UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

DENNIS J. KUCINICH,

KUCINICH FOR PRESIDENT 2008, INC.,

WILLIE NELSON,

Plaintiffs,

v.

TEXAS DEMOCRATIC PARTY,

BOYD L. RICHIE, individually and in his official capacity as Chairman of the Texas Democratic Party

PHIL WILSON, individually and in his official capacity as Secretary of State**,**

Defendants.

CIVIL ACTION NO. 1:08-CV-00007-LY

TRIAL BRIEF OF PLAINTIFFS IN SUPPORT OF COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

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I. INTRODUCTION

James Madison cautioned that "[a] Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 250 (M.Ferrand ed. 1911). While primary elections are unique in that they are a joint undertaking of the state and the political parties, neither may overcome the "fundamental principle of our representative democracy … that the people should choose whom they please to govern them." 2 ELLIOT'S DEBATES 257 (A. Hamilton, New York). While it is axiomatic that the state and parties control the mechanics of the primary election, the instant case seeks this Court's intercession where that control has extended beyond the bounds of the constitution to limit the number capable of being elected.

II. STATEMENT OF FACTS

The facts are not in dispute.

Plaintiff Dennis J. Kucinich seeks to be a candidate at the State of Texas Democratic Party's primary election for President of the United States. Plaintiff Willie Nelson is a qualified elector of the State of Texas who intends to support Dennis J. Kucinich in the primary election.

Plaintiff Kucinich properly and timely tendered his application to appear on the Texas primary ballot on December 28, 2007 with Defendant Texas Democratic Party. Five days later, on January 2, 2007, a representative from the Texas Democratic Party verbally informed a representative of Plaintiff Kucinich that Plaintiff Kucinich's application is defective and his candidacy would not be certified because Plaintiff Kucinich had crossed out the following text found within the application: "I further

swear that I will fully support the Democratic nominee fore President, whoever that shall be." Plaintiff Kucinich was further informed that his application only would be accepted if it was re-signed with the loyalty oath and faxed to the Texas Democratic Party the same day, January 2, 2007. There is no dispute that Plaintiff's application is sufficient in all other respects.

The Election Laws of the State of Texas do not textually require individuals seeking nomination to the office of President to swear their allegiance to the party nominee. Indeed, the Texas Republican Party does not require any similar oath for its primary candidates. Nor is any oath required for candidates, Republican or Democrat, seeking nomination to any office other than President of the United States.

III. PLAINTIFFS ARE ENTITLED TO THE RELIEF SOUGHT

Tex. Election Code Ann. § 191.002(a) states in part that: "Candidates qualify to have their names placed on the presidential primary election ballot in the manner provided by party rule…." Article VII.A.2(b) of Defendant Texas Democratic Party's rules, in turn, provides that a presidential primary candidate must:

> "File an application for a place on the presidential primary ballot in accordance with he same Election Code provisions applicable to a candidate for the United States Senate, including submission of an appropriate petition subject to the limitations of Section 191.002 of the Texas Election Code or payment of the same filing fee. The oath on the application of a presidential candidate shall be:
> 'I, _____ of _____, _____ County/Parish, _____, being a candidate for the Office of President of the United States, swear that I will support and defend the constitution and laws of the United States. ***I further swear that I will fully support the Democratic nominee for President whoever that shall be***.'" (Emphasis supplied).

The Texas Republican Party does not require a similar loyalty oath. Nor does the Texas Democratic Party require a similar loyalty oath in any other candidate application for

public office. Tex. Election Code Ann. § 141.031(K), under the general requirements for public office, calls for a candidate's application to include a statement that the candidate will support and defend the constitutions of the United States and Texas, but does not require a loyalty oath to the eventual nominee of the political party.

Texas statutory law previously required a candidate to affirm "that I will not vote for or in any way aid or encourage the election at the ensuing general election, of any person nominated by any other political party or organization for any office who has been by any other such political party or organization nominated in opposition to the candidate for such office nominated in this primary in which I participate." Love v. Texas (Tex. 1930), 28 S.W.2d 515, 523; citing Acts Regular Session 30th Legislature (1907) c.177, s 114a; 13 GAMMEL'S LAWS OF TEXAS, p.329.[1] A subsequently amended version of this statute was repealed after being declared unconstitutional on other grounds by the Supreme Court as part of its consideration of the *White Primary Cases*. See Love, 28 S.W.2d at 524.[2] Thereafter, the Texas Legislature has provided that the State Executive Committee shall determine the qualifications for participation in primary elections. See id.

