

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**

REPLY BRIEF OF APPELLANT

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of Texas*

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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INTRODUCTION

The replacement process does not constitute a fraud on the voters, but rather promotes the voters' interest by providing them with a choice between candidates who are qualified and willing to run for election. Both parties utilize procedures to remove candidates and replace them with substitute nominees. For example, in Texas in 2004, the Democratic nominee for state representative for House District 5 was declared ineligible as a candidate because he voluntarily relocated to another district and was allowed to be replaced on the ballot. (Docket No. 47, Trial Tr. 45-49; Exhs. 1 and 2.) This replacement was lawful as well as beneficial to the public interest. As the New Jersey Supreme Court stated:

A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." 2 Elliot's Debates 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself.

New Jersey Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1034 (N.J. 2002)

(quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)). The voters here should also be afforded a real choice regarding who should govern them. Allowing DeLay to be replaced on the November ballot will further this fundamental principle of democracy.

ARGUMENT

I. TDP Does Not Have Standing.¹

TDP must prove three elements to establish standing: First, it must have suffered an “injury in fact,” consisting of an “invasion of a *legally protected interest* 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) (emphasis added). 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.* The Fifth Circuit reviews legal 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.*

TDP has failed to meet its burden of establishing its standing to bring suit.

¹TDP’s claim may also be premature because an “unconstitutional application,” according to TDP’s theory, cannot be determined until election day because, according to TDP, we cannot know until that time whether DeLay will be an inhabitant of Virginia or Texas. (TDP Br. 19, 21, 39-40, 48-50.)

A. TDP has suffered no harm to a legally protected right.

1. The competitive effect claimed here is not to a legally protected right.

TDP claims that it has standing because it will have to raise and spend additional funds to compete against a new candidate if DeLay is replaced. (TDP Br. 21.) TDP's Party Director complained, "It's a lot easier to run against somebody that's been indicted and is in the paper all the time . . . than it is for somebody who doesn't have an indictment hanging over them." (TDP Br. 13.) In other words, TDP asks this Court to affirm the District Court's decision so that it can ensure that its candidate competes against an opponent of its choice. However, a preference for a particular opposing candidate is not a legally protected right and is not the basis for a constitutional claim.

As the Supreme Court recognized: "As for the associational 'interest' in selecting the candidate of a group to which one does not belong, that falls far short of a Constitutional right, if indeed it can even fairly be characterized as an interest. It has been described in our cases as a 'desire' – and rejected as a basis for disregarding the First Amendment right to exclude." *California Democratic Party v. Jones*, 530 U.S. 567, 573 n.5 (2000).

In *California Democratic Party*, the Supreme Court considered whether

California could constitutionally implement a “blanket” primary, which allowed voters to vote for any candidate, regardless of the candidate’s party affiliation. 530 U.S. at 570. The law, which was adopted by initiative, was lauded as a procedure that would weaken the party stance and allow for more moderate candidates to be elected. *Id.* The Court held the system was unconstitutional, *id.* at 586, because it “forces political parties to associate with – to have their nominees, and hence their positions, determined by – those who, at best, have refused to affiliate with the party, and at worst, have expressly affiliated with a rival.” *Id.* at 577; *see also United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981) (holding that the state could not force delegates to the Democratic Party National Convention to vote in accordance with the results from Wisconsin’s open presidential primary because it would amount to an unconstitutional “intrusion by those with adverse political principles” upon the party’s protected right to choose its nominee). This is precisely what TDP desires to do: it wishes to intrude upon RPT’s associational rights by forcing RPT to associate with a candidate who will not qualify to serve in the House of Representatives on election day. Thus, a finding in TDP’s favor would condone an “intrusion by those with adverse political” interests into the party’s right to engage in the political party nominating process provided for by the State. Attempting to control an opposing party’s nominating process is not a legally

cognizable right and is insufficient to establish standing.

