No. A-

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

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

APPLICATION FOR STAY OF ENFORCEMENT OF THE JUDGMENT BELOW PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT

TO: THE HONORABLE ANTONIN SCALIA

Associate Justice of the United States Supreme Court and
Circuit Justice for the Fifth Circuit

James Bopp, Jr.
Counsel of Record
Raeanna S. Moore
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807
(812) 232-2434
(812) 235-3685 (facsimile)
Counsel for Applicant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

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

APPLICATION FOR STAY OF ENFORCEMENT OF THE JUDGMENT BELOW PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT

TO THE HONORABLE ANTONIN SCALIA, Associate Justice of the United States Supreme Court and Circuit Justice for the Fifth Circuit:

Pursuant to Rules 22 and 23 of the Rules of this Court and 28 U.S.C. § 2101(f), Applicant Tina J. Benkiser, in her capacity as Chairwoman of the Republican Party of Texas ("Benkiser" or "RPT"), respectfully requests a stay of the judgment below pending the filing and final action by this Court on a petition for certiorari seeking review of the Fifth Circuit's judgment in this case.

This application seeks to protect Republican Party of Texas' First Amendment right of association by protecting its ability to nominate a candidate of its choice free from the intrusion of those with adverse interests, the Texas Democratic Party ("TDP"). As a result of TDP's intrusion into RPT's

nomination process, RPT is forced to retain as its nominee, a nominee who has announced that he will be ineligible to take office if elected, because he has moved to Virginia and plans to live there indefinitely, even though Texas Election laws allow political parties to replace ineligible candidates as their nominee with someone who would be eligible to serve if elected. The Fifth Circuit's decision condones this intrusion by holding that RPT's exercise of its statutory right to require a candidate to reaffirm his eligibility for office, once he has taken steps fundamentally incompatible with his previous promise that he would be eligible for office if elected, unconstitutionally adds a qualification for office. Further, the Fifth Circuit's alternative holding that RPT's administrative declaration of ineligibility in this case violated Texas Election Code § 145.003 renders compliance with that statute an impossibility, not only in this case but in every case where that statute might be applied, because it misconstrued the statute by failing to look at the statute as a whole. Finally, the Fifth Circuit erred when it held that the competitive effects of RPT's replacement of its candidate was a sufficient injury to confer standing on the TDP, its competitor.[1] Therefore,

---

[1]The TDP demands here either that Tom DeLay "withdraw" as the Republican nominee, so that the Democrat candidate can run unopposed, or that he be forced to run in Texas, even though he has resigned from Congress, moved to Virginia, registered to vote and voted in Virginia (thereby swearing that he is now a resident of Virginia), testified that he intends to reside in Virginia indefinitely, and has acknowledged his own ineligibility, so that the TDP can challenge his ineligibility to serve if elected.

RPT respectfully requests a stay of the judgment below so that it may choose an eligible nominee to represent it as a candidate in the November 2006 general election.[2]

RPT has exhausted all possibilities of securing a stay of the judgment from the Fifth Circuit by filing two requests for stay which were both denied as a part of the opinion. *Texas Democratic Party v. Benkiser*, No. 06-50812, slip op. at 26 (5th Cir. Aug. 3, 2006). The District Court stands ready to enforce its injunction preventing RPT from replacing an ineligible candidate on the ballot with an eligible candidate.

I. OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (Exh. A) is not yet reported. The findings of fact and conclusions of law and judgment of the District Court (Exh. B) are found at *Texas Democratic Party v. Benkiser*, __ F. Supp. 2d __, 2006 U.S. Dist. LEXIS 47115 (W.D. TX. July 6, 2006).

II. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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

No Person shall be a Representative who shall not have attained to

---

[2]As indicated in section III.B.19, *infra*, RPT is prepared to file its petition for certiorari no later than September 1, 2006, or such lesser time as the Court may order, or the Court may treat this application for stay as a petition for writ of certiorari.

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.

Article I, Section 4, Clause 1 of the Constitution of the United States provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Sentaors.

Texas Election Code § 145.003, in relevant part, provides:

(b) A candidate in the general election for state and county officers may be declared ineligible before the 30th day preceding election day by: (1) 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; . . .
(f) A candidate may be declared ineligible only if: . . . (2) facts indicating that the candidate is ineligible are conclusively established by another public record.

Texas Election Code § 145.035 provides:

A candidates name shall be omitted from the ballot if the candidate withdraws, dies, or is declared ineligible on or before the 74th day before election day.

Texas Election Code § 145.036, in relevant part, provides:

(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 the general primary election day and the illness would permanently and continuously incapacitate the candidate and

> prevent the candidate from performing the duties of the office sought; and (B) files with the withdrawal request a certificate describing the illness and signed by at least two licensed physicians; (2) no political party that held primary elections has a nominee for the office sought by the withdrawing candidate as of the time of the withdrawal; or (3) the candidate has been elected or appointed to fill a vacancy in another elective office or has become the nominee for another office.

