

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 Chair of the Texas Democratic Party,
Plaintiff-Appellee,**

v.

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

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

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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

v.

No. 06-50812

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

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Circuit 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, Plaintiff-Appellee;
2. Boyd L. Richie, in his capacity as Chairman of the Texas Democratic Party, Plaintiff-Appellee;
3. Tina J. Benkiser, in her capacity as Chairwoman of the Republican Party of Texas, Defendant-Appellant;
4. Republican Party of Texas and its affected local county parties because the injunction against its Chair has a direct impact on the local county parties' ability to have 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.

/s/ Raeanna S. Moore

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STATEMENT REGARDING ORAL ARGUMENT

The Defendant-Appellant, Tina J. Benkiser, respectfully requests oral argument. This appeal concerns the interaction of Article I, Section 2, the Qualifications Clause, and Article I, Section 4, the Elections Clause, of the United States Constitution. Specifically, it asks whether Texas Election Code § 145.003, which regulates the political party nominating process for candidates for state and federal office, violates the Qualifications Clause or is a valid regulation of the election process under the Elections Clause. Oral discussion of the facts and the applicable precedent would benefit the Court.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS i

STATEMENT REGARDING ORAL ARGUMENT iii

TABLE OF AUTHORITIES vi

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 3

 I. Proceedings Below 3

 II. Statement of Facts 5

SUMMARY OF THE ARGUMENT 8

ARGUMENT 9

 I. The District Court Erred When It Concluded That TDP Had
 Standing and That TDP Would Be Irreparably Harmed By
 RPT’s Replacement of DeLay as RPT’s Nominee for Texas’
 22nd Congressional District. 9

 A. Standard of Review 10

 B. TDP Has Not Demonstrated That It Has Standing Or
 That It Will Be Irreparably Harmed If RPT Replaces
 DeLay on the Ballot. 13

 II. The District Court Erred When It Enjoined RPT From Declaring
 DeLay Ineligible and Replacing Him on the Ballot as the
 Republican Nominee for Texas Congressional District 22. 23

A.	Injunction Standards	24
B.	RPT Should Prevail on the Merits Because the Elections Clause Grants Broad Authority to the States to Regulate Congressional Election Procedures.	25
C.	RPT Should Prevail on the Merits Because the Challenged Statutes Are a Valid Exercise of Texas’ Authority to Regulate the Political Party Nomination Process.	27
	1. The Texas Election Code Allows Administrative Declarations of Ineligibility as a Part of the Political Party Nomination Process and Has Been Complied With in Full.	27
	2. The Challenged Provisions Are a Valid Exercise of the State’s Authority to Regulate the Political Party Nomination Process Under the Elections Clause.	32
D.	An Injunction Is Not in the Public Interest.	40
	CONCLUSION	41
	CERTIFICATE OF SERVICE	43
	CERTIFICATE OF COMPLIANCE	44

Addendum

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>Amoco Prod. Co. v. Village of Gambell</i> , 480 U.S. 531 (1987)	25
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	17, 18, 20, 41
<i>Bachur v. Democratic Nat’l Party</i> , 666 F. Supp. 2d 763 (D. Md. 1987)	21
<i>Bay County Democratic Party v. Land</i> , 347 F. Supp. 2d 404 (E.D. Mich. 2004)	20, 21
<i>Biener v. Calio</i> , 361 F.3d 206 (3d Cir. 2004)	37, 38
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	33
<i>Bush v. Gore</i> , 531 U.S. 98 (2000)	19
<i>Campbell v. Davidson</i> , 233 F.3d 1229 (10th Cir. 2000)	37, 38, 39
<i>Cox v. Dallas</i> , 256 F.3d 281 (5th Cir. 2001)	24
<i>Delta Commercial Fisheries Assoc. v. Gulf of Mexico Fishery Mgmt. Council</i> , 364 F.3d 269 (5th Cir. 2004)	10, 11
<i>Dresser-Rand Co. v. Virtual Automation Inc.</i> , 361 F.3d 831 (5th Cir. 2004)	25
<i>Florida Democratic Party v. Hood</i> , 341 F. Supp. 2d 1073 (N.D. Fla. 2004)	20, 21
<i>Gladstone, Realtors v. Village of Bellwood</i> , 441 U.S. 91 (1979)	13
<i>Guy Carpenter & Co. v. Provenzale</i> , 334 F.3d 459 (5th Cir. 2003)	24
<i>Hopwood v. Texas</i> , 236 F.3d 256 (5th Cir. 2000)	24

<i>Indiana Democratic Party v. Rokita</i> , No. 1:05-CV-0634-SEB-VSS, 2006 U.S. Dist. LEXIS 20321(S.D. Ind. Apr. 14, 2006)	12
<i>Jones v. Bush</i> , 122 F. Supp. 2d 713 (N.D. Tex. 2000)	11, 12, 23
<i>Joslyn Mfg. Co. v. Koppers Co.</i> , 40 F.3d 750 (5th Cir. 1994)	24
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	11
<i>Mancuso v. Taft</i> , 476 F.2d 187 (1st Cir. 1973)	21
<i>National Comm. of the U.S. Taxpayers Party v. Garza</i> , 924 F. Supp. 72 (W.D. Tex. 1996)	32, 33
<i>Nixon v. Slagle</i> , 885 S.W. 658 (Tex. Civ. App. - Tyler 1994)	29
<i>Northhampton County Democratic Party v. Hanover Township</i> , No. 04-CV-00643, 2004 U.S. Dist. LEXIS 7755 (E.D. Penn. Apr. 26, 2004)	21
<i>Roudebush v. Hartke</i> , 405 U.S. 15 (1972)	25, 26
<i>Sandusky County Democratic Party v. Blackwell</i> , 387 F.3d 565 (6th Cir. 2004)	20, 21
<i>Schaefer v. Townsend</i> , 215 F.3d 1031 (9th Cir. 2000)	36-39
<i>Smith v. Boyle</i> , 144 F.3d 1060 (7th Cir. 1998)	19
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	26, 34-36
<i>U.S. Term Limits, Inc. v. Thornton</i> , 514 U.S. 779 (1995)	26, 32, 35, 36, 38, 39
<i>Warth v. Sedlin</i> , 422 U.S. 490 (1975)	10-13

CONSTITUTIONAL PROVISIONS

United States Constitution, Article I, § 2 *passim*
United States Constitution, Article I, § 4 *passim*
United States Constitution, Article I, § 5 3

STATUTES

28 U.S.C. § 1291 1
28 U.S.C. § 1331 1
Texas Election Code § 141.062 28
Texas Election Code § 142.004 28, 34
Texas Election Code § 145.003 *passim*
Texas Election Code § 145.004 17, 41
Texas Election Code § 145.031 30
Texas Election Code § 145.032 16
Texas Election Code § 145.033 16
Texas Election Code § 145.034 17
Texas Election Code § 145.035 7, 30, 32
Texas Election Code § 145.036 7, 16-18, 40
Texas Election Code § 161.008 28
Texas Election Code § 172.001 27