Nevertheless, the District Court found that TDP would suffer an injury to a protected right sufficient for standing purposes, if DeLay were replaced, because it would have to expend additional funds and effort to campaign against a new candidate. (TDP Br. 18.) As TDP states, this Court will accept a lower court's factual findings underlying its standing determination unless they are clearly erroneous. (TDP Br. 20-21 (citation omitted).) RPT does not dispute the District Court's factual finding that TDP will suffer an adverse competitive effect, in the event that this Court allows DeLay to be declared ineligible and replaced on the ballot by another nominee. RPT acknowledges that TDP may have expended funds in District 22 to assist its candidate in competing against DeLay and will need to refocus its campaign on a new candidate, if DeLay is allowed to be replaced on the ballot.² What RPT does dispute is that this "harm" is not to a legally cognizable interest of TDP. Benkiser did not declare TDP's candidate ineligible; if she had done so, TDP would suffer harm to a protected interest, their protected right of

²Although Ken Bailey, TDP's Party Affairs Director, (Docket No. 47, Trial Tr. 107), implied that TDP has assisted the Lampson campaign, (Docket No. 47, Trial Tr. 110, 115), a review of Lampson's and TDP's FEC filings show that Lampson has received no contributions from TDP and that TDP has made no coordinated or independent expenditures or even paid for polling or opposition research on Lampson's behalf. This information is available in summary form at www.tray.com/cgi-win/x_candpg.exe?DoFn=H6TX09033*2006, last visited July 26, 2006.

association with its own candidate. However, this is not the case. Benkiser declared ineligible RPT's own candidate, not TDP's, and TDP is not associated with DeLay. Thus, TDP cannot claim an invasion of a legally protected interest in the matter. Therefore, the District Court erred in its legal determination that TDP possesses a legally protected interest in this case that has been, or will be, harmed sufficient to grant standing.

An adverse competitive effect is inherent in the democratic process of elections, where candidates are vying for voter support. The actions of one candidate affects the others. This is similar to the situation in which General Motors competes with Ford Motor Company. For example, if Ford decides to discontinue producing the Edsel and decides to produce in its place the Mustang, Ford's decision will injure the competitive position of General Motors, which had planned its marketing strategy with the purpose of competing against the Edsel. Furthermore, Ford's new car may be able to compete more effectively with GM's. General Motor's plans, then, would be obsolete and would have to be abandoned so that it could devise a new strategy to compete against Ford's new Mustang. However, the "competitive injuries" to General Motors do not arise from an invasion of a legally protected right and General Motors could not recover against Ford for the harm it suffered. Likewise, TDP has no legally protected right here that has been invaded

and, as a result, lacks the requisite standing to bring this case.

2. TDP does not have associational standing in this case.

In addition to the fact that TDP itself has no legally cognizable right that is being invaded here, TDP's candidate and its members also lack a legally protected interest. While the TDP is in association with its candidates and voters, the replacement of DeLay effects no legally cognizable right that they have that TDP could assert. TDP cites *Smith v. Boyle*, 144 F.3d 1060 (7th Cir. 1998), for the proposition that it has standing because "an alleged violation of the rules or Constitution that makes it harder to compete in elections is a cognizable harm." (TDP Br. 23.) The legally protected right in *Smith*, however, was not that the at-large election method at issue made it "harder to compete in elections," but rather that the party members' votes were being diluted. *Smith*, 144 F.3d at 1063. Votes are diluted when some electors' votes are given more weight than others. *Id.* at 1062. Therefore, the party had standing because its own members, with whom they were in association, had a legally protected interest in having their votes count the same as those of other voters. In contrast, there is no dilution of TDP's members' votes in this case and there is no other legally protected interest its members can claim. TDP asserts that its members will be harmed because they "want to win" and replacing DeLay will "give an advantage to one party" that will "necessarily injure"

voters when they “take the trouble to vote.” (TDP. Br. 31). Such a claim, besides being entirely speculative, does not come close to stating an invasion of a legally protected interest.

