UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DENNIS K. KUCINICH, KUCINICH FOR PRESIDENT 2008, INC. and WILLIE NELSON,	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 1:08-CV-00007-LY
TEXAS DEMOCRATIC PARTY, BOYD L. RICHIE and PHIL WILSON,	§	
Defendants.	§	

TEXAS DEMOCRATIC PARTY AND BOYD L. RICHIE'S BRIEF IN OPPOSITION TO PLAINTIFFS' REQUEST FOR RESTRAINING ORDER AND REQUEST FOR TEMPORARY INJUNCTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM.

TO THE HONORABLE LEE YEAKEL, DISTRICT JUDGE:

COMES NOW TEXAS DEMOCRATIC PARTY AND BOYD L. RICHIE, Defendants herein (collectively "TDP"), and file this, their Brief in Opposition to Plaintiffs' Request for Restraining Order and Request for Temporary Injunction requested by DENNIS K. KUCINICH, KUCINICH FOR PRESIDENT 2008, INC. and WILLIE NELSON, Plaintiffs herein (collectively, "Plaintiffs"), and in support of which would respectfully show unto the Honorable Court as follows:

I.

BACKGROUND

Plaintiff, Dennis K. Kucinich is seeking the Democratic nomination for the office of President of the United States. In furtherance of his goal, Mr. Kucinich seeks placement on the Democratic Primary Ballot for that office in the State of Texas. The Texas Democratic Party

consists of members who share a certain philosophy and generally agree to certain policy goals. Every other year, Texas Democrats collect at precinct, county, and state conventions to enact the rules of the organization and to adopt a platform-the statement of its members concerning political philosophy and public policy.

In seeking to join the Texas Democratic Party, run for office under its banner, and to represent himself as the chief spokesman for that political association, Mr. Kucinich filed a Ballot Application with the Chairman of the Texas Democratic Party pursuant to state law. The Ballot Application, as promulgated by the members of the Texas Democratic Party through the adoption of rules at the State Convention, includes an oath wherein Mr. Kucinich affirms that he would support the Democratic nominee for President of the United States, whoever that shall be (the "Party Oath"). Bound by the rules adopted by the members for which he serves, the Chairman of the Texas Democratic Party, Boyd Richie, determined that Mr. Kucinich's Ballot Application was not in order and therefore he was not entitled to be certified as a candidate for the office he seeks. In response, Mr. Kucinich, and others, pursued this lawsuit seeking to strike down the duly adopted Party Oath and in so doing infringe upon the rights of the many members of the Texas Democratic Party who have chosen to associate through the adoption of these rules.

The Texas Court of Criminal Appeals has defined an oath as, "Any form of attestation to which a person signifies that he is bound in conscience to perform an act faithfully and truthfully and the difference between an affidavit and an oath is that an affidavit consists of a statement of fact which is sworn to as the truth, while an oath is a pledge." *Vaughn v. State*, 146 Tex. Crim. 586, 177 S.W.2d 59, 591 (1943). In other words, an oath is only enforced by one's self, subject to the pressure of creating ill feelings among those to whom the oath was given. It is one's honor

that compels him to live up to an oath. As the definition states, the penalties for violation of an oath is the cancer that grows within one's conscience. Moreover, it is between the person who made the oath and his own conscience to determine what is faithful obedience to the oath. It was, after all, an oath that gave birth to this Nation, in the last sentence of the Declaration of Independence, "and for the support of this Declaration, with the firm reliance of the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor." And so it was to the conscience of those Convention Delegates to spread across the nation and work dutifully to ensure the ideals as described in the Declaration of Independence give birth to a new nation. Therefore, though admittedly not as critical as the example, it is fitting that one of the great political parties of this nation require an oath from those who wish to carry its banner.

II.