When the Democratic Executive Committee of the City of Houston imposed a similar requirement, the Galveston Court of Civil Appeals determined that such an oath was "unlawful, and beyond any authority possessed by the committee under the statutes." Love, 28 S.W.2d at 525.[3] Further, ruling on a prior version of the Revised Civil Statutes, the Texas Supreme Court observed that the Legislature intended for the same

[1] In adopting this section, the Texas Legislature declined to adopt a Senate substitute version providing that a violation of the oath would make the individual guilty of a misdemeanor.
[2] See also, Nixon v. Herndon, 273 U.S. 536.
[3] Referring to Clancy v. Claugh (Tex. Civ. App. 1928), 28 S.W.2d 569.

qualifications to be prescribed by the State Committee for all participating in the party primary, whether as voters or candidates, and further that the same qualifications must be prescribed for all candidates. Love, 28 S.W.2d at 525. "Because of the attempted discrimination between candidates and between certain candidates and voters, in violation of the statute, the resolution cannot be upheld." Id.

The Texas Supreme Court has already determined that a pledge requiring future support of primary nominees creates no legal obligation. Westerman v. Mimms (Tex. 1921), 227 S.W. 178. Specifically, the Court held that such a pledge imposes no "executory legal obligation" because "the vital distinction between a legal obligation and a moral obligation is that it is practicable to enforce the former and impracticable to enforce the latter." Westerman, 227 S.W. at 180. It is utterly impracticable to enforce an obligation to uphold another by aid or countenance through either a decree for specific performance or an award of damages. Id. Ultimately, "the courts do not undertake to compel performance of the obligation." Id. at 181. Any obligation is moral and is *unenforceable*. Id. (emphasis supplied).

Yet, despite this well-known unenforceability of the oath at issue, the Texas Democratic Party has enforced the oath requirement against Plaintiff Kucinich and all who would support him in Texas and all who do support him in every other state as the sole basis for his exclusion from participation in the Texas Democratic Party – effectively enforcing that which is legally unenforceable against Plaintiff Kucinich and his supporters. The creation of the additional legal requirement for a candidate to participate in the primary election for President of the United States violates the United States Constitution.

A. The Texas Democratic Party Cannot Impose Its Rules Against The National Interest

"The states unquestionably do retain a significant measure of sovereign authority. They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." Garcia v. San Antonio Metropolitan Transit Authority (1985), 469 U.S. 528 549, 105 S.Ct. 1005, 1016-17. As Justice Story observed, "the states can exercise no powers whatsoever, which exclusively spring out of the existence of a national government, which the constitution does not delegate to them…. No state can say that it has reserved what it never possessed." 1 Story § 627. An original right belonging to the states to control the presidential primary processes has "never existed, and the question whether it has been surrendered, cannot arise." McCullough v. Maryland (1819), 4 Wheat 316, 430. Accordingly, despite any supposed right asserted by Defendants, the relief sought by Plaintiffs "does not deprive the States of any resources which they originally possessed." 4 Wheat, at 436.

At the constitutional convention, the Framers considered "a plan not merely to amend the Articles of Confederation but to create an entirely new National Government with a National Executive, National Judiciary, and a National Legislature." Wesberry v. Sanders (1964), 376 U.S. 1, 10, 84 S.Ct. 526, 531. The President of the United States, like a Member of Congress, "is an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states…. Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people." 1 Story § 627. The President of the United States is an officer of the entire union. U.S. Term Limits v. Thornton

(1995), 514 U.S. 779, 803, 115 S.Ct 1852, 1855. States thus "have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president…. It is no original prerogative of state power to appoint a representative, a senator, or president for the union." Id. at 803-04. While the State can control its own internal process, the Court properly intervenes where a State seeks to exercise control beyond its borders.