TDP also cites *Democratic Party of the United States v. National Conservative PAC*, 578 F. Supp. 797 (E.D. Pa. 1983), which was reversed by the Supreme Court as to the statutory standing issue in *Federal Election Comm’n v. National Conservative PAC*, 470 U.S. 480 (1985), to bolster its claim of standing. (TDP Br. 24.) In that case, a federal statute made it a crime for a political committee to spend more than \$1,000 in support of presidential or vice presidential candidates who receive public funding. *Democratic Party*, 578 F. Supp. at 801. The Democratic Party sought a declaratory action that the statute was constitutional. *Id.* The court held that the party had standing, *id.* at 810, because the statute specifically allowed “the national committee of any political party . . . to institute such actions, including actions for declaratory judgment or injunctive relief.” *Id.* at 804 (*quoting* 26 U.S.C. § 9011(b)). The plaintiff’s rights were given protected legal status by the statute itself. The court noted that “[w]hether private plaintiffs have standing in this declaratory judgment action turns largely on whether private plaintiffs may ultimately enforce the provisions of the Fund Act.” *Id.* at 809. The Supreme Court reversed the lower court decision, holding that the statute did not

confer standing on political parties to seek construction of the statute. *Federal Election Comm'n*, 470 U.S. at 486. The Court did not decide the issue of the party's Article III standing. *Id.* at 489-90. As a result, this case provides no support for TDP's claim of standing based on a judicially cognizable interest.

TDP also cites *Randall v. Sorrell*, 548 U.S. ____ , 136 S. Ct. 2479 (2006)³, in its attempt to establish standing. (TDP Br. 22, 24.) The plaintiffs in *Randall* included political parties that were regulated by Vermont's draconian campaign finance scheme. *Id.* at 2493. They established a legally cognizable interest because the challenged statutes directly limited the amount of money they could contribute to their own candidates and the amount of funds they could receive from donors. *Id.* As a result, their rights of association with their own candidates and donors were directly implicated by the statute. The statute here does not, as TDP claims, "dampen TDP's ability to raise funds," (TDP Br. 12), because RPT's replacement of its own candidate "would be the cause of Democrats' decisions to participate and donate at a lower level." (TDP Br. 27.) This alleged harm, however, is "the result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560.

Political parties have standing to bring suit when they are harmed by a law that

³RPT's counsel in this case also served as counsel in *Randall v. Sorrell*.

directly affects their legally protected interests and those of their candidates or members. In this case, neither TDP nor its members or its candidate have such an interest. Consequently, TDP does not have standing.

a. The rights of a candidate belong only to DeLay.

DeLay won the primary and has a legally protected right to be the Republican nominee for District 22. However, he has voluntarily relinquished this right, by moving, and may not be compelled to associate as a candidate if he does not desire to do so. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000) (see discussion below). If he did desire to remain a candidate, Texas law protects his right by allowing him to bring suit if he is declared ineligible by the party chair against his will. If such an event occurred, it would be a case he would easily win if he were declared ineligible based on out-of-state residency because the question of inhabitancy is determined in large part by where the candidate intends his place of habitation to be. *Jones v. Bush*, 122 F. Supp. 2d 713, 719-20 (N.D. Tex.), *aff'd*, 244 F.3d 134 (5th Cir. 2000).

Only DeLay has a protected right in remaining on the ballot as the Republican candidate for District 22, which the RPT could also assert, since they are in association with him. The TDP is not in association with DeLay, so it may not assert his right to remain a candidate.

b. TDP also cannot bring suit on behalf of Republican voters because it is not in association with them.

TDP claims that removing DeLay from the ballot and allowing a replacement to be named would “perpetrate a fraud on the voters.” (TDP Br. 20.) TDP claims an interest “in having a party’s primary voters . . . choose the nominee.” (TDP Supp. Br. 9 n.3.) Further, TDP maintains that “RPT’s voters chose DeLay, and both they and RPT’s opponent [TDP] should be entitled to assume that choice will be honored.” (TDP Supp. Br. 9 n.3.) TDP, notwithstanding its purported concern for Republican voters, cannot use this lawsuit to vindicate Republican voters’ rights, because TDP is not in association with them.

