Case No. 8-50038

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DENNIS J. KUCINICH; KUCINICH FOR PRESIDENT 2008, INC.; WILLIE NELSON

Plaintiffs-Appellants,

v.

TEXAS DEMOCRATIC PARTY; PHIL WILSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; BOYD L. RICHIE

***Defendants-Appellees*.**

Appeal from the United States District Court
for the Western District of Texas at Austin

BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Mr. Dennis J. Kucinich, Plaintiff-Appellant;

2. Willie Nelson, Plaintiff-Appellant;

3. Boyd L. Richie, Defendant-Appellee;

4. Phil Wilson, Defendant-Appellee;

5. Ms. Kathlyn C. Wilson, counsel for Appellee Phil Wilson in the court below and on this appeal;

6. Mr. Chad W. Dunn, counsel for Appellee Texas Democratic Party in the court below and on this appeal;

7. Mr. Donald J. McTigue, co-counsel for Appellants Dennis J. Kucinich, Kucinich For President 2008, Inc., and Willie Nelson in the court below and on this appeal;

8. Mr. Mark A. McGinnis, co-counsel for Appellants Dennis J. Kucinich, Kucinich For President 2008, Inc., and Willie Nelson in the court below;

9. Mr. John M. Stephan, co-counsel for Appellants Dennis J. Kucinich, Kucinich For President 2008, Inc., and Willie Nelson in the court below; and

10. Mr. Joseph A. Turner, co-counsel for Appellants Dennis J.

Kucinich, Kucinich For President 2008, Inc., and Willie Nelson in the court below and on this appeal.

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WAIVER OF ORAL ARGUMENT

Plaintiffs-Appellants respectfully waive oral argument, and thus are not filing excerpts from the record pursuant to Fifth Circuit Rule 30.1.1.

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JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction over this action and has jurisdiction to grand declaratory and injunctive relief. See 28 U.S.C. §§ 1331, 2201, 2202. Additionally, venue is proper in the Austin Division of the Western District of Texas because a substantial part of the events giving rise to the claims occurred in the Austin Division. 28 U.S.C. § 1391(B).

Jurisdiction in this Court is invoked under Section 1291, Title 28, United States Code, as an appeal from a final judgment in the United States District Court for the Western District of Texas at Austin. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

ISSUE ONE: Whether the district court erred in holding that an oath requiring a presidential candidate to swear to "fully support the Democratic nominee whoever that shall be" is not unconstitutionally vague.

ISSUE TWO: Whether the district court erred in its application of the Anderson/Burdick[2] analysis in holding that an oath requiring a presidential candidate to swear to "fully support the Democratic nominee whoever that shall be" in order to appear on a primary election ballot does not impermissibly infringe upon the First and Fourteenth Amendment rights of the candidate and his supporters.

ISSUE THREE: Whether the district court erred in its application of the Anderson/Burdick analysis in holding that the Fourteenth Amendment's Equal Protection Clause was not violated even though no similar oath is required for Democratic candidates seeking offices other than President or for any Republican candidate seeking nomination in the Texas primary election.

[2] See, Anderson v. Celebreeze, 460 U.S. 780 (1983); Burdick v. Takusih, 504 U.S. 428 (1992).

STATEMENT OF THE CASE

A. Proceedings Below

The suit herein was commenced on January 3, 2008, one day after Dennis J. Kucinich's application for a place on the Texas Democratic primary ballot was rejected. The district court held an immediate hearing and set an expedited schedule. On January 11, 2008 the district court held a hearing and ruled from the bench that the request for permanent injunction was denied.

On January 14, 2008 Plaintiffs-Appellants filed both a *Notice of Appeal* with this Court and an *Emergency Motion for Injunction Pending Appeal* with the district court, which was denied on January 15, 2008. On January 16, 2008, Appellants filed an *Emergency Motion for Injunction Pending Appeal* with this Court, which was denied on January 17, 2008. That same day, Appellants filed an *Emergency Application for Stay and/or Injunction Pending the Filing of a Petition for a Writ of Certiorari* with Circuit Justice Hon. Antonin G. Scalia. Also on January 17, 2008 the district court issued its *Findings of Fact and Conclusions of Law*. On January 18, 2008, Appellants' Emergency Application was denied by the Supreme Court of the United States.

On January 22, 2008 Appellants filed a *Motion to Expedite* this appeal

which was granted on January 24, 2008. On January 25, 2008, Appellants filed an *Unopposed Motion to Vacate* this Court's January 24, 2008 Order which was granted on January 29, 2008.

B. Statement of Facts

The facts are not in dispute.

On December 18, 2007, the Federal Election Commission notified Mr. Kucinich that he qualified for presidential primary federal matching funds pursuant to 26 U.S.C. §9033. (Dist.Ct.Op. p. 2.) On December 28, 2007 Mr. Kucinich timely filed his application for a place on the Democratic primary ballot for the March 4, 2008 Texas primary election. Id. On January 2, 2008, the last day for filing the application, Appellee Texas Democratic Party ("TDP") informed Mr. Kucinich that his application was deficient and that his candidacy would not be certified to Appellee Texas Secretary of State for a place on the primary election ballot because he crossed out the following portion of a the loyalty oath ("Oath") on the application, "I further swear that I will fully support the Democratic nominee for President whoever that shall be."[3] Id. at 2-3. The Texas Republican Party does not require a similar loyalty oath. Id. at 10. Nor does the Texas Democratic Party require a

[3] The entire Oath reads: "I, ___ of ___ , ___ County/Parish, ___ , being a candidate for the Office of President of the United States, swear that I will support and defend the constitution and laws of the United States. I further swear that I will fully support the Democratic nominee for President whoever that shall be." [See USCA5 p. 176.]

similar loyalty oath in any other candidate application for public office. Id. Further, there is no dispute that Plaintiff's application is sufficient in all other respects. Id. at 3. Upon disqualification, Mr. Kucinich, Willie Nelson (a registered elector and member of the Democratic Party of the State of Texas who wished to support Mr. Kucinich) and Kucinich for President 2008, Inc. (Mr. Kucinich's official campaign committee and recipient of federal matching funds)(hereafter, collectively, "Kucinich") commenced the action herein. Id. at 1.

SUMMARY OF THE ARGUMENT

The threshold issue is whether the Texas Democratic Party's requirement that a candidate seeking to appear on the Texas primary ballot for nomination to the Office of President of the United States take a sworn oath to "fully support the Democratic nominee whoever that shall be" can be enforced so as to exclude a candidate who refuses to take the oath from appearing on the ballot. Appellees can point to no case upholding the use of such an oath as the sole basis for the exclusion of a candidate seeking a party's nomination to the Office of President of the United States. Despite the reliance of the district court and Appellees on Ray v. Blair, 343 U.S. 214 (1952), the oath, oath-taker, and claims herein are markedly different and the matter is one of first impression. Further, since the district court's decision was issued, the Supreme Court has issued a ruling in New York State Board of Elections v. Lopez Torres, 522 U.S. ___ (2008), which directly impacts the analysis of the questions before the Court.

