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,
Plaintiffs-Appellees,

v.

TINA J. BENKISER,
IN HER CAPACITY AS CHAIRWOMAN OF THE REPUBLICAN PARTY OF TEXAS,
Defendant-Appellant.

On Appeal from the United States District Court for the
Western District of Texas, Austin Division (No. A-06-CA-459-SS)

BRIEF OF TEXAS SECRETARY OF STATE ROGER WILLIAMS, IN HIS OFFICIAL CAPACITY, AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Texas Secretary of State Roger Williams, in his official capacity, has a direct interest in this case and files this *amicus* brief because—even though he was not a party below—the district court has enjoined the Texas Secretary of State. Specifically, the court enjoined the Secretary of State from removing or causing to be removed the name of Tom DeLay as the Republican candidate for District 22 of the United States House of Representatives unless DeLay withdraws as a candidate or upon further order of the district court.

The Secretary also has an interest in this case because the district court's decision effectively declares a portion of the Texas Election Code, §145.003, to be unconstitutional as applied in this case. The Secretary has a strong interest in defending the constitutionality of the laws of the State of Texas, including especially the Texas Election Code.

Finally, as the chief election officer for the State of Texas, the Secretary has an interest in this case because the district court's decision will have a substantial effect on the November 7, 2006 general election and on future elections. Allowing a candidate to proceed through the election when it is conclusively determined that he cannot serve will compromise the integrity of the election process and serve to deny Texas voters their right to a genuine choice at the polls.

No fee has been paid or will be paid for preparing this brief.

STATEMENT OF THE ISSUES

1. Whether the district court erred when it determined that the Plaintiff Texas Democratic party had standing.

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

TO THE HONORABLE COURT OF APPEALS FOR THE FIFTH CIRCUIT:

The district court failed to apply well established canons of statutory construction in its interpretation of §145.003 of the Texas Election Code, resulting in a decision misconstruing the statute and improperly creating a constitutional infirmity in this important election law. Because the permanent injunction entered by the district court is premised on a fundamental misinterpretation of Texas statutory law, it should be reversed.

STATEMENT OF FACTS

The Texas Election Code and the Qualifications Clause of the U.S. Constitution

The controversy before the Court principally concerns the interaction between §145.003 of the Texas Election Code and the Qualifications Clause of the Constitution. Section 145.003 of the Code provides a mechanism whereby a candidate in the general election for state and county officers in Texas may be declared administratively ineligible. *See* TEX. ELEC. CODE §145.003. The Qualifications Clause, in turn, sets forth the exclusive eligibility requirements for the United States House of Representatives. U.S. CONST. art. I, §2, cl. 2.

The Election Code prescribes certain criteria for a person to be eligible to be a candidate for public elective office in Texas, including, *inter alia*, residency requirements. TEX. ELEC. CODE §141.001(a). But the Code also expressly states that

none of the requirements specified in §141.001(a) apply to an office for which the federal Constitution prescribes exclusive eligibility requirements—such as candidates for the House of Representatives. *See id.* §141.001(c).

The Qualifications Clause of the Constitution sets forth the exclusive eligibility requirements for the House of Representatives:

> 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.

U.S. CONST. art. I, §2, cl.2.

And, §145.003 of the Texas Election Code provides a method for determining whether those eligibility requirements are satisfied:

> (a) Except for a judicial action in which a candidate's eligibility is in issue, a candidate may be declared ineligible only as provided by this section.
> (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.

TEX. ELEC. CODE §145.003(b) (emphasis added).

The Election Code further specifies that an administrative declaration of ineligibility may only be made as follows:

> (f) A candidate may be declared ineligible only if:

> (1) the information on the candidate's application for a place on the ballot indicates that the candidate is ineligible for office; or
> (2) *facts indicating that the candidate is ineligible are conclusively established by another public record*.

Id. §145.003(f) (emphasis added).

Thus, §145.003 expressly provides that the party officer responsible for certifying a candidate's name on the general election ballot may declare a candidate ineligible before the 30th day preceding an election if facts indicating the candidate's ineligibility are conclusively established by a public record. Finally, the Code provides that the Secretary must omit from the ballot any candidate who is declared ineligible on or before the 65th day before an election. *Id.* §145.035.

