

TEXAS DEMOCRATIC PARTY, <i>et al.</i> ,	§	IN THE DISTRICT COURT
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
TEXAS GREEN PARTY, <i>et al.</i> ,	§	353rd JUDICIAL DISTRICT

**RESPONSE OF DEFENDANTS TEXAS GREEN PARTY AND SWIFT
TO PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTION**

Defendants Texas Green Party and Kat Swift respond as follows to the Application For Temporary Injunction filed by the plaintiffs on June 10, 2010:

APPLICABLE LAW

1. Section 181.006(a), Texas Election Code provides:

If the number of precinct convention participants indicated on the lists filed under Section 181.005 is fewer than the number required for the political party to qualify to have the names of its nominees placed on the ballot, the party may qualify by filing a petition as provided by this section.

2. Section 181.068, Texas Election Code provides:

(a) The presiding officer of each convention held under this chapter shall certify in writing for placement on the general election ballot the name and address of each candidate nominated by the convention.

(b) Not later than the 20th day after the date of the convention making the nomination, the presiding officer shall deliver the certification to: (1) the authority responsible for having the official general election ballot prepared in the county, for certification of a county or precinct office; or (2) the secretary of state, for certification of a statewide or district office.

(c) A presiding officer may not certify a candidate's name if, before delivering the certification, the presiding officer learns that the name is to be omitted from the ballot under Section 145.035.

3. Election Law Opinion DAD-53 (1982) states:

A nomination by a minor party must be certified to the proper authority within the statutory time period established by V.A.T.S. Election Code, art. 13.48, in order for the nominee's name to be placed on the ballot for the general election.

4. Section 251.001(2), Texas Election Code provides:

“Contribution” means a direct or indirect transfer of money, goods, services, or any other thing of value

5. Section 251.001(3), Texas Election Code provides:

“Campaign contribution” means a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. Whether a contribution is made before, during, or after an election does not affect its status as a campaign contribution.

6. Section 251.001(5), Texas Election Code provides:

“Political contribution” means a campaign contribution or an officeholder contribution.

7. Section 251.001(6), Texas Election Code provides:

“Expenditure” means a payment of money or any other thing of value

8. Section 251.001(7), Texas Election Code provides:

“Campaign expenditure” means an expenditure made by any person in connection with a campaign for an elective office or on a measure. Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure.

9. Section 251.001(10), Texas Election Code provides:

“Political expenditure” means a campaign expenditure or an officeholder expenditure.

10. Section 251.001(12), Texas Election Code provides:

“Political committee” means a group of persons that has as a principal purpose accepting political contributions or making political expenditures.

11. Section 253.104(a), Texas Election Code provides:

A corporation or labor organization may make a contribution from its own property to a political party to be used as provided by Chapter 257.

12. Section 257.002, Texas Election Code provides:

(a) A political party that accepts a contribution authorized by Section 253.104 may use the contribution only to: (1) defray normal overhead and administrative or operating costs incurred by the party; or (2) administer a primary election or convention held by the party.

(b) A political party that accepts contributions authorized by Section 253.104 shall maintain the contributions in a separate account.

13. Section 257.003, Texas Election Code provides:

(a) A political party that accepts contributions authorized by Section 253.104 shall report all contributions and expenditures made to and from the account required by Section 257.002.

(b) The report must be filed with the commission and must include the information required under Section 254.031 as if the contributions or expenditures were political contributions or political expenditures.

(c) Sections 254.001 and 254.032-254.037 apply to a report required by this section as if the party chair were a campaign treasurer of a political committee and as if the contributions or expenditures were political contributions or political expenditures.

(d) The commission shall prescribe by rule reporting schedules for each primary election held by the political party and for the general election for state and county officers.

14. Section 257.006, Texas Election Code provides:

(a) Except as provided by Section 257.004, a person who knowingly uses a contribution in violation of Section 257.002 or who knowingly fails to otherwise comply with this chapter commits an offense.

(b) An offense under this section is a Class A misdemeanor.

FACTS

15. As specifically authorized by the Texas Election Code, the Texas Green Party qualified for the 2010 general election ballot by filing a petition with the Texas Secretary of State.

16. The Texas Green Party nominated its 2010 statewide nominees at its state convention on June 12, 2010. Those nominees are Deb Shafto (governor), Herb Gonzales, Jr. (lieutenant governor), Ed Lindsay (comptroller), and Art Browning (railroad commissioner).