Specifically, the district court erred in determining that TDP's Oath is not unconstitutionally vague because requiring a candidate to "fully support" the nominee imposes no different obligation than would arise from an oath requiring a candidate to "support" the nominee "whoever that shall be;" which nominee the Oath is referring to being also disputed. Further, the

District Court erred in determining that TDP's associational interests outweigh Kucinich's; particularly since TDP's failed to assert any interest sought to be protected and the district court determined that the Oath is unenforceable at law. The district court further erred in wholly failing to balance the parties' speech interests and in its analysis of Kucinich's Equal Protection claim; stopping with its determination pertaining to relative associational interests.

ARGUMENT

ISSUE ONE: Whether the district court erred in holding that an oath requiring a presidential candidate to swear to "fully support the Democratic nominee whoever that shall be" is not unconstitutionally vague.

A. Standard of Review

The case law is well-settled – the government cannot condition elective office upon taking an oath that impinges on First Amendment rights, such as those guaranteeing freedom of political beliefs. Cole v. Richardson, 405 U.S. 676, 680, 92 S.Ct. 1332 (1972); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 91 S.Ct. 720 (1970). Nor can an oath require denial of future associational activity or advocacy of political doctrine. Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675 (1967); Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275 (1961); Whitehill v. Elkins, 389 U.S. 54, 88 S.Ct. 184 (1967); Elfbrandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238 (1966). Furthermore, an oath cannot be so vague that "men of common intelligence must necessarily guess at its meaning." Cramp, 368 U.S. at 287; Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316 (1964).

Oaths to "*support* the *constitution*" or even to "*support* the *constitution* and *laws*" are not vague and do not impinge on freedom of belief, association, or advocacy. See Bond v. Floyd, 385 U.S. 116, 132, 87

S.Ct. 339 (1966). This is true because, unlike the oath at issue, an oath to "support the constitution" does not and cannot prevent a legislator from, for example, criticizing a war. Id. at 135. Additionally, general "support" oaths have been found not to be vague because they are not meant to impose specific actions and responsibilities upon the oath-taker. Cole, 405 U.S. at 684.

TDP asks more of presidential candidates wishing to participate in the Texas Democratic primary election than a "general support oath." TDP requires a sworn, notarized pledge to "fully support," not the constitution, the laws, or even the party, but rather "the Democratic nominee whoever that shall be." Despite the threshold differences between the oaths which have been sustained and the oath at issue, the district court ignored the plain language of the oath and determined that "[i]t is difficult to see how the addition of 'fully' requires a different moral obligation than would arise from loyalty oaths without 'fully,' which have been previously upheld." (Dist.Ct.Op. p. 13.)

B. Summary of Argument

TDP's Oath is unconstitutionally vague because people "of common intelligence must necessarily guess at its meaning and differ as to its application[.]" Board of Pub. Instruction of Orange County v. Cramp, 368

U.S. 278, 287 (1961). There is more than one objectively reasonable interpretation of what it means to swear to "fully support the Democratic nominee whoever that shall be." Despite the district court's analysis, to prevail, Kucinich need not prove that his interpretation is the only objectively reasonable reading of the Oath. Rather, if the oath's language is also susceptible to another objectively reasonable interpretation – with the attendant consequence that the oath-taker cannot know for certain what he or she would be swearing to – then the oath is unconstitutionally vague and cannot be sustained. In any event, even assuming, *arguendo*, the sole plausible meaning is what the district court determined it to mean; it would still proscribe entirely legitimate, and protected, conduct and belief.

As this Court has held, the opportunity for public service may not be conditioned on an individual's swearing that he or she will "support" something as vague as our "representative form of government." Socialist Workers Party v. Hill, 483 F.2d 554 (5th Cir. 1973). Indeed, in Hill, this Court struck an oath found to inhibit First Amendment rights by conditioning elective office on a candidate's willingness to foreswear political beliefs. Id. at 557. Why, then, would a political party be permitted to condition a candidate's ability to appear on the ballot upon swearing that he or she will "fully support" an individual? The law is clear: TDP's oath

seeks to impose ideological orthodoxy in a manner incompatible with First and Fourteenth Amendment rights. Thus, whether the oath means what Kucinich believes it to mean, what TDP believes it to mean, or what the district court held it to mean; the very fact that at least three independently reasonable interpretations exist renders the oath unconstitutional.

It is not disputed that Kucinich can be required to swear an oath that he will "support the Constitution of the United States," which he has already done.[4] Indeed, the Constitution of the United States requires executive Officers "shall be bound by an oath or Affirmation, to support this Constitution." U.S. Const., Art. VI, cl. 3. TDP further requires candidates seeking nomination to the Office of President of the United States to swear, in the presence of a Notary, "I further swear that I will fully support the Democratic nominee for President whoever that shall be." The Texas Penal Code defines "governmental records" to include "election records," such as the document executed by a candidate seeking ballot access in TDP's primary election, and sets forth criminal penalties for false statements thereon. §§ 37.01(2)(E); 37.10, Tex. Penal Code.

[4] Kucinich executed the form in the presence of a Notary and crossed out only the language at issue. [See USCA5 p. 176.] As a Member of Congress, Kucinich has taken an oath similar to the oath required for the presidency.

TDP's Oath goes far beyond the general "support" oaths which have been upheld; conditioning ballot access upon a candidate's notarized promise to "fully support" an unnamed person - tethering its sworn obligation of "full" support not to the constitution, or even to the party, but to "the Democratic nominee whoever that shall be." Ours is a government of laws, not of men. Particularly those seeking the Nation's highest office cannot, and must not, be obligated, legally or morally, to foreswear their political beliefs and support to an individual in order to seek elected political office.

C. TDP's Oath Is Unconstitutionally Vague

The Due Process Clause of the Fourteenth Amendment requires that prohibitions such as a party loyalty oath must be clearly defined. In this instance, what it means to "fully" support the nominee is vague because it is not clear, if executed, what activities Kucinich is permitted, required, or forbidden to undertake in the future; more precisely between March 4, 2008 and November 4, 2008. What it means to be the "Democratic nominee" is also vague because it is not clear whether the oath of affirmation is to support the individual who is the nominee of the Democratic Party as determined by winning a sufficient number of delegates in primary elections held in the several states, or whether the "Democratic nominee" is the

individual who receives a majority of delegates of the Texas Democratic Party.

1. People of Common Intelligence Must Guess At The Meaning of TDP's Oath and Differ as to its Application

Perhaps the seminal articulation of the standards for evaluating vagueness was in Grayned v. City of Rokford, 408 U.S. 104 (1972), relied on by the district court, wherein the Supreme Court explained (at 108-09):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a *reasonable opportunity to know what is prohibited*, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, *laws must provide explicit standards* for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

(Emphasis supplied.) In Village of Hoffman Estates v. Flipside, 455 U.S. 489, 498-99 (1982)(footnotes omitted), the Court further explained:

> These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment….[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, *the law interferes with the right of free speech or of association, a more stringent vagueness test should apply*.

