NO. 06-50812

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS DEMOCRATIC PARTY AND BOYD L. RICHIE,
in his capacity as Chairman of the Texas Democratic Party,

Plaintiffs-Appellees,

v.

TINA J. BENKISER,
in her capacity as Chairwoman of the Republican Party of Texas,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas

BRIEF OF APPELLEES

Chad W. Dunn
General Counsel
Texas Democratic Party
4201 FM 1960 West
Suite 550
Houston, Texas 77068
Telephone: (28 1) 580-63 10

Martin J. Siegel
Mikal C. Watts
Watts Law Firm, LLP
The Esperson Buildings
815 Walker St.
Houston, Texas 77002
Telephone: (713) 225-0500

Counsel for Appellee

No. 06-508 12

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS DEMOCRATIC PARTY AND BOYD L. RICHIE,
in his capacity as Chairman of the Texas Democratic Party,
Plaintiffs-Appellees,

v.

TINA J. BENKISER,
in her capacity as Chairwoman of the Republican Party of Texas,
Defendant-Appellant.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Texas Democratic Party, Plaintiffs-Appellees.

2. Boyd L. Richie, in his capacity as Chairman of the Texas Democratic Party, Plaintiffs-Appellees.

3. Tina J. Benkiser, in her capacity as Chairwoman of the Republican Party of Texas, Defendant-Appellant.

4. Republican Party of Texas and its affiliated local organizations, because the injunction against its Chair has a direct impact on their ability to place a candidate on the ballot for Texas Congressional District 22.

5. Roger Williams, Secretary of State, State of Texas, enjoined by district court order, though not a party to this action.

6. Thomas D. DeLay.

7. Nick Lampson.

TEXAS DEMOCRATIC PARTY

By: /s/ Martin J. Siegel
Martin J. Siegel

Chad W. Dunn – **Lead Counsel**
General Counsel
420 1 FM 1960 West, Suite 550
Houston, Texas 77068
Telephone: (28 1) 580-63 10
Facsimile: (28 1) 580-6362

Martin J. Siegel
Mikal C. Watts
Watts Law Firm
The Espersen Building
815 Walker St.
Houston, Texas 77002
Telephone: (713) 225-8628
Fax: (713) 225-0566

Cristen D. Feldman
Crews & Elliott
Building 3, Suite 200
460 1 Spicewood Springs
Austin, Texas 78759
Telephone: (5 12) 346-7077
Fax: (5 12) 342-0007

Dicky Grigg
Spivey & Grigg, L.L.P.
48 East Avenue
Austin, Texas 78701
Telephone: (5 12) 474-606 1
Fax: (5 12) 474-8035

ATTORNEYS FOR PLAINTIFFS-APPELLEES

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees respectfully request oral argument. This appeal concerns the interpretation of Texas Election laws and various provisions of the U.S. Constitution. Appellees believe oral discussion of the appeal would benefit the Court and facilitate its consideration of the important issues involved.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

Miscellaneous.

STATEMENT OF ISSUES

1. Whether the district court committed clear error in finding that Benkiser's violations of the Constitution and Texas Election Code would injure TDP, thereby conferring Article III standing.

2. Whether the district court correctly held that Benkiser's threatened replacement of Tom DeLay as the Republican nominee in Texas House District 22 would effectively impose a pre-election inhabitancy requirement in violation of the U.S. Constitution's Qualifications Clause.

3. Whether Benkiser's declaration of DeLay's ineligibility violated **TEX. ELECT. CODE** § 145.003(f) because the public records on which Benkiser purportedly relied in determining ineligibility fail to conclusively establish that DeLay will not inhabit Texas if and when elected.

4. Whether the district court correctly held that the public interests in avoiding abuses of the election system and fraud on the voters required issuance of an injunction restraining further action to replace DeLay on the ballot.

PRELIMINARY STATEMENT

This case tests the limits of a political party's ability to creatively manipulate election rules, disenfranchise its own primary voters and attempt to improve its electoral fortunes by replacing a Congressional nominee long after the other party had to select its candidate. The district court found this process fraudulent, unfair to voters of both parties and unconstitutional, and consequently enjoined it. This Court should now affirm.

The case arose when Defendant-Appellant Tina J. Benkiser, in her capacity as Chairwoman of the Republican Party of Texas (Benkiser or "RPT") declared Tom DeLay, the U.S. Representative from Texas's 22nd District, to be ineligible to run for reelection. DeLay filed for reelection, campaigned and won the Republican primary in March 2006, but then changed his mind and decided to quit Congress. He and Benkiser then cooperated to have Benkiser declare him ineligible to run for reelection on the ground that he had supposedly moved to Virginia.

After a trial on the merits before the United States District Court for the Western District of Texas (Honorable Sam Sparks, J.), in which the Court heard testimony from DeLay and Benkiser, the court found that the two engineered DeLay's "move" so RPT could avoid the consequences of his simply withdrawing

from the race – a step which would have precluded the naming of a replacement candidate under the Texas Election Code. The court found that RPT employed "political acumen, strategy, and manufactured evidence" in its plan to replace DeLay, but concluded that allowing a party to toss out the primary results, hastily shuttle a candidate out of state and install a better one "would be a serious abuse of the election system and a fraud on the voters, which the Court will not condone." The district court held that RPT's actions injured Plaintiff-Appellee the Texas Democratic Party ("TDP"), and that they violated the Constitution's Qualifications Clause, which requires only that a Representative inhabit his or her state "when elected," not before.

This Court should affirm the judgment entered below. While TDP does not challenge the constitutionality of Texas's statutory scheme for nominating candidates or declaring ineligibility, as RPT wrongly claims, Benkiser's misuse of the Code in this specific instance is unconstitutional, as the district court rightly held. Moreover, her declaration also violated state law. Above all, this Court should join the district court in making clear that political parties are not free to make a mockery of the electoral process by deliberately evading the dictates of the Election Code, vitiating primary elections and playing shell games with nominees in order to retain a seat in Congress at any cost.

STATEMENT OF THE CASE

TDP commenced this action by filing suit in Texas state district court in Travis County on June 8, 2006, complaining that RPT's actions to replace DeLay on the District 22 ballot threatened imminent violation of the United States Constitution's Qualifications Clause for the House and Texas Election Code provisions governing candidate withdrawal, ineligibility and replacement. That day, the Texas court issued a temporary restraining order finding it probable that TDP would "prevail against Defendant and obtain a permanent injunction," and concluding that "irreparable harm [was] imminent" if the order did not issue. (R. *533).*

On June 15, 2006, as TDP was preparing to take discovery in the state action, RPT removed the case to federal district court. (R. 1). Following removal, the district court scheduled a hearing on TDP's application for a preliminary injunction for June 26, 2006 and, at RPT's request, consolidated that hearing with trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). (R.484). Trial was held on June 26, and the district court issued its Findings of Fact and Conclusions of Law in favor of TDP on July 6, 2006. *Id.* RPT noticed this appeal the same day. (R. *506-07).*

STATEMENT OF FACTS

A. DeLay's Decision to Terminate His Candidacy and RPT's Plan to Declare Him Ineligible

Until earlier this year, DeLay had served in the House of Representatives for over two decades. RPT Brief at 5. On December 19, 2005, intending to run for a twelfth term, DeLay filed an application for a place on the Republican primary ballot in District 22. (Docket No. 47, Trial Transcript at 75-76; Plaintiffs' Trial Exhibit S).[1] In that application, he declared under oath that he was "eligible to hold such office under the Constitution and the laws of this state." (Plaintiffs' Trial Exhibit 8). Because eligibility to serve as a Representative entails inhabitancy in the state in which the candidate is elected when elected, see U.S. Const., Art. I, § 2, DeLay's application confirms that, at the time he completed it, he believed he would be an inhabitant of Texas when and if elected on November 7, 2006. Consistent with this declaration, DeLay campaigned in the Republican primary in early 2006 and prevailed against three challengers on March 7, 2006, when he received 62% of the vote. (R. 547).

After campaigning in the primary for months, defeating his opponents and securing the Republican nomination, DeLay changed course on April 3, 2006, and

[1] Hereinafter, the Trial Transcript, Docket No. 47, is referred to as "Tr."

made national news by announcing he would resign from Congress and not seek reelection. (Tr. 63). Under Texas law, however, achieving that goal was more complicated than might be expected. DeLay could simply withdraw as a candidate and terminate his candidacy, but in that event RPT would be unable to replace him on the ballot. See **TEX. ELECT. CODE** § 145.036(b).[2] On the other hand, if Benkiser was able to determine that a public record conclusively established DeLay's ineligibility to serve in the House, she could declare him ineligible and institute a process whereby a Republican District Executive Committee would choose a new nominee. See TEX. ELECT. **CODE** § 145.003(f)(2).[3]

---

[2] **TEX. ELECT. CODE** § 145.036(b) provides:

> (b) An executive committee may make a replacement nomination following a withdrawal only if:
> (1) the candidate:
> (A) withdraws because of a catastrophic illness that was diagnosed after the 62nd day before general primary election day and the illness would permanently and continuously incapacitate the candidate and prevent the candidate from performing the duties of the office sought; and
> (B) files with the withdrawal request a certificate describing the illness and signed by at least two licensed physicians;
> (2) no political party that held primary elections has a nominee for the office sought by the withdrawing candidate as of the time of the withdrawal; or
> (3) the candidate has been elected or appointed to fill a vacancy in another elective office or has become the nominee for another office.

[3] **TEX. ELECT. CODE** § 145.003(f)(2) provides: "A candidate may be declared ineligible only if: . ..(2) facts indicating that the candidate is ineligible are conclusively established by another public record."

Sometime in late April or May 2006, DeLay's lawyer and staff members in Washington prepared a letter intended to be signed by DeLay and sent to Benkiser in Texas indicating that DeLay had decided to "pursue new opportunities.. . in Washington D.C.," that he had changed his residency to Virginia and that he was therefore supposedly "no longer eligible" to remain on the general election ballot. (Tr. 22-23, 85-86; Plaintiffs' Trial Exhibit 16). A draft of DeLay's letter was sent by his staffers to Benkiser in Texas, who testified she received it on May 26, 2006. (Tr. 23). A final version of the letter was also transmitted from DeLay to Benkiser on June 6, 2006. (Tr. 23).

At trial, Benkiser testified that, in the weeks preceding her declaration of DeLay's ineligibility, she had not familiarized herself with the rules governing whether DeLay could be replaced on the ballot if he withdrew as a candidate, as opposed to his being declared ineligible. (Tr. 27-29) (Q: , . . [W]hat happens if Mr. DeLay simply withdraws from the election at this date? A: I don't know. I haven't looked at that specifically because it hasn't been the case"). The District Court characterized Benkiser's testimony that she "didn't have any communications or discussions about any of this until she got the letter [from DeLay] and she made the decision [to declare him ineligible] herself' as "somewhat amazing." (Tr. 39). In contrast to Benkiser, DeLay candidly

acknowledged being fully aware of the different effects withdrawal and ineligibility would have on RPT's ability to replace him on the ballot at the time he was considering how to terminate his candidacy:

> The Court: But back in those days, before the draft of the letter was prepared, or before the other letter was prepared, were you aware of the consequences under the Election Code if you withdrew from the race?
>
> The Witness: Yes. My lawyer -- in making the decisions that I made at that time, yes.

(Tr. 87).

B. Benkiser's Declaration of DeLay's Ineligibility

Benkiser declared DeLay ineligible to run for reelection on June 7, 2006. (Tr. 19). She also contacted the Republican county chairmen in the four counties encompassed in District 22, instructing them to begin the process of choosing representatives to the District Executive Committee intended to select a replacement candidate. (Tr. 2 1). Benkiser's determination of DeLay's ineligibility was based solely on her review of three attachments to his letter communicating his supposed intention to relocate to Virginia: a Virginia drivers' license issued on April 27, 2006; a voter's registration card issued on May 8, 2006; and a form dated April 27, 2006 authorizing the withholding of Virginia state income tax. (Tr. 23).

Benkiser acknowledged that these documents were the only records she reviewed in reaching her determination of ineligibility, and that she did not consider any easily obtainable records or other information indicating that DeLay still inhabits Texas, such as his 2006 homestead exemption for his house in Fort Bend County, his wife's continued residence at their longtime Texas home, and his ownership of vehicles registered in Texas. (Tr. 27, 71; Plaintiffs' Trial Exhibit 2). Nor did Benkiser consider the affidavit DeLay gave on November 8, 2005 supporting his motion to transfer venue of the criminal case against him, stating: "I do not waive the right for venue of these causes of action to be in my home county, Fort Bend County, Texas. I am now, and have been for many years, a resident of Fort Bend County, Texas." (Tr. 93-94; Plaintiffs' Trial Exhibit 18).[4]

---

[4] In its brief, RPT emphasizes other connections DeLay has to Virginia, such as hunting and fishing licenses there, his vote in the Virginia primary, a financial disclosure form, a car and condominium he keeps there, the fact that he intends to do business from the condominium and a "personal legal defense fund" in Washington. RPT Brief at 5-6. In the first place, these contacts are irrelevant to the legality of Benkiser's determination because she did not rely on them and had no "public documents" regarding them before her when she decided on ineligibility, as required by **TEX. ELECT. CODE** §145.003(f).

Moreover, as the District Court noted, some of these contacts, such as DeLay's condominium ownership, are longstanding and thus do not indicate a recent change in inhabitancy. (R. 493). Indeed, DeLay moved no furniture or other items into his supposed new home, the condominium, agreeing that "pretty much everything's the same before April 27th and after 27th . . . except my intention to do business there and be a resident of Virginia." [Tr. 74] In addition, it is notable that, despite his claim to now live in Virginia, DeLay was served with a subpoena in this case at his home in Texas on June 23, 2006, (Tr. 84), and was found by reporters there on July 6, 2006 when they sought reaction to the District Court's decision. See

At the trial, Benkiser admitted that the three records on which she claims to have relied in ruling DeLay ineligible do not establish that DeLay will not be an inhabitant of Texas when the general election is held:

> Q: . ..And nothing that you have in these public documents indicates to you where Mr. DeLay will be on election day, does it?
>
> A: No, it doesn't.