17. Unless enjoined by the Court, the Texas Green Party intends to certify its 2010 statewide nominees to the Texas Secretary of State on or before July 2, 2010 as required by law.

APPLICATION FOR TI

18. On June 10, 2010, the plaintiffs filed Plaintiffs' Original Petition And Application For Temporary Restraining Order, Temporary Injunction, Permanent Injunction, Writ Of Mandamus, And Declaratory Judgment.

19. The plaintiffs request a judicial declaration that "the Texas Green Party and its nominees are not entitled to placement on the 2010 General Election ballot because their application for same was procured through numerous violations of law"

20. In addition, the plaintiffs request that the Court enter a temporary injunction enjoining "the TGP and Defendant Swift from certifying the TGP nominees to the SOS" and "Defendants from taking

any steps to have nominees of the TGP placed on the 2010 General Election Ballot.”

21. A hearing on the plaintiffs’ Application For Temporary Injunction is set for June 24, 2010 at 9:00 a.m.

ARGUMENT

22. The plaintiffs assert that the expenses incurred by the defendants to obtain ballot access for the Texas Green Party were made “in connection with a campaign for an elective office.”

23. However, expenses incurred by a minor political party to obtain ballot access in Texas are a normal operating cost of the party. Therefore, under the plain language of the Texas Election Code, a corporation may contribute a ballot access petition to a minor political party and the party may accept such a contribution. *See* Sections 253.104(a) and 257.002(a), Texas Election Code.

24. Further, as a minor party that had insufficient precinct convention participants as indicated on the lists filed under Section 181.005 of the Texas Election Code, the Texas Green Party had to obtain its ballot access by petition under Section 181.006(a), Texas Election Code. By law, signatures on the petitions could not be gathered prior to the party primary date (Section 181.006(j), Texas Election Code), and had to be delivered to the Texas Secretary of State before the start of the Green Party state convention. Section 181.006(b)(3) and 181.005(a) (petitions to be delivered within 75 days after the precinct convention date) and 181.061(a) (state convention candidate nominations to be held on second Saturday in June). Thus, the petitions and their circulations are not only part of the Texas Green Party’s normal operating cost, they are part of the party’s primary and convention costs. The expenses involved with the petitions are not “in connection with a campaign for an elective office.” The expenses are party operating expenses that allow the Texas Green Party members to vote for their nominees at

the general election. Without the petitions, the Texas Green Party members would be disenfranchised from voting for the candidates that their convention nominated after the petitions would have been submitted to the state.

25. Additionally, if the major parties are allowed to utilize corporate or labor union funds in Chapter 257 of the Texas Election Code for primary and convention expenses, and by operation of law¹ are automatically granted ballot access to the general election, a statute (or the application thereof) which prohibits minor parties, such as the Texas Green Party, from utilizing funds from corporations or labor unions for obtaining that same ballot access violates the equal protection guarantees of the United States and Texas Constitutions. U.S. Constitution, 14th Amendment, section 1; Texas Constitution, article 1, section 3.

26. In *Citizens United v. FEC*, 130 S.Ct. 876 (2010), the Supreme Court recently struck down federal restrictions against corporate and labor organization funds being used for independent expenditures, holding that such restrictions were neither narrowly tailored nor underpinned by sufficiently compelling state interests. A state prohibition against corporate or labor organization funds being utilized in the operations of a minor party to obtain sufficient petition signatures so that its ultimate nominees can appear on a general election ballot alongside those of the major parties also lacks a compelling state interest, and is not narrowly tailored to protect such an interest. If, for example,

¹ Section 181.005, Texas Election Code, guarantees major parties ballot access if that party merely has delegates at precinct conventions equal to at least 1 percent of the total number of votes received by all candidates for governor at the previous gubernatorial election, or alternatively if that major party had a nominee for statewide office that received at least five percent of the popular vote at the preceding statewide general election. Minor parties, such as the Texas Green Party, must take an extra step prior to nominating their candidates: they must follow the petition process in Section 181.006, Election Code.

corruption or the appearance of corruption were at issue, the ban on corporate or labor funds should (and is, in Defendants' opinion) limited to direct contributions to candidates, and does not extend to party operations and pre-nomination party expenditures. Plaintiffs do not allege that the Green Party of Texas has utilized corporate funds for any of the individual campaigns of its nominees, and of course, the Green Party of Texas has not utilized those funds in that manner.