STATEMENT OF FACTS

TDP believes the following facts are material and germane to the issues in this suit, and are supported by the evidence presented to the Court, a matter of which the Court may take judicial notice, or are otherwise undisputed:

1. In 2004, there was an election for the office of President of the United States;

2. In 2004, Mr. Kucinich sought the Democratic nomination for that office;

3. In so doing, Mr. Kucinich signed the same Party Oath he challenges here (See Exhibit A);

4. Neither Mr. Kucinich nor his supporters sought to alter the Party Oath at the intervening Democratic Party Conventions;

5. In 2008 there will be an election for the office of President of the United States;

6. The two major political parties, Democratic and Republican, are currently choosing who will run for this office as its candidate;

7. In Texas, this choice is made by a primary election;

8. Dennis J. Kucinich is seeking the Democratic nominee for President of the United States;

9. Dennis J. Kucinich filed an application that was submitted to the TDP seeking placement as a candidate on the ballot that will be used in the Texas Democratic presidential primary;

10. This petition was complete in all respects except one — Mr. Kucinich refused to sign the portion of the petition wherein he swore he would "fully support the Democratic nominee for President, whoever that shall be;"

11. Mr. Kucinich indicated he would not sign the Party Oath unless he was unilaterally allowed to amend it, including a provision to the effect he would "fully support the Democratic nominee for President, whoever that shall be, so long as that nominee agrees to abjure the use of war as an instrument of policy," or words to that effect; and

12. TDP told Mr. Kucinich's representatives that it could not consent to permit such a change because the Party Oath had been adopted by the Texas Democratic Party State Executive Committee, with approval of the Texas Delegate Selection Plan by the Democratic National Committee as a requirement for appearing on the ballot, and accordingly the TDP had no discretion to permit its amendment.

The Plaintiffs are seeking an injunction requiring the TDP to accept the application filed by Mr. Kucinich and list him as a candidate on its primary ballot despite the fact Mr. Kucinich is unwilling to align himself with the TDP's members in accepting their rules by pledging to support the nominee of the very party he wishes to join. According to the Plaintiffs, the Party Oath infringes on their First Amendment Association rights, it violates the Equal Protection clause and it is unconstitutionally vague. The authorities cited below will show these arguments lack merit and should be rejected.

III.

ARGUMENTS AND AUTHORITIES

A. Primary Elections Are Creatures of Political Parties And Are Therefore Granted Authority to Decide Who May be Included on the Ballot

In Texas, as in many states, the primary elections used to determine the party's nominee are run by the political parties; in fact, they are required for the party's nominee to appear on the ballot during the general election. See Tex. Elec. Code § 191.001 (requiring political parties to have a presidential primary in most cases). Political parties are selecting a candidate who is the best advocate for the positions of its members. The party's State Executive Committee is empowered to adopt rules governing its presidential primaries, Tex. Elec. Code § 191.008(a), and the parties are specifically empowered to enact rules governing how a candidate's name is included on the party's primary ballot. Tex. Elec. Code § 191.002(a). These rules are treated as state laws and are enforceable by Mandamus. See Tex. Elec. Code § 163.007.

The TDP's rules provide that anyone who wishes to be named as a candidate on its presidential primary ballot must swear the Party Oath. See Exhibit B, Texas Democratic Party Rules, Article VII.A.2(b). Compliance with these rules is mandatory, *In re Triantaphyllis*, 68 S.W.3d 861, 864-65 (Tex. App. — Houston [14th Dist.] 2002, orig. proceeding), *mand. denied sub nom In re Gamble*, 71 S.W.3d 313 (Tex. 2002) (orig. proceeding); *accord, Leach v. Fischer*, 669 S.W.2d 844, 846 (Tex. App. — Fort Worth 1984, no writ) (per curiam) (while provisions of election laws governing voters are directory, provisions governing candidates are mandatory), and so party officials have no discretion to "bend" these rules. *Escobar v. Sutherland*, 917 S.W.2d 399, 406 (Tex. App. — El Paso 1996, no writ) (determination whether application for placement on the ballot complied with the rules was a ministerial function); *see also* Tex. Elec.