(Tr. 55). Questioned further by the Court, Benkiser testified:

> The Court: Seems to me that there are three qualifications of the Constitution: A person has to be over 25, a citizen of the United States, and an inhabitant of the state when elected. What document do you have in Exhibit 17 that shows conclusively Mr. DeLay's whereabouts in November of 2006?
>
> The Witness: *There's nothing – there's no public document in this package that indicates that.*
>
> The Court: As I understand it, that's the only materials you considered before you declared him ineligible?
>
> The Witness: Yes, sir. That's right.

(Tr. 57) (emphasis added). Indeed, Benkiser conceded that even DeLay's cover letter transmitting the records she considered – which is not itself a public record in any case – failed to establish that he will not live in Texas when the general

---

R.G. Ratcliffe and Kristen Mack, *A Catch-22 in District 22,* **HOUSTON CHRONICLE,** July 7, 2006, at A-6.

election occurs: "Q: Now in anything in that letter that indicates to you where he is going to live on election day, November 7th? A: He doesn't indicate specifically." (Tr. 24).

Not only did Benkiser admit that the records she ostensibly relied on in declaring DeLay ineligible fail to show he will not be an inhabitant of Texas on November 7, she acknowledged the fundamental impossibility of predicting the future and knowing where DeLay will be living on election day:

> Q: And there's no way you can represent to this court where he's going to live on November 7th?
>
> A: I can't represent anything that's going to happen on November 7th.

(Tr. 24). DeLay himself confirmed this:

> Q: All right. So the truth is you didn't know in December what was going to happen in March or April; isn't that correct?
>
> A: I didn't know in December what was going to happen in January.
>
> Q: Right. Just like you don't know now what's going to happen in November with your life; isn't that correct?
>
> A: That's correct. . .
>
> Q: Okay. So you could change those things [driver's license and voter's registration] back to Texas if the circumstances in your life change, right?

A: I guess I could. Yeah.

(Tr. 76-77).

C. **Harm to TDP**

At trial, Dan McClung, a longtime political consultant who works primarily for Democrats, testified that, if RPT is permitted to replace DeLay on the general election ballot at the eleventh hour, "there would have to be a great deal of work done around the record, if any of a replacement candidate," as well as "rethought strategies" and "adjustments that will be costly because of the new candidate." (Tr. 102-03). Exchanging a new candidate for DeLay would'dampen TDP's ability to raise funds to support Democratic campaigns "[b]ecause Mr. DeLay had a profile among contributing Democrats that cause them to be more generous than they are going to be with the candidate who isn't as high profiled," meaning that "[r]esources that were not going to have to be used in the 22nd if Mr. DeLay was on the ballot will now have to be reordered back to 22. Some of the.. . other races will suffer because the Democratic Party doesn't have those resources available for them." (Tr. 105). Not surprisingly, this would hurt the party's prospects for electing more of its candidates because "[e]very [campaign] that's really in contention is very close." (Tr. 106).

Ken Bailey, TDP's Party Director and until six months ago its Political Director, also testified at trial. Like McClung, Bailey testified that replacing DeLay would "affect.. . the bottom line" for "candidates throughout the state." (Tr. 114-15). Fundraising aside, Bailey noted more generally that '[i]t's a lot easier to run against somebody that's been indicted and is in the paper all the time about the wrongdoings than it is for somebody who doesn't have an indictment hanging over them." (Tr. 115). Thus, allowing the replacement of DeLay at this stage would "squash the turnout in District 22" as well as "down-ballot candidates" like "county commissioners, the county judges, and all those that are running as Democrats, it would squash their chances, also." (Tr. 115- 16). Replacing DeLay would also decrease the number of Democratic volunteers. (Tr. 118).

Finally, Benkiser herself testified that winning the race in District 22 is important to both parties and that the Election Code aims to "provide[] a level playing field." (Tr. 16-18). She also acknowledged that one side's violations of the Code would inevitably injure the other. (Tr. 18). Conceding that "every race depends [in part on] who the other candidate is," she testified that character is often an important campaign issue. (Tr. 36-38). Asked whether candidates would be hurt by "criminal charges, ethics charges, being involved in scandal in the media," Benkiser testified: "They could." (Tr. 39-40) "And, obviously," TDP counsel

asked Benkiser, "it would be helpful to one party and the flip side, harmful to the other party, if you're allowed to remove an opponent who has criminal charges against them, who has ethics violations charges against them, who in the media they have been accused of being involved in scandal. Would you agree with me?" (Tr. 40). "It could," Benkiser answered. *Id*.

D. The District Court's Decision

The district court ruled in TDP's favor on July 6, 2006. (R. 484-504). Regarding the circumstances of DeLay's exit from the campaign, the court found: "The simple fact is DeLay, for personal reasons, decided to withdraw his candidacy for the general election after the voters selected him in the Republican primary election. DeLay is entitled to withdraw from the race for House District 22 before the general election; however, Texas law specifies the manner of the withdrawal and its consequences." (R. 496). As the court found: "The Court suspects that the only reason DeLay did not simply withdraw from the race is that the Texas Election Code prohibits the substitution of a replacement nominee in a withdrawal based on these facts. See **TEX. ELECT. CODE** § 145.036(b)." (R. 499). The court also described how RPT, DeLay and their lawyers and staffers collaborated on the letter communicating his ineligibility: "The official letter was prepared and mailed after consultation with party members and lawyers with the

goal of naming a new candidate for the general election and to avoid the consequences of the Texas election laws related to withdrawal from the race." (R. 491).

Regarding the legal issues, the district court held that TDP had standing based on its factual finding that TDP "would be injured. . . because TDP would need to raise and expend additional funds and resources to prepare a new and different campaign in a short time frame." (R. 488). Turning to the merits, the court held that Benkiser violated Tex. Elect. Code § 145.003(f), which requires declarations of ineligibility to be "conclusively established" by a public record: "The documents submitted may well be public records; however, the Court is not convinced that they conclusively establish DeLay's ineligibility. There is simply no evidence before the Court that DeLay is ineligible under the United States Constitution and certainly no conclusive evidence that DeLay will be ineligible on November 7, 2006." (R. 492).

As for TDP's claim of Constitutional violation, the district court noted the "disputed factual issue" of where DeLay actually resides and "assum[ed] without deciding that that DeLay is presently an 'inhabitant' of Virginia." (R. 493). The court then held the Constitution forbids "speculative determinations" of inhabitancy, and that "Benkiser's prediction of future eligibility based on current

inhabitancy would amount to an imposition of an unconstitutional pre-election residency requirement." (R. 494). "Both DeLay and Benkiser testified at the trial that DeLay could move back to Texas before the general election and could not testify regarding where DeLay might be living in November 2006. None of the documents Benkiser purported to rely on, nor even DeLay's accompanying letter, indicates how long DeLay plans to continue living in Virginia, much less that he intends to continue living there until after the general election." (R. 494-95). The court also rejected RPT's argument that Benkiser's declaration was permissible under the Constitution's Elections Clause. (R. 496-97).

Finally, the court noted the obvious and considerable threat RPT's post-primary substitution plan poses for the political process in Texas: "Were the Court to adopt Defendant's position, either political party could and would be able to change candidates after the primary election and before the general election simply by an administrative declaration of ineligibility by the party chair based on a candidate's 'move' to another state. This would be a serious abuse of the election system and a fraud on the voters, which the Court will not condone." (R. 497). The court held that TDP had met the criteria for issuance of a permanent injunction and therefore enjoined Benkiser and the Secretary of State from taking further steps to replace DeLay on the ballot. (R. 500).

E. Events Following Trial

Following the trial but before the district court ruled, the Harris and Fort Bend County Republican Parties selected their representatives to serve on the District Executive Committee Benkiser called to replace DeLay.[5] Thus, at least two of the requested four members of the District Executive Committee called to choose a new nominee have now been selected. For his part, DeLay has publicly implied that he intends to campaign for the District 22 seat if he remains on the ballot and serve in Congress if elected. See, e.g., Mike Allen and Hilary Hylton, *DeLay Redux?*, **TIME MAGAZINE,** July 17, 2006 at 11, 2006 WLNR 11839372 ("A source close to the ex-Congressman tells TIME that DeLay is planning an aggressive campaign to retake the House seat he quit in June" if he remains the nominee); see *also* United Press International, *DeLay May Run After All*, July 8, 2006, posted at http://www.upi.com/NewsTrack/view.php?StoryID=20060708-073549 8004r). (DeLay quoted as stating "I am forced to be on the ballot. And the Democrats are just loving it. Well, they may get exactly what they want"). DeLay's campaign office remains open [Tr. 44], and Benkiser testified that if DeLay remains the nominee, RPT expects him to win the general election. [Tr. 75]

[5] See Kristin Mack, *County GOP Picks Representative for Dist. 22 Panel,* **HOUSTON CHRONICLE,** June 30, 2006 at B-4; Bob Dunn, *Raia Elected to GOP Committee Charged with Replacing Tom DeLay,* **FORT BEND** Now, July 5, 2006 at http://www.fortbendnow.com /news/141 5/terese-raia-elected-togopcommittee-charged-with-finding-DeLay-replacement.

SUMMARY OF ARGUMENT

The district court's decision in this case was correct and should be affirmed. Initially, RPT asserts that TDP lacks standing because RPT's actions to replace DeLay wreak no harm on the party, its voters or the Democratic candidate. But RPT's argument ignores the district court's factual finding of injury: that replacing DeLay at this late stage would force TDP to expend funds and other efforts to prepare a new and different campaign than that planned and executed to date against the Republican primary winner, putting it at a disadvantage in the upcoming general election. This finding is not clearly erroneous, and numerous decisions confirm that political parties have standing to sue when states violate the Constitution or election laws and, as a result, impair parties' electoral efforts.

RPT also challenges the district court's holding that replacing DeLay would violate the Constitution's Qualifications Clause, which prescribes that Representatives must inhabit their States "when elected," not before the election. Benkiser admits, however, that the records she relied on to declare DeLay ineligible do not bear on where he will reside at the time of the election months from now. At most, they relate to his pre-election inhabitancy. Hence, the district court was correct in concluding that Benkiser had effectively imposed a pre-

election residency requirement on House candidates in violation of the Qualifications Clause.

The district court also correctly rejected RPT's argument that Benkiser's action is a permissible exercise of the power given to Texas by the Constitution's Elections Clause. RPT stresses that the Texas Legislature has enacted a particular statutory scheme pursuant to this authority, but TDP does not challenge the constitutionality of any statutory provision. Rather, the district court held that Benkiser's reading and application of state law in this case is unconstitutional. Because Benkiser's declaration and other efforts do not simply regulate election procedures, but discriminate against a class of candidates and attempt to dictate an electoral outcome, they are not permissible under the Elections Clause.

This Court can also affirm on the separate ground that Benkiser's declaration of ineligibility violated **TEX. ELECT. CODE** § 145.003(f) because the district court correctly found that the public records on which Benkiser relied relate at most to DeLay's current inhabitancy and therefore do not conclusively establish DeLay's ineligibility, since eligibility based on inhabitancy can only be determined at the time of election.

Finally, the district court was correct to conclude that the public interest warrants issuance of the injunction. The district court rightly found that RPT's

efforts to evade the rule barring DeLay's withdrawal here through the device of a questionable "move" out of state "would be a serious abuse of the election system." Far from promoting voter choice, as RPT claims, it perpetrates a "fraud on the voters," as the district court held, by tossing out valid primary results. Consequently, the public interest weighs in favor of issuing the injunction.

For these reasons, this Court should affirm the decision below.

ARGUMENT

I. The District Court Correctly Held that TDP Has Standing

A. Standard of Review

TDP does not take issue with the general principles of standing set forth in RPT's brief. See RPT Brief at 10- 13. There is one respect, however, in which RPT's articulation of the appellate standard is incomplete. While legal questions relating to standing are decided on de *novo* review, as RPT notes, see *id*. at 10, this Court "review[s] for clear error the findings underlying a district court's determination of standing." *Pelts & Skins, LLC v. Landreneau, 365* F.3d 423, 428 (5th Cir. *2004) vacated* on *other grounds, 544* U.S. 1058 (2005). "'Jurisdictional questions are questions of law, and thus reviewable *de novo* by this Court,"' but if "'the district court resolves any factual disputes in making its jurisdictional findings, the facts expressly or impliedly found by the district court are accepted

on appeal unless the findings are clearly erroneous."' *Pederson v. Louisiana State University,* 213 F.3d 858, 869 (5th Cir. 2000) (quotation omitted).

B. The District Court's Decision on Standing Is Correct

1. Disadvantaging TDP's Electoral Efforts Constitutes a Comizable Injury

The district court found that the injury TDP will suffer in having to finance and design a new campaign against a new and improved nominee hand-picked by RPT in the late stages of the campaign confers Article III standing on TDP. This conclusion was correct and should be affirmed.

RPT's complaint about standing proceeds as if oblivious to the district court's factual finding of injury. The court below found: "Here, TDP has standing because it would be injured if RPT were allowed to declare DeLay ineligible and substitute a different nominee for the general election because TDP would need to raise and expend additional funds and resources to prepare a new and different campaign in a short time frame." (R. 488). As noted above, this finding must be accepted by this Court unless clearly erroneous.

Far from being erroneous, the district court's finding of injury is amply supported by testimony in the record from McClung and Bailey, who testified that contributions, volunteer efforts and turn-out will all suffer if DeLay is illegally

removed from the ballot. These injuries will not only impair the Democratic effort in District 22, but will disadvantage the party in its efforts to win down-ballot and other Texas races. Moreover, as McClung testified, TDP would have no choice but to expend funds and other efforts redesigning its campaign and "rethink[ing]" its planned strategy in District 22 to address a new opponent, "adjustments that will be costly." (Tr. 102-03). More directly, Bailey confirmed the obvious: "It's a lot easier to run against somebody that's been indicted and is in the paper all the time about the wrongdoings than it is for somebody who doesn't have an indictment hanging over them." (Tr. 115). Even Benkiser testified to the importance of character issues in campaigns and more or less admitted that it would harm one party if the other could simply remove a candidate "who has criminal charges against them, who has ethics violations charges against them, who in the media they have been accused of being involved in scandal." (Tr. 40).

