

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

---

**SUPPLEMENTAL BRIEF OF APPELLEES**

---

Chad W. Dunn  
General Counsel  
Texas Democratic Party  
4201 FM 1960 W., Suite 530  
Houston, Texas 77068  
(281) 580-6310

Cristen D. Feldman  
Crews & Elliott  
Building 3, Suite 200  
4601 Spicewood Springs  
Austin, Texas 78759  
(512) 346-7077

Martin J. Siegel and Mikal C. Watts  
Watts Law Firm, LLP  
815 Walker St., Suite 1600  
Houston, Texas 77002  
(713) 225-0500

Dicky Grigg  
Spivey & Grigg, L.L.P.  
48 East Avenue  
Austin, Texas 78701  
(512) 474-6061

***COUNSEL FOR APPELLEES***

---

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: (281) 580-6310  
Facsimile: (281) 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  
4601 Spicewood Springs  
Austin, Texas 78759  
Telephone: (512) 346-7077  
Fax: (512) 342-0007

Dicky Grigg  
Spivey & Grigg, L.L.P.  
48 East Avenue  
Austin, Texas 78701  
Telephone: (512) 474-6061  
Fax: (512) 474-8035

ATTORNEYS FOR PLAINTIFFS-APPELLEES

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS.....	i
TABLE OF AUTHORITIES.....	v
PRELIMINARY STATEMENT.....	1
SUMMARY OF ARGUMENT.....	1
ARGUMENT.....	3
I.    TDP Does Not Claim and the District Court Did Not Hold that Section 145.003(f) is Unconstitutional.....	3
II.   Amici’s Arguments Based on the Elections Clause Are Unavailing.....	5
A.   Williams’s Arguments.....	5
B.   Wallace’s Arguments.....	8
III. <i>Jones v. Bush</i> Is Inapposite.....	10
IV.  Benkiser’s Declaration is Unconstitutional Under the Holding of <i>Schaefer</i> .....	12
V.   The District Court Properly Enjoined the Secretary of State.....	14
CONCLUSION.....	16
CERTIFICATE OF SERVICE.....	18
CERTIFICATE OF COMPLIANCE.....	19

## TABLE OF AUTHORITIES

### Cases:

<i>Additive Controls &amp; Measurement Systems, Inc. v. Flowdata, Inc.</i> , 96 F.3d 1390 (5 <sup>th</sup> Cir. 1996).....	14, 15
<i>Alemite Mfg. Corporation v. Staff</i> , 42 F.2d 832 (2d Cir. 1930).....	15
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983) .....	5
<i>Campbell v. Davidson</i> , 233 F.3d 1229 (10 <sup>th</sup> Cir. 2000), <i>cert. denied</i> , 532 U.S. 973 (2001).....	7
<i>Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg and Constr. Trades Council</i> , 485 U.S. 568 (1988).....	4, 5
<i>Hopfmann v. Connolly</i> , 746 F.2d 97 (1 <sup>st</sup> Cir. 1984) .....	9
<i>In re Lease Oil Antitrust Litig. No. II</i> , 48 F. Supp. 2d 699 (S.D. Tex.1998) .....	16
<i>Jones v. Bush</i> , 122 F. Supp. 2d 713 (N.D. Tex. 2000) .....	<i>passim</i>
<i>McClelland v. Sharp</i> , 430 S.W.2d 518 (1968).....	12
<i>Medical Prof. Corp. v. Voinovich</i> , 130 F.3d 187 (6 <sup>th</sup> Cir. 1997).....	3
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969).....	8
<i>Puerto Rico v. Branstad</i> , 483 U.S. 219 (1987).....	4
<i>Remington Rand Corp.-Delaware v. Bus. Sys. Inc.</i> , 830 F.2d 1274 (3d Cir. 1987) .....	15
<i>Schaefer v. Townsend</i> , 215 F.3d 1031 (9 <sup>th</sup> Cir. 2000), <i>cert. denied</i> , 532 U.S. 904 (2001).....	<i>passim</i>

<i>Storer v. Brown</i> , 415 U.S. 724 (1974) .....	5
<i>U.S. Term Limits, Inc. v. Thornton</i> , 514 U.S. 779 (1995) .....	9
<i>U.S. v. Int’l Broth. of Teamsters, U.S. v. Int’l Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., AFL-CIO</i> , 266 F.3d 45 (2d Cir. 2001).....	16
<i>U.S. v. New York Tel. Co.</i> , 434 U.S. 159 (1977) .....	16
 <b><i>Statutes:</i></b>	
28 U.S.C. § 1651(a) .....	16
TEX. ELECT. CODE § 145.003 .....	<i>passim</i>
TEX. ELECT. CODE § 145.004.....	7
TEX. ELECT. CODE § 146.022 .....	8
TEX. ELECT. CODE § 146.030(2).....	9
 <b><i>Rules:</i></b>	
<i>Fed. R. Civ. P. 65(d)</i> .....	15
5 <sup>th</sup> Cir. Rule 47.5.....	10
 <b><i>Miscellaneous:</i></b>	
U.S. CONST., amend. XII.....	10
U.S. CONST., art. I, § 2, cl. 2.....	<i>passim</i>
U.S. CONST., art. I, § 4, cl. 1.....	<i>passim</i>
U.S. CONST., art. I, § 5.....	8

Jack Maskell, *Congressional Candidacy, Incarceration,  
and the Constitution's Inhabitancy Qualification*,  
Cong. Research Serv. Report, Order Code RL31532,  
August 12, 2002.....7

## **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 (9<sup>th</sup> 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 (6<sup>th</sup> 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 (9<sup>th</sup> Cir.

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

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.*<sup>2</sup>

---

<sup>1</sup> 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.

<sup>2</sup> 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 RL31532,

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).<sup>3</sup>

Moreover, using the test articulated in *Hopfmann v. Connolly*, 746 F.2d 97 (1<sup>st</sup> 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 917-21.

In *Schaefer v. Townsend*, 215 F.3d 1031, 1038 (9<sup>th</sup> 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

---

<sup>3</sup> 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.<sup>4</sup> 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

---

<sup>4</sup> This Court affirmed the district court's decision in *Jones v. Bush*, *see* 244 F.3d 134 (5<sup>th</sup> Cir. 2000), but because no opinion was written and the affirmance was not published, it has no precedential value. *See* 5<sup>th</sup> 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. 10-11, 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 31-32. 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 (5<sup>th</sup> 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 25<sup>th</sup> 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: (281) 580-6310  
Facsimile: (281) 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: (713) 225-0566

Cristen D. Feldman  
Crews & Elliott  
Building 3, Suite 200  
4601 Spicewood Springs  
Austin, Texas 78759  
Telephone: (512) 346-7077  
Fax: (512) 342-0007

Dicky Grigg  
Spivey & Grigg, L.L.P.  
48 East Avenue  
Austin, Texas 78701  
Telephone: (512) 474-6061  
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 6<sup>th</sup> Street  
Terre Haute, IN 47807-3510

/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 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