1. The Texas Democratic Party's Decision to Exclude Plaintiff Kucinich Dilutes the Value of Every Vote Cast in Support of Plaintiff's Nomination

In the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. Anderson v. Celebreeze (1983), 460 U.S. 780, 794-95, 103 S.Ct. 1564, 1573. The President and Vice President of the United States are the only elected officials who represent all the voters in the Nation. Id. Moreover, the impact of votes cast in each State is affected by the votes cast for the various candidates in other States. Id. Thus, in a Presidential election a State's enforcement of more stringent ballot access requirements has an impact beyond its own borders. Id. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries. Anderson, 460 U.S. at 794-95, 103 S.Ct. at 1573. Indeed, the Supreme Court has recognized "the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." Cousins v. Wigoda (1975), 419 U.S. 477, 490, 95 S.Ct. 541, 549. The goal of voters such as Plaintiff Nelson, is to amass enough delegates to nominate Plaintiff Kucinich at the national party convention. Denying Plaintiff Kucinich a place on

the Texas primary ballot removes the second largest slate of delegates from Plaintiff Kucinich's reach and thereby *reduces the total pool of delegates for which he may compete nationally* by 228. Without the relief requested, the Texas Democratic Party would be permitted to promulgate a rule effectively diluting the value of every vote cast for him in every other state's primary. As Justice Scalia has observed, "[c]ontrol any cog in the machine and you can halt the whole apparatus." McConnell v. F.E.C. (2003), 540 U.S. 93 (SCALIA, J., concurring in part, dissenting in part). If left unchecked, a nefarious state political committee seeking to increase its influence over the selection process could simply promulgate rules, that need not survive the checks and balances of the legislative process, designed to exclude certain candidates from even the opportunity to win any of the state's convention delegates - benefiting favored candidates both by artificially increasing their delegate count and simultaneously limiting the universe of winnable delegates available to disfavored candidates.

2. The Texas Democratic Party's Candidate Loyalty Oath Requirement Dilutes the Value of Every Vote Cast by Every Texas Democratic Primary Voter

Defendant Texas Democratic Party's candidate loyalty oath requirement requires a candidate to "fully support" the "Democratic nominee, whoever that may be" or to be excluded from participation in the Texas Democratic primary. Yet, if there was any candidate who already "fully" supported every other candidate seeking nomination, there would be no need for that individual to seek the nomination. Nor would such an individual draw any additional support to the party. Conversely, the exclusion of a candidate precisely because that candidate is different from the others may have a substantial impact on the participation of independent minded voters, and on the

dissemination of ideas. In election campaigns, particularly those that are national in scope, the candidates and issues simply do not remain static over time. Anderson, 460 U.S. at 790, 103 S.Ct. at 1570. Various candidates rise and fall in popularity; domestic and international developments bring new issues to center stage and may affect voters' assessments of national problems. Id. at 790, 1570-71. Yet, under the present scheme, every individual voting in the Texas Democratic primary need not concern themselves with the issues or the individuals seeking nomination, as every vote cast will eventually merge to "fully support the Democratic nominee, whoever that may be." This stands in stark contrast to the Texas Republican primary, where each individual vote belongs to the candidate who receives it. A candidate who is free to remain committed to the ideology that earned that vote and use the platform created by that community of support to *influence* the nominee, rather than be forced to rebuke the ideology that created it in defeat. This allows factions to associate to enhance their political effectiveness as a group and increase diversity and competition within the marketplace of ideas while still retaining their nexus with the party.

While the direct impact of the nominee loyalty oath falls upon aspirants for office, in this instance uniquely on Democratic candidates for the office of President, it must not be forgotten that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." Bullock v. Carter (1972), 405 U.S. 134, 143, 92 S.Ct. 849, 856. To that end, the United States Supreme Court has identified that its primary concern with ballot access restrictions is that they "limit the filed of candidates from which voters might choose." Id. In short, the primary value protected by the First Amendment is "a

profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times v. Sullivan (1964), 376 U.S. 254, 270, 84 S.Ct. 710, 720.

Clearly, it is permissible to require an individual to establish some nexus with a *party* to participate in the party's primary. This is easily distinguished from state forced allegiance to an *individual*, whatever that individual's ideals, where a candidate must swear full support to each of that individual's competitors in order to seek nomination in a primary election. In effect, it makes no difference who a voter participating in the Texas Democratic primary selects because every vote cast is ultimately a vote of full support for the same person – "the Democratic Party nominee- whoever that may be."

3. The Texas Democratic Party May Not Require a Presidential Candidate to Violate His or Her Oath of Office in Order to Achieve Ballot Access

Plaintiff Kucinich is an elected Member of the House of Representatives serving on the Education and Labor Committee as well as the Government Reform Committee. Congressman Kucinich is the Chairman of the Subcommittee on Domestic Policy.