Code § 191.008(d) (rules governing applications to be placed on the presidential primary ballot must be on file with the Texas Secretary of State no later than January 5th of the presidential election year). Therefore, when presented with the petition filed on behalf of Mr. Kucinich, Chairman Richie rejected it on the grounds that Mr. Kucinich refused to sign the Party Oath.

Plaintiffs' lawsuit presupposes that Defendants acted wrongfully, or worse, with malice. First, excusal from the Party Oath requirement by the Defendants would have amounted to a violation of state law since the Defendants are not permitted to change the rules unilaterally. Chapter 163 of the Texas Election Code provides requirements for the adoption of Party rules. For example, Party rules may only be adopted at a "State Convention or by the State Executive Committee as a temporary rule, if adoption before the next State Convention is necessary." See Tex. Elec. Code § 163.004(a)(2). Any temporary rules must be considered at the next State Convention. See Tex. Elec. Code § 163.004(b). In fact, if the State Convention fails to act, the temporary rule automatically expires. See *Id.* In short, the State scheme for political parties to adopt their rules insist on a democratic process for one reason: **The rules of a political party must be adopted by its members.** The best procedure for this is open discussion and debate at the largest meeting of Texas Democrats, the State Convention.

Had Chairman Richie exempted Mr. Kucinich from the Party Oath requirement, he would have violated State law and would have undermined the democratic process of how members of the Texas Democratic Party adopt their rules.

It is important to note that Mr. Kucinich signed the oath in 2004 and had notice of it. Mr. Kucinich and/or his supporters had the opportunity to alter the oath at the last state convention, which they did not do. In other words, Mr. Kucinich had an opportunity to convince party

members to change the oath. Failing to avail himself of this remedy does not amount to a constitutional violation by those who participated in adopting the rules.

Though Texas Election law does not require voters to register with a particular party, party membership is a requirement for participating in party affairs. For example, in order to be eligible to serve as a delegate at the State Convention (and thereby vote on party rules) a person must be affiliated with that political party. See Tex. Elec. Code § 162.001(a)(1). A person may become affiliated with a political party by voting in its primary election (§ 162.003-4), taking an oath (§ 162.006), taking an oath at a precinct convention (§ 162.007) and/or filing an affiliation certificate (§ 162.009). A person commits a criminal offense if he votes or attempts to vote in an election or participate in a convention if he has participated in the political affairs of another party. See Tex. Elec. Code § 162.014. Furthermore, once a person is affiliated with one political party during a given election cycle, he is prohibited from becoming affiliated with another political party during that same cycle. See Tex. Elec. Code § 162.012. The Election Code goes so far as to void a person's vote in a primary election if they had previously voted in another party's primary. See Tex. Elec. Code § 162.013.

The State regulatory scheme is reasonable when its purpose is taken into account: To allow members of a political party to govern themselves in the selection of their nominee. The selection of a candidate by a political party, to run under its banner is as the heart of the First Amendment's rights of speech and association for the members of that political party. State intervention, or court intervention, in the requirements selected by Democratic Party members for candidates of that party would violate the constitutional rights of those members. For these reasons and the substantial authorities below, Chairman Richie was not provided a legal reason

to revoke the rules adopted by his party's members. Indeed, courts have only been willing to do so when those rules have a clearly discriminatory purpose, for example prohibiting a particular race as a candidate. See *Smith v. Allwright*, 321 US 649 (1944). Absent these most extreme circumstances, party members are permitted to select with whom they wish to associate. In speaking to political parties, the Supreme Court has held a party's right of association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *U.S. v. Wisconsin*, 450 US 107 (1981). As a more recent Supreme Court opinion put it, a "nonmembers desire to vote in the party's affairs is overborne by the counter-veiling and legitimate right of the party to determine its own membership qualifications." *Tashjian v. Republican Party of Connecticut*, 479 US 208 (1986).[1]

B. Party Oaths Have Been Specifically Found by the United States Supreme Court to be Permissible

Therefore, this refusal was proper: the Party Oath the TDP requires of its presidential candidates.