All of these effects – reduced funding, diminished volunteering, lower turn-out, having to refashion a campaign in the late stages, removal of a scandal-plagued opponent close to election day – would make it harder for TDP to compete in the upcoming election, not because of the normal cut and thrust of politics but because of RPT's manipulation of the rules. *See, e.g.*, *Randall v. Sorrell*, *548* U.S. __, 126 S. Ct. 2479, 2495-98 (2006) (reducing funds available to candidates and

parties hampers their ability to compete in elections and crimps party's ability to assist candidates). And numerous decisions confirm that a political party suffers a legally cognizable harm when the violation of applicable electoral rules or the Constitution puts it at a competitive disadvantage in an election. After all, political parties exist to win elections. Their goal, as the Supreme Court observed in *Storer* v. *Brown,* 4 15 U.S. 724, 745 (1974), "is typically to gain control of the machinery of state government by electing [their] candidates to public office." *Accord Smith* v. *Boyle,* 959 F. Supp. 982 (C.D. Ill. 1997) ("the Illinois Republican Party's purpose is to elect their candidates to office"), *aff'd* 144 F.3d 1060 (7th Cir. 1998).

Thus, in *Smith* v. *Boyle,* 144 F.3d 1060 (7th Cir. 1998), the Illinois Republican Party challenged Illinois' method of at-large elections to the state supreme court, complaining "that the use of the at-large method in Cook County denies.. . Republicans a fair opportunity to elect candidates of their choice." *Id.* at 1061. The Seventh Circuit held that the party had standing because it "had a real dispute with the State of Illinois," and "a judicial decree.. . could be entered that would provide the plaintiffs with real relief from *the harm inflicted on them* by the wrong that they allege." *Id.* (emphasis added). In *Smith,* as here, an alleged violation of the rules or Constitution that makes it harder to compete in elections is a cognizable harm.

Similarly, in *Democratic Party of the United States v. National Conservative Political Action Committee, 578* F. Supp. *797* (E.D. Pa. 1983), *aff'd in part and rev'd in part on other grounds,* 470 U.S. 480 (1985),[6] a three-judge panel considered the national Democratic Party's Article III standing to seek a declaratory judgment upholding campaign finance rules that, if violated, would allegedly have made it easier for Republicans to re-elect then-president Reagan and harder for it to elect the Democratic nominee. Analyzing whether the party alleged legal injury, the three-judge court held:

> We now turn to the question whether there is a judicially cognizable injury to the plaintiff stemming from the PAC defendants' threatened conduct. We hold that there is a threatened injury. To begin with, we take judicial notice that the political power of the Democratic Party depends significantly on whether its nominee comes to occupy the White House. Thus, speech that reduces the likelihood of its nominee's victory injures the Democratic Party in more than an ideological way.

Id. at 810; *accord Buckley* v. *Valeo*, 424 U.S. 1, 11-12 (1976) (at least some litigants, including parties and candidates, had standing to challenge federal limits on campaign expenditures and contributions). In *National Conservative Political Action Committee,* the Democratic Party would have been injured if the

---

[6] In *FEC v. National Conservative Political Action Committee, 470* U.S. 480 (1985), the Supreme Court held that the Democratic Party could not bring a declaratory judgment action because Congress had not provided for suits by the party in 26 U.S.C. § 9011(b)(l), and therefore did not reach the question of Article III standing and injury. See *id.* at 489-90.

Republican Party could deluge it with allegedly illegal campaign funding, whereas here, RPT's allegedly illegal acts would deprive TDP of funds and other support and force it to expend resources on redesigning its campaign. Either way, however, the effect amounts to a legally cognizable injury. See *also, e.g., Hirschfeld v. Spanakos,* 104 F.3d 16, 20 (2d Cir. 1997) (losing election or having to spend campaign funds unnecessarily would constitute compensable damages to candidate suing city board of elections); *Bay County Democratic Party v. Land,* 347 F.Supp.2d 404, 423 (E.D. Mich. 2004) (party had standing to challenge provisional ballot rules because potential failure to count ballots would "diminish the [party's] political power").

In response to the District Court's finding and TDP's argument that its actions will unfairly disadvantage TDP in the general election, RPT asserts first that *it* will be harmed, not TDP, by having to replace DeLay. See RPT Brief at 13-14. Its candidate will have to get up and running in a short period, RPT claims, and allowing a replacement will only "level the playing field." *Id.* One shortcoming of this argument is its focus on the wrong party. TDP is the plaintiff and what matters for purposes of its standing is whether the challenged actions injure TDP, not their effect on RPT. Even if RPT's contention is correct, injury to RPT does not deprive another injured party -here TDP – of standing. No principle

of standing dictates that, if two parties to a case suffer injury, only one (or even the one with the most injury) has standing to bring suit. In addition, while TDP disagrees that permitting RPT to violate the rules in the way it proposes would merely "level the playing field," even if that description fit, artificially equalizing litigants can constitute injury if the lawful *status quo ante* would otherwise have favored one or the other side.

Second, this argument simply ignores the district court's factual findings. Not only does it disregard the district court's finding of injury to the TDP, it overlooks the findings that RPT and DeLay engineered the "move" to Virginia in order to circumvent the rule prohibiting a candidate from withdrawing after the opposing party's primary. Obviously, if RPT truly believed that, "if anything, TDP and its candidate have an advantage if RPT names a replacement candidate," RPT Brief at 14, it would not have gone to such great lengths to arrange DeLay's previously unplanned relocation to Virginia and replacement on the ballot, using what the district court called "political acumen, strategy, and manufactured evidence." (R. 498). RPT must explain why the district court erred in its findings, not just ignore them in an effort to argue that it suffers from the current state of affairs, too. As the district court held, whatever predicament RPT finds itself in is at least partially of its own making. *Id.*

RPT also claims that, when it comes to harm done to TDP's fundraising by the substitution of another candidate for DeLay, any injury is caused by the independent decisions of third party Democratic donors, not RPT. See RPT Brief at 15. RPT would be the cause of Democrats' decisions to participate and donate at a lower level, however. If states took other measures to depress voter interest, such as limiting press coverage or scrambling polling places, would RPT claim parties lacked standing to challenge them because their adherents' lowered interest was their own fault? In *National Conservative Political Action Committee, supra*, the court held the Democratic Party had standing to challenge allegedly illegal Republican fundraising, though it could always be claimed that any disadvantage was caused by the independent decisions of Democrats not to offset any Republican advantage by giving more. Moreover, RPT's argument about lowered fundraising and volunteering ignores the more direct harm to TDP testified to by Bailey and Benkiser, namely, the unfair advantage one party would reap if allowed to choose its nominee later in the process and, in the bargain, substitute a "clean" candidate for one under indictment. These effects of RPT's challenged actions would harm TDP in their own right, even if RPT's conduct would not depress fundraising or other support.

2. **The Texas Election Code Presumes Harm to TDP**

While hampering a party's electoral efforts would always qualify as cognizable injury, that is particularly true here in light of applicable provisions of the Texas Election Code. Primary elections are "not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers." *Storer*, 415 U.S. at 735; see *also Bullock v. Carter*, *405* U.S. 134, 146 (1972) ("the primary election may be more critical than the general election in certain parts of Texas"). Because of the importance of the primaries, the Election Code protects parties and candidates from their opponents engaging in "bait and switch" by running one candidate during the primary season and switching to another afterwards when doing so would be politically advantageous. By prohibiting withdrawals after the opposing party's primary absent circumstances not present here, § 145.036(b) recognizes that the practice would disadvantage the opposing party and candidate. As the District Court held: "It appears it was precisely this type of injury that the Texas Legislature foresaw and attempted to prevent by enacting the prohibition on replacing a candidate where another political party held a primary election and has a nominee for the office sought by the withdrawing candidate. TEX. **ELECT. CODE** § 145.036." (R. 488). *Accord,*

e.g., U.S. v. *Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980) ("the passage of the statute is, in a sense, an implied finding that violations will harm the public").

Of course, the notion embodied in § 145.036 – that that allowing one party to ignore primary results and install a different candidate before the general election would necessarily harm the other party – is simply common sense. Political environments and campaigns change over time, and allowing one party to disregard the rules and select its candidate later naturally provides an advantage:

> In election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time. 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. Such developments will certainly affect the strategies of candidates who have already entered the race; they may also create opportunities for new candidacies.

Anderson v. Celebrezze, *460* U.S. 780, 790-91 (1983).

RPT argues in response that no harm is presumed by the Code because "[b]oth candidates who have been declared ineligible and those who have withdrawn, under certain circumstances, may be replaced on the ballot." RPT Brief at 17. The circumstances where replacement would be allowed after withdrawal (illness, election to another office or withdrawal before the other party's primary), see **TEX. ELECT. CODE** § 145.036(b), are not present here,

however, which is precisely why it may be presumed that permitting what is a *de facto* withdrawal in the guise of ineligibility would cause injury. Even stranger is RPT's view that, in essence, TDP is not harmed because it could engage in the same shenanigans and orchestrate the relocation and replacement of its candidate too. See RPT Brief at 18. Bootstrapping its standing argument to its view of the merits, RPT's contention assumes the legality of its actions and asserts that TDP could respond in kind; but TDP contends and the court below agreed that *neither party* can legally act as RPT proposes. Regardless of who is correct on the merits, TDP's ability to emulate RPT's dubious tactics and thereby inflict injury on RPT does not mean that RPT's violations would not injure TDP. A plaintiff is not deprived of standing because he could respond in such a way as to give the defendant standing to bring parallel counterclaims.

3. Associational Standing

Finally, TDP has associational standing to assert the claims of its candidate and party members. As the Supreme Court held in *Bullock, 405* U.S. at 143, "the rights of voters and the rights of candidates do not lend themselves to neat separation." Consequently, federal courts routinely hold that political parties and candidates have associational standing to assert the rights of voters challenging Constitutional and election law violations. *See, e.g., Sandusky County Democratic*

Party v. Blackwell, *387* F.3d *565, 573* (6th Cir. *2004); Mancuso v. Taft, 476* F.2d 187, 190 *(* 1st Cir. 1973); *Bay County Democratic Party, 347* F. Supp. 2d at 422. In this case, voters who might vote for the Democratic candidate in District 22 will be disadvantaged in substantially the same way TDP will be. See *Anderson, 460* U.S. at 787-88 ("voters can assert their preferences only through candidates or parties or both"). Similarly, with regard to the Democratic candidate, just as the party will be disadvantaged in the general election because of RPT's planned conduct – and just as it will have to recalibrate its electoral and political strategy and campaign at some expense and effort – so too will the candidate.

RPT contends that TDP lacks associational standing because its voters "will still be able to go to the polls and choose the candidate of their choice," and "every vote will be given the same weight when it is counted." RPT Brief at 18- 19. But Democrats, like Republicans, do not just want to vote, they want to win. See, e.g., (Tr. 16) (Benkiser testimony); *Anderson, 460* U.S. at 795 n. 19 (goal of voters to elect Anderson). Allegedly illegal actions that give an advantage to one party necessarily injure the voters of the other when they take the trouble to vote and thereby try to achieve victory for their party and political views. Moreover, contrary to RPT's assertion, see RPT Brief at 21, voters *could* have brought this suit in their own right or on behalf of TDP or the Democratic candidate. See, e.g.,

Northampton Cty Democratic Party v. Hanover Township, 2004 WL 887386 at * 8 (E.D. Penn. *2004); Bachur v. Democratic Nat 'l Party, 666* F. Supp. '763, 771 (D. Md. 1987). Thus, this is not a case where associational standing is absent because the members have not suffered their own injuries.

II. The District Court Correctly Held that Replacing DeLay Would Violate the Constitution

The district court's decision rests on its conclusion that allowing RPT to complete its plan to replace DeLay would be unconstitutional as a violation of Article I's Qualifications Clause for the House of Representatives. See U.S. **CONST.** art. I, § 2, cl. 2. Because that conclusion is correct, this Court should affirm.[7]

A. The Qualifications Clause Precludes Finding DeLay Ineligible Until Election Day

1. History and Judicial Interpretation of the Qualifications Clause

The Qualifications Clause set forth in the United States Constitution regarding members of the House of Representatives provides: "No person shall be a Representative who shall not have attained to the age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected,

[7] **TDP** does not contest the standard of review as set forth in RPT's brief at pp. **24-25.**

be an Inhabitant of that State in which he shall be chosen." U.S. **CONST.** art. I, § 2, cl. *2*. The requirement that a Representative inhabit the state where he or she is elected "when elected," and not before, was not accidental but the product of specific deliberations at the Convention. On August 8, 1787, the Convention considered a requirement proposed by South Carolina's John Rutlege that Representatives live in their states for seven years prior to election on the ground that "[a]n emigrant from N. England to S.C. or Georgia would know little of its affairs and could not be supposed to acquire a thorough knowledge in less time." 2 *The Records of the Federal Convention* of 1787, at 2 17 (Max Fart-and, ed. 1966).

Responding to Rutledge, Pennsylvania's Gouverneur Morris noted that "[p]eople rarely chuse a nonresident" anyway, while George Reed of Delaware "reminded him that we were now forming a *Nat 'l* Govt and such a regulation would correspond little with the idea that we were one people." *Id.* Madison expressed concern that a residency requirement would bar new, Western states from representation. See *id*. John Francis Mercer of Maryland observed that "[s]uch a regulation would present greater alienship among the States than existed under the old federal system. It would interweave local prejudices & State distinctions in the very Constitution which is meant to cure them." *Id.* James Wilson also cautioned that, depending on the term, a residency provision "might be

construed to exclude the members of the Legislature, who could not be said to be actual residents in their States" while at the capitol. Id. at 218. North Carolina's Hugh Williamson added that "[n]ew residents if elected will be most zealous to Conform to the will of their constituents, as their conduct will be watched with a more jealous eye." *Id.* In the end, the Convention rejected proposed pre-election residency requirements of seven, three and one years. *Id.* at 2 19,225.