III. STATEMENT

A. Facts

Tom DeLay has represented Texas Congressional District 22 since 1984. On December 19, 2005, DeLay filed his Application for a Place on the Republican Party General Primary Ballot for the office of Texas Congressional District 22 and swore that he was "eligible to hold such office under the Constitution." He subsequently ran for and won the 2006 Republican primary election in March 2006. After the primary, DeLay decided to move to Virginia and began taking steps to complete that move.

On April 27, 2006, DeLay obtained a Virginia driver's license. He surrendered his Texas driver's license to Virginia when he received his Virginia driver's license. Also on April 27, 2006, DeLay changed his employment withholding form to reflect Virginia residency. He subsequently registered to vote in Virginia and his voter's registration card was issued on May 8, 2006. On June 9, 2006, he resigned his seat in Congress.

DeLay has also taken other steps to establish his domicile in Virginia such

as voting in the Virginia primary and obtaining a Virginia hunting and fishing license. DeLay has moved into a condominium that he and his wife have owned for approximately twelve years. His most recent financial disclosure statement filed with the House of Representatives reflects a Virginia address. DeLay runs his business, First Principles, from an office in his Virginia home and is in the process of opening an office in Washington, D.C. DeLay testified that intends to be an inhabitant of Virginia indefinitely.

On June 6, 2006, Benkiser received a letter, dated May 30, 2006,[3] 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 place of residence. On June 7, 2006, based on DeLay's move to Virginia, as evidenced by the three public documents he provided to prove his move, and, pursuant to TEX. ELEC. CODE § 145.003(b), Benkiser, in her capacity as Chair of RPT, declared in writing that DeLay is ineligible to serve as RPT's nominee for Texas Congressional District 22 in the general election, thereby requiring DeLay to reaffirm his eligibility by employing the procedures under Texas Election Code § 273.081 and § 145.004, if he intended to be eligible to serve in Congress on election day, if elected.

---

[3]Members of DeLay's staff had previously provided Benkiser with a draft of that letter on May 26, 2006.

DeLay did not do so, and RPT began the process, provided by Texas Election Code § 145.036, of finding a replacement nominee for the general election ballot for Texas Congressional District 22.

B. Summary of relevant procedural events and deadlines

1. *December 19, 2005*: DeLay filed his Application for a Place on the Republican Party General Primary Ballot for the office of Texas Congressional District 22 and swore that he was "eligible to hold such office under the Constitution."
2. *March 7, 2006*: Primary Election was held and DeLay was chosen as the Republican nominee for Texas Congressional District 22.
3. *June 6, 2006*: Benkiser received a letter from DeLay, dated May 30, 2006, providing her with public documents showing that he has moved to Virginia and stating that he is "no longer eligible to remain on the electoral ballot for the 2006 November election."
4. *June 7, 2006*: Benkiser, pursuant to the authority of the Texas Election Code, administratively declared DeLay ineligible for office, requiring DeLay to reaffirm his eligibility to serve in Congress on election day, if elected, and began the process of replacing him on the ballot.
5. *June 8, 2006*: The Texas Democratic Party and Boyd L. Richie, in his capacity as Chairman of the Texas Democratic Party (collectively "TDP") filed this matter with the District Court of Travis County Texas, 201st Judicial District, which issued a temporary restraining order stopping the replacement process within hours of the filing.
6. *June 15, 2006*: RPT removed the matter to the United States District Court

for the Western District of Texas.

7. *June 26, 2006*: The District Court held a consolidated hearing on the merits.

8. *July 6, 2006*: The District Court declared that the Texas Election Code, as applied in this case, violates the Qualifications Clause of the United States Constitution and entered a permanent injunction which (1) "barred Benkiser from declaring DeLay ineligible and certifying to the Texas Secretary of State any candidate for the 22nd District other than DeLay;" (2) "declared that DeLay is 'not ineligible' to be the Republican Party nominee and voided Benkiser's previous declaration;" and (3) prohibited the Secretary of State from removing DeLay's name from the ballot for the general election unless DeLay withdraws." *Texas Democratic Party*, slip op. at 3. That same day, RPT filed its Notice of Appeal.

9. *July 13, 2006*: The Fifth Circuit granted RPT's Motion to Expedite.

10. *July 31, 2006*: The Fifth Circuit Court of Appeals held oral argument in the matter.

11. *August 3, 2006*: The Fifth Circuit entered an opinion affirming the decision of the District Court and denying RPT's Motions for Stay.

12. *August 7, 2006*: Date of filing the instant application with the Clerk of this Court.

13. *August 25, 2006*: Date on which the Fifth Circuit's mandate will issue, unless

stayed by order of this Court, or a Circuit Justice, *and* deadline for declaration of ineligibility under the Texas statutes.

14. *August 29, 2006*: Deadline for the RPT to deliver the certification of a replacement nominee for Texas Congressional District 22 to the Secretary of State, if a replacement is nominated by a district executive committee. If the district executive committee fails to name a nominee, the RPT itself may name a nominee by September 1, 2006.

15. *September 6, 2006*: Deadline for the Secretary of State to Certify the Ballot.