1. Many Cases Recognize Party Oaths are Proper

In 1952, the United States Supreme Court was presented with the same question that is presented in this case: could the Democratic Party of Alabama require a person who wished to appear on its ballot swear he would support the eventual nominee? *Ray v. Blair*, 343 U.S. 214, 215, 72 S.Ct. 654 (1952). In Ray, the facts were arguably more severe than here because the

[1] Courts typically analyze constitutional claims according to a particular standard (e.g. strict scrutiny, intermediate scrutiny or rational basis). Discussion of these standards it not made here because (1) Plaintiffs cannot show a fundamental right has been burdened thereby implicating the standard, and (2) the Supreme Court has wavered from one case to the other in its use and application of these standards in ballot access cases. For an excellent discussion of the Supreme Court's historical standards of review in these cases see *Duke v. Cleland*, 954 F.2d 1526, 1529-1530. In fact the Supreme Court has stated that weighing these tests does not produce an "automatic" result and that "hard judgments" must be made. See *Anderson v. Celebrezze*, 460 US 780 (1983).

office involved was that of Presidential Elector. The oath had the effect of limiting the discretion of the officer, if elected. In other words, the oath required the Elector to vote in conformity with the primary election results, thereby eliminating any discretion granted to the officer by law. This discretion was arguably vested by the Twelfth Amendment to the U.S. Constitution. Despite these important considerations, the court found the oath constitutional. The court found that an oath almost identical to the Party Oath the TDP requires in this case to be valid, and that requiring a Party Oath did not warrant federal due process or equal protection considerations. *Ray*, 343 U.S. at 224-30. The court did so for a number of discrete reasons:

- it recognized political parties have the right to establish political or other qualifications for those who wish to join and those who wish to run as a candidate of the party, *Id.* at 217;
- a Party Oath provisions served several salutary purposes, including:
  - protecting the party from intrusion by those who do not share its political principles, *Id.* at 221-22; and
  - ensuring that those who have held themselves out as members of the party will be "pledged to the philosophy and leadership of the party," *Id.* at 227;
- a Party Oath would not be permitted if and only if it required the person making the pledge to violate some provision of the constitution or applicable statutes, *Id.*; and
- therefore, where a state allows offices to be filled through primary elections overseen by the political parties, "we see no federal constitutional objection to the requirement of this pledge." *Id.* at 231.

Although the specific issues raised in *Ray* were limited to those of equal protection, due process and the requirements of the Twelfth Amendment, *Ray* and its progeny have been recognized to stand for the proposition that the requirement a putative candidate swear a Party Oath is proper, permissible and not such a severe burden on the rights of a potential candidate as

to be constitutionally barred. *See, e.g., Curry v. Baker*, 802 F.2d 1302, 1306 n. 1 (11th Cir. 1986); *Swanson v. Pitt*, 330 F.Supp.2d 1269, 275-76 (M.D. Ala. 2004); *Nader v. Schaffer*, 417 F.Supp. 837, 845-47 (D. Conn. 1976); *Green v. State of Tex.*, 351 F.Supp. 143, 146 (N.D. Tex. 1972) (per curiam); *see also Jones v. State of Ala.*, 2001 WL 303533 at * 3 (S.D. Ala. Mar. 6, 2001).