The principles underlying the defeat of a residency requirement at the Convention were evident in at least one early Congress, when the House rejected a challenge to the election of William McCreery on the ground that he had not lived in his Maryland district more than a year, as required by state law. Opposing McCreery's seating, Representative Randolph argued that "[t]ransient persons from other States, happening to arrive at Baltimore the day before the election," could be elected under Qualifications Clause as advocated by McCreery's supporters. *See The Founders Constitution* (Philip P. Kurland and Ralph Lerner, eds 1987), at http://presspubs. uchicago.edu/founders/documents/al 2 2s8.html. Yet Congress voted to seat McCreery. As Representative Key explained in opposing Randolph, acceptance of the argument that new residents are unfit for election "proves the people not competent to self-government." *Id.* The House represents the national government, not the states, Key argued, and states could not

set pre-election residency requirements. *See id.; Central Virginia Community College v. Katz,* __ U.S. __, 126 S. Ct. 990, 1009 (2006) (Thomas, J., dissenting) ("The majority correctly notes that the practices of the early Congresses can provide valuable insight into the Framer's understanding of the Constitution"); *Printz v. U.S.*, 521 U.S. 898, 906 (1997) (same).

Key's argument – that states lack power to impose additional requirements on candidates seeking election to Congress – underlies the Supreme Court's holding in *Term Limits, Inc. v. Thornton,* 514 U.S. 779 (1995), where the Court struck down an amendment to the Arkansas constitution barring certain House and Senate incumbents from appearing on the general election ballot. After exhaustive analysis of the history, purpose and theory of the Qualification Clauses, the Court concluded that "[a]llowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States. If the qualifications set forth in the text of the Constitution are to be changed, that text must be amended." *Id.* at 783.

Two recent decisions from other circuits confirm that the rule against state additions to the Qualifications Clauses enunciated in *Term Limits* prohibits states from barring candidates for running for the House on the ground that they reside

out of state before election day. See *Schaefer v. Townsend,* 215 F.3d 103 1 (9th Cir. 2000), *cert. denied, 532* U.S. *904* (2001); *Campbell v. Davidson, 233* F.3d 1229 (10th Cir. 2000), *cert. denied,* 532 U.S. 973 (2001). In *Schaefer,* a Nevada resident attempted to run for a seat in the House in a special election in California but was denied filing papers because he was not registered to vote in California, which in turn required California residency. See 215 F.3d at 1032. The Ninth Circuit reviewed *Term Limits* and the Framers' rejection of pre-election residency requirements and concluded that "California's requirement that candidates to the House of Representatives reside within the state *before* election, violates the Constitution by handicapping the class of nonresident candidates who otherwise satisfy the Qualifications Clause." *Id.* at 1037 (emphasis in original). Noting the express language in the Qualifications Clause stating that Representatives must be inhabitants "when elected," the court held: "This specific time at which the Constitution mandates residency bars the states from requiring residency before the election." *Id.* at 1036.

The Tenth Circuit's decision in *Campbell* is identical to the Ninth Circuit's in *Schaefer.* In *Campbell,* the court applied *Term Limits* to strike down a state law that required, *inter alia*, candidates to reside in Colorado for at least thirty days prior to the election. *See 233* F.3d at 1231-35. As the Tenth Circuit held,

Colorado's requirement of even a brief pre-election residency period "disadvantages a particular class of candidates and evades the dictates of the Qualifications Clause." *Id.* at 1234. Earlier decisions similarly invalidated rules that had the effect of imposing pre-election residence requirements on candidates for Congress. *See, e.g., Johnson v. Mortham,* 915 F. Supp. 1529 (N.D. Fla. 1995) (district residency requirement "would be an additional qualification that is void under the Constitution"); *Dillon v. Fiorina, 340* F. Supp. 729, 73 1 (D.N.M. 1972) (invalidating laws that effectively required 2 year residency for Senators); *Exon v. Tieman,* 279 F. Supp. 609, 613 (D. Neb. 1968) ("There being no such requirement in the Constitution itself, a state cannot require that a Representative live in the District from which he was nominated"); *State ex rel. Chavez v. Evans, 446* P.2d 445, 448-49 (N.M. 1968) (invalidating pre-election district residency requirement; "The constitutional qualifications for membership in the lower house of Congress exclude all other qualifications, and state law can neither add to nor subtract from them").

2. Replacing DeLay Would Violate the Qualifications Clause

This case is on all fours with *Schaefer*, *Campbell* and the earlier decisions. Here, as in those cases, Benkiser proposes to exclude a House candidate months before the election on the basis of where he lives beforehand, whereas the "specific time at which the Constitution mandates residency bars the states from requiring residency before the election." *Schaefer, 2* 15 F.3d at 1036. Thus, RPT's descriptions of DeLay as someone "who *has become* ineligible for office" or "who no *longer meet[s]* the eligibility requirements" are fundamentally incorrect. See RPT Brief at 38, 40 (emphases added). DeLay cannot become ineligible for Congress based on inhabitancy until election day. Even if DeLay now inhabits Virginia – a factual question the District Court pretermited – that fact is of no significance because it is not yet November 7, and all that matters for purposes of his eligibility to serve in the House is where he resides then. Benkiser repeatedly admitted that the documents she used to declare DeLay ineligible proved only, at most, where he lives now, and shed no light on where he may be living on election day. Both DeLay and Benkiser acknowledged that DeLay could move back to Texas before election day, and that it is simply impossible to predict what state he will inhabit then. Hence, the District Court's conclusion that "allowing Benkiser

to declare DeLay ineligible at this time would amount to a de *facto* in-state residency requirement in violation of the United States Constitution" is correct, since the declaration depends entirely on current residence. (R. 496).

Indeed, the tortured facts of DeLay's recent history perfectly illustrates why inhabitancy must be tested on election day and not before. In December, when he applied to run in the primary, DeLay swore that he would be eligible to serve in Congress, *i.e.*, that he would inhabit Texas when elected. There is no dispute that he lived in Texas as recently as April. Then, in late April and May, he claims to have taken up residence in Virginia, though he continued to represent the people of his Texas district until he resigned from Congress in June. He currently has ties to both Virginia and Texas, making any decision about where he truly resides a difficult task the District Court wisely bypassed as unnecessary. As for the future, he and Benkiser both concede he could move back to Texas before the election; "people's lives do change," RPT counsel noted at trial. [Tr. 94]. And in recent remarks to the press, DeLay appears eager to revive his campaign (though he supposedly lives in Virginia).

All of this is muddled and contradictory, to say the least, and demonstrates the Founders' wisdom in linking eligibility to inhabitancy "when elected," not in the period of pre-election jockeying. It is precisely because "people's lives do

change" in the way RPT claims DeLay's has this year that RPT's argument that Benkiser was simply being permissibly "predictive" is wrong. See RPT Brief at 29, 40. In light of the plain and unambiguous text of the Qualifications Clause, states cannot be predictive but must test residence "when [the candidate is] elected." U.S. **CONST.** art. I, § 2, cl. 2.[8] Through history, people have occasionally chosen to move to a state and run for Congress very shortly thereafter, and some of these candidates have prevailed." "Predictiveness" exercised months before the election would have barred these candidacies, as Benkiser proposes to exclude

---

[8] See *Solorio* v. U.S., 483 U.S. 435, 441 (1987) ("there is no evidence in the debates over the adoption of the Constitution that the Framers intended the language of Clause 14 to be accorded anything other than its plain meaning"); *Reid* v. Covert, 354 U.S. 1, 8 n.7 (1957) ("This Court has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning"); *United States v. Sprague, 282* U.S. 716, 73 l-732 (193 1) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition").

[9] See, e.g. (R. 495-96) (citing *Sundry Electors* v. Key, case XXVIII, 10th Cong., Cl. & H. El. Cas. 224, 233 (1808) (approving election of candidate who moved to state of election two weeks before election)); VI *Cannon's Precedents of the House of Representatives,* § 174. (House approved election of member who rented apartment in state where elected in June preceding the November election). The candidates in *Schaefer* and *Campbell* also moved into districts just weeks or months shortly beforehand in order to run, as have others. (Tr. 59) ("THE COURT: And you're not familiar with other people who have never resided in a congressional district that ran for [Congress] and said that I'm going to move there two weeks, one week, one day before the election? THE WITNESS: I'm not aware of any particular situation in Congress where this has happened before. THE COURT: I'm just a lot older than you are"). At the Convention, George Mason advocated a pre-election residency requirement precisely because he believed the practice of wealthy English candidates moving to districts and winning seats in Parliament shortly thereafter demonstrated the corruption of English elections, but a pre-election residency requirement was nonetheless rejected by the Convention. See 2 Farrand at 217.

DeLay. The district court was correct in concluding that RPT's predictiveness standard would result in nothing other than "speculative determinations" at odds with what might otherwise happen in the future as well as the clear language and intent of the Qualifications Clause. (R. 494).

RPT attempts to distinguish *Schaefer* and *Campbell* by arguing that "the challenged provisions of the Texas Election Code do not require that a candidate reside in Texas for a period of time before the election." RPT Brief at 37. That is true, but Benkiser is nonetheless using **TEX. ELECT. CODE** § 145.003 to declare a candidate ineligible on the basis of evidence she concedes does not relate to his inhabitancy when elected, but rather where he lives now. TDP does not challenge the constitutionality of the Texas Election Code, nor did the District Court hold any portion of it unconstitutional; rather, this is an as-applied challenge to the misuse of state law to eject a candidate from the ballot based on pre-election residency. (R. 496) ("*construing* the Texas Election Code to permit such a declaration of ineligibility based on inhabitancy at this time would be an unconstitutional *application* of state law") (emphasis added); see *also, e.g., Women's Medical Prof. Corp. v. Voinovich,* 130 F.3d 187, 193 (6th Cir. 1997) (distinguishing between facial and as-applied constitutional challenges), *cert. denied, 523* U.S. 1036 (1998). *Schaefer* and *Campbell* involved challenges to

facially invalid state laws, whereas this case involves an as-applied challenge to an otherwise valid state law, but all three cases feature the same constitutional infirmity. This Court can no more permit Benkiser's termination of an eligible Congressional candidacy months before the election pursuant to her faulty interpretation of federal eligibility and TEX. ELECT. CODE § 145.003 than the Ninth and Tenth Circuits could condone the exclusion of eligible Congressional candidates months before those elections under the terms of exclusionary California and Colorado state laws."

B. Benkiser's Exclusion of DeLay is Not Permissible Under the Elections Clause

RPT's primary argument for reversing the District Court is that Benkiser's action is justified under the Constitution's Elections Clause. See Article I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to

---

[10] As the district court correctly held, RPT's reliance on *Nixon v. Slagle*, 885 S.W.2d 658 (Tex. App. – Tyler 1994), is misplaced. (R. 494). In *Nixon*, the challenged eligibility decision did not entail a prediction of future residence based on documents regarding current residence; rather, because Article III, § 6 of the Texas Constitution requires past district residence for election to the Texas Senate, the candidate's change of residence during this pre-election period conclusively disqualified him. The instant case does not turn on whether "a change of voter registration alone is sufficient to provide conclusive proof of change of residence," RPT Brief at 29, it involves whether eligibility can constitutionally be anticipated months in advance despite Article I's language conditioning eligibility on in-state inhabitancy "when elected."

the place of chusing Senators"). The contention that the Elections Clause permits exclusion of House candidates based on pre-election inhabitancy was rejected in *Schaefer* and *Campbell* and is equally unpersuasive here.

1. Excluding Candidates Based on Pre-election Residency Is Not a Permissible Regulation of the "Manner" of Elections

"[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Term Limits,* 514 U.S. at *834; accord Cook v. Gralike,* 53 1 U.S. 5 10, 523-24 (2001) (states may "prescribe the procedural mechanisms for holding congressional elections"). Reviewing Elections Clause decisions, the *Term Limits* Court noted that the clause permits "'numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved,"' *id.* (quoting *Smiley v. Holm, 285* U.S. 355, 366 (1932)), but cannot "'justify, without more, the abridgement of fundamental rights."' *Id.* (quoting *Tashjian v. Repub. Party of Conn., 479* U.S. 208, 217 (1986)). Rather, regulating the "manner" of elections refers simply to "matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors

and canvassers, and making and publication of election returns."' *Cook, 53* 1 U.S. at *523-24 (quoting Smiley*, 285 U.S. at 366). Rejecting the argument that adding to the qualifications of Representatives and Senators by imposing term limits was a permissible "time, place and manner" regulation, the Supreme Court concluded:

> The provisions at issue in *Storer* and our other Elections Clause cases were thus constitutional because they regulated election *procedures* and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position. They served the state interest in protecting the integrity and regularity of the election process, an interest independent of any attempt to evade the constitutional prohibition against the imposition of additional qualifications for service in Congress. And they did not involve measures that exclude candidates from the ballot without reference to the candidates' support in the electoral process.

Id. at 83 5 (emphasis in original).

Applying the holding in *Term Limits,* the *Courts* in *Schaefer* and *Campbell* rejected the argument that a House candidate living out of state before the election could be barred in order to serve a state's interest in regulating the manner of elections. The Court in *Schaefer* began its analysis by declining to balance a state's interests in regulating elections and ordering the ballot with the interest in including properly eligible candidates: "The *Term Limits* Court rejected such a broad reading of the Elections Clause and held the balancing test inapplicable where the challenged provision supplemented the Qualifications Clause and did

not regulate a procedural aspect of an election or require a candidate to show a minimum level of support before running." 215 F.3d at 1038. The *Schaefer Court* then concluded that California's pre-election residency law "falls outside the scope of Elections Clause cases because it neither regulates the procedural aspects of election nor requires some initial showing of support." Id. Although California complained, as does RPT, that the result could be election of an ineligible nonresident, the Ninth Circuit nonetheless held that the law in question imposed a substantive requirement on candidates, was not a procedural rule, contravened the Qualifications Clause and was therefore unconstitutional. See *id*.