As discussed herein, the candidate loyalty oath requires a candidate to swear to "fully support the Democratic nominee, whoever that may be." Many of the other candidates seeking the Democratic nomination are also Members of Congress. Should one of those members be nominated and introduce or support legislation pending in Congress, a conflict between Plaintiff Kucinich's sworn obligations as a Member of Congress and his sworn obligation to "fully support" the nominee could easily arise.

4. There is No Dispute That Plaintiff Kucinich is a Democratic Candidate for Nomination to the Office of President of the United States

a. Plaintiff Kucinich is Known to Be a Member of the Democratic Party

As discussed at length, *infra*, a political party may impose reasonable requirements aimed at determining party membership in order to ensure to limit primary election participation to its members. Ironically, the nominee loyalty oath is required only of presidential candidates, whose party membership is well known. Accordingly, Defendant Texas Democratic Party cannot support its nominee loyalty oath requirement based on the authority providing that the party is free to determine its own membership. There is no dispute as to Plaintiff Kucinich's party membership. Consider,

- Plaintiff Kucinich has participated in numerous nationally televised candidates and forums with other individuals seeking the 2008 Democratic nomination to the office of President of the United States;
- In 2006, Plaintiff Kucinich was elected to his sixth term as a Democratic Member of the United States House of Representatives;
- Plaintiff Kucinich previously sought the 2004 Democratic nomination to the office of President of the United States;
- Plaintiff Kucinich participated in the 2004 Texas Democratic primary election for nomination to the office of President of the United States.

With Plaintiff's party membership and status as a candidate for the Democratic nomination well-known, what possible interest could the State party advance sufficient to form the basis for his wholesale rejection from the Democratic Party primary process?

b. Plaintiff Kucinich's Candidacy for Nomination for the Office of President of the United States is Recognized and Has Been Given Legal Status by the Federal Government

On December 18, 2007 the Federal Election Commission issued a letter to Treasury Secretary Henry M. Paulson, Jr., stating:

> "On December 17, 2007, the Federal Election Commission determined that the following candidate and his authorized committee seeking nomination for election to the Office of President of the United States had satisfied the eligibility requirements of 26 U.S.C. §9033 and 11 CFR §§9033.1, 9033.2, and 9036.1 to receive Presidential primary matching funds under 26 U.S.C. §9037 and 11 CFR §9037.1:
>
> Dennis J. Kucinich/Kucinich for President 2008"

In fact, on December 17, 2007 the Commissioners of the Federal Election Commission (FEC) adopted a Certification unanimously approving Plaintiff Kucinich's matching fund application based on a 20-state "Threshold Submission" that included the State of Texas. In fact, the Supreme Court has determined that this "preliminary showing of a significant modicum of support"[4] as an eligibility requirement for public funds "also serves the important public interest against providing artificial incentives to 'splintered parties and unrestrained factionalism.'" Buckley v. Valeo (1976), 424 U.S. 1, 48; citing Storer v. Brown (1974), 415 U.S. 724, 736.

For candidates receiving matching funds, the Presidential Primary Matching Account Act requires the suspension of matching fund payments to any eligible presidential candidate who receives less than ten percent of the votes cast in two consecutive primary elections. See 26 U.S.C. §9033(c)(1) and 11 C.F.R. §9033.5(b). By excluding Plaintiff Kucinich from participation in the Texas Democratic primary, thus reducing the number of primaries available for Plaintiff Kucinich to compete in, Defendant Texas Democratic Party's action undermines the purposes of the federal law governing financing of presidential primary elections. A declaration of ineligibility to

[4] Jenness v. Fortson (1971), 403 U.S. 431, 442.

receive additional matching funds further limits the opportunity of a candidate whose fundraising ability is already limited by statute to compete for the nomination.