Moreover, even if Republican voters made such a claim, that DeLay’s removal violated their right of association with him, they would be in error because Republican voters cannot compel DeLay to stay in association with them if he does not so desire. And DeLay has made it clear that he does not intend to associate with the Republican party in a bid for the House seat in November. “Freedom of association . . . plainly presupposes a freedom not to associate.” *Boy Scouts*, 530 U.S. at 647-48 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

In *Boy Scouts*, the Supreme Court considered whether the group could constitutionally revoke the membership of a homosexual adult member because homosexual conduct is not consistent with the values it seeks to promote. *Id.* at 645. The Court held that the Boy Scouts, as an expressive association, could not be forced to associate with a member who did not share their views, *id.* at 656, reasoning that an “‘intrusion into the internal structure or affairs of an association’ like a ‘regulation that forces the group to accept members it does not desire’” is unconstitutional. *Id.* at 648 (citing *Roberts*, 468 U.S. at 623); see also *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (holding that an association of individuals could not be forced to associate with a group promoting a message it did not wish to convey).

Therefore, even if TDP had standing based on the rights of its opponent and its opponents’ members, which it does not because it is not in association with them, Republican voters could not successfully bring suit challenging DeLay’s declaration of ineligibility because he does not wish to run for reelection and they do not have the right to compel him to associate with them in this way.

II. The State Has Authority to Allow Declarations of Ineligibility Based on Inhabitancy Pursuant to the Elections and Qualifications Clauses.

A. Each element of the Qualifications Clause is predictive and contingent.

Article I, Section 2 of the United States Constitution provides:

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

It was this provision that the district court referred to when it determined that it “must decide whether the Constitution permits Defendant to divine or predict where DeLay will be an inhabitant on November 7, 2006 based on facts available in June of 2006.” (Docket No. 40, Findings of Fact and Conclusions of Law 11, July 6, 2006; ROA 00494.) It then found “that the Constitution does not permit such speculative determinations where the election of a United States Representative is at issue, specifically because Benkiser’s prediction of future eligibility based on current inhabitancy would amount to an imposition of an unconstitutional pre-election residency requirement.” *Id.*

However, each of the qualifications are predictive and contingent until after the election. First, with regard to whether a candidate will reach the age of 25, we can know that a person’s birth date falls on the day of the election, so that if he is presently twenty-four we can predict that he will turn twenty-five on his birthday but we cannot know that he will actually live to reach the age of twenty-five. He

may step in front of a bus or suffer a heart attack because of a previously undetected heart defect. Still, because his birthday falls on election day, we will presume that he will reach the appropriate age and allow him to remain on the ballot.

Similarly, with respect to the requirement that a representative be seven years a citizen of the United States, we can know the date on which he became a citizen, but we cannot know whether he will remain a citizen. He may, as some Hollywood types have threatened, move to another country, renounce his U.S. Citizenship and take the necessary steps to become a citizen of that country. Still, because he is currently a U.S. citizen and has not taken those steps, we will presume that he will remain a U.S. citizen and allow him to remain on the ballot.

Although the first two requirements are easier to prove, they are no more predictive or contingent than the third requirement, that he be an inhabitant of the state that elected him on election day. A person may indeed be an inhabitant of one state today and the inhabitant of another state the next day, such is the nature of our society which permits the free movement of its citizens. However, as shown below, the inhabitancy requirement can be established by the person's presence within a state coupled by his intent to remain there indefinitely.

Therefore, just as we can predict that someone will attain the proper age based on

their birth certificate or that they will remain a citizen based on their current citizenship, we can predict that someone will be an inhabitant of the state where he currently resides when coupled with his intent to remain there indefinitely.