The Administrative Declaration That Tom Delay Is Ineligible for District 22

The following facts are undisputed. Tom DeLay ran for and won the 2006 Republican primary election for Texas Congressional District 22. On April 27, 2006, DeLay obtained a Virginia driver's license, surrendered his Texas driver's license, and changed his employment withholding form to reflect Virginia residency.[1] DeLay subsequently registered to vote in Virginia, and his Virginia voter's registration card was issued on May 8, 2006. DeLay voted in the Virginia primary. He also obtained

1. DeLay's most recent financial disclosure statement filed with the U.S. House of Representatives reflects his residence in Alexandria, Virginia.

Virginia hunting and fishing licenses. DeLay lives in a condominium in Virginia that he owns with his wife and for which they pay property taxes.

Following these events, DeLay sent a letter dated May 30, 2006, to Appellant Tina Benkiser. *See Tex. Democratic Party v. Benkiser*, No. A 06 CA 459 SS, 2006 WL 1851295, at *4 (W.D. Tex. July 6, 2006).[2] The May 30, 2006 letter provided the following relevant information:

> As you are aware, I have recently made the decision to pursue new opportunities from outside the arena of the U.S. House of Representatives. The majority of these new opportunities will exist in Washington, D.C. Therefore, this past April, I changed my residency and voter registration from Texas to Virginia to begin the next step in my career. As a result of this change, I am no longer eligible to remain on the electoral ballot for the 2006 November general election. Please see the attached documents reflecting my Virginia residency and voter registration status. . . .
>
> Sincerely,
>
> Tom DeLay,
> Member of Congress
>
> Attachments:
>
> (1) Virginia driver's license
> (2) Virginia voter registration card
> (3) Virginia tax withholding

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2. The district court also noted that a second letter was also submitted into evidence at trial, which was dated May 25, 2006, and was marked "DRAFT." *Id.* at *4.

Id. at *4-5. As the district court noted, no party contested the authenticity of the documents attached to the Delay letter. *Id.* at *5.

Benkiser testified that, on June 7, 2006, after receiving Delay's letter and the attached documents, she made an administrative declaration that Delay was ineligible as a general election candidate for House District 22. *Id.* Benkiser also confirmed that she considered the three documents provided by DeLay to be public records conclusively establishing his ineligibility. *Id.* Because the DeLay letter and its attachments form part of the election record regarding District 22, Texas law provides that these documents are public information. TEX. ELEC. CODE §1.012.[3]

The District Court's Decision

The Texas Democratic Party filed suit to keep DeLay's name on the ballot, notwithstanding Benkiser's determination of administrative ineligibility. After Benkiser removed to federal court, the district court found in favor of the state Democratic Party and enjoined Benkiser from acting to replace DeLay's name on the ballot. In addition—even though the Secretary of State was not a party to the

3. The Appellees have not argued that the referenced documents are not public records. *Id.* at *5 n.7.

litigation[4]—the district court issued an injunction against the Secretary prohibiting him from causing DeLay's name to be removed from the ballot.

The precise grounds of the district court decision are not entirely clear. Notably, the district court did not make a state-law determination that DeLay failed to satisfy the terms of the Texas Election Code, nor any factual determination that DeLay is in fact an inhabitant of Texas. Instead, although the language is somewhat oblique, the necessary import of the district court's holding is to effectively declare unconstitutional §145.003 of the Texas Election Code.

Specifically, the district court held that the Constitution would not "permit" Benkiser to determine DeLay's eligibility for the November 7, 2006, election based upon facts available in June of 2006. *See Benkiser*, 2006 WL 1851295, at *6. The court therefore concluded:

> "that *no determination* as to DeLay's eligibility due to present inhabitancy in Virginia *can be made at this time or at any time prior to*

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4. The Office of the Secretary of State did file a short amicus letter before the district court, simply to apprise the court of the relevant election deadlines and to urge an expeditious resolution of this litigation. That letter is a part of the record, *see* Docket No. 19, and the legal deadlines described therein should establish the pressing need for swift resolution of this case. Because the suit in the district court was at that time merely a dispute between two private parties—indeed, between the two major political parties—the Secretary of State did not enter an appearance and took no position on the merits of the case. It was only after the district court enjoined the Secretary of State and effectively declared a portion of the Texas Election Code unconstitutional that the Secretary was obliged to appear as an amicus and defend the constitutionality of Texas law.

> *election day* because construing the Texas Election Code to permit such a declaration of ineligibility based on inhabitancy at this time *would be an unconstitutional application of state law*."

Id. at *8 (emphases added). Since the express terms of §145.003 of the Texas Election Code authorize the administrative determination of eligibility prior to election day, the necessary effect of the court's ruling is to declare that portion of the Election Code unconstitutional.