More specifically, it has been recognized that *Ray* allows the use of Party Oaths in primary elections because such oaths (which ensure the candidates share the party's views, prevents the intrusion of those whose views the party does not support and preserves the integrity of the election process) are so important that they themselves represent a compelling state interest worthy of protection, *Gartell v. Knight*, 546 F.Supp. 449, 454 (N.D. Ala. 1982), even going so far as to hold the assertion that a "sore loser" provision (i.e., a provision similar to a Party Oath that requires a primary candidate to swear not to run against the party's nominee as an independent in the general election if he is defeated in the primary) was constitutionally infirm was "frivolous." *Backus v. Spears*, 677 F.2d 397, 399-400 (4th Cir. 1982).[2] Put more simply, Supreme Court precedent recognizing that the imposition of reasonable requirements on those who wish to run in a party's primary are constitutional "virtually commands the result that the South Carolina loyalty oath provision is a valid regulation" of primary elections. *Backus*, 677 F.2d at 400 (*citing White v. West*, 74-1709 (D. S.C. Jan. 9, 1976)).

[2] The only occasion the TDP could find where such an oath was not allowed was where the candidates in question were running unopposed and so the primary election was cancelled, and therefore the court found the statute requiring the Party Oath did not apply. See *Canton v. Toddman*, 367 F.2d 1005, 1008 (3rd Cir. 1966). The Canton decision was decided on Virgin Islands Territory laws and no discussion was had on constitutional grounds. As for a state case, the only opinion located was from 1930 and well before the statutory scheme the law provides now. That case found that the Executive Committee could not require such an oath because doing so would be undemocratic. The Court's decision was on state law grounds. See *Love v. Texas*, 28 S.W.2d 515, 523 (Tex. 1930). In *Love,* the offending oath was required to participate, even vote, at the Party's convention or in its primary election. The Court seemed concerned that it was the Executive Committee and not the membership at the Convention at large that enacted the restriction, as is the case here.

C. The Plaintiffs Allegations

Despite this authority, and despite this recognition that the TDP has the right to conduct its presidential primary as it sees fit, the Plaintiffs argue that the TDP cannot require Mr. Kucinich to sign the Party Oath. The primary argument the Plaintiffs make is that requiring Mr. Kucinich to sign the Party Oath violates his First Amendment rights of Free Association (apparently by requiring him to "support" the eventual nominee), and free speech (apparently by preventing him from opposing the nominee or contributing to the success of another candidate). Plaintiffs' First Amended Complaint, ¶¶ 21-23.[3] The Plaintiffs also claim that the Party Oath violates equal protection (because the Republican Party of Texas does not require a similar oath of its candidates), *Id.*, ¶ 27, and that it is unconstitutionally vague (apparently because Mr. Kucinich cannot determine what it would mean to "fully support" the eventual Democratic nominee for President, or even who the eventual nominee will be). *Id.*, ¶¶ 29-30.

D. TDP's Response — the Plaintiffs are Wrong

Turning to the Plaintiffs' claims on their merits, the TDP's position is simple — Plaintiffs are wrong, and because they are wrong the Plaintiffs are entitled to no injunctive relief, or any relief at all.

1. First Amendment Claims

a. If Any Right to Association is Being Violated, it is TDP's

Beginning with the Plaintiffs' First Amendment association claims, if anyone's right of association is being violated it is not Mr. Kucinich's, but rather the TDP's. The Plaintiffs claim

[3] The Plaintiffs also assert that the Party Oath requirement has the effect of restricting their speech and association outside of Texas. *Id.*, ¶ 24. The reason for the inclusion of this particular allegation is unclear: either the Party Oath requirement does not run afoul of the First Amendment or else it does, and if it does it does so in Texas and elsewhere.

that requiring a candidate for the party's nomination for President to swear to support the eventual nominee violates Mr. Kucinich's right of association because it could force him to support someone whom he does not wish to support. The fallacy of this argument is that it does not recognize that the right of association is a two-way street. Mr. Kucinich seeks the benefit of the Democratic Party organization, infrastructure and substantial membership, but does not wish to follow the rules adopted by that membership. Allowing him to be certified as a candidate forces the party's members to associate with Mr. Kucinich.