B. Inhabitancy Is Determined Using the *Jones* Standard.

In *Jones v. Bush*, 122 F. Supp. 2d 713 (N.D. Tex. 2000), the court was asked to determine whether Vice-President Dick Cheney was an inhabitant of Texas or Wyoming “within the meaning of the Twelfth Amendment.” *Id.* at 715. In determining the meaning of the word “inhabitant” the district court determined that the “touchstone . . . is the intent of the Framers.” *Id.* at 718. Thus, “[t]he court’s inquiry into the meaning of ‘inhabitant’ is informed by the definitions of the term contained in dictionaries in use at the time the Twelfth Amendment was adopted and ratified.” *Id.* at 719. Further, “there is no indication in the text of the Constitution that the same term should be given different meanings” so that the definition of the word “inhabitant” in Article I, § 2 should be the same as that in the Twelfth Amendment. *Id.* at 720.

After examining the definition of inhabitant as used in the appropriate time period, the court determined that “[t]hese definitions closely parallel the modern concept of domicile, which ‘is established by physical presence in a place in connection with a certain state of mind concerning one’s intent to remain there.’”

Id. at 719 (quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989)). It then held “that a person is an ‘inhabitant’ of a state . . . if he (1) has a physical presence within that state and (2) intends that it be his place of habitation.” *Id.* (citing *Texas v. State of Florida*, 306 U.S. 398, 424 (1939) and *Coury v. Prot.*, 85 F.3d 244, 250 (5th Cir. 1996)).

Under this standard, DeLay is presently an inhabitant of Virginia. DeLay lives in a condominium in Virginia that he and his wife have owned for approximately twelve years. (Docket No. 47, Trial Tr. 73, 79.) Prior to being declared ineligible, DeLay had taken other steps such as obtaining a Virginia driver’s license and voter’s registration and changing his employment withholding form to reflect Virginia residency to establish his presence in Virginia. (Docket No. 9, Pls.’ 1st Am. Compl. Exhs. 5 and 8; Docket No. 47, Trial Tr. 65, 67 and Pls.’ Exh. 17.) While DeLay has also taken many other steps to establish his domicile in Virginia, *see* RPT’s brief at 5-7, Benkiser specifically relied on these three actions in declaring DeLay ineligible to serve as the party’s nominee in the general election. (Docket No. 47, Trial Tr. 23 and Pls.’ Exh. 17.) DeLay provided public documents verifying these actions as attachments to a letter to Benkiser in which he explained that he was “no longer eligible to remain on the electoral ballot” because he had moved to Virginia to “pursue new opportunities

from outside the arena of the U.S. House of Representatives.” *Id.* Further, DeLay has stated his “intention to be an inhabitant of Virginia indefinitely.” (Docket No. 47, Trial Tr. 78.) Thus, under the *Jones* standard, it can be determined that DeLay is currently an inhabitant of Virginia and, as discussed above, absent a present intent to change his domicile, we can presume that DeLay will remain an inhabitant of Virginia.

C. Voter registration is a public record that proves change of domicile and conclusively establishes such a change for purposes of Texas Election Code § 145.003.

The criminal penalties attendant with filing a false statement on a voter registration form demonstrate that the filing of such a form is objective evidence of a nominee’s intent to reside elsewhere. Under the Texas Election Code a person may be convicted of a Class B Misdemeanor if he “knowingly makes a false statement on . . . a [voter] registration application.” Tex. Elect. Code § 13.007. A person convicted of a Class B Misdemeanor may be sentenced to up to 180 days in jail, fined up to \$2,000 or both. Tex. Penal Code § 12.22. Similarly, Virginia’s Election Code provides that any person who willfully makes a false material statement on a voter registration form may be convicted of a Class 5 felony. Virginia Code § 24.2-1016. A person convicted of a Class 5 felony may be sentenced to up to ten years imprisonment or up to twelve months in jail and

fined up to \$2,500. Virginia Code § 18.2-10.

As the severity of the criminal penalties demonstrate, a decision to file a voter registration form is a serious decision. As such, the filing of a voter registration should be considered objective evidence of a candidate's intent to change his domicile.