SUMMARY OF THE ARGUMENT

The Constitution expressly authorizes the States to prescribe "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. I, §4, cl. 1. The Supreme Court has recognized that the States' exercise of this constitutional authority is necessary to ensure fair and honest elections. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Section 145.003 of the Texas Election Code, consistent with the State's authority under the Elections Clause, provides that the party officer responsible for certifying a candidate's name on the general election ballot may declare a candidate ineligible before the 30th day preceding an election if facts indicating the candidate's ineligibility—however determined—are conclusively established by a public record. *See* TEX. ELEC. CODE §145.003. This statute protects the integrity of the election process and the voters'

rights to a legitimate choice at the polls by not allowing a candidate to appear as a party nominee on the ballot if it is conclusively demonstrated that he cannot serve.

The district court misinterpreted §145.003 as applied in this case, improperly creating a constitutional infirmity in the statute rather than construing it so as to avoid constitutional issues. Specifically, the district court held that no determination as to Tom DeLay's—or any candidate's—eligibility for the House of Representatives may ever be made at any time prior to election day based on their status as an inhabitant of another State, because construing the Texas Election Code to permit such a declaration of ineligibility would be an unconstitutional application of state law. *Benkiser*, 2006 WL 1851295, at *8. Thus, the district court effectively decided, the provision of §145.003 allowing such a determination prior to election day is therefore unconstitutional. The district court further concluded that "allowing Benkiser to declare DeLay ineligible at this time would amount to a de facto in-state residency requirement in violation of the United States Constitution." *Id.*

The district court failed to follow longstanding canons of statutory construction dictating that federal courts should construe a statute, whenever reasonably possible, so that it is in harmony with the Constitution. In this case, the district court could—and should—have applied the principles set forth in *Jones v. Bush*, 122 F.Supp. 2d 713, 718 (N.D. Tex.), *aff'd*, 244 F.3d 134 (5th Cir. 2000). Under *Jones*,

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." 122 F.Supp.2d at 720. Because the "intent" portion of the *Jones* inhabitance test is predictive in nature, the court recognized that it could be met by records generated prior to election day. *Id.* at 720-21.

The district court should have interpreted §145.003 of the Texas Election Code to be consistent with the *Jones* guidelines and the Constitution, allowing a candidate to be declared administratively ineligible if public records related to his present inhabitance conclusively establish his prospective intent to remain an inhabitant of another State through election day. Because the district court rejected *Jones* and a reasonable alternative interpretation of §145.003, instead misconstruing the statute to create a constitutional infirmity, its decision should be reversed.

ARGUMENT

I. THE DISTRICT COURT FAILED TO APPLY WELL ESTABLISHED CANONS OF STATUTORY CONSTRUCTION AND CONSEQUENTLY FAILED TO UPHOLD A CONSTITUTIONALLY VALID EXERCISE OF TEXAS'S AUTHORITY TO REGULATE THE POLITICAL PARTY NOMINATION PROCESS UNDER THE ELECTIONS CLAUSE.

A. The Applicable Canons of Construction Required the District Court to Construe §145.003, If at All Possible, in Harmony with the Constitution.

The Supreme Court has stated that the "cardinal principle of statutory construction is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). Thus, federal courts must "construe a statute, whenever reasonably possible, so that it may be constitutional rather than unconstitutional." *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 470 (1945); *see also Screws v. United States*, 325 U.S. 91, 98 (1945).

As Justice Holmes observed, when a federal court is confronted with "two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a federal court's] plain duty is to adopt that which will save the [statute]." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring). The same canon has been stated as follows: "where two interpretations of a statute are in reason admissible, one of which creates a repugnancy to the Constitution and the other avoids such repugnancy, the one which makes the statute harmonize with

the Constitution must be adopted." *Abby Dodge*, 223 U.S. 166, 175 (1912); *see also McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969).

The Texas statutory scheme reflects the same presumption. Section 1.003 of the Election Code states that the Texas Code Construction Act applies to every provision of the Election Code, except as otherwise expressly provided in the Code. The Code Construction Act, in turn, requires the presumption that, in enacting any statute, the Texas Legislature intended to comply with the Constitution. TEX. GOV'T CODE §311.021. Thus, the district court was bound by both longstanding canons of construction and applicable Texas statutory law to presume §145.003 of the Election Code creates no constitutional issues, and likewise to construe the statute, if at all possible, in harmony with the Constitution.