(Emphasis supplied.) Indeed, where the regulation at issue has touched upon

core constitutional rights, this Court has engaged in a searching inquiry that tolerates little ambiguity. Wiegand v. Seaver, 504 F.2d 303 (5th Cir. 1974)(striking a breach of the peace statute); Hiett v. United States, 415 F.2d 664 (5th Cir. 1969)(striking a Texas statute prohibiting mailing of information about divorce.)

Even in a facial vagueness challenge, the regulation "need not be vague in all applications if it reaches a substantial amount of constitutionally protected conduct." Village of Hoffman Estates, 455 U.S. at 494-95. The "vice of unconstitutional vagueness" is particularly astringent where a regulation "operates to inhibit the exercise of individual freedoms affirmatively protected by the constitution." Cramp, 368 U.S. at 287. In the instant case, the Oath implicates the most "core constitutionally protected conduct" imaginable – the bedrock rights to freedom of speech and political belief, as well as the opportunity for involvement in civic institutions and seeking election to the Nation's highest office. The high hurdle typically ascribed to a facial challenge is thus substantially lower herein.

Despite the ease of analysis urged below by TDP, and adopted by the district court, no reported case has directly examined the phrase "fully support" either within or outside of the context of a party "nominee." Thus, because the phraseology of each particular oath may differ from any other,

judicial review of each oath is *sui generis*; so that a case upholding a particular oath does not stand for the proposition that oaths themselves are a valid exercise of party power, but rather imparts principles that may be distilled and applied in resolving future cases. Indeed, the Supreme Court has determined that individual terms such as "support" are not susceptible to objective measurement or evaluation, and thus an oath relying on such a term creates two independent constitutional harms: (1) it might create a chilling effect and deter certain individuals from participating in civic affairs, for fear they may not be able to live up to the *perceived dictates of the oath*; and (2) the oath's lack of clarity may open the door to any attention-seeking prosecutor who might want to accuse an oath-taker of failing to live up to his or her promise. Cramp, 368 U.S. at 286-87. As the Court explained:

> With such vagaries in mind, it is not unrealistic to suggest that the compulsion of this oath provision might *weight most heavily upon those whose conscientious scruples were the most sensitive*. While it is perhaps fanciful to suppose that a perjury prosecution would ever be initiated for past conduct of the kind suggested, it requires no strain of the imagination to envision the possibility of prosecution for other types of equally guiltless knowing behavior …. experience teaches that prosecutors too are human.

Id. (emphasis supplied.) Beyond the proposition that a loyalty oath cannot require future associational activity or advocacy of political doctrine, enough itself to strike the oath at issue, Cramp also stands for the proposition that any oath whose language might be reasonably interpreted in a manner that

could cause individuals to refrain themselves from unfettered involvement in civil affairs must be stricken:

> It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.[5] The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution….[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. The maintenance of the opportunity for free political discussion to the end that the government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

Id. at 287-88 (internal citations omitted.) To permit the even the *possibility* of the punishment of the fair use of this opportunity is repugnant to the guarantee of liberty contained in the Fourteenth Amendment. Id.

The Court has upheld loyalty oaths of "*support*" for the *Constitution*, so too have oaths been upheld requiring "*support*" for the *Constitution* "and *laws*." See Hosack v. Smiley, 276 F.Supp. 876 (D.Colo. 1967)(*aff'd*, 390 U.S. 774(1968).) The case herein is easily distinguished from cases such as Cole, where the Court suggested that "support" oaths do not "create specific responsibilities but…assure that those in positions of public trust were willing to commit themselves to live by the constitutional processes of our

[5] *i.e.*, enforceability is not the standard.

system." Cole v. Richardson, 405 U.S. 676, 684 (1972). TDP asks more. TDP requires a presidential candidate to swear to "fully support" "the nominee." The addition of the word "fully" draws the oathtaker's attention to TDP's intent that the oath rise above a benign "support" obligation. No case has ever analyzed an oath requiring a presidential candidate to support another presidential candidate in order to appear on the ballot and run against him or her.

In Baggit v. Bullit the Supreme Court considered a Washington state oath that required an individual, in part, to "promote respect for the flag and the institutions of the United States of America and the State of Washington …" 377 U.S. 360, 361-62 (1964). In finding the oath unconstitutionally vague, the Court keyed in specifically on the promise to *promote* respect for the flag and institutions of government, finding that it did require action that swept a wide range of activities, including exercises of free speech. *Id*. at 371. Similarly, the Court found it "difficult to ascertain" how one could avoid violating their promise to "promote" "undivided allegiance." Such uncertainty allowed "infinite" interpretations and would require "extensive adjudications" to produce definite boundaries. Id. at 377-78. The "promotion" considered and struck by the Supreme Court in Baggit is paralleled by the "full support" required for those seeking access

to the Democratic primary ballot in Texas – both seek undivided allegiance, and neither tethered that allegiance to the only object to which such an oath has ever been upheld, *i.e*., the constitution or the constitution and laws.

The relevant portion of the oath upheld in Cole read, "I will oppose the overthrow of the government of the United States of America or this Constitution by force, violence, or by any illegal or unconstitutional method." Cole, 405 U.S. at 677-78. The phrase *will oppose* the overthrow of the government is meaningfully different from the phrase *fully support* the Democratic nominee – the former reaches only conduct while the latter also seeks to stifle personal belief. To "oppose the overthrow" regulates the affiant's conduct in response to the conduct of another. Conversely, TDP's Oath to "fully support the Democratic nominee" imposes a prior restraint that also seeks to regulate the affiant's thoughts, belief, and conscience. Rather than respond to or oppose conduct, as is the case with oaths that have been upheld, TDP's Oath requires the affiant to pledge to perform an abstraction, *i.e*., "full support" to an individual whose identity unknown at the time the oath is taken, *i.e*., the Democratic nominee "whoever that shall be."

Specific to ballot access for candidates, the Supreme Court invalidated an Indiana statute denying candidate ballot access unless their party filed an

affidavit swearing that the party does not "advocate the overthrow of local, state, or national government by force or violence." Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 94 S.Ct. 656 (1974). The Court affirmed the axiom that *an oath cannot forbid or prescribe advocacy of a doctrine, divorced from any direct incitement of lawless behavior*. (Emphasis supplied.) See also Brandenburg v. Ohio, 395 U.S. 444 (1969). Unlike a general "support" oath, such as the one at issue in Ray, relied upon by the district court, oaths such as the one at issue require more, directly infringe on expressive rights and are properly struck down. Whitcomb, 414 U.S. 448-50. Indeed, this Court has not hesitated to strike loyalty oaths as unconstitutional on both occasions a challenge has been encountered. See Socialist Workers Party v. Hardy, 607 F.2d 704 (5th Cir. 1979); Socialist Workers Party v. Hill, 483 F.2d 554 (5th Cir. 1973).