In *Campbell,* the Tenth Circuit also rejected the state's Elections Clause argument. Colorado relied on *Storer,* as RPT does here, see RPT Brief at 34, to analogize between its pre-election exclusion of nonresidents and the California disaffiliation rule upheld in *Storer,* but the Tenth Circuit held: "In contrast, here, Colorado's registration requirement does little to 'winnow out' chosen candidates, but rather completely *excludes* those who have not registered.. . The Colorado registration requirement does not advance ballot housekeeping by limiting access to the ballot based on electoral support; instead it limits access based on other

exclusionary measures. The State's reliance upon the Elections Clause is misplaced." 233 F.3d at 1233 (emphasis in original). [11]

In this case, as in *Term Limits, Schaefer* and *Campbell,* Benkiser's declaration "falls outside the scope of Elections Clause cases because it neither regulates the procedural aspects of election nor requires some initial showing of support." *Schaefer,* 215 F.3d at 1038. Instead, Benkiser's actions seek to "dictate [an] electoral outcome." *Term Limits,* 514 U.S. at 834. Removing the candidate who won the primary and replacing him with someone chosen by a four-member party committee could well affect the result of the general election one way or the other, and is not analogous to even-handedly applying a state law barring ballot access to all candidates who lack sufficient political support. Benkiser's conduct threatens the same class of candidates targeted in the laws struck down in *Schaefer* and *Campbell* -- those who live out of state prior to election day. Or, as the court put it in *Biener v. Calio*, 361 F.3d 206 (3d Cir.), *cert. denied, 543* U.S. 817 (2004), a decision RPT cites, Benkiser's decision turns on an attribute "inherent in the

---

[11] Notably, those who prevailed in the House's debate over seating McCreery in 1807 also recognized that the Elections Clause cannot justify a pre-election residency requirement. As Representative Key explained: "The State Legislatures may regulate the manner of holding elections. Now the manner of holding an election has no conexion with the previous residence or qualification of a candidate; but it implies that the election may be *viva voce*, by ballot, by districts for the convenience of the voters, or by the States in a general ticket." *The Founders Constitution* http://presspubs.uchicago.edu/founders/documents/al 2 2s 8. html.

candidate" – residency – not the operation of a neutral procedural regulation. Id. at 2 12; RPT Brief at 37-38 (citing *Biener).* While, in this case, the candidate in question has colluded in the declaration of ineligibility, next time the party chair may simply decide to utilize RPT's claimed "predictive" powers against an unwilling nominee to obtain a candidate the chair believes has a better chance at winning the general election, to favor one faction of the party over another, or for personal reasons. *See, e.g., Went-worth v. Meyer, 839* S.W.2d 766, 767 (Tex. 1992) (Republican party chair declared Republican candidate ineligible based on holding another office). However exercised, the power is not one merely regulating the "manner" of elections.

2. The State Interests Posited by RPT Do Not Constitutionally Justify Benkiser's Actions

RPT's version of the argument rejected in Term *Limits, Schaefer* and *Campbell* asserts that Texas has, under the Elections Clause, permissibly enacted a comprehensive scheme whereby a candidate may withdraw "or, if he is willing, to move out of state, which permits his political party to declare him ineligible and replace him as their nominee on the general election ballot." RPT Brief at 30. According to RPT, "the candidate may make this choice and make it for any reason." *Id.* at 3 1. "[T]he T exas Legislature has rightly determined that moving is

a good predictor that the candidate will no longer be eligible for office on election day," RPT argues, and predictive declarations of ineligibility are necessary to "further the State's goals of protecting the integrity of the election process by removing frivolous candidates from the ballot, of enhancing voter choice by ensuring that eligible candidates are on the general election ballot, and of protecting a political party's interest in being able to nominate an eligible candidate on the general election ballot." *Id.* at 29.

In the first place, it is important to reiterate that, as noted above, TDP does not challenge the constitutionality of Texas's withdrawal or eligibility laws. Even with regard to Congressional elections, TDP agrees that candidates could be declared ineligible if such determinations can be made before the election consistent with the Qualifications Clause. For example, there is no dispute that, if DeLay presented Benkiser with a birth certificate establishing conclusively that he would not be 25 by election day, she could declare him ineligible before November 7. Rather, the only difficulty arises where, as here, eligibility cannot be determined until the election because the text of Article I only requires inhabitancy "when elected." In that specific event, the Election Code's eligibility rules must be read and applied in harmony with the Constitution, which bars pre-election declarations of ineligibility based on non-inhabitancy.

Thus, it is too broad to say that the District Court ruled that § 145.003 violates the Constitution "as applied to candidates for office," RPT Brief at 23 – it held only that Benkiser's specific actions are unconstitutional in light of one aspect of the Qualifications Clause. It is similarly inaccurate to refer to § 145.003 or other portions of the Election Code as "challenged statutes" or "challenged provisions." RPT Brief at 27, 3 1, 4 1. TDP does not challenge the constitutionality of any law, only the particular and discrete manner in which Benkiser has attempted to apply § 145.003(f) in this case. Despite RPT's contentions, this case provides no occasion to seek out and resolve conflicts between state or federal law or prerogatives over elections. Indeed, TEX. ELECT. **CODE** § 14 1 .OO 1 (c) confirms Texas's intent to avoid imposing eligibility qualifications for federal candidates apart from those specified in the U.S. Constitution.[12]

As for the state interests RPT articulates, RPT substantially misreads the statutory scheme and purpose. Contrary to RPT's argument, §145.003(f) does not authorize predictive judgments of eligibility. As discussed more fully below, that provision allows determinations of ineligibility when a candidate "*is* ineligible," not when they might become ineligible. Thus, in *In re Jackson,* 14 S.W.3d 843

[12] **TEX. ELECT. CODE** § 141.001(c) provides: "Subsection (a) [prescribing eligibility requirements for state offices] does not apply to an office for which the federal or state constitution or a statute outside this code prescribes exclusive eligibility requirements."

(Tex. App. – Waco 2000), for example, the court makes clear that a party chair has "no fact-finding authority" and "may rely on a public record to administratively declare that a candidate is ineligible only when the record *conclusively establishes* the candidate's ineligibility." *Id.* at 848-49 (emphasis in original). The *Jackson* court specifically disallows ineligibility determinations on the basis of a "presumption" – there, as here, founded on a voting record. Likewise, RPT cites no legislative history or other authority for the proposition that ineligibility based on voluntarily relocating should be considered merely another form of candidate withdrawal.

Perhaps more importantly, since this is an as-applied challenge, the question is not whether the statutes RPT identifies generically serve certain interests, but whether Benkiser's challenged actions do. With regard to that more precise question, it is doubtful that the questionable tactics used to try to replace DeLay promote valid state interests. Initially, RPT argues that Benkiser's move averts the danger of frivolous candidacies. In Elections Clause jurisprudence, the term "frivolous," as applied to candidacies, refers to candidates unable to qualify for the ballot by demonstrating the requisite political support. *See,* e.g., *Anderson, 460* U.S. at 788 n. 8 (collecting cases). There is nothing frivolous in this respect about DeLay's candidacy. He is a powerful incumbent who won his party's primary

election with 62% of the vote. His party's chairman believes he will win again if he is on the ballot. His recent public comments suggest he is eager to plunge back into the fray and resume the campaign. His campaign offices remain open. DeLay's campaign has never been "frivolous" within the true meaning of the Elections Clause cases, nor will it be if he remains on the ballot.

RPT evidently means that DeLay's candidacy would be "frivolous" because he could not or would not serve if elected, see RPT Brief at 33, but there is no guarantee of that either. "People's lives do change," RPT counsel recognized, and if DeLay remains on the ballot he may just as well clarify his Texas inhabitancy and resume the campaign, as his recent public statements imply. By January, when the new Congress will be seated, DeLay could easily have reevaluated whatever political, legal or personal factors led him to resign in April 2006 – which by then will be nearly a year in the past. Calling DeLay's candidacy "frivolous" is nothing more than what the district court meant by a "speculative determination." (R. 494).

At worst, if DeLay remains on the ballot, prevails and resigns or is declared ineligible by the House, see U.S. **CONST., ARTICLE** I, § 5, he would be replaced in a special election – the unfortunate result of RPT's tactics. See **TEX. ELECT. CODE** §§ 145.005(b), 201.028, 204.021. Special elections surely cause administrative

expense, but they occur from time to time and hardly justify restricting ballot access by declaring a candidate who won his party's primary ineligible. See, e.g., *In re Francis*, 186 S.W.3d 534, 542 (Tex. 2006) ("access to the ballot lies at the very heart of a constitutional republic"); *Tashjian*, *479* U.S. at 218 (expense of administering elections cannot justify abridging fundamental constitutional rights). In Texas, eligibility rules are strictly construed in favor of eligibility, *see Francis*, 186 S.W.3d at 542, and contrary to RPT's position, there is no indication that Texas has any "state interest" in voiding legitimate primary results for no other reason than to avert the possibility of a special election.

The two other "state interests" RPT offers in support of Benkiser's actions – "enhancing voter choice by ensuring that eligible candidates" are on the ballot and "protecting a political party's interest in being able to nominate an eligible candidate" – are simply restatements of the same goal: having an eligible rather than a "frivolous" candidate. But again, it may be questioned whether voter choice or even Republican partisan interests are truly advanced by Benkiser's actions. As the district court held: "Were the Court to adopt Defendant's position, either political party could and would be able to change candidates after the primary election and before the general election simply by an administrative declaration of ineligibility by the party chair based on a candidate's 'move' to another state." (R.

497). RPT argues boldly that this sort of conduct has been happily and knowingly "authorize[d]" by Texas law, see RPT Brief at 30, but the district court properly recognized that it "would be a serious abuse of the election system and a fraud on the voters, which the Court will not condone." *Id.* The Court below also found that the declaration of ineligibility was concocted to evade the rules barring replacement of candidates who withdraw after the primary – a result "the Texas Legislature foresaw and attempted to prevent" by barring withdrawal in these circumstances. (R. 488).

Ultimately, Benkiser proposes to use a dubious eligibility determination to replace a nominee overwhelmingly selected by Republican primary voters with someone hand-picked by a committee of four party officials. Far from serving the important value of voter choice, "[t]his sort of game-playing by party officials harkens a return to the days of political bosses and smoke-filled rooms, when the ordinary voter was effectively shut out of the decision-making process." *Wentworth,* 839 S.W.2d at 772 (Mauzy, J.) (describing party chairman's declaration of candidate's ineligibility despite past certifications of eligibility when allegedly disqualifying facts were known).

In sum, Benkiser's actions cannot be rendered constitutional by calling them "merely part of the nomination process." RPT Brief at 3 5. Far from a benign

procedural regulation governing the "manner" of elections, they threaten to dictate an electoral outcome in violation of the Qualifications Clause unless this Court affirms the decision below.

III. Benkiser's Actions Also Violate Texas State Law

This Court should also affirm on the independent ground that Benkiser's actions violate the Texas Election Code, irrespective of their constitutionality.

Even if RPT is correct that Benkiser's actions do not effectively impose "a de *facto* in-state residency requirement in violation of the United States Constitution," (R. 496), they are still clearly illegal under state law. **TEX. ELECT. CODE** § 145.003(f)(2) requires ineligibility to be "conclusively established" by a public record. But the district court was "not convinced that [the public records on which Benkiser relied] conclusively establish DeLay's ineligibility. There is simply no evidence before the Court that DeLay is ineligible under the United States Constitution and certainly no conclusive evidence that DeLay will be ineligible on November 7, 2006." (R. 492). Since DeLay's eligibility turns on Texas inhabitancy "when elected," (even if constitutionally determinable now), Benkiser would have to have relied on public records conclusively establishing that DeLay will not be an inhabitant of Texas on November 7. But Benkiser herself

conceded that the Virginia driver's license, voter's registration and tax withholding form DeLay provided flunk that elementary test:

> The Court: . . . What document do you have in Exhibit 17 that shows conclusively Mr. DeLay's whereabouts in November of 2006?
>
> The Witness: There's nothing – there's no public document in this package that indicates that.

(Tr. 57). The district court was therefore correct in holding that Benkiser violated Section § 145.003(f)(2).

There is also a second sense in which Benkiser's determination violates Section § 145.003(f)(2). That provision permits declarations of ineligibility when public records conclusively show that a candidate "***is*** ineligible." *Id.* (emphasis added). Given the present tense of the Code's text, a candidate may not be subject to a declaration under §145.003(f) merely if he or she ***will become*** ineligible; the candidate's ineligibility must exist presently. As discussed throughout, there is no way DeLay can be ineligible until election day, since eligibility in this context derives from the Qualifications Clause, which requires in-state inhabitancy only "when elected." At most, DeLay may become ineligible – he could not have been ineligible on June 7, 2006, when Benkiser made the declaration challenged herein. Thus, not only does the Constitution bar predictive determinations of ineligibility,

§145.003(f)(2) does also. *See Jackson*, 14 S.W.3d at 848-49 (ineligibility cannot be based on presumption); *accord Francis*, 186 S.W.3d at 542 (Code construed to favor eligibility). RPT fully acknowledges throughout its brief in this Court that Benkiser acted "predictive[ly]." See, e.g., RPT Brief at 29, 40. Since predictive declarations are not authorized by the text of Section 145.003(f)(2), this is another respect in which Benkiser violated Texas state law.

While the district court did not identify Benkiser's violations of §145.003(f) as an independent basis for granting TDP's requested relief, it unmistakably made the factual findings compelling this conclusion. Moreover, as RPT notes in its brief, affirmance may be had on any ground. See RPT Brief at 24. Accordingly, this Court should affirm on the basis that Benkiser's challenged conduct violated Texas state law, irrespective of its constitutional difficulties.

IV. The District Court Properly Granted TDP's Request for an Injunction

RPT's final point on appeal is that the District Court erred in concluding that the injunction requested by TDP is in the public interest. According to RPT, the injunction thwarts the right of District 22 "voters [to] have a real choice on the ballot," RPT Brief at 41. It argues that the injunction contravenes "the public's interest in having competitive elections and ballot choice," *id.*, but it also

acknowledges that the district court's grant of injunction relief is reviewed for abuse of discretion. See *id*. at 24.