16. *September 7, 2006*: Date ballots should be sent to the printer for printing.

17. *September 8, 2006*: First day that voters may request a ballot by mail for the November election.

18. *September 23, 2006*: Deadline for mailing ballots to overseas voters, including military voters.

19. *November 1, 2006*: Present due date for filing petition for writ of certiorari, being 90 days from the date the Fifth Circuit entered its opinion in this matter (August 3, 2006). However, petitioner is prepared to file its petition for certiorari no later than September 1, 2006, or such lesser time as the Court may order.[4]

---

[4]Alternatively, the Court may wish to treat this application as a petition for a writ of certiorari. *See, e.g., Barefoot v. Estelle*, 459 U.S. 1169 (1983), 463 U.S. 880,

20. *November 7, 2006*: General Election Day.

IV. JURISDICTION

The court of appeals rendered its decision on August 3, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

V. REASONS FOR GRANTING A STAY

The authority of this Court or any Circuit Justice to grant a stay of enforcement of the judgment below is found in 28 U.S.C. § 2101(f), which reads:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . . .

Stemming from that statutory provision, this Court's Rule 23 states that "[a] stay may be granted by a Justice as permitted by law." To implement their stay jurisdiction, the Circuit Justices of the Court have established four general criteria that a stay applicant must satisfy if it is to rebut the presumption that the decisions below–both on the merits and on the refusal to grant a stay pending certiorari–are correct. *See, e.g. Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan J., in chambers). In sum, the applicant must make the following four-

---

887 (1983); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1011, 423 U.S. 1027 (1975); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 400 U.S. 939 (1970), 401 U.S. 402, 406 (1971).

part showing:

1. The applicant must establish that there is a "reasonable probability" that four Justices will consider the certiorari issue sufficiently meritorious to grant certiorari.

2. The applicant must show that there is a "fair prospect" that a majority of the Court will conclude that the decision below on the merits was erroneous.

3. The applicant must demonstrate that irreparable harm will result from the denial of a stay.

4. In close cases, it may be appropriate to balance the equities, by exploring the relative harms to the parties and to the public at large.

See Lucas v. Townsend, 468 U.S. 1301, 1304 (1988) (Kennedy J., in chambers).

A. The "Reasonable Probability" of Granting Certiorari

This case presents an important question of federal constitutional law. The question is whether a law that requires a candidate to reaffirm his eligibility for office, once he has taken steps that are fundamentally incompatible with that eligibility, unconstitutionally adds a qualification for federal office. This question is "certworthy" because the States need guidance from this Court as to the difference between adding a qualification for office and regulating the electoral process. The lower courts are looking only to the first prong of the *U.S. Term Limits* and striking down laws regardless of whether they were passed for

other legitimate procedural reasons as in *Storer*. In the present case, unlike *U.S. Term Limits*, the law does not act as a complete bar to the ballot by a candidate and serves the important state interests in ensuring that political parties field eligible nominees, in preventing frivolous candidates, and in fostering voter choice and competitive elections.

The Fifth Circuit's decision upheld the District Court's judgment that (1) enjoined "Benkiser from declaring DeLay ineligible and certifying to the Texas Secretary of State any candidate for the 22nd District other than DeLay;" (2) "declared that DeLay is 'not ineligible' to be the Republican Party nominee and voided Benkier's previous declaration;" and (3) "prohibited the Secretary of State from removing DeLay's name from the ballot for the general election unless DeLay withdraws." *Texas Democratic Party*, slip op. at 3. The Fifth Circuit upheld the judgment because it found that Texas Election Code § 145.003, as applied, "is unconstitutional under *U.S. Term Limits*." *Id.*, slip op. at 17. The Fifth Circuit also upheld the District Court's decision "on the alternative state law ground that the declaration violated the Texas Election Code." *Id.*, slip op. at 2. Additionally, the Fifth Circuit held that the competitive effects of RTP's attempts to replace its ineligible candidate were sufficient to confer standing on its rival party, TDP. In reaching its decision, the Fifth Circuit failed to look at the statute as a whole and disregarded DeLay's and RPT's First Amendment right of association by effectively allowing TDP to dictate RPT's nominee for office.

1. The Texas Election Code, unlike the provisions at issue in *U.S. Term Limits, Schaefer*, and *Campbell*, is not a bar to a place on the ballot, and the Supreme Court should clarify the difference between adding a qualification for office and regulating the nomination process for political parties.

Article I, § 2, cl. 2 of the United States Constitution sets forth the qualifications for membership in the House of Representatives. Article I, § 4, however, allows the states to regulate the time, place and manner of elections. This Court has recognized that, absent Congressional action, the State's power to regulate federal elections under the Elections Clause is "quite broad." *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972).

> 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); *see also Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (States have enacted comprehensive election codes concerning the "eligibility" of candidates.). As long as those

regulations do not "exclude classes of candidates from federal office," *U.S. Term Limits v. Thornton*, 514 U.S. 779, 832-33 (1995), "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases . . . ." *Storer*, 415 U.S. at 730.