The provision in TDP's Oath requiring a presidential candidate to swear to "fully support the Democratic nominee for President whoever that shall be" is unconstitutionally vague because "men of common intelligence must necessarily guess at its meaning." Cramp, 368 U.S. at 287. Indeed, the district court found the oath at issue "inartfully worded and arguably vague" (Dist.Ct.Op. p. 13) but refused to strike it for two reasons: (1) because, in its estimation, the addition of the word "fully" does not require a different

obligation from "support" oaths that have been upheld; and (2) because, in the district court's view, the oath is a "moral obligation, which is unenforceable at law" Under this analysis, the amount to which the candidate loyalty oath interferes with a candidate's constitutional rights moves on a sliding scale, more severely restricting a candidate whose honor compels a sense of duty to the oath, so that the most honorable individual will confront the greatest restriction of First Amendment rights. These two rationales, the second hinging on the validity of the first, simply miss the mark. Whether one considers the text of TDP's oath, its structure, dictionary definitions, the common understanding of the terms, the factual record available to the court, or the governing case law – indeed, when one considers any and all of the above, all roads lead to Rome. Each of these modes of analysis simply confirms that TDP's Oath is unconstitutionally vague.

Both of the district court's rationales are incorrect for a shared reason – *i.e.*, because it is entirely reasonable to believe, as Kucinich does, that a sworn oath of full support would require him to:

> "endorse the Democratic nominee; campaign and/or raise campaign funds on behalf of the Democratic nominee; support legislative proposals advanced by the Democratic nominee; refrain from supporting any position contrary to the Democratic nominee;, and; refrain from publicly criticizing, disagreeing, or making any public comment that could be construed as nonsupport of the nominee's

position on any public policy issue."

See Affidavit of Dennis J. Kucinich [USCA5 p. 199-200.] The district court's fundamental error of analysis was that – after correctly stating that its vagueness inquiry turned on how the "person of ordinary intelligence" could reasonably interpret the Oath – the district court then proceeded to base its holding on what *the court itself* thought the oath meant. The district court's reasoning that "the extent to which Kucinich must comply with its terms is solely within Kucinich's discretion" (Dist.Ct.Op. p. 13) plainly demonstrates that the district court never engaged in the proper inquiry, which is to evaluate the "person of ordinary intelligence" could reasonably interpret it.

Had the district court engaged in the proper inquiry, it would have been clear that while Kucinich's interpretation of the Oath is certainly not the only possible interpretation, it just as certainly comports with how a "person of ordinary intelligence" may read it. Even if the district court is correct in its assertion that the "oath as it exists is a moral obligation," (Dist.Ct.Op. p. 13) that necessarily means that the Oath is subject to multiple reasonable interpretations by persons of ordinary intelligence. Indeed, the district court found that "Kucinich is free to define 'fully support' however *he* sees fit and act accordingly." (Dist.Ct.Op. p. 7.)(emphasis supplied.) It is precisely this range of reasonable interpretations, any number of which are

plainly unconstitutional, that confirm the inherent vagueness of the Oath.

According to the standard articulated by the district court, since Kucinich was free to select from the vagaries a constitutional application of the Oath, then it must be constitutional– "the extent to which Kucinich must comply with its terms is solely within Kucinich's discretion." (Dist.Ct.Op. p. 13.) Indeed, according to the district court, he must only "abide by the oath to the degree his conscience requires." (Dist.Ct.Op. p. 13.) In other words, the district court's holding is wholly premised on its own interpretation to the exclusion of Kucinich's interpretation and any other, *i.e.*, the district court's interpretation is the only one reachable by "persons of ordinary intelligence."

While there are certainly those who may not interpret TDP's Oath in the same manner as Kucinich, the district court among them, the operative question in a vagueness challenge is not whether a majority, or even plurality, *agree* with a particular interpretation or another. The standard is whether people of common intelligence can reasonably *disagree* about its meaning and are thus left to guess. Indeed, in its ruling from the bench, the district court stated:

> There have been, in my opinion, any – that I have read, any number of cases that have upheld oaths and pledges. "Fully" *may be subject to many interpretations*. It *may be subject to the one Mr. Kucinich gives it*; it *may be subject to other interpretations*, but it is legally

> unenforceable. And, although it may make a – place a moral dilemma on Mr. Kucinich if he had taken it, clearly, because the oath is not legally enforceable, he could determine what *in his mind* "fully" meant and act accordingly.

(Tr. at 37.) As the record confirms, *reasonable people are disagreeing* about the meaning of *this oath*. Thus, according to the standard applied by the district court, each of us is left to individually guess in our minds what "fully" means and act accordingly. This is precisely the harm this Court has cautioned against in ruling that such torturing of the language in order to reach a constitutional reading cannot alter the fact that reasonable people could still read the plain words and be uncertain as to whether their otherwise constitutionally protected activities are subject to it. Hardy, 607 F.2d at 704, *aff'g*, 480 F.Supp at 943.

2. The Vagueness Analysis is Not Affected by the Enforceability of the Oath

It is without question that the district court determined that the oath is subject to multiple interpretations by persons of reasonable intelligence. Thus, the vagueness holding must rest on the determination that the oath is no more than a moral obligation that is unenforceable at law. Appellants respectfully submit that it not unreasonable to read the words and obligations as they actually appear in the oath. By contrast, the district court's view, that the notarized oath is unenforceable at law, requires the addition of words and

concepts not indicated, if not directly refuted, by the text of the oath and then makes the additional leap of logic by assuming that a person of common intelligence knows that these phantom additions and deletions were intended all along – indeed, to the exclusion of any other interpretation.

Even if, *arguendo*, TDP's Oath is a new kind of sworn, notarized statement that is somehow not enforceable at law, the analysis is unchanged. The Supreme Court clearly expressed its refusal to rely on "a prosecutor's sense of fairness and the Constitution" to prevent perjury prosecutions. Baggett, 377 U.S. at 373. Baggett makes clear that the constitutional problem emanating from a vague oath is not in any way dependent on the likelihood of actual prosecution for perjury; the broader concern is that good citizens will be chilled into silence:

> It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions….Well intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law….upholding the discharge or exclusion from public employment of those with a conscientious and scrupulous regard for such undertakings….The State may not require one to choose between subscribing to an unduly vague and broad oath, thereby incurring the likelihood of prosecution, and conscientiously refusing to take the oath with the consequent [injury.]

Baggett, 377 U.S. at 373-74. Such a chilling effect would be expected to be amplified as to presidential candidates, who are under tremendous public scrutiny. Such individuals are much more likely to encounter an "attention

seeking prosecutor" looking to gain national attention. Just because the district court may not interpret the Texas Penal Code so as to apply a criminal penalty, if that case were before it, does not leave Kucinich free to break the law.

