in Texas, and at the beginning of further delegate selection through caucuses, Latino voters and organizations filed a federal complaint in the Western District of Texas's San Antonio courthouse, alleging violations of sections 2 and 5 of the Voting Rights Act in how the Democratic Party picked delegates for national and local nominating conventions.¹ Five days after filing their complaint, the plaintiffs moved for a preliminary injunction on the grounds that procedures had not been precleared as required by section 5.² The Texas Democratic Party moved for dismissal of the action on the next day.³

On the next day, May 16, Judge Fred Biery noted that the case file contained "voluminous documents, presently totaling approximately 300 pages, with more likely to come," and he informed the parties that he expected to provide his first ruling without an oral proceeding.⁴ Judge Biery, who adjust-

1. Complaint, *LULAC of Tex. v. Texas*, No. 5:08-cv-389 (W.D. Tex. May 9, 2008), D.E. 1; *LULAC of Tex. v. Tex. Democratic Party*, 651 F. Supp. 2d 700, 701 (W.D. Tex. 2009); see Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, §§ 2, 5, 79 Stat. 437, 437, 439, as amended, 52 U.S.C. §§ 10301, 10304.

2. Preliminary-Injunction Motion, *LULAC of Tex.*, No. 5:08-cv-389 (W.D. Tex. May 14, 2008), D.E. 3; *LULAC of Tex.*, 651 F. Supp. 2d at 701; see VRA, § 5, 79 Stat. at 439, as amended, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination and requiring that preclearance disputes be heard by a three-judge district court).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. *Shelby County v. Holder*, 570 U.S. 529 (2013).

3. Motion to Dismiss, *LULAC of Tex.*, No. 5:08-cv-389 (W.D. Tex. May 15, 2008), D.E. 4.

4. Order, *id.* (May 16, 2008), D.E. 8 [hereinafter May 16, 2008, Order].

Tim Reagan interviewed Judge Biery for this report by telephone on August 30, 2012.

ed his work day to avoid San Antonio's rush-hour traffic, was cognizant of his district's 90,000 square miles in size.⁵

While the Court realizes time is of the essence in this case, the Court wants to perform its task thoroughly, correctly, and in an orderly fashion. At this time the Court sees no reason for a hearing with testimony. Moreover, numerous gallons of \$4.00 a gallon gasoline would be expended for a significant number of persons to appear with the result being an oral presentation of the already written arguments.⁶

On May 22, Judge Biery granted the motion to dismiss the action.⁷ He denied an injunction on the section 5 claim because of the lateness with which the plaintiffs brought the claim and because they did not show an abridgement of voting rights.⁸

He did not think a three-judge district court was needed for the section 5 claim, and the circuit's chief judge agreed.⁹ On February 17, 2009, the court of appeals reversed the dismissal and determined that a three-judge court was required for the section 5 claim.¹⁰ A three-judge district court denied section 5 summary judgment on August 24.¹¹ Upon the Justice Department's granting of preclearance, the case was dismissed as moot on December 16.¹² On June 16, 2011, the court of appeals vacated the district court's award of \$67,392.06 in attorney fees and costs, because the district court never granted the plaintiffs relief.¹³

5. Interview with Hon. Fred Biery, Aug. 30, 2012.

6. May 16, 2008, Order, *supra* note 4.

7. Opinion, *LULAC of Tex.*, No. 5:08-cv-389 (W.D. Tex. May 22, 2008), D.E. 15.

8. *Id.* at 13–21.

9. Interview with Hon. Fred Biery, Aug. 30, 2012.

10. *LULAC of Tex. v. Texas*, 318 F. App'x 261 (5th Cir. 2009).

11. *LULAC of Tex. v. Tex. Democratic Party*, 651 F. Supp. 2d 700 (W.D. Tex. 2009) (holding that section 5 applied to party-delegate allocation formulas); *see* Elaine Ayala, *LULAC Suit Against Dems to Proceed*, Hous. Chron., Aug. 26, 2009, at B2.

12. Order, *LULAC of Tex.*, No. 5:08-cv-389 (W.D. Tex. Dec. 16, 2009), D.E. 57.

13. *LULAC of Tex. v. Tex. Democratic Party*, 428 F. App'x 460 (5th Cir. 2011); *see* Order, *LULAC of Tex.*, No. 5:08-cv-389 (W.D. Tex. Apr. 7, 2010), D.E. 64.