Texas Election Code § 172.002	27
Texas Election Code § 172.119	27
Texas Election Code § 172.120	27
Texas Election Code § 172.122	28
Texas Election Code § 273.081	34, 41

OTHER AUTHORITIES

Fed. R. App. P. 4	1
Fed. R. Civ. P. 4(a)	1

Jurisdictional Statement

The district court's subject matter jurisdiction in this case rests on 28 U.S.C. § 1331, because this is a civil action alleging that the challenged provisions of the Texas Election Code violate the U.S. Constitution. This Court has jurisdiction under 28 U.S.C. § 1291 to review the district court's final judgment, issued July 6, 2006, enjoining Defendant-Appellant Benkiser from taking any steps to replace Tom DeLay on the November 2006 ballot as the Republican nominee. (Docket No. 41, Judgment.) Defendant-Appellant Benkiser now takes an appeal as of right of that judgment. Fed. R. App. P. 4. She timely filed her Notice of Appeal on July 6, 2006, after the district court entered its final judgment that same day. (Docket No. 43, Notice of Appeal, July 6, 2006.) *See* Fed. R. Civ. P. 4(a).

STATEMENT OF THE ISSUES

- I. Whether the district court erred when it determined that the Plaintiff Texas Democratic Party had standing.
- II. Whether the district court erred in granting a permanent injunction after it determined that Texas Election Code § 145.003, as applied to federal elections, violates the Qualifications Clause of the United States Constitution rather than finding it a valid exercise of the State's authority to regulate the political party nomination process through the time, place, and manner provisions of the Elections Clause.

STATEMENT OF THE CASE

I. Proceedings Below

Plaintiffs-Appellees, Texas Democratic Party and Boyd L. Richie, in his capacity as Chair of the Texas Democratic Party, (collectively “TDP”) filed this case in Texas state court on June 8, 2006. (Docket No. 40, Findings of Fact and Conclusions of Law (“Findings”) 2.) In their Complaint, TDP alleged (1) that DeLay is an “inhabitant” of Texas as required by Article I, Section 2 of the United States Constitution and could not therefore be “declared ineligible” to be placed on the ballot as the Republican nominee for Texas 22nd Congressional District; and (2) that, regardless of whether DeLay was an inhabitant of Texas, the Texas Election Code provisions allowing the state party chair to declare DeLay ineligible and to replace him as the Republican nominee on the general election ballot are unconstitutional under Article I, Sections 2 and 5 of the United States Constitution, because the challenged provisions add a qualification for office and usurp the House’s authority to be the exclusive judge of the qualifications of its members. (Docket No. 1 Exh. 1, Pls.’ Original Pet. and App. for TRO, Temp. Inj., Perm. Inj., Writ of Mandamus, and Declaratory Judgment (“Pls.’ Pet.”) 7-8, June 8, 2006.) After a hearing that same day, the state court issued a temporary injunction. (Docket No. 1 Exh. 2, TRO Order, June 8, 2006.)

Because both the question of the meaning of the term “inhabitant” as used in Article I, Section 2, and the determinations of whether the Texas Election Code violates the U.S. Constitution by adding a qualification for federal office or by usurping the House’s authority to judge the qualifications of its members are federal questions, Defendant Tina J. Benkiser, in her capacity as Chair of the Republican Party of Texas (“Benkiser” or “RPT”) filed her Notice of Removal on June 15, 2006. (Docket No. 1, Notice of Removal.) On June 19, 2006, the District Court denied TDP’s Motion to Extend the Temporary Restraining Order and set the matter for hearing on TDP’s request for a preliminary injunction. (Docket No. 11, Order.) On June 23, 2006, the court granted RPT’s motion to consolidate the preliminary injunction hearing with the hearing on the merits. (Docket No. 18, Order Granting Motion to Consolidate.)

On June 26, 2006, an evidentiary hearing was held. (Docket No. 32.) At that hearing, the Court denied RPT’s Motion to Dismiss for lack of standing as moot after allowing TDP to file its second amended complaint. (Docket No. 30; Docket No. 47, Trial Tr. 4, 129.) After the parties filed additional briefs (Docket Nos. 27, 39), the Court issued its Findings of Fact and Conclusions of Law and Final Judgment on July 6, 2006. (Docket Nos. 40, 41.) RPT timely filed its notice of appeal that same day. (Docket No. 43, Notice of Appeal.)

II. Statement of Facts

DeLay has represented Texas Congressional District 22 since 1984. (Docket No. 9, Pls.' 1st Am. Compl. Exh. 4 p. 196, June 19, 2006; Docket No. 47, Trial Tr. Pls.' Exh. 17.) He ran for and won the 2006 Republican primary election for that District in March 2006. (Docket No. 9, Pls.' 1st Am. Compl. 3; Docket No. 47, Trial Tr. 21.) After the primary, DeLay decided to move to Virginia and began taking steps to complete that move. (Docket No. 47, Trial Tr. Pls. Exh. 17.)

On April 27, 2006, DeLay obtained a Virginia driver's license. (Docket No. 9, Pls.' 1st Am. Compl. Exhs. 5 and 8; Docket No. 47, Trial Tr. 67 and Pls.' Exh. 17.) He surrendered his Texas driver's license to Virginia, when he received his Virginia driver's license. (Docket No. 47, Trial Tr. 77.) Also on April 27, 2006, DeLay changed his employment withholding form to reflect Virginia residency. (Docket No. 9, Pls.' 1st Am. Compl. Exhs. 5 and 8; Docket No. 47, Trial Tr. 65 and Pls.' Exh. 17.) He subsequently registered to vote in Virginia and his voter's registration card was issued on May 8, 2006. (Docket No. 9, Pls.' 1st Am. Compl. Exhs. 5 and 8; Docket No. 47, Trial Tr. 65 and Pls.' Exh. 17.) He voted in the Virginia primary. (Docket No. 47, Trial Tr. 79.) He has also obtained Virginia hunting and fishing licenses. (Docket No. 47, Trial Tr. 83.) His most recent financial disclosure statement filed with the House of Representatives reflects that

his residence is in Alexandria, Virginia. (Docket No. 47, Trial Tr. 82 and Def.'s Exh. 8.) DeLay has a car in Virginia and is in the process of obtaining a Virginia registration. (Docket No. 47, Trial Tr. 74, 83.) He lives in a condominium in Virginia that he and his wife have owned for approximately twelve years. (Docket No. 47, Trial Tr. 73, 79.) DeLay and his wife pay property taxes on their Virginia home. (Docket No. 47, Trial Tr. 80 and Def.'s Exh. 5.)