As a result, "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. The Third Circuit, in *Biener v. Calio*, 361 F.3d 206 (3d Cir. 2004), recognized 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. In short, a primary election is a part of the nomination process whereby a political party chooses from among its associates, its representative on the general election ballot. *See U.S. Term Limits*, 514 U.S. at 793 (It is a "fundamental principal of our representative democracy . . . that the people should choose whom they please to govern them.") (internal quotation marks and citations omitted)). However, because things may change after a primary election is held, a primary election it is not necessarily the end of the process. Many states, including Texas, provide procedures by which party leaders may replace the duly elected nominee after the primary election is

held.[5]

In *U.S. Term Limits*, this Court was asked whether "an amendment to the Arkansas State Constitution that prohibits 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" was constitutional. 514 U.S. at 783. This 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." *Id*. at 836. While holding the term limit amendment unconstitutional, 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

---

[5]*See* N.H. REV. STAT. § 655:38 (nominee may withdraw and be replaced if he makes an "oath that he . . . does not qualify for the public office he . . . seeks because of age, domicile, or incapacitating physical disability acquired subsequent to the primary"); IND. CODE § 3-13-2-1 (allows political party to fill a vacancy that exists when a candidate withdraws because he "has moved from the election district"); MICH. COMP. LAWS § 168.138 (allows candidate to withdraw and be replaced if he has "removed from the state or has become physically unfit"); N.D. CENT. CODE § 16.1-11-18 (party may replace its nominee if a vacancy occurs because of the nominees' death, debilitating illness, cessation of residence in the state, or ineligibility for office if elected.); TENN. CODE § 2-13-204 (nominee may be replaced if he "withdraws because of military call-up for the draft, or physical or mental disability, . . . or is forced to change residence by the candidate's employer for a job-related reason, or is declared ineligible or disqualified by a court").

> 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.

In *Storer*, this 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. at 726 (internal citations omitted). This 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 election ballot or otherwise demonstrate substantial community support." *Id.*

However, from a practical standpoint, the challenged statute in *Storer* handicapped a class of candidates because it acted as a bar to the ballot for those candidates who wished to disaffiliate themselves from a major political party within a year of the election and run for office. Still, such a law was not passed with the sole purpose of creating an additional qualification for office, even indirectly. Rather the statute served the State's "interest if not a duty, to

protect the integrity of its political processes from frivolous or fraudulent candidacies" and was "expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot." *Id.* at 733; *see also Bullock v. Carter*, 405 U.S. 134, 145 (1972).

In *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000), 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 (emphasis in original).

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. A prospective voter had to meet certain requirements in order to register as an elector. The effect of Colorado's voter registration requirements excluded several classes of federal candidates

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.*

Implicit in *U.S. Term Limits, Schaefer* and *Campbell* was the problem that otherwise eligible candidates were barred from the ballot because they did not meet some "additional" criteria, i.e. they were not a resident or voter of the State at the time they filed for candidacy or had already served the maximum allowable number of terms of office. In each case, the requirement was conclusive, barring the candidate from the ballot without recourse. Unlike the statutes challenged in those cases, the Texas Election Code, even as applied in this case, does not act as a bar to the ballot for otherwise eligible candidates. A candidate declared "ineligible" may contest this ineligibility under the Texas Election Code. Thus the statute simply shifts the burden to the candidate to reaffirm his eligibility, a burden that a candidate can readily meet if he is indeed eligible, in which case he is never removed from the ballot.

The Texas Election Code requires a candidate, at the time of filing his candidacy, to swear that he is eligible for office, which for Congressional candidates means that he will be eligible under the Constitution on election day. *See Schaefer*, 215 F.3d at 1039 ("This is not to say, however, that California could not require candidates to file a document with their nominating papers

attesting that they will be inhabitants of the state when elected."). Rather than a bar, as discussed in detail *infra* at section V.A.2.a, the Texas Election Code provides a procedure whereby a candidate who has won the party primary, but has now taken steps that are fundamentally incompatible with his declaration that he will be eligible on election day, may be required to reaffirm his eligibility by contesting an administrative determination of ineligibility. Unless he does so, he may be replaced on the ballot as the political party's nominee. A candidate reaffirms his eligibility for office by filing a lawsuit, the mere filing of which is enough to keep the nominee's name on the ballot. *See* TEX. ELEC. CODE § 273.081 and § 145.004. Further, since inhabitancy is based on the person's intent, *see Jones v. Bush*, 122 F. Supp. 2d 713, 719-20 (N.D. Tex. 2000) (*citing Texas v. Florida*, 306 U.S. 398, 424 (1939))[6], and since the Texas courts give great weight to "'representations made and actions taken' by the candidate himself," *Nixon v. Slagle*, 885 S.W. 658, 662 (Tex. Civ. App. - Tyler 1994, no writ), the testimony of the candidate that he intends to be an inhabitant of Virginia on election day, especially in light of public records substantiating that he had taken specific actions to change his inhabitancy to Virginia, would be conclusive.