3. Kucinich's Interpretation of the Oath Has Never Been Determined to Be Unreasonable

In short, the district court's decision answers the wrong question; the question is not whether "fully support" requires more action than "support," or even whether "fully support" requires any action at all. Rather, the question is whether Kucinich's interpretation of "fully support" is reasonable, and whether TDP can condition ballot access upon his personal political beliefs and views.

To the person of ordinary intelligence, the term "support" may indeed impose some specific responsibility, as it typically means "to aid the cause of by approving, favoring, or advocating." AMERICAN HERITAGE DICTIONARY, 2nd College Ed. 1985 at p.1222. Indeed, the fact that Ray, upon which the district court and TDP heavily relied, found innocuous a pledge of "support" for a nominee only furthers the reasonableness Kucinich's interpretation that "fully support" is intended to require something more. Ray, 343 U.S. at 221-22. By amplifying the language determined to be benign in Ray, TDP must have meant for its oath to mean

something more, *i.e*., to have some consequence. TDP has conceded as much, arguing below:

> "Fully" means "completely or entirely," Oxforf Eng.Dict., or "totally and completely." American Heritage Dict.(4th ed. 2000). "Support" means to "give assistance, encouragement or approval to," Oxford Eng. Dict., or to "oprovide for or maintain, by supplying with money or necessities." American Heritage Dict.(4th ed. 2000). Therefore, the phrase "fully support" means something like "to give one's *complete* assistance or approval to," and a person of even the meanest intelligence should know that the party's nominee refers to the person who gave the acceptance speech at the Democratic Party's convention or (if something were to happen to that person later on) his replacement.

TDP's Brief in Opposition, p. 18 [USCA5 p. 102] (emphasis supplied.)

To apply Ray, the district court decouples the adverb from its object verb, dismissing the addition of the word "fully." (See Dist.Ct.Op. p. 13.) This is problematic because neither term can be properly analyzed without reference to the other. This is why the district court's reliance on Ray's upholding an oath of "support" is un-illuminating here, and why the district court was wrong in its holding that the phrase "fully support" requires no more than the requirement of support considered in Ray. If the benign and unenforceable nature of the oath is tethered to the construction of a single term, so that the term "support" imposes no specific or enforceable obligation to act, it necessarily follows that the amplification and enlargement of precisely that term amplifies and enlarges the obligation; in

this case so that the oath in question is susceptible to more than one reasonable meaning and the oathtaker cannot possibly know what he or she is pledging to do. In short, to borrow a phrase from TDP, "a person of even the meanest intelligence" knows that full is more than some. (TDP's Brief in Opposition, p. 18 [USCA5 p. 102].)

4. People of Common Intelligence Also Differ as to the Meaning of "Democratic Nominee"

The lack of any definitions for the terms "fully" and "Democratic nominee" further confirm the rule's constitutional infirmity. In Law Students Civil Rights Research Council v. Wadmond the Supreme Court analyzed the distinguishing characteristics of a valid support oath. 401 U.S. 154, 91 S.Ct. 720 (1970). In upholding a rule requiring the committee reviewing state bar applicants to certify that an applicant "believes in the form of government of the United States and is loyal to such government" the Supreme Court relied on a determination by the state authorities entrusted with interpreting the rule that "the form of government of the United States" and "the government" refer solely to the Constitution, *i.e.*, to the *principles* of a party and not to its *individual standardbearer*.

It is unclear whether Kucinich, who will not be the Democratic Party's nominee, would be permitted to endorse the party's nominee but take a different position from the nominee on even a single issue; lest he no

longer "fully" support the nominee in violation of his sworn statement. The effect is to attempt to "unify the party" by chilling the speech of its leaders when their ideas differ. Nor can a candidate know who the Democratic nominee will be when making the pledge of full support. It is not clear from the text of the rule whether the Texas primary itself produces the "Democratic nominee" or if the sworn affirmation refers to the individual chosen based at the party's national convention – the winner of the Texas Democratic primary may not be the same individual who receives a majority of delegates at the party's national convention. Therefore, it is possible that the rule requires a candidate for nomination in the Texas Democratic primary to fully support the victor of the primary (*i.e.*, the Texas Democratic primary's "Democratic nominee"), and specifically reject the individual who receives a majority of delegates at the party's convention (*i.e.*, the national convention's "Democratic nominee"). Indeed, despite TDP's assertion that "even a person of even the meanest intelligence should know that the party's nominee refers to the person who gave the acceptance speech at the Democratic Party's convention or (if something were to happen to that person later on) his replacement," (See TDP Brief in Opposition, p. 18 [USCA5 p. 102]) the district court found otherwise, determining that "Democratic nominee" refers to TDP's "nominee." (Kucinich has a choice

of whether to associate "and assume an obligation to support the *TDP's nominee*;" the primary election will determine "*TDP's nominee*;" the court finds the oath fails to give rise to any legal obligation to support "the *TDP's nominee*" (emphasis supplied) Dist.Ct.Op. pp. 8, 9 and 13, respectively.) Without knowing what is meant, all speech by those seeking the presidential nomination in the Texas Democratic primary is chilled until the party chooses a Democratic nominee in late August 2008; lest the individual would risk making a statement that could be found not to "fully support" that individual in violation of their sworn statement.

Whichever "nominee" is intended by TDP's Oath, it is axiomatic that when support oaths have been upheld, it is precisely because they require only recognition that "ours is a government of laws and not of men." Id. at 878.[6]

> Recognition and respect for law in no way prevents the right to dissent and question repugnant laws. Nor does it limit the right to seek through lawful means the repeal or amendment of state or federal laws with which the oath taker is in disagreement. Support for the constitutions and laws of the nation and state does not call for blind subservience. Such an extreme concept is not now nor has it ever been accepted.

Id. at 879; see also Ohlson v. Phillips, 304 F.Supp. 1152 (D.Colo. 1969)(aff'd, 397 U.S. 317(1970.)) Indeed,

> The single greatest source of America's strength is our basic premise that this government may never close the gateway to free men's minds to new ideas. The market place of politics has nothing to fear from the unencumbered presentation of

[6] As early as 1562, members of the English House of Commons took oaths recognizing the Queen as the supreme ruler of England both in spiritual and worldly matters. A 1609 oath required members to swear that the King was the lawful King and could not be removed by the Pope. F.MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 364-66 (1961)(cited in John J. Concannon III, *The Pledge of Allegiance and the First Amendment*, 23 Suffolk U.L.Rev. 1019, n. 8.(1989.) Colonists settling in Virginia and Massachusetts brought similar oaths to the new world in the name of religious and political conformity. Harold H. Hyman, TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY, 15 (Univ. of Ca. Press 1959) ("Hyman.") Around the time of the American Revolution, several of the new American states amended prior oaths of allegiance to the King to instead require their public officials to swear loyalty or allegiance to the state's constitutional government. By 1778, each state had a loyalty oath, and the Continental Congress authorized an oath for military and civilian officers swearing loyalty to a free America and denying allegiance to King George. Hyman, at 82. Indeed, founders George Washington and Thomas Jefferson agreed that only those willing to swear loyalty to American independence should enjoy the "full rights" of citizenship. Id. at 85.