DeLay's business, First Principles, is incorporated in North Carolina. (Docket No. 47, Trial Tr. 83.) He has an office for his business in his Virginia condominium, (Docket No. 47, Trial Tr. 74.), and has recently opened an office for his business in Washington, D.C. (Docket No. 47, Trial Tr. 81 and Def.'s Exh. 7.) He has also established a personal legal defense fund which is located in Washington, D.C. (Docket No. 47, Trial Tr. 80 and Def.'s Exh. 6.) On June 9, 2006, DeLay resigned his seat in the House of Representatives. (Docket No. 22, Pls.' 2nd Amend. Compl. 3, Exh. 5.) DeLay intends to be an inhabitant of Virginia indefinitely. (Docket No. 47, Trial Tr. 74, 78.) DeLay's only remaining tie to Texas is that he and his wife own a house in Texas for his wife's use. (Docket No. 47, Trial Tr. 71.)

On June 6, 2006, Benkiser received a letter, dated May 30, 2006, from DeLay explaining that he was "no longer eligible to remain on the electoral ballot"

because he had moved to Virginia, and providing copies of his Virginia driver's license, Virginia voter registration, and a copy of his employment withholding form reflecting Virginia as his residence. (Docket No. 47, Trial Tr. 23 and Pls. Exh. 17.) On June 7, 2006, based on DeLay's move to Virginia, and a review of the three public documents he provided to prove his move, and pursuant to Texas Election Code § 145.003(b), Benkiser, in her capacity as Chair of RPT, declared in writing that DeLay is ineligible to be RPT's nominee. (Docket No. 9, Pls.' 1st Am. Compl. 8 and Exh. 4; Docket No. 47, Trial Tr. 19, 21, 23, 26-27, 52-54, 56, 58.) Her declaration means that the Secretary of State cannot certify DeLay as the RPT as the Republican nominee in the general election for Texas Congressional District 22 by operation of law. *See* Tex. Election Code § 145.035 ("A candidate's name shall be omitted from the ballot if the candidate . . . is declared ineligible on or before the 74th day before election day.").¹ As a result, RPT began the process, provided by Texas Election Code § 145.036, to fill the vacancy on the ballot for Texas Congressional District 22.

This process has not been completed due to the TRO issued by the state court and now to the permanent injunction issued by the district court.

¹In 2006, the general election is scheduled for November 7th. Thus, "the 74th day before election day" falls on August 25, 2006. Since Benkiser's declaration of ineligibility occurred on or about June 7, 2006, DeLay's name may not appear on the ballot pursuant to Texas Election Code § 145.035.

SUMMARY OF THE ARGUMENT

The district court erred when it determined that TDP has standing to bring its claims, because TDP's alleged harm, if any, is common to all citizens, in that it is simply an interest in the proper application of the Constitution and the law, and is inherent in the democratic process. Further, TDP's alleged injuries are speculative and the result of the independent actions of third parties not before the court. TDP has also not shown that it has associational standing based on its candidate's or members' standing, because it has not shown that either its candidate or its members would suffer a harm sufficient for them to have standing in their own right to bring suit.

In addition, the district court erred when it permanently enjoined RPT from declaring DeLay ineligible and replacing him as the Republican nominee on the general election ballot, because it incorrectly found that Texas Election Code § 145.003, as applied to federal elections, unconstitutionally adds a qualification for federal office. Instead, Texas Election Code § 145.003 is an integral part of the the State's regulation of the political party nomination process and is a constitutional exercise of the State's authority under the Elections Clause. Further, because TDP's alleged injury is simply inherent in our democratic election process, the district court erred when it found that TDP would be irreparably harmed. Finally,

the district court erred when it determined that an injunction would serve the public interest, because the injunction serves to thwart the public's interest in voter choice and competitive elections and the State's interest in keeping frivolous candidates off the ballot and in promoting political parties' ability to nominate eligible candidates for the general election.

ARGUMENT

I. The District Court Erred When It Concluded That TDP Had Standing, and That TDP Would Be Irreparably Harmed By RPT's Replacement of DeLay as RPT's Nominee for Texas' 22nd Congressional District.

The district court found that "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." (Docket No. 40, Findings 5.) It also found that TDP had "demonstrated an irreparable injury." (Docket No. 40, Findings 14.) The district court erred in determining that this was a cognizable and irreparable harm that afforded TDP standing because it is a harm that is built into our democratic process and not a harm caused by RPT.

Even after trial and amending its complaint a second time, TDP can neither demonstrate standing nor show irreparable harm. TDP claims that it has standing

(1) because it and its candidate are harmed by the “unfair advantage” RPT will gain by declaring DeLay ineligible and replacing him on the ballot; (2) because it and its candidate are harmed since they will have to raise funds and direct their campaigns to oppose a different challenger than the one they originally believed they were challenging; and (3) because TDP’s members’ “ability to participate in the general election on the same footing with voters of the Republican party will be compromised, and their votes will be diluted.” (Docket No. 22, Pls.’ 2nd Amend. Compl. 4-6.) TDP has not met its burden of showing that it has standing based on these alleged harms, much less that it will be irreparably harmed so that it is entitled to injunctive relief.

A. Standard of Review

The Fifth Circuit “review[s] questions of standing *de novo*.” *Delta Commercial Fisheries Assoc. v. Gulf of Mexico Fishery Mgmt. Council*, 364 F.3d 269, 272 (5th Cir. 2004). “If a plaintiff lacks Article III standing, then a federal court lacks jurisdiction to hear the complaint.” *Id.*

“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of a particular issue.” *Warth v. Seldin*, 422 U.S. 490, 498 (1975). This requirement “involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.”

Id. To satisfy the constitutional requirements for standing, TDP must establish three elements. First, TDP must have suffered an “injury in fact,” consisting of an “invasion of a legally protected injury which is (a) concrete and particularized . . . and (b) actual or imminent.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). Second, “there must be a causal connection between the injury and the conduct complained of,” where the injury is “fairly . . . traceable to the challenged action of the defendant and not . . . the result [of] the independent action of some third party not before the court.” *Id.* And third, “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Id.*

Further, this Court has recognized that a frustration of a “generalized interest in the proper application of the law . . . is not by itself an injury in fact for purposes of standing.” *Delta Commercial Fisheries*, 364 F.3d at 273. This echoes the Supreme Court’s pronouncement that in those circumstances where a plaintiff

raise[s] only a generally available grievance about government—claiming only harm to his and every citizen’s interest in the proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Lujan. 504 U.S. at 573-74. An example of such a generalized grievance is found in *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000), in which the “plaintiffs

assert[ed] that a violation of the Twelfth Amendment [would] harm them by infringing on their right to cast a meaningful vote.” *Id.* at 716-17. The court held that plaintiffs did not have standing, because such an injury was abstract and that plaintiffs had “conspicuously fail[ed] to demonstrate how they, as opposed to the general voting population, will feel its effects.” *Id.* at 717.