The Texas Election Code, as applied in this case, does not "handicap a

---

[6]"[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." *Jones*, 122 F. Supp. 2d at 719.

class of candidates," by barring out-of-state residents from a place on the ballot. Rather, it provides a political party with a mechanism allowing it to protect its interest in fielding eligible candidates by requiring a candidate, who has taken actions fundamentally incompatible with his sworn statement of eligibility, to reaffirm his eligibility if he desires to remain on the ballot as the party's nominee. If the candidate fails to reaffirm his eligibility, he may then be replaced on the ballot as the nominee for his party. As such, it serves the State's interests in keeping frivolous candidate's off the ballot, in protecting the political party's interest in nominating eligible candidates and in enhancing voter choice on election day.

2. The Fifth Circuit, by failing to look at the statute as a whole, misconstrued the statute and incorrectly determined that RPT had violated the Texas Election Code.

In determining that RPT violated the Texas Election Code "because DeLay's future residency was not conclusively established by public record," *Texas Democratic Party*, slip op. at 19-20, the Fifth Circuit misconstrued the statute by failing to look at the statute as a whole.

a. Texas has implemented procedures to assist political parties in selecting their candidates for office.

The Texas Legislature, in the exercise of its powers to regulate federal elections under the Elections Clause, has passed a comprehensive elections code that applies to both state and federal elections. Parties, like RPT and TDP,

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. ELEC. CODE § 172.001. After the primary is over, the state party chair certifies the party's nominees for the general election ballot to the Secretary of State. TEX. ELEC. CODE § 172.122. However, the Secretary of State does not complete the certification process until the 62nd day prior to the election. TEX. ELEC. CODE § 161.008.

Still, recognizing that lives are not stagnant and that things may change between the primary and general elections, *see Anderson*, 460 U.S. at 790 ("[C]andidates and issues do not remain static over time . . . such developments will certainly affect the strategies of candidates who have already entered the race; and also create opportunities for new candidacies."), Texas has provided procedures for handling those contingencies as part of the political party nominating process. First, a candidate may withdraw for any reason whatsoever, TEX. ELEC. CODE § 145.001, as long as that withdrawal is filed prior to "the 74th day before election day" and the candidate takes specified steps of withdrawal. TEX. ELEC. CODE § 145.032. Further, a 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. ELEC. CODE § 145.035, unless he reaffirms his eligibility, TEX. ELEC. CODE § 273.081and § 145.004. Under certain circumstances, a candidate may be replaced on the ballot by

the affected political party. TEX. ELEC. CODE § 145.036(b).

Second, 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. ELEC. CODE § 145.003 ("administrative declaration of ineligibility statute"). 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). The Texas Legislature has rightly determined that establishing residence in another state, after being nominated to run for office in Texas, is an act fundamentally incompatible with a candidate's intention to be eligible for such Texas office if elected. Thus, Texas law allows a state party chair, through its administrative declaration of ineligibility statute, to require the candidate to reaffirm his eligibility. If the party chair declares the candidate ineligible to be the nominee of the party and the candidate does not contest the determination of ineligibility, *see* TEX. ELEC. CODE § 273.081 and § 145.004,[7] the party may replace

[7]As noted above, since Texas courts give great weight to "'representations made and actions taken' by the candidate himself," *Nixon*, 885 S.W. at 662, and, since inhabitancy is based on where the candidate intends to be, then a candidate can readily demonstrate his continued eligibility by testifying that he intends to inhabit Texas on election day.

him or her as their nominee with an eligible candidate. TEX. ELEC. CODE § 145.036.

Thus, these post-primary procedures are an integral part of the political party nomination process and intended to protect the State's interest in keeping frivolous candidates off the ballot, the political party's interest in nominating eligible candidates for the general election ballot and the voter's interest in having a choice on election day.[8] However, because an administrative declaration of ineligibility does not remove a nominee from the ballot if he reaffirms his eligibility, the process also protects an eligible candidate's interests in remaining on the ballot.

b. The Fifth Circuit's interpretation of Texas Election Code § 145.003 renders compliance with that statute an impossibility.

The Fifth Circuit's interpretation of the Texas Election Code should be rejected because it renders compliance with TEX. ELEC. CODE § 145.003 an impossibility, not only in this case but in every case where that statute might be

[8]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 take other action to become ineligible such as moving out of state, thereby allowing 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 both the withdrawal and administrative declaration of ineligibility statutes as a part of the political party nomination process.

applied.[9] The Fifth Circuit relied on WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (2002) to define "conclusive" as something that "by virtue of 'reason,' . . . 'put[s] and end to debate or question' usually because of its irrefutability.'" *Texas Democratic Party*, slip op. at 18. It then found that "[t]he intersection of § 145.003,which requires proof of ineligibility to be *conclusive*, and the Qualifications Clause, which requires inhabitancy only 'when elected,' presents an extraordinary burden to declaring a candidate ineligible on residency grounds prior to the election." *Texas Democratic Party*, slip op. at 19. It then cites two Texas cases, *In re Jackson*, 14 S.W.3d 843 (Tex. App.–Waco 2000, orig. pet.) and *Culberson v. Palm*, 451 S.W.2d 927 (Tex. Civ. App.–Houston [14th Dist.] 1970, orig. pet.), for the proposition that ineligibility cannot be established when there is "a fact question" because a State actor does not have "fact-finding authority." *Texas Democratic Party*, slip op. at 18. Based on these conclusions, the Fifth Circuit determined that the documents Benkiser relied upon to make her determination left a fact question because those documents could not possibly prove where DeLay would live in November 2006. *Id.* at 19.