B. The Texas Democratic Party's Candidate Loyalty Oath Requirement Burdens Speech and Association in Violation of the Guarantees of the Constitution of the United States

Defendants' party loyalty oath requirement for candidates to participate in the primary election for President of the United States violates the First and Fourteenth Amendments to the United States Constitution in that it restricts the exercise of association by preventing participation in the Texas presidential primary without giving up the right of association after the primary with any one other than the nominee and compels future association in that the oath contains the obligation to only be associated with the nominee. Further, Defendants' party loyalty oath requirement for candidates to participate in the primary election for President of the United States violates the First and Fourteenth Amendments to the United States Constitution in that it restricts speech by preventing making any statements that may be perceived as non-supportive of the nominee and compels future speech in that the oath contains the obligation to fully support the nominee. The impact of candidate eligibility requirements on voters implicates basic constitutional rights. Anderson v. Celebreeze (1983), 460 U.S. 780, 786, 103 S.Ct. 1564, 1569. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. NAACP v. Alabama (1958), 357 U.S. 449, 460, 78 S.Ct. 1163, 1170.

The Supreme Court has repeatedly recognized that voters can assert their preferences only through candidates or parties or both. Anderson v. Celebreeze (1983),

460 U.S. 780, 787, 103 S.Ct. 1564, 1569. It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues. Lubin v. Parish (1974), 415 U.S. 709, 716, 94 S.Ct. 1315, 1320. The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens. Anderson, 460 U.S. at 787-88, 103 S.Ct. at 1569. Indeed, an election campaign is a means of disseminating ideas as well as attaining political office. Illinois Elections Board v. Socialist Workers Party (1979), 440 U.S. 173, 186, 99 S.Ct. 983, 991.

There is no doubt that "as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. Storer v. Brown (1974), 415 U.S. 724, 730, 94 S.Ct. 1274, 1279. In this vain, in order to achieve these necessary objectives, states, including Texas, have enacted comprehensive election codes which govern the registration and qualifications of voters, the selection and eligibility of candidates, and the voting process itself; each of which inevitably affects, to some degree, the individual's right to vote and to associate with others for political ends. Anderson, 460 U.S. at 788, 103 S.Ct. at 1570. State interests with respect to voting generally include preserving the integrity of the electoral process, providing secrecy of the ballot, increasing voter participation, and preventing the harassment of voters. These important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. Id. The primary issue herein is that Defendant Texas Democratic Party in

requiring a sworn affirmation to "fully" support has significantly overreached, and thus not appropriately tailored the means by which it may achieve its permissible goals.

In Anderson, the Supreme Court articulated the test to separate valid and invalid restrictions, namely this Court must:

1. Consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that Plaintiffs seek to vindicate;

2. Identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule;

3. In addition to determining the legitimacy and strength of each of these interests, it must also consider the extent to which those interests make it necessary to burden Plaintiffs' rights.

Anderson v. Celebreeze (1983), 460 U.S. 780, 789-90, 103 S.Ct. 1564, 1570. It is especially difficult for a State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status. Anderson, 460 U.S. at 793, 103 S.Ct. at 1572. Consider, for example, the impact on a Democratic primary voter who will only support a candidate who has never supported the war in Iraq. If Plaintiff Kucinich is excluded, such an individual will have no individual to support in the Democratic primary. Regrettably, Plaintiff Kucinich can participate in the primary only by pledging his support to any of the other candidates seeking the nomination, each of which has a different viewpoint on this issue. Accordingly, Plaintiff Kucinich is forced to choose between his ideology and participation. Either way, those who would support his ideology are excluded from meaningful participation. Such viewpoint restrictions were precisely what the Supreme Court warned against in Anderson.

Conversely, courts have upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral *process*. With respect to the regulation of candidates, the State has a right to require candidates to make a preliminary showing of support,[5] to prevent distortion of the electoral process through party raiding[6] and, in some instances, to restrict candidate eligibility to serve legitimate state goals unrelated to First Amendment values, such as prohibitions against seeking or holding multiple offices.[7] The party nominee loyalty oath requirement goes well beyond controlling "the mechanics of the electoral process"; rather, it directly burdens core political speech. See Buckley v. American Const. Law Found., Inc. (1999), 525 U.S. 182, 204. Permissible state interests pertain to the protection of the state party and the state's voters and do not justify the substantial intrusion herein into the associational and speech rights of the national candidate and the associational rights of those individuals outside of the State of Texas who support that candidate. Election laws may permissibly regulate the electoral process, not speech. See McIntyre v. Ohio Elections Comm'n (1995), 514 U.S. 334, 345-346.