> novel theories of government. Even a brief glance about discloses that the majority of the civic systems in operation … in the United States are products or twentieth century solons. The fact that these systems are still embraced within the tent of as republican form of government attests to its enduring utility, but not to any ultimate constitutional prerogative of that system. The surest way to kill a bad idea is to thoroughly expose it. If it can't stand the heat in President Truman's kitchen crucible of politics, it's dead. If it wins acceptance and endures, then constitutional government grows more not less secure. That is what the First Amendment is all about. *No state may condition the right to seek elective office on the willingness of candidates to foreswear their political beliefs and thoughts*.

Socialist Workers Party v. Hill, 483 F.2d 554, 557 (5th Cir. 1973)(emphasis supplied.) If an individual cannot at law, or even in good conscience, "swear that I will fully support the Democratic nominee for President whoever that shall be," the State of Texas cannot compel that individual to swear otherwise, and most certainly it cannot condition access to its primary ballot upon such a declaration.

TDP's position has been that its oath is innocuous – empty platitudes with no legally enforceable meaning - the view unfortunately adopted by the district court. Instead of looking at the words of the Oath and analyzing how a person of common intelligence might reasonably interpret them, the district court applied its own view of what the terms meant, excluding all others, including Kucinich's. This is simply not the test for vagueness articulated by the Supreme Court. To affirm the district court's analysis

would swallow the vagueness doctrine, because a reviewing court could in every case simply apply its own interpretation of an unclear rule, without regard for how others might reasonably interpret it.

ARGUMENT

ISSUE TWO: Whether the district court erred in its application of the Anderson/Burdick analysis in holding that an oath requiring a presidential candidate to swear to "fully support the Democratic nominee whoever that shall be" in order to appear on a primary election ballot does not impermissibly infringe upon the First and Fourteenth Amendment rights of the candidate and his supporters.

A. Standard of Review

"A political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform." New York State Board of Elections v. Lopez Torres, 522 U.S. ___ (2008), slip op. at 5 (citations omitted). These rights are circumscribed, however, when the State gives the party a role in the election process – as the State of Texas has done here. Id. The question is not that "a State may prescribe party use of primaries and conventions to select nominees who appear on the general-election ballot." American Party of Texas v. White, 415 U.S. 767, 781 (1974). The issue, rather, is "that prescriptive power is not without limits." Lopez Torres, slip op. at 5.

The impact of candidate eligibility requirements on voters also implicates basic constitutional rights. Anderson, 460 U.S. at 786. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due

Process Clause of the Fourteenth Amendment, which embraces freedom of speech. NAACP v. Alabama, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170 (1958). The Supreme Court has repeatedly recognized that voters can assert their preferences only through candidates or parties or both. Anderson, 460 U.S. at 787. It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues. Lubin v. Parish, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320 (1974).

The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference. Lopez Torres, slip op. at 8; citing Abrams v. United States, 250 U.S. 616, 630 (1919)(Holmes, J., dissenting). It does not call on the federal courts to manage the market by preventing too many buyers from settling upon a single product. Lopez Torres, slip op. at 8. Nor can the Court allow TDP to manage the market by limiting the products available to its buyers.

Denying ballot access to a candidate who refuses to sign TDP's Oath is a clear-cut violation of the First Amendment. Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment. Regan v. Time, 486 U.S. 641, 648-49 (1984). Such actions are subject to "the most exacting

scrutiny." Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 642 (1994). Generally, such regulations can be saved only if it can be shown "that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Ark. Writers' Project v. Ragland, 481 U.S. 221, 231 (1987).

Any requirement that compels a speaker to utter or distribute speech bearing a political message is subject to the same rigorous scrutiny. Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 798 (1988). TDP's Oath plainly fails a First Amendment analysis. The Supreme Court has repeatedly struck requirements mandating individuals to adopt speech or expressive conduct as their own. See, e.g., Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group, 515 U.S. 557, 559 (1995)(striking a requirement that private parade organizers to allow participation of a particular group); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977)(striking use of mandatory union dues for political speech); W. Va. State Board of Educ. V. Barnette, 319 U.S. 624 (1943) (adherents of a particular religion may not be compelled to salute flag in school).

The constitutional right of free speech includes both the right to speak freely and the right to refrain from speaking at all. Barnette, 319 U.S. at 645 (Murphy, J., concurring.) As TDP's interest has become intersected with the

dissemination of a particular ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming a carrier for such a message. Wooley v. Maynard, 430 U.S. 705, 717 (1977). TDP's oath requires a presidential candidate to undertake a sworn obligation to adopt a presidential endorsement as their own. Whatever the balance of associational rights, this certainly offends the principle against compelled expression.

The district court correctly identified the Anderson/Burdick[7] analysis as controlling in resolving "candidate-eligibility restrictions [that] may implicate fundamental constitutional rights, including the right of association and speech." (Dist.Ct.Op. p. 5; citing Anderson, 460 U.S. at 786-87.) Courts have upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral *process*. With respect to the regulation of candidates, the State has a right to require candidates to make a preliminary showing of support,[8] to prevent distortion of the

[7] Courts analyze constitutional challenges to state's election laws by (1) considering the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments; (2) identifying and evaluating the precise interests put forward by the state as justification for the burden imposed by its rule; and, (3) weighing the legitimacy and strength of each of the state's proffered justifications against the extent to which those interests make it necessary to burden [Plaintiff's] rights. Burdick v. Takusih, 504 U.S. 428, 433 (1992); see also, Texas Ind. Party v. Kirk, 84 F.3d 178, 182 (5th Cir. 1996).

[8] See, e.g., Jenness v. Fortson, 403 U.S. 431 (1971).

electoral process through party raiding[9] and, in some instances, to restrict candidate eligibility to serve legitimate state goals unrelated to First Amendment values, such as prohibitions against seeking or holding multiple offices.[10] TDP's oath requirement goes well beyond controlling "the mechanics of the electoral process"; rather, it directly burdens core political speech. See Buckley v. American Const. Law Found., Inc. (1999), 525 U.S. 182, 204. In short, election laws may permissibly regulate the electoral process, not speech. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345-46 (1995)(emphasis supplied.)