The district court correctly understood the actual public interests at stake in this case. The court below found that Benkiser and DeLay cooperated in cooking up a "move" to Virginia that may or may not have actually occurred – leaving his wife behind in their longtime Sugarland home if it did – for the sole purpose of avoiding the clear requirements of TEX. **ELECT. CODE** § 145.036, which precludes replacement on the ballot if DeLay simply withdrew, as he no doubt otherwise would have.

The effect of this legerdemain is to throw out the votes of primary voters who thought they had duly selected the Republican nominee. Instead, Benkiser and RPT hope a committee of four party operatives will install a better candidate on the general election ballot. How RPT can argue that this charade serves the public interest in any but a "whimsical form of democracy" is baffling. *Francis*, 186 S. W.3d at 541. Rather, the district court correctly labeled it a "serious abuse of the election system and a fraud on the voters." (R. 497). Indeed, RPT's surprising description of how the Code should properly operate in its brief to this Court is cause for even greater concern, since it appears to believe that the Code invites parties to persuade Congressional primary victors "willing to move out of

state" to skedaddle over the border so party committees can quickly replace them with better candidates unsullied in the primaries and untroubled by the need to obtain their place on the ballot through election. It takes little imagination to visualize the possibilities for abuse in this conception of the Code, and the meaningless exercises party primaries would soon become. RPT is undoubtedly correct that fostering voter choice is in the public interest, but such choice is not enhanced when primary votes are tossed aside in favor of "game-playing by party officials... political bosses and smoke-filled rooms." *Wentworth, 839* S.W.2d at 772 (Mauzy, J.); *accord* U.S. v. *Classic,* 3 13 U.S. 299, 3 16-17 (1941) (voting rights in primary elections "one of the great purposes of our Constitutional scheme of government" no less than in general elections).

RPT also argues that the injunction disserves the public interest in "competitive elections." RPT Brief at 41. In the first place, RPT again ignores that DeLay, an eleven-term incumbent running in a district he is widely credited with helping to shape, would surely be a competitive candidate if, as appears likely, he chooses to remain in the race. More important, competitive elections are fostered by treating rival parties and candidates fairly and equally. Giving one party the advantage of ignoring its primary results and parachuting in a new and improved candidate just as the general election picks up steam does not promote

competition, it tilts the playing field and in some races could amount to picking winners. As Benkiser testified, the Election Code strives to treat the parties equally. (Tr. 18); *accord Francis*, 186 S.W.3d at 541 ("it would be inconsistent with the purposes of the Code if some candidates but not others get an opportunity to cure defects"). Compromising this interest by forcing one party to throw out its original campaign and start from scratch against a new opponent promotes inequity, not fair electoral competition.

In sum, far from compromising the public interests in vindicating voters' rights and ensuring competitive elections, the injunction issued by the district court promotes them. Because the district court did not abuse its discretion in granting the injunction, this Court should affirm.

CONCLUSION

This Court should affirm the judgment of the district court.

Dated this 21st day of July, *2006.*

TEXAS DEMOCRATIC PARTY

By: /s/ Martin J. Siegel
Martin J. Siegel

Chad W. Dunn **– Lead Counsel**
General Counsel
420 1 FM 1960 West, Suite 550
Houston, Texas 77068
Telephone: (28 1) 580-63 10
Facsimile: (28 1) 580-6362

Martin J. Siegel
Mikal C. Watts
Watts Law Firm
The Esperson Buildings
8 15 Walker St.
Houston, Texas 77002
Telephone: (713) 225-8628
Fax: (713) 225-0566

Cristen D. Feldman
Crews & Elliott
Building 3, Suite 200
460 1 Spicewood Springs
Austin, Texas 78759
Telephone: (5 12) 346-7077
Fax: (5 12) 342-0007

Dicky Grigg
Spivey & Grigg, L.L.P.
48 East Avenue
Austin, Texas 78701
Telephone: (5 12) 474-606 1
Fax: (5 12) 474-8035

ATTORNEYS FOR PLAINTIFFS-APPELLEES

CERTIFICATE OF SERVICE

I, Chad W. Dunn, certify that today, July 21, 2006, a copy of the above Response to Motion to Expedite, was served upon the following persons at the following addresses by first class mail and e-mail.

James Bopp, Jr.
Raeanna S. Moore
Bopp, Coleson & Bostrom
1 South 6th Street
Terre Haute, IN 47807-35 10

/s/ Chad W. Dunn
Chad W. Dunn

CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7(c), undersigned counsel certifies that this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b).

1. Exclusive of the portions exempted by 5TH CIR. R. 32.2.7(b)(3), this brief contains 13,722 number words printed in a proportionally spaced typeface.

2. This brief is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes produced by Microsoft Word XP software.

3. Upon request, the undersigned counsel will provided an electronic version of this brief and/or a copy of the word printout to the Court.

4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5TH CIR. R. 32.2.7, may result in the Court's striking this brief and imposing sanctions against the person who signed it.

By: /s/ Martin J. Siegel
Martin J. Siegel

NO. 06-50812

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS DEMOCRATIC PARTY AND BOYD L. RICHIE,
in his capacity as Chairman of the Texas Democratic Party,

Plaint@-Appellees,

v.

TINA J. BENKISER,
in her capacity as Chairwoman of the Republican Party of Texas,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas

SUPPLEMENTAL BRIEF OF APPELLEES

Chad W. Dunn
General Counsel
Texas Democratic Party
4201 FM 1960 W., Suite 530
Houston, Texas 77068
(281) 580-63 10

Cristen D. Feldman
Crews & Elliott
Building 3, Suite 200
460 1 Spicewood Springs
Austin, Texas 78759
(5 12) 346-7077

Martin J. Siegel and Mikal C. Watts
Watts Law Firm, LLP
815 Walker St., Suite 1600
Houston, Texas 77002
(7 13) 225-0500

Dicky Grigg
Spivey & Grigg, L.L.P.
48 East Avenue
Austin, Texas 78701
(5 12) 474-6061

COUNSEL FOR APPELLEES

No. 06-508 12

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS DEMOCRATIC PARTY AND BOYD L. RICHIE,
in his capacity as Chairman of the Texas Democratic Party,
Plaintiffs-Appellees,

v.

TINA J. BENKISER,
in her capacity as Chairwoman of the Republican Party of Texas,
Defendant-Appellant.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Texas Democratic Party, Plaintiffs-Appellees.

2. Boyd L. Richie, in his capacity as Chairman of the Texas Democratic Party, Plaintiffs-Appellees.

3. Tina J. Benkiser, in her capacity as Chairwoman of the Republican Party of Texas, Defendant-Appellant.

4. Republican Party of Texas and its affiliated local organizations, because the injunction against its Chair has a direct impact on their ability to place a candidate on the ballot for Texas Congressional District 22.

5. Roger Williams, Secretary of State, State of Texas, enjoined by district court order, though not a party to this action.

6. Thomas D. DeLay.

7. Nick Lampson.

TEXAS DEMOCRATIC PARTY

By: /s/ Martin J. Siegel
Martin J. Siegel

Chad W. Dunn – **Lead Counsel**
General Counsel
4201 FM 1960 West, Suite 550
Houston, Texas 77068
Telephone: (28 1) 580-63 10
Facsimile: (28 1) 580-6362

Martin J. Siegel
Mikal C. Watts
Watts Law Firm
The Espersen Building
815 Walker St.
Houston, Texas 77002
Telephone: (7 13) 225-8628
Fax: (713) 225-0566

Cristen D. Feldman
Crews & Elliott
Building 3, Suite 200
4601 Spicewood Springs
Austin, Texas 78759
Telephone: (5 12) 346-7077
Fax: (5 12) 342-0007

Dicky Grigg
Spivey & Grigg, L.L.P.
48 East Avenue
Austin, Texas 78701
Telephone: (5 12) 474-606 1
Fax: (512) 474-8035

ATTORNEYS FOR PLAINTIFFS-APPELLEES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

Miscellaneous:

PRELIMINARY STATEMENT

Plaintiffs-Appellees the Texas Democratic Party and Boyd L. Ritchie, in his capacity as Chairman of the Texas Democratic Party (collectively "TDP"), respectfully submit this supplemental brief to address the arguments of *amici* Texas Secretary of State Roger Williams and Wallace for Congress ("Wallace"). Because *amici's* briefs were filed one day before TDP's expedited deadline to file its main brief, TDP had no opportunity to respond to these arguments in that submission. *Amici* present various arguments urging reversal, many of which echo arguments made by Defendant-Appellant (Benkiser or "RPT"), but some of which are distinct.

SUMMARY OF ARGUMENT

Initially, Williams argues that the district court held **TEX. ELECT. CODE** § 145.003 unconstitutional, and that it ignored well-established canons of construction in doing so. In fact, the district court did not hold the statute unconstitutional but merely held Benkiser's application of the law in this instance to be so. Nor did the district court run afoul of the rule requiring statutes to be saved where possible, as Williams claims.

Amici also argue that Benkiser's actions are permissible under the Elections Clause. Williams claims that states may make eligibility determinations regarding Congressional candidates under the applicable precedents, but these decisions

involve only eligibility based on sufficient political support, not inhabitancy or other qualifications. Moreover, Williams is wrong that Benkiser's actions do not target a class of candidates; they affect all persons with out of state connections who party chairs may, at their whim, predictively declare ineligible before the election if Benkiser's interpretation of the Code is ratified. For his part, Wallace argues that DeLay could still be a write-in candidate, but that is incorrect under the Texas Election Code and, more important, irrelevant to whether Benkiser's declaration imposes an additional qualification to serve.

Amici urge the Court to apply the decision in *Jones v. Bush,* 122 F. Supp. 2d 713 (N.D. Tex. 2000), to this appeal, but that case did not involve determining *when* a candidate must intend to inhabit a state in order to be eligible for the House, which is the issue here; it merely discussed the definition of "inhabitant." As such, it is irrelevant to this appeal.

Finally, Wallace is incorrect that Benkiser's declaration is not unconstitutional under *Schaefer v. Townsend,* 215 F.3d 1031 (9th Cir. 2000), *cert. denied,* 532 U.S. 904 (2001). And Williams is incorrect that the district court lacked power to enjoin it because he was not a party below. This Court should therefore affirm.

ARGUMENT

I. TDP Does Not Claim and the District Court Did Not Hold that Section 145.003(f) is Unconstitutional

Initially, Williams claims that this appeal involves whether TEX. ELECT. CODE § 145.003 is unconstitutional: "Since the express terms of § 145.003.. . authorize administrative determination of eligibility prior to election day, the necessary effect of the court's ruling is to declare that portion of the Election Code unconstitutional." Williams Brief at 9.

As TDP makes clear in its main brief, it is simply wrong to characterize the decision below as holding that § 145.003 is unconstitutional. See TDP Brief at 41, 48; (R. 496) (Decision referring to Benkiser "*construing*" the Code, and declaration of ineligibility as "unconstitutional *application* of state law") (emphases added). The decision reaches one action by one official on one particular set of facts – nowhere does it state that § 145.003 is facially deficient or incapable of constitutional application in other circumstances. "If a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances where it is not unconstitutional.. . [T]he constitutional inquiry in an as-applied challenge is limited to the plaintiff's particular situation." *Medical Prof. Corp. v. Voinovich,* 130 F.3d 187, 193 (6th Cir. 1997). TDP agrees

that party chairs could exclude ineligible Congressional candidates based on other facts, and gives one such example in its brief. See TDP Brief at 48.

Williams also argues that the district court ignored the canon of statutory construction dictating that statutes should be given constitutional constructions wherever possible. See Williams Brief at 12-13. That canon grows from the respect courts owe to legislative enactments and the assumption that legislatures fulfill their oaths to uphold the Constitution no less than *courts. See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg and Constr. Trades Council, 485 U.S.* 568, 575 (1988). It cannot seriously be argued that the isolated choices of political party officials – decisions inevitably infected with the momentary exigencies of partisan politics – deserve the sort of deference traditionally given Congressional or state legislative enactments.

Indeed, it was Benkiser who was duty-bound to construe and apply § 145.003(f) in harmony with the U.S. Constitution and avoid action that directly offends the express text of the Qualifications Clause. See *Puerto Rico v. Branstad,* 483 U.S. 219, 228 (1987) ("It would be superfluous to restate all the occasions on which this Court has imposed upon state officials a duty to obey the requirements of the Constitution"). Williams asserts that "nothing in 145.003 purports to create additional eligibility requirements," Williams Brief at 18, and TDP fully agrees, The imposition of additional requirements is a product of Benkiser's declaration,

not the text of state law. To the degree that constitutional questions must be faced in this matter, *see DeBartolo Corp.*, 485 U.S. at 575 (canon Williams cites based in part on "the prudential concern that constitutional issues not be needlessly confronted"), that is Benkiser's fault, not the district court's.

II. Amici's Arguments Based on the Elections Clause Are Unavailing

Like RPT, *amici* argue that Benkiser's declaration is permissible under the Elections Clause. While this argument is addressed in TDP's main brief, some of the specific points *amici* make deserve response.

A. Williams's Arguments

Williams quotes excerpts from the Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Storer* v. *Brown*, 415 U.S. 724 (1974) and claims: "Thus, Supreme Court precedent expressly contemplates state election code provisions concerning the determination of the eligibility of candidates for the House of Representatives." Williams Brief at 15. However, *Anderson*, *Storer* and the prior decisions they cite deal primarily with state laws requiring candidates to show some level of support for ballot access and claimed discrimination against independents and minor party candidates. See 460 U.S. at 788 and n. 9; 415 U.S. at 730. Tellingly, *amici* cite no decision involving states determining "the eligibility of candidates for the House of Representatives" outside of that limited

context. Here, Benkiser's conduct targets a candidate based on inhabitancy, not insufficient political support or status as a non-major party candidate.