Additionally, in order for TDP to assert associational standing, it “must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.” *Warth*, 422 U.S. at 411; *see also Indiana Democratic Party v. Rokita*, No. 1:05-CV-0634-SEB-VSS, 2006 U.S. Dist. LEXIS 20321, at *87 (S.D. Ind. Apr. 14, 2006) (Democratic Party did not have associational standing “to assert the rights of those registered voters who associate with them and who will be voting, or who desire to vote, in future elections for public office, including the elections scheduled in May and November 2006.” However, the party did have standing to sue on behalf of voters who intended to vote for Democratic candidates but would be turned away from the polls.).

Finally, the plaintiff must demonstrate standing “with the manner and degree of evidence required at the successive stages of the litigation.” *Warth*, 422 U.S. at 411. “At the final stage, those facts [supporting standing] (if controverted) must be

‘supported adequately by the evidence adduced at trial.’” *Id.* (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n. 31 (1979)). TDP has failed to meet its burden of showing that it has standing to challenge Texas’ regulation of the nomination process.

B. TDP Has Not Demonstrated That It Has Standing Or That It Will Be Irreparably Harmed If RPT Replaces DeLay on the Ballot

First, TDP claims it and its candidate are injured because RPT will gain an “unfair advantage” by substituting a candidate who is “able and willing to campaign and serve for one who has publicly declared he will not campaign for office or fill the office if elected.” (Docket No. 22, Pls.’ 2nd Amend. Compl. 4-5.) Of course, RPT will benefit if it has a candidate that is able and willing to serve in office rather than one that is not. However, it does not necessarily follow that the benefit is an “advantage,” much less an “unfair advantage,” or a cognizable harm for standing purposes. If anyone is “disadvantaged” by the replacement of a candidate, it is the replacing party and its candidate. A new candidate will have to put together a campaign and raise funds in a very short period of time (Docket No. 47, Trial Tr. 121), while the TDP and its candidate have raised funds throughout the primary season and thereafter. Therefore, TDP already has an “advantage” in the fundraising area, especially since, as it claims, DeLay is a “lightning rod” that

enables them to raise more funds than if he were not in the race. (Docket No. 47, Trial Tr. 114.)

Further, it is unlikely that TDP and its candidate's campaign focus solely on DeLay rather than the alleged good qualities of its own candidate. Campaign strategies focusing on its candidate's good qualities will not be wasted while TDP comes up with new ads to differentiate its candidate from RPT's replacement candidate. In contrast, RPT's newly nominated candidate will have to start from scratch and develop an entire campaign. (Docket No. 47, Trial Tr. 121.) In addition, TDP, and its candidate Nick Lampson, have had months to extoll his virtues and educate the public regarding his fitness for office, while RPT's candidate will have to do this same task in a much shorter period of time. Thus, if anything, TDP and its candidate have an advantage if RPT names a replacement candidate. Such an advantage is not a cognizable harm to TDP, but simply a product of our democratic process. Allowing RPT to replace an ineligible candidate will not give it an "advantage" but attempts to level the playing field, by allowing members of both parties to nominate an eligible candidate for the general election ballot. (Docket No. 47, Trial Tr. 121.)

TDP also claims it and its candidate are injured "because it will have to raise and expend funds and other resources to shift gears and prepare an entirely different

campaign than the one it already devoted fundraising, funds and other efforts toward preparing.” (Docket No. 22, Pls.’ 2nd Amend. Compl. 4, 6.) However, that alleged injury is also one that is inherent in the democratic election process.

According to the testimony of James Bailey, Party Affairs Director for TDP, (Docket No. 47, Trial Tr. 106-107), each of the alleged harms are actually the result of the decisions of third parties not before the court. Baily testified that DeLay “is kind of a lightning rod that we use to drum up support.” (Docket No. 47, Trial Tr. 114-15.) He then testified that if Delay were off the ballot that it would negatively effect “how much money we can raise in that district,” that they would not be able to bring in money based on DeLay “centered” fundraisers, that “[i]t could squash the turnout in District 22,” that it would make it “harder to get out-of-state money to come in” from “California” and groups such as the “LaRouche people” and the “Democratic Congressional Committee,” and that fewer volunteers would be willing to travel from out of district to support their candidate. (Docket No. 47, Trial Tr. 114-18.) Implicit in each of these allegations of injury is the fact that a third party, not before the court, will make a decision that, since that third party’s main reason for giving of their time and financial resources was to defeat DeLay rather than elect the Democratic Party candidate, they would rather spend their time and money elsewhere since that goal has been achieved if DeLay is removed from the ballot.

Further, these injuries are speculative because one cannot know for certain that the third parties will decide that, since DeLay is off the ballot, their goal has been achieved.

Although TDP claims that the Texas Election Code “prohibit[s] withdrawal of a party’s candidate after the other parties have selected their nominee,” and that such a prohibition “necessarily presumes that one party’s illegally switching candidates after the primary injures opposing parties,” that claim is, at best, a misstatement of the law. In fact, the section of the code that TDP cites to back up this proposition, Texas Election Code § 145.036(b), is precisely the section of the code that allows the party to replace a candidate who has withdrawn.

A candidate may withdraw for any reason prior to “the 74th day before election day.” Tex. Elect. Code § 145.032 (“A candidate may not withdraw from the general election after the 74th day before election day.”). In order to withdraw, a candidate files his request to withdraw with the Secretary of State, Texas Election Code § 145.033, and with the “chair of the executive committee authorized to fill a vacancy in the nomination.”² Tex. Elect. Code § 145.034. A candidate may also

²DeLay has not taken the proper steps to withdraw from the election under the Texas Election Code. To the contrary, he has done no more than provide RPT’s chair with the information necessary to declare him ineligible pursuant to the administrative declaration of ineligibility statute.

be omitted from the ballot if he has been administratively declared ineligible and has not challenged that declaration in court. *See* Tex. Elect. Code §§ 145.003 and 145.004. Both candidates who have been declared ineligible and those who have withdrawn, under certain circumstances, may be replaced on the ballot. Tex. Elect. Code § 145.036.

TDP claims that it will be harmed because it will have to shift gears and raise funds to oppose a different candidate than the one already on the ballot. However, that is a harm that is built into the democratic election process and one that Texas Election Code 145.036 presumes TDP should absorb in order to promote the State's substantial interest in voter choice, competitive elections, keeping frivolous candidates off the ballot, and facilitating the ability of political parties to nominate eligible candidates for the general election ballot.