B. Section 145.003 Could Have Been Construed by the District Court, and Should Be Construed by This Court, as a Constitutionally Valid Exercise of Texas's Authority to Regulate the Political Party Nomination Process Under the Elections Clause.

The Court reviews question of law, including the interpretation of statutory language, de novo. *In re Mirant Corp.*, 440 F.3d 238, 245 (5th Cir. 2006). Likewise where, as here, the district court's decision to grant an injunction turns on the application of statutes, the Court's review of that interpretation is de novo. *United States v. Holy Land Found. for Relief & Dev.*, 445 F.3d 771, 778 (5th Cir. 2006).

The district court could have—and should have—construed §145.003 as a valid exercise of Texas's authority under the Elections Clause to impose a generally applicable and evenhanded restriction excluding ineligible candidates and protecting the integrity of the election process. Because both the text of the Elections Clause and applicable Supreme Court precedent support this interpretation of §145.003 as applied in this case, the district court's decision should be reversed.

1. The Elections Clause provides the States with broad authority to regulate the time, place, and manner of elections.

The Constitution expressly authorizes the States to prescribe "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. I, §4, cl. 1. The Supreme Court has repeatedly recognized that the States' exercise of this authority is necessary because "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Anderson*, 460 U.S. at 788 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

The Court has also recognized that, in order to achieve these objectives, "States have enacted comprehensive and sometimes complex election codes," that regulate, *inter alia*, the "selection and eligibility of candidates." *Id.*; *see also Storer*, 415 U.S. at 730 ("The States have evolved comprehensive . . . election codes regulating in most

substantial ways . . . the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, *and the selection and qualification of candidates*.") (emphasis added). Thus, Supreme Court precedent expressly contemplates state election code provisions concerning the determination of the eligibility of candidates for the House of Representatives.

Finally, the Court has explained that the States are "entitled to adopt 'generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'" *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) (quoting *Anderson*, 460 U.S. at 788, n.9). But a state election code provision will be held 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.

2. Consistent with the Elections Clause, §145.003 provides a nondiscriminatory mechanism whereby a candidate may be administratively removed and replaced on a ballot when public records demonstrate that he will not qualify for office if elected.

Section 145.003 expressly provides that the party officer responsible for certifying a candidate's name on the general election ballot may declare a candidate ineligible before the 30th day preceding an election if facts indicating the candidate's ineligibility are conclusively established by a public record. TEX. ELEC. CODE

§145.003. This provision serves the States' interest in ensuring a fair and honest election process, and avoiding "encumbering the ballot with the names of frivolous candidates." *Anderson*, 460 U.S. at 788, n.9. Indeed, allowing a candidate to proceed through the election when it is conclusively demonstrated that he cannot serve substantially compromises the integrity of the election process and the voters' rights to a genuine choice at the polls.

However, the Texas Election Code preserves the candidate's individual right to challenge any declaration of ineligibility, providing that a candidate may file a judicial action challenging the declaration. *See* TEX. ELEC. CODE §273.081. And the candidate will remain on the ballot until a judgment confirming his ineligibility becomes final. *See id.* §145.004.

Because §145.003 applies generally to any and all candidates, regardless of party, it is evenhanded and does not "handicap" any class of candidates. Nor does it indirectly create additional qualifications because any declaration of ineligibility must be premised upon public records conclusively establishing that a candidate cannot meet eligibility requirements already set forth in the Constitution. Finally, by excluding ineligible candidates it preserves the integrity of the electoral process. Under the circumstances, the district court erred in failing to construe §145.003 as a constitutionally valid state regulation of the eligibility of party nominees.

II. THE DISTRICT COURT CREATED A CONSTITUTIONAL ISSUE BY ERRONEOUSLY INTERPRETING §145.003 TO, IN EFFECT, IMPOSE AN ADDITIONAL QUALIFICATION FOR THE U.S. HOUSE OF REPRESENTATIVES.

A. The District Court Improperly Interpreted §145.003 as Creating Additional Qualifications for Serving in the House of Representatives, Rather Than Merely Providing a State Law Mechanism for Determining Whether the Constitutional Prerequisites for Eligibility Have Been Satisfied.

The core of the district court's reasoning can be expressed in the following four-part syllogism:

1. The Constitution sets forth the exclusive requirements for eligibility for the House of Representatives.

2. The Constitution provides that a candidate for the House must be an inhabitant of the State "when elected," i.e., on election day.

3. It is impossible to make any certain determination of where a candidate will be inhabiting on election day until election day itself.