B. Summary of Argument

TDP's candidate loyalty oath requires a candidate to "fully support" the "Democratic nominee, whoever that may be" or to be excluded from participation in the Texas Democratic primary, despite the candidate's established nexus with the party. Yet, if there was any candidate who already "fully" supported *every* other potential nominee, there would be no need for that individual to seek the nomination. Nor would such an individual draw any additional support to the party. Conversely, the exclusion of a known Democratic candidate precisely because of that candidate's beliefs may have a substantial impact on voter participation and

[9] Rosario v. Rockefeller, 410 U.S. 752 (1973).
[10] See Clements v. Fashing, 457 U.S. 957 (1982).

on the dissemination of ideas within the party. In election campaigns, particularly those that are national in scope, the candidates and issues do not remain static over time. Anderson, 460 U.S. at 790. Candidates rise and fall in popularity; domestic and international developments bring new issues to center stage and may affect voters' assessments of national problems. Id. at 790. Yet, under the present scheme, individuals voting in the Texas Democratic primary need not concern themselves with the issues or the candidates seeking nomination, as every vote cast will eventually merge to "fully support the Democratic nominee, whoever that may be." Thus, by preventing the opportunity for factions to associate to enhance their political effectiveness as a group, whatever interest TDP may assert in support of its Oath, it does nothing to increase diversity and competition within the marketplace of ideas or ensure participant nexus with the party.

TDP's oath requirement violates the First and Fourteenth Amendments to the United States Constitution in that it restricts the exercise of association by preventing participation in the Texas presidential primary unless the candidate swears to give up the right of association after the primary with any one other than the nominee as well as compels future association in that the oath contains the obligation to only be associated with the nominee. Further, TDP's Oath violates the First and Fourteenth

Amendments to the United States Constitution in that it restricts speech by preventing statements that may be perceived as non-supportive of the nominee as well as compels future speech in that the oath contains the obligation to fully support the nominee. The district court erred both in determining that the party's associational interest, if any, outweighed Kucinich's and in failing to balance Kucinich's speech interest against the party's in reaching its decision.

C. TDP's Oath Unconstitutionally Restricts Kucinich's First and Fourteenth Amendment Rights

The district court's determination that TDP's Oath can be saved because it does not seek to "disenfranchise classes of people based on race, sex, national origin, or religion" and thus "Kucinich's allegedly-infringed speech and associational rights pale in comparison" ignores that, as to *candidates*, a State may *only* "demand a minimum degree of support for candidate access to a primary ballot." New York State Board of Elections v. Lopez Torres, 522 U.S. ___ (2008), slip op. at 6 (emphasis supplied.) In other words, the fact that TDP's Oath may not be facially bigoted, misogynistic, or intolerant does not therefore mean that it must survive constitutional scrutiny. When a candidate seeks to appear on a primary ballot and that candidate has established a "minimum degree of support" that candidate's name is to be printed on the ballot. Jenness v. Fortson, 403 U.S.

431, 91 S.Ct. 1970, fn.25 (primaries are "open to a candidate with unorthodox or 'radical' views," because all such a candidate need do to appear on the ballot is demonstrate sufficient support.) The district court specifically rejected this view, holding that "[a] rule may be ill advised, an anachronism, disagreeable to some, or legally unenforceable, but unless the rule impinges on a fundamental right implicating constitutional protection, a political party may enact and enforce it." (Dist.Ct.Op. p. 7.)

To that end, what has not been argued that Kucinich lacks sufficient nexus with the Democratic Party. What has been argued by TDP, and held by the district court, is that the Oath at issue creates no legally enforceable obligation. If this is true, what possible interest can be advanced by the party's enforcement of an unenforceable oath against one it its own candidates? In other words, if the Anderson/Burdick analysis is correctly applied, how could the "legitimacy and strength" of a rule which has been held to be unenforceable possibly outweigh even a minimal burden on speech and/or associational rights?

1. The Dominant Right of Association Cannot Possibly Be Based on Legitimacy and Strength of an Unenforceable Oath

The district court observed that the associational rights of the party outweighed those of Kucinich because the primary process "often determines the party's positions on the most significant public policy issues

of the day and even when those positions are predetermined it is the nominee who becomes the party's ambassador of the general electorate in winning it over to the party views." California Democratic Party v. Jones, 530 U.S. 567, 575 (2000). If, as the Supreme Court determined, the positions are generally predetermined, and primaries are more pageantry then substance, it becomes even more important to ensure the participation of insurgent candidates, so long as their nexus with the party is established. Indeed, Justice Scalia observed in Lopez-Torres, "[t]o be sure, we have … permitted States to set their faces against 'party bosses' by requiring party-candidate selection through process *more favorable to insurgents*, such as primaries." Lopez Torres, 522 U.S., slip op. at 7 (emphasis supplied.)

TDP's Oath of fidelity to the nominee, unlike an oath of fealty to the party, undermines the sanctity of the primary election as a separate election. The associational rights appurtenant to a particular candidate and his or her supporters in a primary election cannot be strengthened, lessened, or otherwise conditioned upon any consideration of the general election – their fundamental nature remains static. As articulated by the Supreme Court,

> "[i]t is hard to understand how competitiveness in the general election *has anything to do with [a candidate's] associational rights in the party's selection process*. It makes no difference to a person who associates with a party and seeks its nomination whether the party is a contender in the general election, an underdog, or the favorite. Competitiveness may be of interest to the voters in the general

> election, and to the candidates who choose to run against the dominant party. But we have held that those interests are well enough protected so long as all candidates have an adequate opportunity to appear on the general-election ballot."

Lopez Torres, 522 U.S., slip op. at 7 (emphasis supplied.) In other words, Kucinich's associational rights in the selection process cannot be sacrificed so that TDP can ensure competitiveness by requiring everyone who participates in its process *as a candidate*[11] to coalesce around every other one of the party's *candidates* participating in the process. To the contrary, competitiveness is protected "so long as all candidates have an adequate opportunity to appear on the general-election ballot." Yet, TDP's requirement alone does much to preclude that opportunity.

The exclusion of candidates also burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens. Anderson, 460 U.S. at 787-88, 103 S.Ct. at 1569. Indeed, an election campaign is a means of disseminating ideas as well as attaining political office. Illinois Elections Board v.

[11] Clearly, it is permissible to require an individual to establish some nexus with a *party* to participate in the party's primary. This is easily distinguished from state forced allegiance to an *individual*, whatever that individual's ideals, where a candidate must swear full support to each of that individual's competitors in order to seek nomination in a primary election. In effect, it makes no difference who a voter participating in the Texas Democratic primary selects because every vote cast is ultimately a vote of full support for the same person – "the Democratic Party nominee- whoever that may be."

Socialist Workers Party (1979), 440 U.S. 173, 186, 99 S.Ct. 983, 991.

Finally, adherents of the National Democratic Party also enjoy a constitutionally protected right of political association. Cousins v. Wogoda (1975), 419 U.S. 477, 487, 95 S.Ct. 541, 547. The "freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party *of one's choice* is an integral part of this basic constitutional freedom." Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973) (emphasis supplied.) Yet, as the district court determined, TDP's sworn oath is to its nominee, not the nominee of the National Democratic Convention. Even if, indeed, the dominant right of association lies with the party, under the district court's analysis, it apparently lies with the state party even to the exclusion of the national party. It does not support any interest, and may well run contrary to protected interests, to require those wishing to participate as candidates in the Texas Democratic primary election to support TDP's nominee no matter who is chosen as the party's standardbearer at the national convention.