There is no question that the First Amendment guarantees the right to associate for the advancement of beliefs and ideas. *Healy v. James*, 408 U.S. 169, 181, 92 S.Ct. 2338 (1972). It is equally well-settled that the right to associate freely itself also includes the right not to associate, *Democratic Party of the U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122, 101 S.Ct. 1010 (1981), and that this right to associate (or not to associate) extends to political parties. *Timmons*, 520 U.S. at 357-58; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214, 107 S.Ct. 544 (1986); *see also Larouche v. Fowler*, 77 F.Supp.2d 80, 88 (D. D.C. 1999) (noting that political party associational rights were first recognized "at least as early as *Ray v. Blair*"). This "necessarily presupposes the freedom to identify the people who constitute the association," i.e., those whose beliefs mirror the party's. *LaFollette*, 450 U.S. at 122.

Therefore, while Mr. Kucinich may have a constitutional right to choose with whom he does and does not associate, so too does the TDP have the right to set the terms under which it is willing to allow people to associate with it. The TDP has made a decision regarding those who wish to run for its nomination — it wants those people to support the eventual nominee, for the good of the party and to maximize its chances of prevailing in the general election.

In several cases candidates or voters have asserted that some act of a political party is constitutionally infirm because it interferes with their right of association, and every time this argument has been made, it has been unsuccessful: in each case, the court found the political party's right to determine those who would associate with it meant it could enforce its rules to preclude the association of the candidate. *See, e.g., Duke v. Cleland*, 954 F.2d 1526, 1530-33 (11th Cir. 1992) (rejecting argument by potential candidate and voters that party's refusal to place him on primary ballot violated their associational rights); *Hole v. North Carolina Bd. of Elections*, 112 F.Supp.2d 475, 480-82 (M.D. N.C. 2000) (rejecting voter's claim that political party's decision to allow unaffiliated voters to vote in its primary violated her associational rights). Similarly, in another case a minor political party challenged a law that prohibited a candidate from appearing on the ballot of more than one party, and the Supreme Court held that its associational rights were not violated by its inability to list as its nominee a person already listed on the ballot of another party. *Timmons*, 520 U.S. at 359-70. These cases mandate the same result in this case: the TDP has enacted a rule requiring the Party Oath, Mr. Kucinich is unwilling to abide by this rule, the TDP should not be forced to associate itself with Mr. Kucinich, a man who has rejected its view, and this refusal of the TDP to be associated with a person unwilling to endorse its views does not violate Mr. Kucinich's First Amendment associational rights.

b. Free Speech Claims

Similar principles allow the Court to dispose of the Plaintiffs' First Amendment freedom of expression claims. These claims are based on the idea that if Mr. Kucinich signs the Party Oath he will have obligated himself to either say something he does not believe (i.e., that people

should vote for the Democratic party candidate for President) or not say something he does not believe (i.e., that people should vote for some other candidate, or perhaps not vote at all).[4]

However, nothing in the Party Oath restricts the ability of any of the Plaintiffs to endorse, support or vote for anyone they like. *Timmons*, 520 U.S. at 363. Rather, the Party Oath states that if you wish to run as a Democrat in the Democratic presidential primary you have to be willing to declare your adherence to the party under whose banner you wish to run for office. The Party Oath will affect how Mr. Kucinich may express himself if and only if he wishes to voluntarily associate himself with the TDP for purposes of running in its presidential primary. He may choose not to do so, and his options are limitless: he may choose to run as a Republican, he may choose to run as an independent or he may choose not to run at all, and in any of those cases he may express himself whenever, wherever and however he pleases. See *Duke v. Cleland* 954 S.W.2d 1526, 1531 (11th Cir. 1992).