The Texas rule does not target all candidates, just those for President, nor does it target all candidates for President, just those seeking the Democratic nomination. If the party believes that an important interest is at stake, why not require the sworn candidate loyalty oath for all party candidates seeking nomination? Any relationship between the loyalty oath requirement and seeking the Democratic nomination for President in the State of Texas, if any, is tenuous.

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[5] See, e.g., Jenness v. Fortson (1971), 403 U.S. 431, 91 S.Ct. 1970.
[6] Rosario v. Rockefeller (1973), 410 U.S. 752, 93 S.Ct. 1245.
[7] See Clements v. Fashing (1982), 457 U.S. 957, 102 S.Ct. 2836.

The adherents of the National Democratic Party enjoy a constitutionally protected right of political association. Cousins v. Wogoda (1975), 419 U.S. 477, 487, 95 S.Ct. 541, 547. The "freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." Kusper v. Pontikes (1973), 414 U.S. 51, 56-57, 94 S.Ct. 303, 307. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. Williams v. Rhodes (1968), 393 U.S. 23, 30-31, 89 S.Ct. 5. 10.

The Texas Democratic Party's candidate loyalty oath requirement quarantines the marketplace of ideas around an unknown individual. Such an extraordinary burden on First Amendment rights is not tailored to serve the party's interest. The outright prohibition of any speech, or other activity, that does not "fully support the Democratic nominee, whoever that may be" is not the party's principal weapon against factionalism. Rather than requiring, for example, an affirmation that the candidate will not endorse the nominee of another party, the Texas Democratic Party has chosen to employ a blunt weapon instead of a scalpel. Such an assault on constitutional rights cannot be permitted.

C. The Texas Democratic Party's Candidate Loyalty Oath Requirement is Unconstitutionally Vague

The Due Process Clause of the Fourteenth Amendment requires that prohibitions such as the party oath must be clearly defined, but what it means to "fully" support the nominee is vague because it is not clear what activities Plaintiff Kucinich is permitted, required, or forbidden to undertake in the future, more precisely between March 4, 2008

and November 4, 2008. What it means to be the "Democratic nominee" is vague because it is not clear whether the oath of affirmation is to support the individual who is the nominee of the Democratic Party as determined by winning a sufficient number of delegates in primary elections held in the several states, or whether the "Democratic nominee" is the individual who receives a majority of delegates of the Texas Democratic Party.

There is no conceivable evidence that the party's candidate loyalty oath, required only of presidential candidates, is narrowly drafted to prevent party factionalism or in support of any other permissible party interest – particularly when candidates for any other office, appearing on the same ballot, are required to make no such affirmation.

The lack of any definitions for the terms "fully" and "party nominee" only add to the rule's constitutional infirmity. It is unclear whether Plaintiff Kucinich, should he not be the Democratic Party's nominee, would be permitted to endorse the party's nominee but take a different position from the nominee on even a single issue, lest he no longer "fully" support the nominee in violation of his sworn statement. The effect is to attempt to unify the party by chilling the speech of its leaders when their ideas differ. Nor can a candidate know who the Democratic nominee will be when pledging making the pledge of full support. Indeed, it is not clear from the text of the rule whether the Texas primary itself produces the "Democratic nominee" or if the sworn affirmation refers to the individual chosen based at the party's national convention – indeed, the winner of the Texas Democratic primary may not be the same individual who receives a majority of delegates at the party's national convention. Therefore, it is possible that the rule requires a candidate for nomination in the Texas Democratic primary to fully support the

victor of the primary (*i.e*. the Texas Democratic primary's "Democratic nominee"), and specifically reject the individual who receives a majority of delegates at the party's convention (*i.e*. the national convention's "Democratic nominee"). Indeed, it is unclear whether the Texas Democratic Party can require anything of, or with respect to, the Democratic nominee that will emerge from the party's national convention, as that would require the Texas Democratic Party to hold powers well beyond the control of its delegates to convention. Without knowing what is meant, all speech by those seeking nomination to the Office of President in the Texas Democratic primary is chilled until the party chooses a Democratic nominee in late August 2008, lest the individual would risk making a statement that could be found not to "fully support" that individual in violation of their sworn statement.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined…. [W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly." Grayned v. City of Rockford (1972), 408 U.S. 104, 108. Particularly close inspection of the language is required where a criminal penalty is imposed in an area permeated by First Amendment interests.[8] See Buckley v. Valeo (1976), 424 U.S. 1, 40-41. The test whether the language affords "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button (1963), 371 U.S. 415, 438. The rule's party loyalty oath provisions are

[8] According to Texas law, an individual creating a false "governmental record" may be subject to a felony. Tx. Penal Code. Ann. § 37.10. "Election records" are "governmental records" for these purposes. Tx. Penal Code. Ann. § 37.01(2)(E). In addition, there are additional criminal provisions in the Texas Penal Code dealing with perjury (§37.02), aggregated perjury (§37.03), and inconsistent statements (§37.06).

unconstitutionally vague, in violation of the First and Fourteenth Amendments to the United States.