Further, the seriousness of the penalties supports the Texas Court of Appeal's decision that a change of voter registration alone is conclusive proof for purposes of § 145.003. *See Nixon v. Slagle*, 885 S.W. 2d 658, 662 (Tex. Civ. App. – Tyler 1994, no writ.) (“Thus, we conclude that the application was a public record that conclusively established the fact of [the candidate's] residence.”). “Under Section 145.003, if residency outside the appropriate territory can be conclusively established by public record, then ineligibility can be appropriately determined by Administrative Declaration.” *Id.* at 661. A voter registration form is a public record because Texas Election Code § 1.012(c) “provides that ‘all election records are public information’” and such records are filed with and maintained by the county registrar. *See Nixon*, 885 S.W. 2d at 661 (*quoting* Texas Elect. Code § 1.012(c)).⁴

⁴Both the District Court, (ROA 00494), and TDP claim that RPT's reliance on *Nixon* “is misplaced” (TDP Br. 42 n.10). Even though *Nixon* may be superficially distinguished based on the fact that it involved a candidate for state office and a not a candidate for federal office, *Nixon*

Where, as here, a party's nominee has submitted a voter registration to show that he has changed his domicile, that registration is both objective evidence of the nominee's intent to change his domicile for purposes of the *Jones* standard and conclusive evidence of that change of domicile for purposes of Texas Election Code § 145.003.

III. Upholding the Injunction Will Disserve the Public Interest.

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

supports RPT's claim that Benkiser complied with Texas Election Code § 145.003 by relying on DeLay's Virginia voter's registration as well as two other documents to conclusively establish DeLay's ineligibility. In short, a single public record sufficiently satisfies § 145.003's requirement that ineligibility be conclusively established.

Cir. 2004) (*citing Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987)).

Reversing the district court's injunction in this case will serve the public interest. Courts have recognized that construing election laws in such a way as to promote the voters' choice of qualified candidates on election day is in the electorate's interest and is

in accord with sound public policy. It imposes neither hardship nor disadvantage upon nor gives preference or advantage to either party or candidate and does maintain a fair and equal balance in the election procedures and machinery, thereby affording the electorate the opportunity for choice, an opportunity basic to a democratic and fair election. To have denied the substitution, in reality, would have resolved the election in advance of November 5 and not at the polls. The selection of elected public officials is historically and legally a function exclusively reserved for eligible voters. No tradition of American life is more cherished than the right of the voter, at all levels of government, to express his choice between candidates at the polls.

In re Mayor of Altoona, 196 A.2d 371, 375 (Pa. 1964) (holding that party could lawfully choose a replacement nominee two months before election even though replacement was outside of statutory deadline).

Both parties utilize procedures to remove candidates from the ballot and replace them with substitute nominees. The replacement process, far from defrauding voters, promotes the voters' interest by providing them with a choice between candidates who are qualified and willing to run for election. For example,

United States Senator Robert Torricelli withdrew as the Democratic Party's New Jersey senatorial candidate for the 2002 election after winning his party's primary. The Democratic Party brought suit, asking the court to allow it to remove Senator Torricelli from the ballot and replace him with another candidate. *New Jersey Democratic Party, Inc. v. Samson*, 814 A.2d 1028 (N.J. 2002). The court unanimously granted the relief requested even though the party had failed to comply with a state statute providing that a candidate could be selected by the state party to fill a vacancy occurring 51 days before the general election and the selection could not be made later than 48 days before. *Id.* at 1036-37. The court "liberally construed" the statute, *id.* at 1033, in order to "ensure an opportunity for voters to exercise their right of choice in the November 2002 senatorial election consonant with an orderly process for the handling of ballots." *Id.* at 1042. The court recognized that "election laws are to be liberally construed so as to effectuate their purpose. They should not be construed so as to deprive voters of their franchise or so as to render an election void for technical reasons." *Id.* at 1033 (citation omitted). *See also Kilmurray v. Gilfert*, 91 A.2d 865, 867 (N.J. 1952) (allowing a replacement candidate to be named outside of the statutory time frame allowing replacement because "[i]t is in the public interest and the general intent of the election laws to preserve the two-party system and to submit to the

electorate a ballot bearing the names of candidates of both major political parties as well as of all other qualifying parties and groups”); *Black v. Board of Supervisors of Elections of Baltimore City*, 191 A.2d 581, 583 (Md. 1963) (holding that replacement nominee could be named outside statutory window time line because “a construction that would, in effect, deprive the voters of a right to vote for a candidate who is willing to accept the office, should not be favored”).