4. Therefore, §145.003's provision for administratively determining ineligibility prior to election day amounts to a *de facto* residence requirement before election day, which is an unconstitutional attempt to add to the exclusive requirements for eligibility for the House.

Steps one and two of this reasoning are indisputably correct; steps three and four, however, construct and then refute a straw man.

Step three is fallacious, because it is altogether possible to reasonably determine inhabitancy on election day at a time prior to election day. Indeed, *Jones v. Bush*, discussed *infra* Part II(B), expressly held that a person is an "inhabitant" of

a State, for purposes of the Constitution, when (1) he has a physical presence in the State, and (2) intends, as a forward-looking matter, that it be his place of habitation. *See Jones*, 122 F.Supp. at 718. Thus, the constitutional test is necessarily forward looking, and nothing requires that it be static and unknowable at any prior date.

And step four is faulty because nothing in §145.003 purports to create additional eligibility requirements. To the contrary, §141.001(c) expressly provides that the Constitution provides the *only* eligibility requirements for federal office. Rather, §145.003 merely provides a reasonable state-law method for determining whether the constitutional requirements are satisfied.[5]

Two hypotheticals illustrate the fallacy of the district court's construct. First, assume Candidate X is currently a resident of another State, and intends to reside in that State continuously until the day before election day and then move permanently to Texas on election day. If the district court's step four were correct, that candidate would be ineligible under §145.003 because that section enacts a "a de facto in-state residency requirement" prior to election day. *Benkiser*, 2006 WL 1851295, at *8.

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5. After election day, the House is the sole judge of whether its eligibility requirements are satisfied, but that does not divest States of full authority to determine constitutional eligibility prior to the election. *See Anderson*, 460 U.S. at 788; *Storer*, 415 U.S. at 730. For example, if a person age 22 attempted to run as a candidate for Congress, it is difficult to mount a serious argument that the State would be powerless to decline to allow him on the ballot for constitutional ineligibility.

But nothing in §145.003 suggests that Candidate X would be deemed ineligible. If the evidence showed he was going to be an inhabitant of Texas on election day, §145.003 simply would not apply.

Secondly, imagine a candidate for Congress who is currently serving a life sentence of imprisonment in a distant State. Under the district court's reasoning (step three), that candidate could not be deemed ineligible prior to election day, because it would always be theoretically possible that the governor of the imprisoning State could pardon him (or he could escape from prison) prior to election day, and so he might possibly in fact be an inhabitant of Texas on election day. Such a reading, of course, would be absurd. But nothing in the district court's reasoning escapes that logical consequence of its construction of the Texas Election Code.

The alternative to the district court's straw man is the straightforward reading of §145.003: that it provides a reasonable method for determining whether the constitutional eligibility requirements are satisfied, a determination well within a State's authority to regulate the "time, place, and manner" of congressional elections.

B. The Decision in *Jones v. Bush* Points to the Correct, Alternative Interpretation of §145.003.

The district court's interpretation is erroneous because §145.003 could be constitutionally applied to declare a candidate for the House of Representatives

ineligible in Texas based on public records establishing that he is an "inhabitant"of another State prior to the election, and also providing evidence of his intent to remain in that State through the election date. The use of records generated prior to an election regarding "inhabitant" status to determine a candidate's eligibility is a logical corollary to the principle that a person is an "inhabitant" of a State, for purposes of the Constitution, when (1) he has a physical presence in the State, and (2) intends that it be his place of habitation. *See Jones*, 122 F.Supp. at 718. The second part of this inquiry, by its very nature, contains a predictive or speculative element that the individual is not only currently present in the State, but also intends to remain there indefinitely. *See id.* at 720.

In *Jones*, the court carefully examined the question of what the term "inhabitant" means in the Constitution, and adopted a test for "inhabitant" status that is instructive.[6] The *Jones* court began with the premise that the "touchstone" for its determination of the meaning of "inhabitant" is the intent of the Framers, *id.* at 718. The court then explained that the contemporaneous dictionary definitions of "inhabitant" closely parallel the modern concept of domicile, which "'is established

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6. Although the *Jones* court analyzed the meaning of "Inhabitant" as used in the Twelfth Amendment, as the court noted, there is no indication in the text of the Constitution that the same term has a different meaning where it appears in Article I, §2, cl. 2 (qualifications for members of the House of Representatives) or Article I, §3, cl. 3 (qualifications for the Senate). *See id.* at 721.