D. The Court May Properly Intervene to Require Political Party Activities to be Conducted in Accordance with the Constitution

Following the 1968 Democratic National Convention, the Democratic National Committee (DNC) was directed to establish a Commission on Party Structure and Delegate Selection and that the Party should "find methods which would guarantee every American who claims a stake in the Democratic Party the opportunity to make his judgment felt in the presidential nominating process." Democratic Party of the United States v. Wisconsin (1981), 450 U.S. 107, 115-16, 101 S.Ct. 1010, 1016; citing, *Commission on Party Structure and Delegate Selection to the Democratic National Committee* 8 (Apr.1970). Following subsequent conventions there have been subsequent commissions that have focused on methods of delegate selection that seek to prevent dilution without sacrificing accessibility. See id. at 115-20 (discussing the McGovern/Fraser Commission, Mikulski Commission, and Winograd Commission). These principles are significant in that the protection afforded to political parties concerns their right to choose the various ways to determine the makeup of a state's delegation to the party's national convention. 450 U.S. at 123. It is as to these matters that the courts will generally not interfere on the ground that they view a particular expression as unwise or irrational. Id. at 124. These internal matters stand in stark contrast to the constitutional matters of national significance implicated herein.

The rule has been succinctly stated by the Supreme Court of Alabama in holding that its election laws "give full power to the state executive committee to determine 'who shall be entitled and qualified to vote in primary elections or be candidates or otherwise

participate therein * * * just so such Committee action does not run afoul of some statutory or constitutional provision." Ray v. Garner (Ala. 1952), 57 So.2d 824, 826. Indeed, the Alabama Court determined that a requirement that "a candidate in the primary [ ] follow a party requirement and make a public oath as to his vote in the past general election, where it was declared 'a test by a political organization of party affiliation and party fealty is reasonable and proper for those participating in its primary election." Lett v. Dennis (Ala. 1930), 129 So. 33, 34. This is much different from the instant situation where the candidate is asked to make a public oath promising his full future support. Indeed, the Texas Democratic Party's candidate loyalty oath requires a *future* promise of support and does nothing to test *existing* "party affiliation and party fealty." This requirement, standing alone, does nothing to prohibit an individual of any political persuasion from participating in the Texas Democratic primary so long as that individual makes an unenforceable promise of future action. Thus, unfortunately, whatever justification the Texas Democratic Party seeks to advance in support of its candidate loyalty oath requirement, it does nothing to advance its members interests in casting an effective ballot. See Bullock v. Carter (1972), 405 U.S. 134, 142-44, 92 S.Ct. 849, 855-56.

Nor are the political parties organized around the achievement of defined ideological goals. While the parties take positions on particular issues of national significance, these positions vary across time and across those affiliated with the party. Rather than establish a monolithic ideological identity by excluding those with differing views, the parties generally take an expansive approach, so as to capture the broadest base of support. To the extent the parties have ideological identities, primary elections

also capture additional individuals who rarely participate but are attracted by contemporary issues of interest. It is precisely by offering candidates for nomination such a Plaintiff Kucinich, whose view of party ideology is unique from many if not all of the other candidates seeking nomination that arguably may *enlarge* support for the party.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' request that the Court declare that the Texas Democratic Party candidate loyalty oath as written and as applied to Plaintiff Kucinich violates Plaintiffs' associational, speech and due process rights under the First and Fourteenth Amendments; and that the Court order that Plaintiff Kucinich's candidacy be submitted to the electors in the Texas Democratic Party March 4, 2008 presidential primary election.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel for all parties via the Court's electronic filing system and/or fax machine on this the 8th day of January, 2008.

/s/ Joseph A. Turner
JOSEPH A. TURNER