Williams also argues that, "[b]ecause § 145.003 applies generally to any and all candidates, regardless of party, it is even-handed and does not 'handicap' any class of candidate." Williams Brief at 16. This may be true of § 145.003, but it is not true of Benkiser's determination, which is what TDP challenges. While Benkiser's decision was specific to one candidate, it could be duplicated by either party in the future to bar other candidates on the bases of their ties to other states months before election day. (R. 497) (Decision, noting both parties' abilities to "abuse. . . the election system" if RPT's position prevails). If a candidate has run afoul of the party chair and happens to maintain a house or hunting license in another state, that candidate could be predictively declared an out-of-state inhabitant and found ineligible in Texas if Benkiser's use of § 145.003 is correct. Once Benkiser's decision is judicially ratified, the entire class of potential Congressional candidates who actually or just arguably reside outside of Texas at some time before election day will be fair game for predictive, pre-election disqualification. This is the same class – inhabitants of other states prior to the election – that the Ninth and Tenth Circuits held were targeted by the state laws requiring pre-election residency in *Schaefer v. Townsend,* 215 F.3d 1031 (9th Cir.

2000), *cert.* denied, 532 U.S. 904 (2001) and *Campbell v. Davidson, 233* F.3d 1229 (10th Cir. 2000), *cert. denied, 532* U.S. 973 (2001). [1]

Williams also conjures the hypothetical of a candidate serving a life sentence out of state and asks whether such a person could be declared ineligible by state authorities before the election. See Williams Brief at 19. Of course, the extreme nature of this hypothetical only highlights how different it is from the present case. DeLay is not physically restrained from residing in Texas on November 7. He and Benkiser both conceded that, unlike the hypothetical prisoner-candidate, it is impossible to predict where he would live then. See TDP Brief at 10-12. Both agreed he could be in Texas. See *id.* Moreover, whereas evidence of involuntary incarceration for life might at least be "conclusive evidence" under § 145.003 of the state a candidate would inhabit at the time of the election, Benkiser conceded such evidence is lacking here when she admitted that the records she relied on to exclude DeLay did not relate to where he will reside in November. See *id.* [2]

---

[1] Williams also cites a candidate's ability to administratively challenge a declaration of ineligibility and remain on the ballot while the challenge is being heard. See Williams Brief at 16 (citing **TEX. ELECT. CODE** § 145.004). A candidate's ability to contest an unconstitutional qualification does not cure the constitutional problem, however, any more than other unconstitutional state actions are somehow immunized by the ability of their victims to sue in federal court. Williams confuses the provision of a forum with the provision of an actual remedy or, better yet, forgoing the illegality in the first place.

[2] Williams's hypothetical is not only irrelevant to the present case, it is wrong on its own terms. Under the Qualifications Clause, prisoners do not necessarily inhabit the states where they are incarcerated. See Jack Maskell, *Congressional Candidacy, Incarceration, and the Constitution's Inhabitancy Qualification,* Cong. Research Serv. Report, Order Code RL3 1532,

In any event, the ultimate response to farfetched hypotheticals of this sort is the power of the House of Representatives to adjudge the qualifications of its members. Under Article I, § 5, the House excludes persons elected but ineligible to serve. *See Powell v. McCormack*, *395* U.S. 486, 523 (1969). Because the Framers understood that ineligible persons may occasionally win election, the Constitution provides a mechanism to ensure they do not serve. And through the years, the House has refused to seat persons ineligible to serve. See *id.* at 541-47 (discussing exclusion proceedings in House) Thus, restraining state officials' predictive exclusions of candidates based on inhabitancy before the election in light of Article I's "when elected" language is not "absurd" even if the candidate proves ineligible, Williams Brief at 19 – it simply means that, in rare cases, ineligible winners will be excluded by the House.

B. Wallace's Arguments

Wallace argues that DeLay's exclusion does not amount to imposing a pre-election residency requirement because DeLay could still be a write-in candidate. See Wallace Brief at 6-8. In fact, under the Election Code, Benkiser's declaration of DeLay's ineligibility precludes any possibility of his being elected as a write-in candidate. See **TEX. ELECT. CODE** § 146.022 (write-in votes not counted unless

August 12, 2002, at CRS-8 (incarceration out-of-state only one factor in determining convict's inhabitancy under Qualifications Clause; "The involuntary nature of the relocation to another State would, in fact, significantly militate against a finding that such person intended to abandon his inhabitancy and residency in the first State").

candidate names appear on list of write-in candidates); § 146.030(2) (candidate cannot be certified for placement on list of write-in candidates if ineligible).[3]

Moreover, using the test articulated in *Hopfmann v. Connolly, 746* F.2d 97 (1st Cir. 1984), as Wallace urges, and asking whether DeLay could be elected as a write-in candidate despite the declaration is questionable outside of the particular context of ballot exclusions based on insufficient political support. As Wallace forthrightly notes, the Supreme Court in *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779 (1995) observed that write-in candidates lack an equal chance at success and rarely succeed, see *id.* at 832 n. 45, and did not save the term limits provisions on the basis that excluded candidates still had ballot access via write-in votes. See *id.* at 836; Wallace Brief at 7 n. 2. Rather, Wallace's argument appears to derive from the dissent in *Term Limits. See id.* at 836 and 9 17-21.

In *Schaefer v. Townsend,* 215 F.3d 1031, 1038 (9th Cir. 2000), *cert. denied,* 532 U.S. 904 (2001), the Ninth Circuit held that exclusion of nonresident candidates "falls outside the scope of Elections Clause cases because it neither regulates the procedural aspects of elections nor requires some initial showing of support." Because this test is adapted directly from *Term Limits,* postdates the

---

[3] Wallace repeatedly characterizes TDP's interest in this case as the interest in "choosing its opponent." See, e.g., Wallace Brief at 2. In fact, it is the interest in having a party's primary voters, not its opponent, choose the nominee. RPT's voters chose DeLay, and both they and RPT's opponent should be entitled to assume that choice will be honored without what the district court called "a serious abuse of the election system and a fraud on the voters." (R. 497).

lower court decisions Wallace cites, and was applied by the Ninth Circuit in a context much closer to the case *sub judice (i.e.,* the exclusion of non-resident candidates), its application is more appropriate here. And since Benkiser's declaration neither regulates election procedures nor simply requires an initial showing of political support for placement on the ballot, but has the effect of predictively excluding non-resident candidates, it cannot be rendered constitutional by the Elections Clause.

III. Jones v. *Bush* Is Inapposite

Amici, and Williams in particular, rely heavily on the decision of the district court for the Northern District of Texas in *Jones v. Bush,* 122 F. Supp. 2d 713 (N.D. Tex. 2000). See Williams Brief at 19-23, Wallace Brief at 12-13.[4] This reliance is misplaced.

Jones involved a challenge to then-candidate Richard Cheney's alleged residence in Texas. Had the court concluded Cheney was a Texas inhabitant, he could not have served as Vice President under the Twelfth Amendment. See U.S. Const., amend. XII. Thus, in determining which state Cheney inhabited, the court concluded that one inhabits a state within the meaning of the Twelfth Amendment if he or she has a physical presence within the state and intends it to be his or her

[4] This Court affirmed the district court's decision in *Jones v. Bush, see 244* F.3d 134 (5th Cir. 2000), but because no opinion was written and the affirmance was not published, it has no precedential value. See 5th Cir. Rule 47.5.

place of habitation. *Id.* at 719. Because the court used a standard that depends in part on the candidate's intent, *amici* argue that it is "predictive in nature" and that records generated before an election may establish the intent to stay in a state through the election. Williams Brief at 22.

Jones is simply irrelevant to this appeal. The court in *Jones* did not purport to consider *when* inhabitancy must be tested, which is the pivotal question here in light of the Qualifications Clause. *Jones* may correctly hold that determining where someone inhabits requires examining his or her intent, but this appeal concerns *when* that intent must exist – "when elected," as provided in the Qualifications Clause, or months earlier. That question was in no way at issue in *Jones.* For example, DeLay presumably intended to inhabit Texas when he affirmed under oath in his December 2005 application to run in the primary that he would be eligible to serve in Congress. (Plaintiff's Trial Exhibit 8). Now, he claims to have changed that intent, but he and Benkiser both testified that his intent could change yet again before election day. The district court concluded that the three records Benkiser used to issue her declaration do not reflect intent as of November 2006 – at most they reflect present intent. *Amici* fail to show how this conclusion errs. Because DeLay's and Benkiser's testimony so obviously undercuts RPT's legal position, Williams is moved to characterize it as "less than clear," Williams Brief at 23 n. 8, but it was actually unambiguous: the three

records at most establish only DeLay's current inhabitancy, while no evidence conclusively establishes his inhabitancy as of November, as Benkiser freely admitted.

Nor are DeLay's "actual or implied representations as to his residence at the time in question" helpful to RPT's and *amici's* cause, as Wallace contends. Wallace Brief at 13 (quoting *McClelland v. Sharp*, *430* S.W.2d 518 (1968)). The district court found and Benkiser admitted that even DeLay's letter transmitting the public records she relied on did not conclusively establish his inhabitancy as of election day, (R. 10-l 1, 495), and the transmittal letter is not a "public record" that could be used to declare DeLay ineligible under § 145.003(f)(2) in any case. *Amici's* position would permit a candidate to drive from Texas to Louisiana, send a letter back indicating an intent to stay, have the party chair make a declaration of ineligibility based on the candidate's then-expressed intent, and then return to Texas sometime later after or even before a replacement was named.

In sum, even if *Jones* is correctly decided, it is irrelevant to this appeal since (i) the Qualifications Clause requires examination of inhabitancy-related intent "when [the candidate] is elected," and (ii) no evidence conclusively establishes DeLay's intent as of then.

IV. Benkiser's Declaration is Unconstitutional Under the Holding of *Schaefer*

Wallace argues that, even under the holding of *Schaefer*, on which TDP relies, Benkiser's actions pass muster. See Wallace Brief at 14-16. First he claims that "Benkiser was not predicting future ineligibility," id. at 14, but in her brief Benkiser expressly acknowledges "the predictive nature" of her declaration. RPT Brief at 40. To Wallace, "DeLay's ineligibility" was established by the records Benkiser reviewed, Wallace Brief at 14, but as TDP argues in its main brief, DeLay cannot be ineligible based on inhabitancy until election day, given the plain text of the Qualifications Clause. See TDP Brief at 38. At most, DeLay may become ineligible – he is not ineligible now. See *id*.

Wallace then claims that, even if this Court applies *Schaefer* as TDP urges, Benkiser's actions are still permissible because "it is neither the statute nor Benkiser's declaration that creates a bar to eligibility, but the willful act of an incumbent candidacy." Wallace Brief at 15. But DeLay could not and did not declare his own ineligibility. The only party with the statutory authority to initiate his replacement on the ballot is Benkiser, and the district court held that she colluded with DeLay to bring about this result.

Wallace also cites *dicta* in *Schaefer* to the effect that California could require candidates to file attestations that they will be inhabitants when elected.

See Wallace Brief at 15 (quoting *Schaefer*, 215 F.3d at 1038). He then claims that Texas does not require this, but that the statement in *Schaefer* indicates that "relying on sworn testimony" that a candidate will not reside in-state "cannot constitute an unconstitutional qualification addition." Id. at 16.

Wallace again has the facts wrong, however. DeLay actually did give such an attestation when he applied to be a candidate in the primary in December 2005 and swore under oath that he was "eligible to hold such office under the Constitution" – meaning necessarily that he would inhabit Texas when elected. See TDP Brief at 5; Plaintiff's Trial Exhibit 8. It is also inaccurate to say that Benkiser "rel[ied] on sworn testimony" to eject DeLay from the ballot; she actually based her decision on three records she herself admitted did not relate to where DeLay would live in November. That a state may require some attestation of eligibility, as actually occurred here, does not speak to whether it may remove a candidate from the ballot months later on the basis of evidence it concedes establishes only pre-election residence.

V. The District Court Properly Enjoined the Secretary of State

Finally, Williams argues that the district court improperly enjoined him because he was not a party below. See Williams Brief at 3 l-32. While it is generally true that courts cannot enjoin non-parties, see *id.*, *accord Additive*

Controls & Measurement Systems, Inc. v. Flowdata, Inc., *96* F.3d 1390 (5th Cir. 1996), there are two clear exceptions, both of which apply here.

First, under Fed. R. Civ. P. 65(d), non-parties can be enjoined from participating with parties in committing proscribed conduct as long as they "receive actual notice of the order by personal service or otherwise." Here, Williams has been served with the injunction, and what is enjoined is his participation with Benkiser in replacing DeLay on the ballot. Thus, the injunction is lawful under Rule *65. See, e.g., Remington Rand Corp.-Delaware v. Bus. Sys. Inc.*, 830 F.2d 1274, 1275 (3d Cir. 1987) (referring to questions regarding enjoining non-parties "*absent service* of *process* or personal jurisdiction over that non-party") (emphasis added). Indeed, even the authority Williams cites, *Alemite Mfg. Corporation* v. *Staff*, 42 F.2d 832 (2d Cir. 1930), which predates the Federal Rules of Civil Procedure, holds that a court can enjoin non-parties "over whom it gets personal service" because, once served, the non-party can appear, have his or her day in court and contest the injunction. *Id.* at 833. Here, of course, the Secretary of State was aware of the proceedings, supplied an *amicus* letter to the court, and, once served with the injunction, could have appeared to contest it by means of a motion for reconsideration or otherwise. Williams chose not to do so.

Second, "[t]he power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action

or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice." U.S. v. New *York Tel. Co., 434* U.S. 159, 174 (1977). Under the All Writs Act, 28 U.S.C. § 1651(a), courts may "enjoin and bind non-parties to an action when needed to preserve the court's ability to reach or enforce its decision in a case over which it has proper jurisdiction." *U.S. v. Int'l Broth. of Teamsters, U.S. v. Int'l Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., AFL-CIO, 266* F.3d 45, 50 (2d Cir. 2001); *accord In re Lease Oil Antitrust Litig. No. II, 48* F. Supp. 2d 699, 704 (S.D. Tex. 1998). In this case, Williams may be "in a position to frustrate the implementation of [the district court's] order," *New York Tel., supra,* by taking steps on his own or with tacit encouragement from RPT to replace DeLay on the ballot. Thus, the All Writs Act supports the injunction because ensuring that Williams does not take such action is necessary to fully "preserve the court's ability to reach or enforce its decision" enjoining Benkiser. *Int'l Broth. of Teamsters, supra.*

CONCLUSION

This Court should affirm the judgment of the district court.