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 *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989)). The court also looked to this Court's precedent that a "'change in domicile typically requires only the concurrence of: (1) physical presence at the new location and (2) an intention to remain there indefinitely . . . or, as some courts articulate it, the absence of any intention to go elsewhere.'" *Id.* at 720 (quoting *Coury v. Prot*, 85 F.3d 244, 250 (5th Cir. 1996)).

Based upon its analysis, the *Jones* court 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.* The court summarized as follows: "[t]he test for ascertaining inhabitance is thus a dual inquiry concerning physical presence in fact and intent to remain in or return to the state after an absence." *Id.* at 719-20. The court also cites to the evidence relevant to a domicile inquiry as equally applicable to the question of "inhabitant" status:

> The court should look to all evidence shedding light on the litigant's intention to establish domicile. The factors may include the places where the litigant exercises civil and political rights, pays taxes, owns real and personal property, has driver's and other licenses, maintains bank accounts, belongs to clubs and churches, has places of business or employment, and maintains a home for his family.

Id. (quoting *Coury*, 85 F.3d at 251). The *Jones* court then evaluated the above-described types of evidence to evaluate whether Vice-President Richard Cheney was an "inhabitant" of Texas or Wyoming for purposes of the November 2000 general election. In making this determination, the court noted that on July 21, 2000, (approximately four months preceding the election) Cheney declared his intent to return to Wyoming. *Id.* Subsequently, Cheney traveled to Wyoming and registered to vote there, voted in Wyoming elections, obtained a Wyoming driver's license (voiding his Texas license), and registered one of his four vehicles in Wyoming. *Id.* Based upon these records, the court concluded that Cheney had both a physical presence in Wyoming and the intent that Wyoming be his place of habitation, establishing his status as an "inhabitant" of that State for purposes of the November 2000 general election. *Id.* at 720-21.

Thus, the *Jones* decision and its articulation of the test for "inhabitant" status expressly contemplate that a substantial aspect of the test is predictive in nature—*i.e.* whether the individual intends to remain indefinitely in the State where he is presently located—and various public records generated prior to an election may establish an intent to remain in a State through the date of an election. Indeed, the *Jones* court identified precisely the kinds of records relied upon by Benkiser when she declared DeLay ineligible (voter registration, driver's license, tax records) as the

types of documents that could be used to determine a candidate's intent to remain in a particular State for purposes of "inhabitant" status. *Id.* Under the circumstances, there is no reason to believe that the public records relied upon by Benkiser, including critically DeLay's letter expressly conceding his ineligibility,[7] would not suffice under *Jones* to establish his status as an "inhabitant" of Virginia for purposes of the November 7, 2006 general election.[8]

If, as it should have done, the district court had accepted and followed the *Jones* test for inhabitance, it would have concluded that no constitutional issue is raised by applying §145.003 in this case.

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7. Under Texas law, "where the public records showing the disqualification of the candidate are based 'on representations made and actions taken' by the candidate himself, they are particularly compelling." *Nixon v. Slagle*, 885 S.W.2d 658, 661-62 (Tex. App.—Tyler 1994, no writ) (quoting *McClelland v. Sharp*, 430 S.W.2d 518, 522 (Tex. Civ. App.—Houston [14th Dist.] 1968, orig. proceeding)).

8. The public documents submitted by DeLay—along with his letter expressly stating that he was "*no longer eligible* to remain on the electoral ballot" because he has "changed [his] residency and voter registration from Texas to Virginia" in order "to pursue new opportunities"that "*will exist* in Washington, D.C.,"*Benkiser*, 2006 WL 1851295, at *4-5 (emphases added)—provided ample basis for Benkiser to determine that the two elements of the *Jones* test were fully satisfied. Although the testimony at trial was less than clear, any such live testimony is irrelevant to the legal question before the district court: whether the documentary evidence, *at the time of Benkiser's determination*, demonstrated DeLay's ineligibility.

C. Ignoring Applicable Canons of Construction, the District Court Effectively Rejected the Inhabitance Test Set Forth in *Jones,* and Improperly Created a Constitutional Issue Regarding the Validity of §145.003.

The district court could have applied the inhabitance test set forth in *Jones*. The proper application of *Jones* in this case would have allowed for a determination of ineligibility—consistent with the Constitution—based upon public records generated prior to election day (such as those relied upon by Benkiser). *See* Section II(B) *supra.* If the district court had followed this course, the only remaining question to be resolved would have been the state law question whether, under §145.003, the public records relied upon by Benkiser conclusively established DeLay's ineligibility. *See* TEX. ELEC. CODE §145.003(f). Applying the canon of statutory construction that §145.003 should be construed in harmony with the Constitution if at all possible, and applying the principles of *Jones*, should have resulted in a decision discerning no constitutional problem with the statute.