Specifically, it found that the evidence Benkiser had before her were

---

[9]Furthermore, the Fifth Circuit was obligated to construe the statute "to save and not to destroy" it, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937), by construing it, "whenever possible, so that it may be constitutional rather than unconstitutional." *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 470 (1945).

DeLay's Virginia driver's license, his Virginia voter registration, and an employment withholding form reflecting his Virginia residence. This evidence contradicted the evidence provided in DeLay's application of candidacy in which he swore that he was eligible for office and Benkiser's knowledge that DeLay "had been an inhabitant of Texas for decades. *Id*., slip op. at 20. Therefore, according to the Fifth Circuit, since the later conflicted with the former, Benkiser could not possibly make an administrative determination of ineligibility because such a determination "would have required a finding of fact, which RPT had no authority to make." *Id.*, slip op. at 20-21.

Reading the statute in that manner renders compliance with that statute an impossibility. TEX. ELEC. CODE § 145.003(f)(1) provides that a candidate may be declared ineligible if facts *on his application* show that the candidate is ineligible. While TEX. ELEC. CODE § 145.003(f)(2) provides that a candidate may be declared ineligible if "facts indicating that the candidate is ineligible are conclusively established by *another* public record." (Emphasis added). 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 and that the declarant may still make the determination based on public records other than the application. If this were not so, section (2) could never be used to declare a candidate ineligible because the declarant would inevitably be faced with a conflict

between the candidate's application and the public records on which she relied to make that determination.

The logical construction of the statute, therefore, is that section (2) is intended to apply at least here where a subsequent public record demonstrates that a candidate has taken steps fundamentally at odds with his continued eligibility and, when this occurs, the party chairman can require the candidate to reaffirm his eligibility by declaring him ineligible. *Jackson*, *Culberson* and *Nixon* support this construction of the statutes, *i.e.*, that an administrative declaration of ineligibility merely requires a candidate to reaffirm his eligibility for office if he wishes to remain on the ballot. In *Jackson*, a candidate challenged the City Secretary's administrative declaration of the candidate's ineligibility. The City Secretary had declared Jackson ineligible because

> (1) the application on its face demonstrated that she would not have been a resident of District One for the required six months preceding the election; and (2) Jackson's casting of a ballot in Precinct 84 on November 2, 1999 established that she would not have been a resident of the City for the required twelve months preceding the election.

14 S.W.3d at 845. After Jackson submitted a new application, she was told that she was still ineligible because the fact that she voted in the November 2, 1999, election showed that she could not have been a resident until November 3, 1999, and thus would not meet the requirement that she be a resident of the

city for twelve months preceding the election. *Id.* The document relied upon was not her voter registration but her voter record. However, a voter record "is not a public record which *conclusively establishes* [a candidate's] ineligibility," because "current voting laws permit a voter to cast a ballot in her former precinct," even after she has moved. *Id.* at 848-49. Therefore, according to the Court, the determination of ineligibility required the City Secretary to resolve a question of fact–something that neither she nor the court had the authority to do. *Id.* at 848. This outcome was required, because Texas courts "strictly construe" Texas laws "in favor of eligibility."

In *Culberson*, a candidate challenged a political party chairman's administrative declaration of ineligibility. *Culberson*, 451 S.W.2d at 927. The court was faced with the question of whether a candidate's longstanding voter registration conclusively proved that he was a resident of his former precinct in the face of the candidate's application for a place on the ballot to run for the office of precinct chairman in another precinct when he had declared his residence in that district. *Id*. at 927-28. Because the office did not require any specific term of residence, only that the candidate reside in the precinct at the time of filing his application, the Court found that at best, the party could show that there was a question regarding his residence. *Id.* at 929. Therefore, since "[n]either party officials nor this Court is authorized to make a finding on that question of fact, . . . which would deny the relator the right to have his name on

the ballot," the political party was directed to place the candidate's name on the ballot. *Id.*

In contrast, the court in *Nixon* was faced with a Republican candidate's challenge to the administrative declaration of ineligibility and replacement of a candidate by the Democratic Party chair. 885 S.W.2d at 659. There, the Republican candidate, just like TDP in the present case, wanted the Court to find that the candidate had withdrawn so that he could not be replaced on the ballot. *Id.* The Democratic Party Chair had declared its candidate ineligible based on copies of the candidate's application for voter registration and its receipt. *Id.* at 661. "[B]ecause the receipt established that [the candidate's] application for voter registration had been submitted to the registrar of Travis County, the application constituted a public record." *Id.* Further, "where the public records showing the disqualification of the candidate are based 'on representations made and actions take' by the candidate himself, they are particularly compelling." *Id.* at 662. Thus, the Court "conclud[ed] that the application was a public record that "conclusively established the fact of [the candidate's] residence in Travis County." *Id.* In so holding, the court specifically rejected the Republican candidate's claim that since the subsequent records conflicted with the application that it presented "a mixed question of law and fact which must be judicially decided and cannot be determined by the chairman of the party." *Id.*