The fact the TDP requires a Party Oath before he is permitted to run as a Democrat does not limit his right to free expression any more than it implicates his associational rights. Mr. Kucinich has no right to run for or to be named as the Democratic's nominee for president, and therefore has no right to insist that he be allowed to express himself in any way he pleases at the TDP's expense, especially in light of the important public interest that exists in regulating primary elections and preventing confusion, discussed above. *Timmons*, 520 U.S. at 363-370; *Stewart v. Taylor*, 104 F.3d 965, 974 (7th Cir. 1997); *Duke v. Massey*, 87 F.3d 1226, 1232-33 (11th Cir. 1996); *accord, Halsell v. Local Union No. 5, Bricklayers & Allied Craftsmen*, 530 F.Supp. 803, 808 (N.D. Tex. 1982), *aff'd*, 706 F.2d 313 (5th Cir.), *cert. denied*, 464 U.S. 895,

[4] In fact, the Plaintiffs go further, claiming that the Party Oath "compels future speech."

104 S.Ct. 244 (1983) (plaintiff, who voluntarily entered union, did not have his right of free speech violated when the union made him stop teaching non-union apprentices in part because plaintiff's membership in the union was voluntary). Accordingly, the Plaintiffs' freedom of expression claims have no more viability than their freedom of association claims.

2. Equal Protection Claims

With respect to the Plaintiffs' Equal Protection claims, the TDP begins by observing that the requirement that a candidate give a Party Oath has been found to be "reasonably related to a legitimate legislative objective." the protection of primaries from the evils catalogued above. *Ray*, 343 U.S. at 226 n. 14. This reasonable relationship means the Plaintiffs' Equal Protection claims must be rejected, and the TDP can do no better than to quote the Supreme Court: "This requirement of a pledge [to support the party's nominee] does not deny equal protection or due process." *Id.*

However, even in the absence of the decision in Ray, the Plaintiffs' equal protection challenge should be rejected because Equal Protection concerns are simply not implicated in this case. Equal Protection requires, at its heart, all similarly situated persons to be treated equally. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 472, 439, 105 S.Ct. 3249 (1985); *Mikeska v. City of Galveston*, 451 F.3d 376, 381 (5th Cir. 2006). In the absence of proof of differential treatment, the Plaintiffs' Equal Protection Claim fails. *Brieva-Perez v. Gonzales*, 482 F.3d 356, 362 (5th Cir. 2007).

Here, the Plaintiffs complain that while the TDP requires a Party Oath, the Texas Republican Party does not, nor does the State of Texas. This does not prove Mr. Kucinich is being treated differentially than other similarly situated people. Rather, Mr. Kucinich is being

treated exactly the same as every other person who is similarly situated to him, i.e., anyone who wishes to be named on the ballot in the Democratic presidential primary. Because he is being treated the same as everyone else, no Equal Protection violation has occurred. *Snowden v. Hughes*, 321 U.S. 1, 7-8, 64 S.Ct. 397 (1944) (refusal to certify candidate for election did not state an Equal Protection claim in absence of evidence showing the decision was the product of intentional or purposeful discrimination against the plaintiff); *Swanson*, 330 F.Supp.2d at 1277 (lack of evidence that potential candidate was being treated differently than any other person seeking admission to the political party meant his Equal Protection claim failed).

3. Vagueness Claims

Plaintiffs' vagueness challenge ignores the nature of the act requested by the Texas Democratic Party members. Indeed, Plaintiff concedes that what he is being asked to sign is in fact an oath. As stated above, an oath is enforceable by one's conscience. In that way, an oath is markedly differently than an affirmative statement of fact subject to the penalties of perjury. Indeed, a pledge to perform an act in the future is more in the nature of a moral contract than a regulatory scheme. Mr. Kucinich, of course, is free to avoid the terms of this moral contract by either, (1) refusing to enter into same (as he has done here); or (2) seeking to change the terms of the contract, which he and/or his supporters were free to do by participation in any past Democratic convention. Vagueness is an argument that does not apply in this case, because unlike the typical vagueness cases, Mr. Kucinich is not being prosecuted for his violation of the oath (See *e.g. Grayned v. City of Rockford* 408 US 104 (1972)) nor is he facing the loss of an important civil right such as his professional license (See *e.g. Women's Medical Center of N.W. Houston v. Bell*, 248 F.3d 411 (5th Cir. 2001)). It is for these reasons, the courts have treated an

oath, not as something that is enforceable at law, but rather is enforceable by the fear of tarnishing their honor. See *Westerman v. Mimms,* 227 S.W. 178 (Tex. 1921).