But the district court, despite citing with approval the *Jones* court's formulation of the "inhabitance" test, *Benkiser*, 2006 WL 1851295, at *6, ultimately rejected its application in this case. First, contrary to part one of the *Jones* test, the court expressly rejected the notion that public records reflecting DeLay's current residence

in Virginia constituted *any evidence* or indication whatsoever of "inhabitance" for purposes of eligibility. *Id.* at *5.

The district court went on to reject the second or "intent" portion of the *Jones* test in the process of concluding that it was *impossible* to make any eligibility determination based on inhabitance prior to election day. *Id.* at *8. Put another way, the district court's conclusion that inhabitant status cannot, under any circumstances, be determined prior to election day necessarily precluded its acceptance of the "intent" test described and applied in *Jones.* Putting the figurative exclamation point on its rejection of *Jones*, the district court concluded that the very types of evidence described in *Jones* as directly relevant to determining intent as related to inhabitant status (driver's license, voter registration, tax documents) are in fact "no evidence" of the inhabitance of DeLay or any other similarly situated candidate on election day. *See id.* at *5. By rejecting the principles set forth in *Jones*, the district court improperly refused to apply a reasonable alternative construction of §145.003 that would have upheld its constitutional validity as applied in this case.

D. The District Court Incorrectly Equated §145.003 with the Statutes Struck Down in the *Schaefer* and *Campbell* Cases.

In arriving at its conclusion that §145.003 would impose an unconstitutional additional qualification for the House of Representatives if it were applied to allow

a determination of inhabitant status prior to election day, the district court relied in substantial part on the decisions in *Campbell v. Davidson*, 233 F.3d 1229 (10th Cir. 2000), and *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000). But the *Campbell* and *Schaefer* decisions are inapposite because they concern statutes, unlike §145.003, that imposed qualifications for the House of Representatives in addition to those specified in the Qualifications Clause.

In *Campbell*, the Tenth Circuit considered a case involving a candidate seeking to represent Colorado in the House of Representatives who was advised he could not appear on the ballot because he was not registered to vote in Colorado as required by Colorado statute. 233 F.3d at 1231. The court's decision turned on two Colorado statutes. The first statute, COLO. REV. STAT. ANN. §1-4-501(1), required that a candidate seeking election to the House of Representatives from Colorado would not be eligible unless he or she met the requirements not only of the Qualifications Clause, but also all qualifications for office set forth in the Colorado constitution and statutes. *Id.* In direct contrast, the Texas Election Code expressly specifies that *none* of the requirements for state elective office apply to an office for which the federal constitution prescribes exclusive eligibility requirements—such as candidates for the House of Representatives. *See* TEX. ELEC. CODE §141.001(c).

The second Colorado statute at issue, COLO. REV. STAT. ANN. §1-4-802(1)(g), provided that no one could be nominated by petition for a public office—including the House of Representatives under COLO. REV. STAT. ANN. §1-4-501(1)—unless that person was registered to vote for at least 12 months prior to the last date the petition could be filed. *Campbell*, 233 F.3d at 1231. Again, the Texas Election Code expressly disavows any such state voting or residency requirement for candidates for the House of Representatives. *See* TEX. ELEC. CODE §141.001(c).

In *Schaefer*, the Ninth Circuit considered a case involving a Nevada resident who wanted to file as a candidate for a California seat in the House of Representatives. *Schaefer*, 215 F.3d at 1032. The candidate was refused nomination papers based upon California statutes requiring that a candidate was not eligible for the House of Representatives unless and until he or she became a registered California voter, which in turn invoked another California statute requiring that no individual could register to vote until he or she established residency in California. *Id.* at 1032-34. Thus, *Schaefer*—like *Campbell*—involved state statutes expressly imposing residency and voting requirements on candidates seeking election to the House of Representatives, in a addition to the exclusive requirements set forth in the Qualifications Clause. The Texas Election Code, again in direct contrast, provides

that candidates for the House of Representatives must only meet the Constitution's exclusive requirements. *See* TEX. ELEC. CODE §141.001(c).