Dated this 25th day of July, 2006.

TEXAS DEMOCRATIC PARTY

By: /s/ Martin J. Siegel
Martin J. Siegel

Chad W. Dunn – **Lead Counsel**
General Counsel
4201 FM 1960 West, Suite 550
Houston, Texas 77068
Telephone: (28 1) 580-63 10
Facsimile: (28 1) 580-6362

Martin J. Siegel
Mikal C. Watts
Watts Law Firm
The Esperson Buildings
815 Walker St.
Houston, Texas 77002
Telephone: (713) 225-8628
Fax: (7 13) 225-0566

Cristen D. Feldman
Crews & Elliott
Building 3, Suite 200
460 1 Spicewood Springs
Austin, Texas 78759
Telephone: (5 12) 346-7077
Fax: (512) 342-0007

Dicky Grigg
Spivey & Grigg, L.L.P.
48 East Avenue
Austin, Texas 78701
Telephone: (5 12) 474-606 l
Fax: (512) 474-8035

ATTORNEYS FOR PLAINTIFFS-APPELLEES

CERTIFICATE OF SERVICE

I, Chad W. Dunn, certify that today, July 25, 2006, a copy of the above Response to Motion to Expedite, was served upon the following persons at the following addresses by first class mail and e-mail.

James Bopp, Jr.
Raeanna S. Moore
Bopp, Coleson & Bostrom
1 South 6th Street
Terre Haute, IN 47807-35 10

/s/ Chad W. Dunn
Chad W. Dunn

CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7(c), undersigned counsel certifies that this brief complies with the type-volume limitations of 5TH CR. R. 32.2.7(b).

1. Exclusive of the portions exempted by 5TH CIR. R. 32.2.7(b)(3), this brief contains 3,608 words printed in a proportionally spaced typeface.

2. This brief is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes produced by Microsoft Word XP software.

3. Upon request, the undersigned counsel will provided an electronic version of this brief and/or a copy of the word printout to the Court.

4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5TH CIR. R. 32.2.7, may result in the Court's striking this brief and imposing sanctions against the person who signed it.

By: /s/ Martin J. Siegel
Martin J. Siegel

MARTIN J. SIEGEL

BIOGRAPHY

Martin J. Siegel was born and raised in Houston. He earned a B.A., Highest Honors, from The University of Texas at Austin in 1988, where he majored in the Plan II Liberal Arts Honors Program and graduated *Phi Beta Kappa.*

Siegel received his law degree, *Cum Laude*, from Harvard Law School in 1991. Following law school, he served as law clerk to the Honorable Irving R. Kaufman on the United States Court of Appeals for the Second Circuit in New York City.

From 1992 to 1994, Siegel was an associate in the Washington, DC office of Jenner & Block. At Jenner, he worked on appellate, commercial, intellectual property, and environmental matters. He assisted in the Supreme Court briefing for respondents in *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of America*, 508 U.S. 439 (1993); represented MCI in patent, antitrust and other matters; and helped develop the evidence for, draft and present a petition for post-conviction relief to the Maryland state trial court on behalf of death row inmate Kevin Wiggins. Although the court denied the petition, the U.S. Supreme Court eventually granted it in a decision vacating the death sentence and setting new standards for counsel in the sentencing phase of capital cases. *See Wiggins v. Smith*, 539 U.S. 510 (2003).

From 1995 to 2000, Siegel served as an Assistant United States Attorney in the Civil Division in the Southern District of New York, where his practice focused on bringing civil rights actions, defending statutes from constitutional challenge, and defending federal agencies and officers from suits based on government action. Civil rights cases brought by Siegel include a complaint under the Voting Rights Act following fraud in a Bronx school board vote, resulting in a new election; some of the first cases in the United States brought under the Freedom of Access to Clinic Entrances Act; an action based on discriminatory zoning in violation of the Americans with Disabilities Act; and an investigation of the New York City Parks Department for employment discrimination. In a case of first impression, Siegel successfully defended provisions of the 1996 immigration and welfare reform laws (invalidating local rules against disclosing the immigration status of aliens to federal law enforcement) from constitutional attack under the 10th Amendment brought by New York City. *See City of New York and Rudolph Giuliani v. United States and Janet Reno,* 179 F.3d 29 (2d Cir. 1999).

Law Offices of Martin J. Siegel
815 Walker Street, Suite 1600
Houston, TX 77002
(713) 226-8566
martin@siegelfirm.com
www.siegelfirm.com

In all, Siegel tried eight cases in federal district court and briefed and argued twelve appeals to the Second Circuit. He received the Department of Justice's Director's Award for Superior Performance as an Assistant United States Attorney in 1999 for the successful trial defense of the former chief of the CIA's Technical Services Division in a case involving the agency's experimentation with LSD in the early 1950s.

In 2000-01, Siegel was detailed to serve as Special Counsel on the minority staff of the Senate Judiciary Committee, where his responsibilities included drafting and analyzing legislation on election reform, the McCain-Feingold campaign finance bill, criminal justice, immigration and other issues.

From 2001-06, Siegel was a partner at Watts Law Firm in Houston, where he worked on commercial, franchise, patent, trade secret, false advertising, product liability and personal injury litigation. In 2002, he successfully represented Texas beer distributors against Anheuser-Busch after it wrongfully prevented a $60 million sale of their distributorship, achieving a highly favorable confidential settlement. In 2003, he helped represent the founder of a securities trading firm forced out of the business he founded before its sale for $150 million, winning a $43 million arbitral award. In 2005, he successfully represented Stabar Enterprises, a small Austin pet products company, in multiple lawsuits arising from a licensing dispute with one of the country's largest makers of animal products, securing the dismissal of a related suit against Stabar and a favorable confidential settlement that included the sale of the company's assets.

In 2006, Siegel successfully represented the Texas Democratic Party in its suit to prevent the Republican Party of Texas from replacing Tom DeLay on the general election ballot for Congress following DeLay's withdrawal as a candidate. Siegel wrote the Democratic Party's briefs in the Fifth Circuit on an expedited schedule and co-argued the appeal, resulting in a complete victory for TDP's position under the Constitution's Qualifications Clause and state election law and an order barring the replacement.

In 2007, Siegel opened the Law Offices of Martin J. Siegel to focus on appellate advocacy. He remains of counsel to Watts Law Firm.

In 2004 and 2007, *Texas Monthly* named Siegel a "Texas Super Lawyer Rising Star," an award given to lawyers under 40 chosen by other lawyers throughout the state.

Law Offices of Martin J. Siegel
815 Walker Street, Suite 1600
Houston, TX 77002
(713) 226-8566
martin@siegelfirm.com
www.siegelfirm.com

Siegel has written frequently on legal topics. In 2007, he was named to the Board of editors of Litigation, the magazine published by the ABA's Section on Litigation. Siegel's writings include:

- *Zealous Advocacy vs. Truth*, 33 LITIGATION 31 (Fall 2006);
- *The Myth of Dem, GOP Justice*, HOUSTON CHRONICLE, September 10, 2006, at E4;
- *We Don't Have Kings in Texas*, HOUSTON CHRONICLE, May 29, 2005, at E4;
- *Congressional Power over Presidential Elections: The Constitutionality of the Help America Vote Act Under Article II, Section 1*, 28 VERMONT L. REV. 373 (Winter 2004);
- *Bryant Case Tosses a Lifeline to the Laws Against Adultery*, LOS ANGELES TIMES, August 13, 2004, at B13;
- *Why Texas Republicans Should Love the Trial Lawyers*, HOUSTON CHRONICLE, April 20, 2003, at 4C; and
- *For Better or For Worse: Adultery, Crime and the Constitution*, 30 J. FAMILY L. 45 (1991-92).

Siegel has also served as an adjunct professor at the University of Houston Law Center, as a guest lecturer there and at business and graduate school classes at Princeton and UCLA, and as a speaker at CLE seminars and workshops in Houston and elsewhere.

APPELLATE AND BRIEF WRITING EXPERIENCE

Martin Siegel has an extensive background in appellate and trial-level briefing and argument cutting across a broad range of substantive and procedural areas, including constitutional law, commercial disputes, product liability, personal injury, federal preemption, consumer protection, jurisdiction, removal and remand, governmental immunities, employment law and others.

Siegel's experience began as a federal appellate law clerk and deepened over years of representation of corporate defendants, the United States and individual plaintiffs. He has briefed and argued appeals in the United States Courts of Appeals for the Second Circuit and Fifth Circuit, the Texas Supreme Court (briefed only), and several state appellate courts, and has assisted with briefs written for the United States Supreme Court.

Law Offices of Martin J. Siegel
815 Walker Street, Suite 1600
Houston, TX 77002
(713) 226-8566
martin@siegelfirm.com
www.siegelfirm.com

Some of Siegel's more significant cases include:

- *Texas Democratic Party v. Tina Benkiser, Chairwoman of the Republican Party of Texas.* The Texas Democratic Party sued the Republican Party of Texas to prevent it from substituting a new Congressional candidate for Tom DeLay after his withdrawal from the 2006 election. TDP argued that it was too late to substitute candidates, while RPT claimed replacement was permitted because DeLay had moved to Virginia and was therefore constitutionally ineligible to serve. Siegel handled most of the briefing in the district court, wrote the briefs for TDP in the Fifth Circuit on an expedited schedule and shared oral argument with the party's full-time counsel, obtaining a complete vindication of TDP's position that it had standing to bring the case and that DeLay's replacement would violate the Constitution's Qualifications Clause and state election law. *See* 459 F.3d 582 (5th Cir. 2006).

- *City of New York and Rudolph Giuliani v. United States and Janet Reno.* New York City challenged provisions of the 1996 welfare and immigration reform laws that invalidated local rules against disclosing the immigration status of aliens to federal law enforcement. In a case of first impression, the Second Circuit held that the federal provisions do not violate the Tenth Amendment's bars on interfering with state operations or conscripting state officials to carry out federal tasks. *See* 179 F.3d 29 (2d Cir. 1999). Siegel wrote the federal government's trial and appellate briefs and successfully argued the appeal in the Second Circuit.

- *Grigsby v. ProTrader Group Management LLC, et al.* In this arbitration, Grigsby claimed that the defendants violated securities laws and committed minority shareholder oppression by squeezing him out of the company he co-founded shortly before it was sold for $150 million. As part of the team representing Grigsby, Siegel briefed and argued summary judgment motions and other issues, including ratification, duties owed under the Texas Revised Partnership Act, the statute of limitations for 10b-5 claims under Sarbanes-Oxley, standards for recovery for shareholder oppression, and others. The arbitrators accepted Grigsby's legal positions and awarded him $43 million in compensation. Case No. AAA 70 180 00648 02.

- *Barahona v. Toyota Motor Corp., et al.* The plaintiff sued Toyota when his son was rendered a quadriplegic, alleging that the defective design of the Toyota

Law Offices of Martin J. Siegel
815 Walker Street, Suite 1600
Houston, TX 77002
(713) 226-8566
martin@siegelfirm.com
www.siegelfirm.com

Echo's seatback caused the injuries. Toyota twice filed writs of mandamus in the Court of Appeals and once in the Texas Supreme Court attacking various discovery and other rulings. Siegel wrote the plaintiff's responses, obtaining denials of Toyota's petitions. *See* 191 S.W. 3d 498 (Tex. App. – Waco 2006, mandamus denied, Case No. 06-0449, TX Sup. Ct., June 5, 2006). Siegel also briefed several *Daubert,* summary judgment and other motions, resulting in rulings favorable to the plaintiff.

- *Ayala v. Ford Motor Co.* In this wrongful death case, Ford argued that it complied with applicable federal safety standards and was therefore not liable under TEX. CIV. PRAC. & REM. CODE § 82.008(a). When the plaintiffs responded that Ford's inadequate disclosures to NHTSA rebutted the presumption of nonliability under § 82.008(b)(2), Ford replied that subsection (b)(2) is impliedly preempted under the reasoning in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), a position the Sixth Circuit and other courts have adopted. Siegel handled the plaintiffs' briefing, and the district court agreed with the plaintiffs that federal law does not conflict with § 82.008(b)(2) and that *Buckman* preemption applies only to fraud-on-the-agency theories of liability, not traditional state product liability claims. Case No. 2-04CV-395 (E.D. Tex. 2005).

- *Rivera v. Heyman, Secretary, Smithsonian Institution, et al.* Siegel represented the Smithsonian in this employment discrimination case raising the novel question whether the Smithsonian, a unique and independent federal trust instrumentality dating to 1836, is subject to § 501 of the Rehabilitation Act, which covers only executive branch employees. Following Siegel's briefing and argument, the district court agreed with the government that the Smithsonian is not in the executive branch and therefore not subject to § 501. As a result of the case, Congress amended the Act to include the Smithsonian. On appeal, which Siegel also briefed and argued, the Second Circuit upheld the remainder of the district court's decision holding that the plaintiff had no additional remedy under § 504 of the Act – a question on which several circuit courts had split – or state and local civil rights laws. *See* 157 F.3d 101 (2d Cir. 1998).

- *Good Samaritan Hospital Regional Medical Center, et al. v. Shalala.* Three hospitals and Medicare providers sued HHS seeking to compel review of a decision not to reopen the hospitals' claims for reimbursement of various significant expenses. Siding with the government after Siegel's briefing and argument, the Second Circuit held that jurisdiction to undertake the requested review was lacking, and that challenged HHS regulations were permissible in

Law Offices of Martin J. Siegel
815 Walker Street, Suite 1600
Houston, TX 77002
(713) 226-8566
martin@siegelfirm.com
www.siegelfirm.com

light of the Medicare Act. The Second Circuit reached this conclusion despite Ninth Circuit precedent to the contrary. *See* 85 F.3d 1057 (1996).

Law Offices of Martin J. Siegel
815 Walker Street, Suite 1600
Houston, TX 77002
(713) 226-8566
martin@siegelfirm.com
www.siegelfirm.com