That parties are expected to absorb these types of costs in order to promote democracy is also shown in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). There, the Court noted that “candidates and issues do not remain static over time . . . such developments will certainly affect the strategies of candidates who have already entered the race; and may also create opportunities for new candidacies.” *Id.* at 790. The *Anderson* Court struck down an Ohio law which disadvantaged an independent candidate because it required an independent candidate to declare and file

nominating petitions earlier than the major parties, giving the major parties more flexibility to respond to changing political environments than independent candidates. *Id.* at 790-91. Although TDP cites this case as support for its claim that the Texas Election Code § 145.036 attempts to avoid the result in *Anderson*, (Docket No. 26, Pls.’ Resp. to Def.’s Motion to Dismiss (“Pls.’ Resp.”), filed June 26, 2006, 5-6), it misses the point that the result disapproved of in *Anderson* was that the statute, by its terms, created the disadvantage by treating independent candidates differently than it treated major political parties. In contrast, Texas Election Code § 145.036 provides both parties with the same flexibility to replace a nominee that has been declared ineligible or who has withdrawn under certain circumstances.

TDP’s final claim is that it has associational standing, since its “voters will be injured” because “their ability to participate in the general election on the same footing with voters of the Republican party will be compromised, and their votes will be diluted.” (Docket No. 26, Pls.’ Resp. 3.) However, regardless of whether DeLay or some other Republican candidate is on the ballot, *all* voters, regardless of party affiliation, will still be able to go to the polls and choose the candidate of their choice. Therefore, TDP’s voters will participate in the election “on the same footing” as RPT’s voters.

Further, every vote will be given the same weight when it is counted. TDP's argument that its members' votes will be diluted if RPT replaces DeLay on the ballot demonstrates a lack of understanding of the meaning of the term "dilution" in the election context. Votes are diluted when some electors' votes are given more weight than others. *Smith v. Boyle*, 144 F.3d 1060, 1062 (7th Cir. 1998) (explaining that in order to avoid vote dilution "each voter's vote should have to the extent feasible the same weight in the political process as every other voters."). In other words, an elector's vote is diluted when the process is skewed so that his vote does not count as much as another person's vote. Dilution occurs when, as in *Bush v. Gore*, 531 U.S. 98, 104-110 (2000), the ballots are not counted using the same standards, or when, for example, at-large election districts are used to reduce the voting power of minorities. *Boyle*, 144 F.3d at 1062. Vote dilution does not occur simply because voters decide not to vote because they are not interested in supporting the Democratic candidate unless he is running against DeLay. TDP has not offered any facts that demonstrate that RPT's replacement of DeLay on the ballot will lead to TDP's electors' votes being given less weight than those of other voters in the election and that type of harm is not a logical consequence of doing so. Thus, TDP does not have associational standing to redress the alleged injuries to the voters when neither of the alleged injuries flow from the alleged wrongful act.

In its response to RPT's Motion to Dismiss, TDP cited several cases to bolster its claim of associational standing. (Docket No. 26, Pls.' Resp. 10-12.) These cases bear out the admonition that, in order to assert third party standing, the litigant must show that the third party has standing to assert his own rights. In *Anderson*, the candidate was joined by several supporters in his challenge to Ohio's requirement that independent presidential candidates had to file all of the papers required to get the independent on the ballot several months prior to the date on which the major parties were required to name their candidates. *Id.* 460 U.S. at 782-83. The candidate and his supporters shared an interest in associating together to get the candidate elected by having their candidate listed on the ballot. *Id.* In *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004), *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404 (E.D. Mich. 2004), and *Florida Democratic Party v. Hood*, 341 F. Supp. 2d 1073 (N.D. Fla. 2004), each court found that the challenging political party had standing to assert the rights of its members who would vote in the election and either be denied a provisional ballot because he tried to vote in the wrong precinct or whose vote would not be counted because it was cast in the wrong precinct. *Sandusky*, 387 F.3d at 573-74; *Bay County*, 347 F. Supp. 2d at 423; *Florida Democratic Party*, 341 F. Supp. 2d at 1079.

In *Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973), the First Circuit noted that a candidate and his supporters' interests are closely related so that the candidate may raise the constitutional rights of those voters when challenging a requirement that a candidate may not continue to hold a job as a police officer and run for elected public office. *Id.* ("That voters and candidates may attack candidacy restrictions affecting voting rights *on their face* seems indisputable."); *see also* *Bachur v. Democratic Nat'l Party*, 666 F. Supp. 763, 771 (D. Md. 1987) (Stating that a voter had standing to challenge candidacy restrictions because they affected his right to vote for the candidate of his choice.). In the final case cited by TDP, *Northhampton County Democratic Party v. Hanover Township*, No. 04-CV-00643, 2004 U.S. Dist. LEXIS 7755 at * 23-25 (E.D. Penn. Apr. 26, 2004), the Court found that the party had associational standing to assert the rights of itself, its candidate, and its voters because the challenged sign ordinances impinged on the First Amendment rights of free speech and association of each. In each of these cases, it was clear that the third party on behalf of whom the plaintiff was attempting to assert associational standing had standing in its own right. In contrast, TDP's member voters do not have standing in this case, because it cannot be shown that RPT's replacement of DeLay on the ballot would cause either of the alleged injuries. Further, TDP's candidate does not have standing, because TDP has failed

to allege any harm to their candidate other than that inherent in the democratic election process. Therefore, TDP does not have standing based on its association with its candidate or member voters.

Thus, as shown above, TDP has failed to assert a harm that is not common to the general public, inherent in our democratic processes, or caused by the independent decisions of third parties not before the court. TDP has also failed to show that its member voters would suffer any harm. These failures also show that TDP has failed to demonstrate that it will be irreparably harmed if RPT replaces DeLay on the ballot. In sum, TDP's failure to show harm sufficient to confer standing, necessarily shows that it has not suffered an irreparable harm.

II. The District Court Erred When It Enjoined RPT From Declaring DeLay Ineligible and Replacing Him on the Ballot as the Republican Nominee for Texas Congressional District 22.³

The district court held that Texas Election Code § 145.003, which, as part of the political party nominating process, allows a state party chair to declare a candidate ineligible and replace him on the ballot, violates Article I, Section 2 of the United States Constitution as applied to candidates for federal office. (Docket No. 40, Findings 13 (“[T]he Court concludes that no determination as to DeLay’s ineligibility due to present inhabitancy in Virginia can be made at this time or at any time prior to the election because 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.”).) According to the district court “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.” *Id.* However, in reaching this conclusion, the district court failed to recognize the broad authority of the states to regulate election procedures under the Elections Clause, Article I, Section 4, of the United States Constitution. Thus, the district

³Due to the exigencies of the case and the possibility of further appeal, this Court should reach the substantive issue presented here, even if this Court finds that TDP does not have standing. *See, e.g., Jones*, 122 F. Supp. 2d at 718 (“Although the court is dismissing this case for lack of standing, it will address the merits . . . [as] entering a ruling . . . will assist the parties in obtaining full appellate review in the short period of time before the Electoral College votes.”).

court erred when it enjoined RPT from declaring DeLay ineligible and replacing him as its nominee for Texas' Congressional District 22.