Taken together, these cases show that RPT's interpretation of the statute, that it merely requires a candidate to reaffirm his eligibility for office, is correct. They also show that the person making the challenge is an important factor in these determinations. Where a candidate challenges a declaration of ineligibility, any evidence that will create a question of fact is construed in favor of allowing the candidate to remain on the ballot. However, where members of a rival political party make the challenge so that a determination in the challenger's favor would render the opposing party without a candidate on the ballot, the statute is construed in favor of allowing a replacement candidate. In all, these cases show that, like New Jersey, Texas interprets its election laws "to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day." *New Jersey Democratic Party, Inc. v. Samson*, 814 A.2d 1028, 1036 (N.J. 2002) (internal quotation marks and citation omitted). Thus, the Fifth Circuit erred when it held that RPT did not comply with the Texas Election Code.

3. The Fifth Circuit erred when it held that the competitive effects of RPT's replacement of its candidate was a sufficient injury to confer standing on TDP.

A plaintiff 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, 505 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.*

Here, "[t]he district court found that the TDP would suffer an injury in fact because it 'would need to raise and expend additional funds and resources to prepare a new and different campaign in a short time frame." *Texas Democratic Party*, slip op. at 4 (*quoting Tex. Democratic Party v. Benkiser*, __ F. Supp. 2d __, 2006 WL 185129, *2 (W.D. Tex. July 6, 2006)). The Fifth Circuit found that this type of "economic injury is a quintessential injury upon which to base standing," *id.,* that "RPT's declaration of ineligibility and replacement of DeLay would be a but-for cause" of this injury, *id.* at 5, and that "the district court's injunction prevents the declaration of ineligibility and replacement, thereby redressing TDP's injury," *id.* at 6. The Fifth Circuit also found that TDP had standing because RPT's declaration of ineligibility and replacement of DeLay on the ballot would reduce TDP's chances of getting its Texas Congressional District 22 candidate elected, as well as its other "down-ballot" candidates because of "the change's effect on voter turnout and volunteer efforts." *Id.* at 6-7. It also

found that TDP had associational standing on behalf of its candidate because the candidate would suffer similar injuries. *Id.* at 7-9. In short, according to the Fifth Circuit, TDP is harmed unless its candidate gets to compete against the opponent of their choice.

In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), this 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." *Id.*, 530 U.S. at 573 n.5. "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." *Id.*, 530 U.S. at 574 (*quoting United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981)).

In *California Democratic Party*, this 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 La Follette*, 450 U.S. at 122 (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, the Fifth Circuit's decision condones an "intrusion by those with adverse political" interests into the RPT's right to engage in the political party nominating process provided for by the State.

Assuming arguendo that TDP will suffer an adverse competitive effect, in the event that the Court allows DeLay to be declared ineligible and replaced on the ballot by another nominee, an adverse competitive effect is inherent in the democratic process of elections, where candidates are vying for voter support. As this Court recognized in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), the actions of candidates and the replacement of candidates affects others. *Id.* at 790 ("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"). 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 may 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 interest, and General Motors could not recover against Ford for the harm it suffered. Likewise, neither TDP nor its candidate have a legally protected interest that has been invaded and, as a result, both lack the requisite standing to bring this case.

B. The "Fair Prospect" that the Decision Below Will Be Found Erroneous.

There is a fair prospect that a majority of this Court might well reverse the Fifth Circuit's decision in this case because the Fifth Circuit's holding that TEX. ELEC. CODE § 145.003, as applied, violates Article I, § 2 of the United States Constitution is erroneous and because the Fifth Circuit's failure to consider the statute as a whole also renders it alternative state grounds erroneous. Finally, the Court may well conclude that the Fifth Circuit erred when it held that the

competitive effects of RPT's replacement of DeLay on the ballot are a legally cognizable interest sufficient to confer standing on TDP.

C. The Irreparable Harm to Petitioner if a Stay is Denied.

RPT is suffering and continues to suffer irreparable harm to its First Amendment right of association, as a result of TDP's court sanctioned efforts to keep RPT from replacing DeLay on the ballot. Further, RPT's, as yet unnamed, replacement candidate is suffering irreparable harm each day that RPT is prevented from naming him or her, because that candidate is unable to take the necessary steps to get himself or herself elected.

"Freedom of association . . . plainly presupposes a freedom not to associate." *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000) (*quoting Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). In *Boy Scouts*, this Court considered whether a 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).