As courts have recognized, replacement of a candidate does not in any way defraud the electorate, but rather promotes the interests of voters by providing them with a choice between candidates who are qualified and willing to run for election.

IV. TDP Is Not Irreparably Harmed Because TDP Has an Adequate Remedy at Law.

“A party seeking a permanent injunction must also plead and prove an irreparable injury for which no adequate remedy at law exists.” *Dresser-Rand Co.*, 361 F.3d at 847-48. Thus, in order to show irreparable harm, TDP must show that it does not have an adequate remedy at law. Here, TDP is not irreparably harmed because it has an adequate remedy at law.

TDP claims that Benkiser’s administrative declaration of DeLay’s ineligibility is an “unconstitutional application” of § 145.003 because, according

to TDP's theory, DeLay's domicile cannot be determined until election day. (TDP Br. 19, 21, 39-40, 48-50.) Thus, under TDP's own theory, the proper time to award relief would be after the election. There are at least two remedies available after the election.

First, if RPT nominates an ineligible candidate, and that candidate wins the election, TDP's candidate would have a remedy available after the election.

TDP's candidate can petition the United States House of Representatives and ask it to declare that the Republican candidate is ineligible and find that TDP's candidate is the properly elected member. *See* 28 U.S.C. § 381, *et. seq.*

(Outlining procedures for election contests by any person whose name was "printed on the official ballot for election to the office of Representative.").

Second, if DeLay is removed and replaced on the ballot and the new Republican candidate is elected, TDP can bring a declaratory action at that time, if DeLay is in actuality still an inhabitant of Texas and was wrongfully removed. If TDP wins this claim a special election can be held. As TDP acknowledges, a special election is an adequate remedy at law that would be available here. (TDP Br. 51-52.) Therefore, TDP is not entitled to a permanent injunction because it has an adequate remedy at law.

V. The Legislative History Behind Section 145.036 Demonstrates that the

Legislature Purposefully Did Not Change the Provisions Regarding Declarations of Ineligibility When It Amended the Provisions Allowing Political Parties to Replace Nominees that Declined the Nomination.

According to the members of the 68th Texas Legislature who filed as amicus curiae in support of TDP, “the legislative history of the Texas Election Code demonstrates that – barring death or catastrophic illness – political parties are stuck with their nominees after the primary.” (68th Legislature Br. 5.) While the 68th legislature was indeed fed up with the increasing number of nominees replaced under the “declination” statute that allowed a candidate to “decline and annul his nomination by delivering” a signed declaration to the appropriate official, (Appendix of 68th Legislature 00003), the corresponding “modern” provision is not the ineligibility statute but the withdrawal statute.

The relevant portions of S.B. 122 provided:

- (a) A nominee of a political party may decline and annul his nomination by delivering to the officer with whom the certificate of his nomination is filed and to the chairman of the executive committee having the power to fill a vacancy in such nomination [~~, not later than the 45th day before the day of the general election,~~ a declaration in writing, signed by him and acknowledged before some officer authorized to take acknowledgments. If the declination occurs on or before the 65th day before general election day, [whereupon] the officer receiving the declaration shall take the necessary action to have the name of the nominee removed from the ballot. [~~A nominee may not decline the nomination after the 45th day before election day.~~]
- (b) If on or before the 65th [~~45th~~] day before the day of the election, a nominee dies, [~~or~~] declines the nomination as provided by this

subsection, or is declared ineligible to be elected to or to hold the office for which he is a candidate, the executive committee of the party for the state, district, county, or precinct, as the office to be nominated may require, may nominate a candidate to supply the vacancy. An executive committee may not make a substitute nomination after a declination unless the nominee declines the nomination because of a catastrophic illness, the diagnosis of which occurred after the 6th day before general primary election day, that would incapacitate the nominee permanently and continuously to prevent him from performing the duties of the office sought and the nominee files with the declaration required by subsection (a) of this section a certificate describing the illness signed by at least two licensed physicians.