A. Injunction Standards

This court reviews “the district court’s findings of fact for clear error and legal issues de novo.” *Cox v. Dallas*, 256 F.3d 281, 288 (5th Cir. 2001). Still, this Court “may affirm for reasons other than those relied upon by the district court.” *Id.* at 288-89 (quoting *Joslyn Mfg. Co. v. Koppers Co.*, 40 F.3d 750, 753 (5th Cir. 1994)). If this Court is “left with the definite and firm conviction that a mistake has been made,” the district court’s ruling is clearly erroneous. *Id.* at 289. Finally, this Court “review[s] the district court’s grant of a permanent injunction for abuse of discretion.” *Id.* (quoting *Hopwood v. Texas*, 236 F.3d 256, 276 (5th Cir. 2000)).

A party requesting a preliminary injunction “must establish that (1) it has a substantial likelihood of prevailing on the merits; (2) there is a substantial threat it will suffer irreparable injury if the preliminary injunction is denied; (3) the threatened injury to [the plaintiff] outweighs the potential injury posed by the injunction to [the defendant]; and (4) granting the preliminary injunction will not disserve the public interest.” *Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 464 (5th Cir. 2003). “The standard for a permanent injunction is essentially the same as the standard for a preliminary injunction with the exception that the plaintiff

must show actual success on the merits rather than a mere likelihood of success.”

Dresser-Rand Co. v. Virtual Automation Inc., 361 F.3d 831, 847 (5th Cir. 2004)

(citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12 (1987)).

Because the District Court erred as a matter of law in holding that the Texas

Election Code, as applied to federal elections, unconstitutionally adds a qualification

for office, it abused its discretion when it granted the requested injunctive relief.

B. RPT Should Prevail on the Merits Because the Elections Clause Grants Broad Authority to the States to Regulate Congressional Election Procedures.

Although TDP claims that “there are three, and only three constitutional requirements a person must meet to hold office as United States Representative,” (Docket No. 27, Pls. Mem. of Law Regarding the Proper Time to Determine A Candidate’s Residence, for Purposes of Determining Whether the Candidate is Constitutionally Qualified to Serve as a United States Representative (“Pl.s’ Residency Memo”) 2), there are four requirements – the final requirement being that the “[Representative] be elected by the people of his State.” *Roudebush v. Hartke*, 405 U.S. 15, 26 n. 13 (1972) (citing U.S. CONST., ART. I, § 2). The States, via Article I, § 4, commonly known as the “Elections Clause,” have long had the authority to create procedural regulations of federal elections so long as those regulations do not “exclude classes of candidates from federal office.” *U.S. Term*

Limits, Inc. v. Thornton, 514 U.S. 779, 832-33 (1995). The Supreme Court has recognized that, absent Congressional action, the States' power to regulate federal elections under the Elections Clause is quite broad. *Roudebush*, 405 U.S. at 24.

It cannot be doubted that these comprehensive words embrace authority to provide a complete code for *congressional* elections, not only as to times and places, but in relation to 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; in short to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Id. at 24-25 (emphasis added). Under this broad procedural authority

the States have evolved comprehensive . . . election codes regulating in most substantial ways, with respect to both *federal* and state elections, the time place and manner of holding primary and general elections . . . and the selection and *qualification* of candidates.

Storer v. Brown, 415 U.S. 724, 730 (1974) (emphasis added). "It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases" *Id.*

C. RPT Should Prevail on the Merits Because the Challenged Statutes Are a Valid Exercise of Texas' Authority to Regulate the Political Party Nomination Process.

1. The Texas Election Code Allows Administrative Declarations of Ineligibility as a Part of the Political Party Nomination Process and Has Been Complied with in Full.

The Texas Legislature has, in the exercise of its powers to regulate federal elections under the Elections Clause, passed a comprehensive elections code that applies to both state and federal elections. In Texas, candidates for major parties, those whose gubernatorial candidates received more than twenty percent of the vote in the last gubernatorial election, are required to choose their candidates for the general election using the primary process. Tex. Elect. Code § 172.001. Parties whose gubernatorial candidates received more than two percent but less than twenty percent of the vote in the last gubernatorial election have the option of choosing their candidates for the general election using the primary process or by convention. Tex. Elect. Code § 172.002.

The county chair of those political parties holding elections then delivers the election returns to the state chair, Tex. Elect. Code § 172.119, who then conducts a canvas of the election returns on the second Wednesday after the primary and delivers the election returns to the Secretary of State for preservation. Tex. Elect. Code § 172.120. Within 20 days of the canvas, the state chair certifies to the

Secretary of State the party's nominees for the general election ballot. Tex. Elect. Code § 172.122. However, the Secretary of State does not complete the certification process until the 62nd day prior to the election. Tex. Elect. Code § 161.008. Thus, the Secretary of State will not certify the candidates for the general election ballot until September 6, 2006. (Docket No. 19, Amicus Letter from Secretary of State 2, June 23, 2006.) Independent candidates wishing to appear on the general election ballot are allowed to do so if they file an application along with a petition demonstrating that the candidate has a minimal level of support sufficient to show that his candidacy is not frivolous. *See* Tex. Elect. Code §§ 142.004, 141.062.

However, recognizing that lives are not stagnant and that things may change between the primary date and the date that the political parties certify their candidates to the Secretary of State for the general election ballot, Texas has provided procedures for handling those contingencies as part of the political party nominating process. First, a candidate may be declared ineligible by “the party officer responsible for certifying the candidate’s name for placement on the general election ballot, in the case of a candidate who is a political party’s nominee,” if “facts indicating that the candidate is ineligible are conclusively established by another public record.” Tex. Elect. Code § 145.003 (“administrative declaration of

ineligibility statute”).⁴ A Texas court has held that a change of voter registration alone is sufficient to provide conclusive proof of a change of residence. *See Nixon v. Slagle*, 885 S.W. 658, 661 (Tex. Civ. App. - Tyler 1994). Common sense dictates that some bases of ineligibility, such as whether a candidate will attain the required age for office, are reasonably knowable in advance, while others, such as where a candidate will live on election day, will have a predictive quality. Still, the Texas Legislature has rightly determined that moving is a good predictor that the candidate will no longer be eligible for office on election day, and allows a state party chair, through its administrative declaration of ineligibility statute, to declare such a candidate ineligible to be the nominee of the party and replace him or her with an eligible candidate in order 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.

⁴This statute is administrative and does not contemplate a court case unless the candidate is dissatisfied with the declaration. The use of the word “another” in Texas Election Code 145.003(f)(2) is not superfluous. Texas Election Code 145.003(f)(1) provides that a candidate may be declared ineligible if facts on his application show that the candidate is ineligible. Thus, the use of the disjunctive “or” between sections (1) and (2) and the reference to “another public record” imply that these other public records are expected to conflict with the statements on the application. Further, the choice of the phrase “another public record” rather than “other public records,” means that one conflicting public record is sufficient for a declaration of ineligibility.