Thus, unlike the statutes at issue in *Schaefer* and *Campbell*, §145.003, taken together with §141.001(c), can only provide a mechanism by which a candidate for the House of Representatives may be declared ineligible prior to election day if public records conclusively establish he or she does not meet the qualifications *set forth exclusively in the Qualifications Clause*. Under the principles of *Jones*, *see* Section II(B) *supra,* §145.003 allows for an administrative declaration of ineligibility—entirely consistent with the Constitution—when public records evidence both current residence in another State and the prospective intent to remain there through the date of the election.

In sum, the district court failed to apply a reasonable alternative interpretation of §145.003, guided by *Jones*, that the statute provides a constitutionally valid, nondiscriminatory mechanism whereby a candidate may be administratively removed and replaced on a ballot when public records demonstrate that he will not qualify for office if elected. Because the district court's decision misconstrues §145.003 to improperly create a constitutional infirmity in the statute, its decision should be reversed.

III. THE DISTRICT COURT LACKED AUTHORITY TO ORDER THE SECRETARY OF STATE NOT TO REMOVE THE NAME OF TOM DELAY AS THE REPUBLICAN CANDIDATE FOR DISTRICT 22.

The district court's order commands the Secretary not to remove or cause to be removed the name of Tom DeLay as the Republican candidate for District 22 of the United States House of Representatives unless DeLay withdraws as a candidate or upon further order of the district court. *Id.* at 10. But, for several reasons, the court lacked authority to impose this order on the Secretary, who is not a party to the litigation.

First, because the Plaintiffs-Appellees lacked standing, the court did not have subject-matter jurisdiction, and therefore could not issue any order except one dismissing the case for lack of jurisdiction. Second, because the case involves no violation of the Constitution or a federal statute, there is no basis in federal law for the injunction against the Secretary. Third, the district court exceeded its authority by issuing an injunction against a non-party, the Secretary, when this action was unnecessary to enforce the court's ruling. For these reasons, the district court's order as to the Secretary should be vacated.

A. Absent Standing on the Part of Plaintiffs, the District Court Lacked Authority to Issue an Injunction.

Because standing is an element of the constitutional requirement of "case or controversy," lack of standing deprives a district court of subject matter jurisdiction. *In re Weaver*, 632 F.2d 461, 463 n.6 (5th Cir. 1980). As explained thoroughly in Appellant's opening brief, the Plaintiffs-Appellees failed to demonstrate that they have standing to pursue this lawsuit. *See* Appellant's Br. at 9-22. Absent standing, the district court lacked subject-matter jurisdiction, and it lacked authority to issue any order other than an order dismissing the case for want of jurisdiction.

B. Even Assuming the Plaintiffs Had Standing, the District Court Could Not Properly Enjoin the Secretary, Who Is Not a Party in This Litigation.

Even assuming *arguendo* that Plaintiffs-Appellees have standing to prosecute this suit, the district court nonetheless lacked authority to order the Secretary not to remove or cause to be removed the name of Tom DeLay as the Republican candidate for District 22. As demonstrated herein, under a proper evaluation of §145.003, this case presented no constitutional violation or violation of a federal statute for the district court to correct. Accordingly, there was no basis in federal law for an injunction against Appellant or the Secretary.

But if it is assumed that Plaintiffs had standing and that an injunction based on federal law was properly entered against Appellant Benkiser, the district court nonetheless lacked authority to enjoin the Secretary—a non-party. The Supreme Court has long held that "[t]he courts . . . may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945) (citations omitted). As explained by Judge Learned Hand, a court "cannot lawfully enjoin the world at large, no matter how broadly it words its decree." *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930).

Likewise Federal Rule of Civil Procedure 65 expressly limits the scope of injunctions to "the parties to the action, their officers, agents, servants, employees, and attorneys, and [] those persons in active concert or participation with them who receive actual notice of the order." The Secretary is not a party to this action, nor does he fall within any of the other categories specified in the Rule.

A federal court's injunction should be only as broad as is necessary to effectuate its purpose. Because an injunction against Benkiser compelling her to withdraw her declaration of ineligibility based upon the public records submitted to her by DeLay would be sufficient to keep his name on the ballot (unless another

circumstance such as his withdrawal arose), the district court exceeded its authority when it also enjoined the Secretary.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

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CERTIFICATE OF SERVICE

The undersigned counsel of record does hereby certify that two true and correct copies of the *Brief of Texas Secretary of State Roger Williams, in his official capacity, as Amicus Curiae in Support of Appellant*, along with a computer readable disk copy of the brief, was served via UPS (Next Day Air Delivery), on July 20, 2006 to:

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