(Appendix of 68th Legislature 00003; *see also id.* at 00005-6, 00010-11, 00013, 00015-16, 00018-19, 00025-26, 00028-29, 00034.)

The provisions governing declination are analogous to the present provisions governing withdrawal. The statute allowing withdrawal provides, in relevant part, as follows:

(a) To withdraw from an election, a candidate whose name is to appear on the ballot must request that the candidate's name be omitted from the ballot. (b) To be effective, a withdrawal request must: (1) be in writing and signed and acknowledged by the candidate; and (2) be timely filed with the appropriate authority as provided by this code.

Tex. Elect. Code § 145.001. Further, “[a] candidate may not withdraw from the general election after the 74th day before election day.” Tex. Elect. Code § 145.033. “A candidate’s name shall be omitted from the ballot if the candidate withdraws, dies, or is declared ineligible on or before the 74th day before

election.” Tex. Elect. Code § 145.035. Finally,

(a) Except as provided by Subsection (b), if a candidate’s name is to be omitted from the ballot under Section 145.035, the political party’s state, district, county, or precinct executive committee, as appropriate for the particular office, may nominate a replacement candidate to fill the vacancy in the nomination.

(b) An executive committee may make a replacement nomination following a withdrawal only if: (1) the candidate: (A) withdraws because of a catastrophic illness that was diagnosed after the 62nd day before general primary election day and the illness would permanently and continuously incapacitate the candidate and prevent the candidate from performing the duties of the office sought; and (B) files with the withdrawal request a certificate describing the illness and signed by at least two licensed physicians.

Tex. Elect. Code § 145.036. A simple comparison of the former “declination” provisions and the current “withdrawal” provisions show that these are the analogous provisions. This is particularly true when one considers that both the statute that was amended by S.B. 122 and the current provisions also referred to candidates who were “ineligible” as distinct from those who had declined or withdrawn from the ballot.

Further, candidate replacement after a declaration of ineligibility was not a concern of the 68th Legislature and was specifically not changed at the time the declination provisions were amended. As explained by Senator Caperton, the bill’s sponsor at the Hearing on S.B. 122 Before the Senate State Affairs Committee, the bill was offered because candidates were replaced “not through

ineligibility, not through unavailability to serve, or not through any other reason other than political considerations.” (Hearing on S.B. 122 Before the Senate State Affairs Committee, 68th Leg. R.S., 3-4-12 (Feb. 7, 1983) (emphasis added); 68th Legislature Br. 9 and Appendix Tab D.) Senator Caperton went on to explain

This bill does three things. It says that if a nominee declines the nomination on or before the 45th day before the general election, the candidate’s name shall be removed from the ballot, and that party will have no candidate.

Number two, if the nominee declines within the 45 days – in other words, right before the election – then that person’s name obviously is going to stay on the ballot. But we treat that candidate, then, as we would one who dies or becomes *ineligible*. And if that candidate’s name receives the number of votes necessary to win, we have to have a special election.

So, basically, there’s three alternatives. The declination on or before the 45th day, if he’s declared. The second one I left out. If he dies *or is declared ineligible* on or before the 45th day, the party can nominate someone. *And that’s the way the law is today.*

In other words, if between May and 45 days before the general election you die *or declared ineligible for some reason*, then the usual procedure of nominating a replacement candidate through the executive committees of the party is followed. And that’s left in (inaudible).

But if within the 45 days the nominee is – dies or *declared ineligible*, *the law just stays the same.*

(Hearing on S.B. 122 Before the Senate State Affairs Committee, 68th Leg. R.S., 3:22-4:24(emphasis added); 68th Legislature Br. Appendix Tab D.). Thus, rather than support Amici’s claim, the legislative history it provides to back up its assertion demonstrates that declarations of candidate ineligibility were not

perceived as being abused so that those provisions were left unchanged and remain unchanged to this day.

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 26, 2006

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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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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