Second, a candidate may withdraw for any reason whatsoever as long as that withdrawal is filed prior to “the 74th day before election day.” Tex. Elect. Code § 145.031, *et seq.* Thus, regardless of the circumstances, any reason is a valid and, more importantly, legal reason to withdraw from an election. The candidate’s name is removed from the ballot by operation of law, if he “withdraws, dies, or is declared ineligible on or before the 74th day before election day.” Tex. Elect. Code § 145.035. A political party finding itself with a “vacancy in nomination” may replace that candidate using the procedures in Texas Election Code § 145.035, if the vacancy occurs as a result of candidate ineligibility or if the candidate has withdrawn under certain circumstances. Thus, the administrative declaration of ineligibility is an integral part of the political party nomination process and intended to protect both the State’s interest in keeping frivolous candidates off the ballot and the political party’s interest in nominating eligible candidates for the general election ballot.

Texas state law authorizes the candidate to make a choice of whether to withdraw his candidacy, which may require that his party be unrepresented on the general election ballot, 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. Although the candidate may make this choice and make it

for any reason, it was the actions of the Texas Legislature which gave him that choice by adopting the withdrawal and administrative declaration of ineligibility statutes as a part of the political party nomination process.

Here, DeLay, the winner of the Republican primary for Texas Congressional District 22, sent Benkiser a letter explaining that he had moved and provided her with three public records, his Virginia drivers license, his Virginia voter registration, and his federal tax withholding form asking that Virginia taxes be withheld from his income. (Docket No. 47, Trial Tr. 23 and Pls. Exh. 17.) Based on these documents, Benkiser exercised her statutory authority to declare DeLay ineligible. (Docket No. 9, Pls.' 1st Am. Compl. 8 and Exh. 4; Docket No. 47, Trial Tr. 19, 21, 23, 26-27, 52-54, 56, 58.) And, but for this lawsuit, Benkiser would have taken the appropriate steps under the Texas Election Code to fill the vacancy on the ballot. (See Docket No. 47, Trial Tr. 29 (“We started the [replacement] process and then—” [interrupted implying that this lawsuit stopped the process]).) Because the Texas Election Code has been complied with, in full, the only question is whether the challenged provisions are a valid exercise of the State’s authority to regulate the political party nomination process under the Elections Clause.

2. The Challenged Provisions Are a Valid Exercise of the State’s Authority to Regulate the Political Party Nomination Process Under the Elections Clause.

Since the Supreme Court has said that “establishing a nominating process is no more setting a qualification for office than is creating a primary,” *U.S. Term Limits*, 514 U.S. at 826 n.41, TDP cannot claim that Texas Election Code § 145.035 which provides a nominating process for filling a political party nomination vacancy, unconstitutionally adds a qualification for office. Therefore, the only question is whether Texas Election Code § 145.003, the administrative declaration of ineligibility statute, is a valid exercise of the State’s authority to regulate the political party nomination process under the Elections Clause.

The ineligibility statute is no different than the withdrawal statute. It provides a procedure by which a candidate who has won a political party’s primary, but has moved from the district and will be ineligible to serve if elected, may be declared ineligible and replaced as the political party’s nominee on the general election ballot. In other words, the “ineligibility” statute allows a candidate to withdraw as the political party’s nominee, while the “withdrawal” statute allows a candidate to withdraw from the election. Both the ineligibility and the withdrawal statutes support “the States’ strong interests in . . . maintaining the integrity of various routes to the ballot . . . avoiding voter confusion, . . . or the presence of frivolous candidacies; and in seeking to ensure that elections are operated equitably and

efficiently.” *National Comm. of the U.S. Taxpayers Party v. Garza*, 924 F. Supp. 71, 73 (W.D. Tex. 1996) (citing *U.S. Term Limits*, 514 U.S. at 834).

Although TDP claims “that the Texas Election Code presumes that the actions Defendant is allegedly about to take will cause harm to the Plaintiffs” (Docket No. 26, Pls.’ Resp. 4), it fails to recognize that even if such is true, which RPT denies, the State has attempted to balance that harm with its “interest, if not a duty, to protect the integrity of the political process from frivolous or fraudulent candidacies.” *See Bullock v. Carter*, 405 U.S. 134, 145 (1972). It can hardly be argued that keeping a candidate on the ballot after that candidate has declared his intent to change his domicile, and has taken significant steps to carry out that intent, so that he will not be eligible for office when elected, is anything other than frivolous and may even rise to the level of creating a fraud on the voters because those voting for him are effectively disenfranchised by voting for a nullity.

The State has also attempted to balance its interests with those of a candidate who may be harmed by an administrative declaration of ineligibility by allowing that candidate to file a judicial action challenging that declaration, the result of that filing is that the candidate remains on the ballot unless and until a Court confirms that determination. *See Tex. Elect. Code* § 273.081 and § 145.004. Thus, the challenged provision neither handicaps a class of candidates nor was passed for the

sole purpose of adding a qualification for office. Rather, the Texas Election Code strikes the appropriate balance between the State's interest in eliminating "frivolous" candidates from the ballot, the voters' interest in choice and competitive elections, a political party's interest in having an eligible candidate on the ballot, and the candidate's interest in running for office. Rather than adding an unconstitutional qualification for office, the Texas Election Code strikes the appropriate constitutional balance considering all of those interests.

In *Storer v. Brown*, the Supreme Court was asked to decide whether California's election provisions that denied a "ballot position to an independent candidate for elective public office if he voted in the immediately preceding primary or if he had registered his affiliation with a qualified political party at any time within one year prior to the immediately preceding primary election" unconstitutionally added a qualification for office. 415 U.S. 724, 726 (1974) (internal citations omitted). The Court rejected the argument that the challenged provisions added a qualification for office as "wholly without merit." *Id.* at 746 n. 16. According to the Court, "[t]he non-affiliation requirement no more establishes an additional qualification for office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support." *Id.* Like the

claims in *Storer*, TDP's claims that the administrative ineligibility statute adds a qualification for office are "wholly without merit," because the statute is merely a part of the nomination process.

Still, TDP relies on *U.S. Term Limits* to support its argument that the administrative ineligibility statute adds a qualification for office. In *U.S. Term Limits*, the Court held "that a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly." 514 U.S. at 836. Plaintiffs in *U.S. Term Limits* challenged an amendment to the Arkansas State Constitution which "prohibit[ed] the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate has already served three terms in the House of Representatives or two terms in the Senate." *Id.* at 783. Despite finding the term limit amendment unconstitutional because it handicapped a class of candidates, those who had previously served in Congress for the proscribed length of time, and that it was passed with the sole purpose of keeping those candidates from office, the Court reaffirmed *Storer*, stating:

The provisions 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 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.

U.S. Term Limits, 514 U.S. at 835 (emphasis added). The statutes TDP challenges here are like those in *Storer* in that they simply regulate election procedures and serve the State's interests in keeping frivolous candidacies off the ballot while promoting voter choice and competitive elections. It also promotes a political party's interest in having an eligible candidate on the ballot.