Here, RPT wants to disassociate with an ineligible candidate and form a new association with an eligible candidate–something that the Texas Election Code allows it to do. DeLay has also expressed his desire to disassociate with RPT by moving to Virginia and telling Benkiser that he is no longer eligible for office. Therefore, every day that RPT is required to keep DeLay on the ballot, RPT's First Amendment rights of association with both DeLay and its as yet unnamed nominee are irreparably harmed.

D. The Balance of Equities

The balance of the equities is weighted on RPT's side.

1. The harm to RPT if a stay is not granted outweighs the harm to TDP.

As demonstrated above, RPT and its as yet unnamed replacement candidate are suffering irreparable harm each day RPT is prevented from choosing that candidate for office. In contrast, TDP claims that it is harmed because RPT will gain an "unfair advantage" and that 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 for the election. However, TDP's harm is simply that inherent in the democratic election process and the same as any

competitor suffers when a rival company discontinues producing one product and replaces it with another. *See* Section V.A.3, *supra*. Because RPT will suffer not just a competitive harm, but an irreparable harm to its First Amendment right of association the harm to RPT if a stay is not granted outweighs the harm to TDP.

Further, TDP will not be irreparably harmed because it has an adequate remedy at law. If RPT' replacement of DeLay is unlawful and the replacement 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."). Because this remedy is limited to those whose names are "printed on the official ballot for elections to the office of Representative," this remedy would not be available to RPT or its desired replacement nominee because RPT would not have been allowed to name that person. Thus, the balance of harms tips in RPT's favor here as well. *See Davis v. Adams*, 400 U.S. 1203, 1204 (1970) (Black J., in chambers) (granting motion for stay where candidate would have been "unconstitutionally deprived of his right to run for office," while the opposing party would have opportunity to challenge the

election on grounds of ineligibility if the candidate won the election).

2. A stay is 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 balance these public interests by enacting statutes that allow party chairs to declare candidates who have taken steps fundamentally incompatible with eligibility ineligible and replace the candidate on the ballot unless the candidate reaffirms his eligibility. A candidate who reaffirms his eligibility must remain on the ballot. 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.

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. Other courts have also 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 for the 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). Further,

> [V]igorous elections under our present system require the participation of the two major parties. . . . Moreover, plaintiffs' remedy [being allowed to replace its candidate] does not preclude voters from casting ballots in favor of the Republican candidate already on the ballot, or, as they choose any of the third-party candidates seeking election to the United States Senate in the November election.

New Jersey Democratic Party, 814 A.2d at 1041. Therefore, even if it requires replacing a candidate, it is important that both major parties be allowed to meaningfully participate in elections.

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 replace him with another candidate, even though the statutory deadline for replacing a withdrawn candidate had passed. *Id.* at 1032. The court unanimously granted the relief, because the court sought to "ensure an opportunity for voters to exercise their right of choice in the November 2002 senatorial election consonant with an orderly process of 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 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. Bd. 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").

Here, the Fifth Circuit's decision restricts the voters' range of choices, because it requires RPT to keep an ineligible candidate on the ballot. It limits voter choice because the opportunity to vote for an ineligible candidate is no choice at all. Thus, the replacement of an ineligible 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 willing to run and qualified to serve.

VI. CONCLUSION

For the foregoing reasons, Petitioner RPT requests that an order be entered staying the decision of the district court below pending completion of certiorari proceedings before this Court.

Respectfully submitted,

Bopp, Coleson & Bostrom

/s James Bopp, Jr

James Bopp, Jr.
Counsel of Record
Raeanna S. Moore
Bopp, Coleson & Bostrom
1 South 6th Street
Terre Haute, IN 47807
(812) 232-2434
(812) 235-3685 (fax)
Counsel for Petitioner

August 7, 2006

EXHIBIT A

EXHIBIT B

No. A-

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

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

CERTIFICATE OF SERVICE

I, James Bopp, Jr., a member of the bar of this court, certify that on August 7, 2006, I served a copy of the APPLICATION FOR STAY OF ENFORCEMENT OF THE JUDGMENT BELOW PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT by e-mail, facsimile, and first-class mail upon the following persons and that all persons required to be served have been served:

Chad W. Dunn
4201 FM 1960 West, Suite 550
Houston, Texas 77068
(281) 580-6362 (facsimile)
duncha@sbcglobal.net

Cristen D. Feldman
Crews & Elliott
Building 3, Suite 200
4601 Spicewood Springs
Austin, Texas 78759
(512) 342-0007 (facsimile)
feldman@crewselliott.com

Martin J. Siegel
Watts Law Firm
The Esperson Bldgs, 16th Floor
815 Walker St.
Houston, Texas 77002
(713) 225-0566 (facsimile)
msiegel@wattslawfirm.com

Dicky Grigg
Spivey & Grigg, L.L.P.
48 East Avenue
Austin, Texas 78701
(512) 474-8035 (facsimile)
dicky@grigg-law.com

/s James Bopp, Jr.

James Bopp, Jr.
Counsel of Record
Raeanna S. Moore
Bopp, Coleson & Bostrom
1 South 6th Street
Terre Haute, IN 47807
(812) 232-2434
(812) 235-3685 (fax)
Counsel for Petitioner

August 7, 2006