27. Even if the Plaintiffs' allegations and interpretation of Section 257.002(a) were taken as true, and a violation of the law pertaining to the funding of the collection of signatures for the petition were deemed to have occurred, the relief the Plaintiffs seek constitutes a death penalty for the Green Party of Texas. The Texas Election Code sets out the appropriate penalty for violating Chapters 254, 257, and other Title 15 campaign finance violations. Those potential penalties are criminal and civil, and the statutes do not authorize a party to seek to prevent an entire slate of candidates nominated by that party (or even an individual candidate) from appearing on a ballot.

28. The relief sought by the Plaintiffs, even assuming the Defendants violated some provisions of Texas campaign finance law (which Defendants strenuously deny), is so severe that the Court cannot grant such relief as the Court cannot balance the equities in granting that relief. *Storey v. Central Hide & Rendering*, 226 S.W.2d 615, 618-19 (Tex. 1950). The relief sought by the Plaintiffs would completely disenfranchise all Texas Green Party voters, deny them the opportunity to vote for their party nominees, as well as to deny the nominees themselves from the ability to stand for election in the general statewide election, and finally denies the opportunity for all Texas voters to have additional choices at the ballot box. The potential harm, if any, to Plaintiffs if the injunctive relief is not granted, is slight, while the potential harm to Defendants is extreme.

29. In any event, the defendants cannot be served, discovery completed, a final trial on the merits conducted, an appeal decided by the Third Court of Appeals, and appeal to the Texas Supreme Court concluded prior to July 2, 2010. Therefore, the plaintiffs' request for injunctive relief is moot. *See Sterling v. Ferguson*, 53 S.W.2d 753, 763 (Tex. 1932) (orig. proceeding) (per curiam) ("The trial court trying an election contest is impotent to grant substantial relief once the time passes for the name of the contestant or certificate holder to be certified to the local election officers and to be placed on the official ballot. To preserve the status quo the court would be compelled to enjoin the holding of the election until the case was disposed of. This a court cannot do. A general election must be held on the statutory date, and neither that nor any duty with reference thereto prescribed by a valid law to bring about the election can be enjoined. So, in the very nature of things, an injunction, the effect of which is to prevent the certification of Mrs. Ferguson's name after the time arrives when it must be certified, in order to be posted and placed on the ballot as provided by law, not only does not preserve the subject-matter, but destroys the right of the certified nominee and grants no right of value to the contestant. Such an injunction no court has power to issue, except after final trial on the merits."); *see also Brimer v. Maxwell*, 265 S.W.3d 926, 928 (Tex.App.CDallas 2008, no pet.) (citations omitted) ("The law is clear that a challenge to the candidacy of an individual becomes moot 'when any right which might be determined by the judicial tribunal could not be effectuated in the manner provided by law.' If a challenge to a candidate's eligibility 'cannot be tried and a final decree entered in time for compliance with pre-election statutes by officials charged with the duty of preparing for the holding of the election,' we must dismiss the challenge as moot.").

30. Finally, other valid arguments exist as to why the requested temporary injunction should not be entered: (a) the plaintiffs lack standing (*see Colvin v. Ellis Co. Republican Executive Comm.*, 719 S.W.2d 265, 267 (Tex.App--Waco 1986, no writ) (“the only plaintiffs who could bring this case would be the Democratic candidates for the offices involved, or the State in *quo warranto*”); (b) under the circumstances of this case, a temporary injunction is inappropriate (*see, e.g., In re Newton*, 146 S.W.3d 648 (Tex. 2004)); (c) the unserved 2010 statewide nominees of the Texas Green Party are indispensable parties; and (d) it would be an unlawful prior restraint of the defendants’ free speech and political association rights guaranteed by the federal and state constitutions.

REQUEST FOR RELIEF

31. Based on the foregoing, the Texas Green Party and Kat Swift request that the Court deny the plaintiffs’ Application For Temporary Injunction. In the alternative, they request that the Court extend the July 2, 2010 certification deadline. The defendants seek such other and further relief to which they may be justly entitled at law or equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I personally served a copy of the foregoing response on plaintiffs' attorney-in-charge Chad W. Dunn immediately prior to the scheduled June 24, 2010, 9:00 a.m. hearing.

 /S/
David A. Rogers