TDP also relies on *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000), to support its claim. In *Schaefer*, the Ninth Circuit was asked “whether California may require that candidates for the United States House of Representatives reside in the state when filing nomination papers, as distinguished from when elected.” *Id.* at 1032. *Schaefer*, a Nevada resident who desired to run for a California U.S. Congressional seat, was denied “nomination papers because he was not registered to vote in California” and “could not register to vote without first establishing residency in California.” *Id.* The Ninth Circuit held “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.

Similarly, in *Campbell v. Davidson*, 233 F.3d 1229 (10th Cir. 2000), the

Tenth Circuit held that Colorado’s requirement that a candidate be a registered voter before his name can appear on the ballot unconstitutionally adds a qualification for federal office. *Id.* at 1231. Colorado’s voter registration requirement excluded several classes of federal candidate’s from the ballot—(1) those who lived outside the Congressional District for which the candidate wished to run; (2) those who had not lived in the state for at least thirty days; and (3) those who were convicted felons serving sentences or on parole. *Id.* Unlike the statutes in *Schaefer* and *Campbell*, 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. Rather the Texas Election Code provides a procedure whereby a candidate may be administratively removed and replaced on the ballot as a political party’s nominee, when he has taken steps that demonstrate that he will not qualify for office if elected.

In contrast, the Third Circuit, in *Biener v. Calio*, 361 F.3d 206 (3d Cir. 2004), upheld a Delaware statute that allowed political parties to charge a filing fee of up to “1% of the total salary for the term of office the candidate seeks,” unless the candidate is indigent. *Id.* at 209. The plaintiff challenged this provision as a violation of Article I, Section 2, claiming that it unconstitutionally added a “wealth” qualification for federal office. *Id.* at 210. Like TDP, Biener argued that *U.S. Term Limits*, *Schaefer*, and *Campbell* substantiated his claim that the challenged statute

unconstitutionally added a qualification for office. *Biener*, 361 F. 3d at 211-12. The court rejected those arguments finding that “[u]nlike these impermissible qualifications, the filing fee for the Democratic primary is not inherent in the candidate.” *Id.* at 212. Further, there was “no avowed purpose to evade the constitution and exclude a class; instead, the purpose of the filing fee is to keep Delaware’s ballots manageable.” *Id.* In reaching its decision, the Third Circuit noted that “[u]nlike general elections, which are held by the state to select government office-holders, primary elections are conducted by the state on behalf of and as a convenience to political parties to assist them in selecting their candidates for office.” *Id.* at 209. Delaware, like Texas, shares responsibility for conducting primaries with individual political parties. *Id.*

As shown above, the administrative declaration of ineligibility statute is a part of the political party nomination process whereby a candidate who has become ineligible for office may be replaced as the political party’s nominee and is balanced by the provisions that allow a candidate to remain on the ballot if he challenges that declaration. The administrative declaration of ineligibility statute serves the purpose of assisting political parties in selecting candidates that will actually be able to serve in office, if elected, and promoting the State’s interest in keeping frivolous candidates off the ballot while promoting voter choice and competitive elections.

Implicit in *U.S. Term Limits, Schaefer* and *Campbell* was the problem that willing and able candidates would be denied the opportunity to be elected to federal office, because the candidates did not meet some additional criteria. In contrast, the administrative declaration of ineligibility statute does not require that the candidate live in Texas prior to the election. Rather, it provides a mechanism to remove a frivolous candidate as a political party's nominee when it appears that he will not be an inhabitant of Texas at the time of the election. This provision does not apply to a class of candidates, i.e. those who have already served a certain number of terms in office, or those who reside outside of the state when they file their nomination papers. Rather, it applies to those who have won a political party's primary and who have taken some conclusive action to demonstrate that he or she will not be qualified for office, if elected, as long as this occurs after the political party's primary and before the Secretary of State certifies the candidates for the general election ballot. It also provides a safeguard to candidates who may be wrongly declared ineligible by requiring that the names of candidates who judicially challenge such a determination remain on the ballot until the case is decided.⁵

⁵Because the definition of domicile and, therefore, inhabitancy, focuses not just on the public records but on the candidate's intent, a court asked to determine a candidate's domicile should err on the side of caution and find a candidate eligible for federal office if that candidate asserts his intention to make Texas his home. Similar weight should be given to a candidate's assertion that he intends to make another state his home so that he will be ineligible for office.

Therefore, regardless of the predictive nature of the administrative determination of ineligibility, Texas Election Code § 145.003, which allows such administrative determinations of ineligibility, like the challenged statutes in *Storer*, is a part of the political party nomination process and a constitutional regulation of the election procedure under the Elections Clause

D. An Injunction Is Not in the Public Interest.

In the election process the public is best served by voter choice and competitive elections. However, it is equally important that those ineligible to hold office not be allowed to effectively disenfranchise voters by taking up a place on the ballot that would otherwise go to an eligible candidate. Texas has attempted to serve all of these public interests by enacting statutes that allow party chairs to declare candidates who no longer meet the eligibility requirements ineligible and replace them on the ballot. *See* Tex. Elect. Code § § 145.003 and 145.036. Texas has also protected candidates that may be wrongfully declared ineligible by providing a judicial procedure whereby they can challenge that declaration. *See* Tex. Elect. Code § 145.004 and 273.081. These procedures strike the appropriate balance in favor of competitive elections and voter choice, by giving voters not just a choice on election day but a real choice between candidates who are eligible to serve if elected. An injunction, like that requested by the Plaintiffs, which thwarts

these procedures and requires that an ineligible candidate be returned to a place on the ballot cannot serve the public interest.

In *Anderson*, the Court explained that “[o]ur primary concern is with the tendency of ballot access restrictions ‘to limit the field of candidates from which voters might choose.’” 460 U.S. at 786. This passage highlights the Court’s concern that voters have a real choice on the ballot. Here, it is TDP’s lawsuit, rather than the challenged statute, that limits the field of candidates. If TDP succeeds, either RPT will have a candidate on the ballot who will be ineligible to serve, if elected, or no candidate on the ballot. In either case, voter choice is limited because the opportunity to vote for a candidate who has announced he will not serve if elected is no choice at all. Therefore, TDP’s interest is contrary to the public’s interest in having competitive elections and ballot choice.

CONCLUSION

For the foregoing reasons, the Defendant-Appellant, Tina J. Benkiser, respectfully requests that this Court reverse the decision of the district court and find that Texas Election Code § 145.003 is a constitutional exercise of the State of Texas’ authority to regulate the political party nomination process pursuant to the Elections Clause.

Dated: July 13, 2006

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Raeanna S. Moore, certify that today, July 13, 2006, a copy of the brief for appellant and a copy of the record excerpts were served upon the following persons at the following addresses via first class mail and e-mail:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to 4th 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).

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Dated: July 13, 2006