Finally, the Plaintiffs complain that the terms of the Party Oath are so vague as to be unconstitutional. A rule or law is only unconstitutionally vague if it fails to afford those it is intended to affect a reasonable opportunity to know what is required of them or if it is indefinite that any enforcement is necessarily arbitrary or discriminatory. *Women's Med. Ctr. of N.W. Houston v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001). If the rule or law is sufficiently clear to give a person of reasonable intelligence notice of what is required or prohibited it is not unconstitutionally vague. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294 (1972); *Ford Motor Co. v. Texas Dep't of Transp*., 264 F.3d 493, 509 (5th Cir. 2001). As the Supreme Court stated in *Grayned*, "Condemned to the use of the words, we can never expect mathematical certainty from our language." *Id* at 110.

A constitutional vagueness challenge can take two forms, the first of which is an overbreadth challenge. An overbreadth challenge asserts the law or rule at issue would prohibit a substantial amount of constitutionally-protected conduct. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186 (1982). The Plaintiffs' argument that the Party Oath somehow implicates constitutionally-protected conduct is incorrect, and so the terms of the Oath cannot be constitutionally overbroad.

Alternatively, even if a rule or law passes the overbreadth test, it may nevertheless be found to be unconstitutional if it is so vague it cannot be understood, and that it is "impermissibly vague in all its applications." *Village of Hoffman Estates*, 455 U.S. at 498. In

this case, the Plaintiffs complain that the meaning of the phrase "fully support" is unclear and/or that the meaning of "Democratic nominee for President" is also unclear.

"Fully" means "completely or entirely," OXFORD ENG. DICT., or "totally and completely." AMERICAN HERITAGE DICT.(4th ed. 2000). "Support" means to "give assistance, encouragement or approval to," OXFORD ENG. DICT., or to "provide for or maintain, by supplying with money or necessities." AMERICAN HERITAGE DICT.(4th ed. 2000). Therefore, the phrase "fully support" means something like "to give one's complete assistance or approval to," and a person of even the meanest intelligence should know that the party's nominee refers to the person who gave the acceptance speech at the Democratic Party's convention or (if something were to happen to that person later on) his replacement. Because the Party Oath is not so vague that it is "vague in all its applications," and because a person of reasonable intelligence can determine some (if not the vast majority) of things that it requires of him, it also survives a facial challenge to its validity and is not unconstitutionally vague.

In any event, Plaintiffs' claims in this regard are not ripe until such time as the State (or Party) takes legal action to enforce it against Mr. Kucinich.

F. Conclusion

Mr. Kucinich wishes to run for President of the United States as a Democrat. The TDP welcomes his participation, but only subject to the reasonable terms and conditions its members have established in permitting such a candidacy.

The TDP has good reasons for requiring the Party Oath, reasons the Supreme Court found sufficient 55 years ago. If the Plaintiffs wish to associate themselves with the principles

and ideals of the Texas Democratic Party and run under its banner, they must adhere to its rules. Plaintiffs' request for any form of injunctive relief should be denied.

WHEREFORE, PREMISES CONSIDERED, the TDP prays that the Plaintiffs' request for injunctive relief be in all respects DENIED, for the reasons set forth herein.

The TDP prays for such other and further relief, general or special, at law or in equity, to which it may show itself be justly entitled.

Respectfully submitted,

TEXAS DEMOCRATIC PARTY

By: */s/ Chad W. Dunn*

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2008, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Western District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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