It is especially difficult for a State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.

Anderson, 460 U.S. at 793. Consider, for example, the impact on a Democratic primary voter who will only support a candidate who has never supported the war in Iraq. If Kucinich is excluded, such a party member will have no individual to support in the Democratic primary. Regrettably, Kucinich can participate in the primary only by pledging his support to any of the other candidates seeking the nomination, each of which has a different viewpoint on this issue. Accordingly, as an established candidate Kucinich is denied even a Hobson's choice, as he is ultimately forced to choose between his ideology without participation *or* participation contrary to his ideology. Either way, through his exclusion, all those party members who would support his ideology are excluded from meaningful participation. Such viewpoint restrictions were precisely what the Supreme Court warned against in Anderson.

The district court would overlook TDP's wholesale restriction upon Kucinich's associational interests because he "could have chosen to be a candidate in the Texas Republican Party primary, a third-party candidate, or an independent candidate." (Dist.Ct.Op. p. 9.) Even if these were reasonable alternatives, which they are not, they do nothing to protect the rights of those such as Appellant Nelson, for whom the Supreme Court has "acknowledged an individual's associational right to vote in a party primary

without undue state-imposed impediment." Lopez Torres, 522 U.S. ___, slip op. at 6. Indeed, the Supreme Court has recognized an *individual* right to associate with the party of one's choice and to have a voice in the selection of that party's candidate for public office. Kusper v. Pontikes, 414 U.S. 51, 58 (1973)(emphasis supplied.) In any event, this line of reasoning has been rejected by the Supreme Court, as even free access to the general election ballot does not validate an otherwise unconstitutional restriction upon participation in a party's nominating process. See Lopez Torres, 522 U.S. ___ (2008), slip op. at 8; citing Bullock v. Carter, 405 U.S. 134, 146-47, 92 S.Ct. 849 (1972)("We can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations....")

Ultimately, in applying the Anderson/Burdick analysis, the district court determined that "[t]he dominant right of association in this case lies with the party." (Dist.Ct.Op. p. 8.) Yet, the district court simultaneously determined that "the oath at issue fails to give rise to any legal obligation." (Dist.Ct.Op. p. 8.) In finding that the Oath creates no legal obligation, the district court erroneously determined that it must follow that "these considerations impact the Court's assessment of the character and magnitude of the asserted constitutional injury." (Dist.Ct.Op. p. 7.) Rather, under a proper Anderson/Burdick analysis, the Oath's lack of meaning does not

speak to the extent of Kucnich's injury. Rather, it necessarily precludes any possibly that TDP could prevail under the third prong of the Anderson/Burdick analysis – *i.e*., it is impossible for an unenforcable oath to bring "legitimacy" or "strength" to any proffered justification for its existence. Thus, the district court's holding that the unenforcability of the oath somehow lessens the injury to Kucinich while simultaneously elevating TDP's interest so as to defeat the interests of Kucinich and his supporters in access to the ballot is plainly erroneous.

2. The District Court Erroneously Failed to Consider the Comparative Speech Rights

In balancing the speech interests, as Anderson requires, the district court's finding that the "dominant right of association" lies with the party does end the analysis, as it does not resolve Kucinich's free speech claims against TDP. By failing to look beyond association, the district court confused TDP's constitutional rights with its constitutional obligations. In the *White Primary Cases*, constitutional rights of voters were asserted successfully against political parties. Many cases have considered the rights of the parties, the result often favoring the party over state regulation. While seemingly disjointed, these cases intersect in disfavoring regulation limiting broad participation. Where the parties have been successful is in cases that seek to defeat oppressive state action. Indeed, these are cases that

protect the rights of election participants. In this action, it is the party that is the oppressive actor. In each of these cases, associational considerations have been asserted to vindicate, not defeat, First Amendment rights. In other words, First Amendment rights are dominant. Knowing that the party may survive an Anderson balancing analysis with respect to associational claims does not preclude analysis of the speech claim. While the district court conceded that TDP's Oath is a restriction on Kucinich's speech,[12] it made no finding that, on balance, the burden upon Kucinich's speech is justified or outweighed by any party interest.

TDP's forced speech required in exchange for participation in the primary election distorts the informational marketplace and is precisely the *affirmative* action the State may not undertake. The Supreme Court has specifically rejected state action that manipulates the information available to the public:

- "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. C.f. Parker v. Brown, 317 U.S. 341 (1943). But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold." Virginia Pharmacy Board v. Virginia

[12] The oath "does not so significantly restrict Kucinich's First Amendment speech and associational rights that it requires a strict scrutiny analysis …" (Dist.Ct.Op. p. 8.)

Consumer Council, 425 U.S. 748 (1976);

- "[t]he First Amendment goes beyond protection of the press and the self-expression of individuals to limit government from limiting the stock of information from which members of the public may draw." First National Bank of Boston v. Belotti, 435 U.S. 765, 783 (1978);

- "[f]ree speech carries with it some freedom to listen. In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas'" Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

The district court would overlook TDP's wholesale restriction upon Kucinich's speech because "[i]t is enough that the party supports its requirement by asserting its important interests in regulating elections an in preventing association with those who do not support the party." (Dist.Ct.Op. p. 8.) Thus, under the district court's analysis, TDP is somehow able to apply its unenforceable oath to generate such a strong associational interest that it outweighs both Kucinich's associational interests *and* his speech interests.

By inflating the value of the Oath so as to defeat every constitutional interest advanced by Kucinich in opposition, the district court significantly undermines its own determination that its supposed unenforceability renders it so innocuous as to survive constitutional scrutiny. It is either meaningless and thus protects no interest, or it is so meaningful that it can be the sole basis for excluding a candidate from appearing on the ballot – either way, it

cannot survive constitutional scrutiny.

In the final analysis, the primary value protected by the First Amendment is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times v. Sullivan (1964), 376 U.S. 254, 270, 84 S.Ct. 710, 720. Indeed,

> [i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what is to be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Barnette, 319 U.S. at 642. TDP's Oath does not now present that first exception.

3. The District Court Was Not "Bound by Ray" in Resolving Kucinich's First and Fourteenth Amendment Claims

James Madison cautioned that "[a] Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 250 (M.Ferrand ed. 1911). While primary elections are unique in that they are a joint undertaking of the state and the political parties, neither may overcome the "fundamental principle of our representative democracy … that the people should choose whom they please to govern them." 2 ELLIOT'S DEBATES 257 (A. Hamilton, New York). These axioms, still true today, draw out why the district court's reliance on

Ray is inapposite.

In Ray, the Alabama Democratic Party "oath required electors to pledge their support for 'the nominees of the National Convention of the Democratic Party for President and Vice-President of the United States." (Dist.Ct.Op. p. 7; citing Ray, 343 U.S. at 215.) Therefore, reasoned the district court, "just as the *elector* in *Ray* had a choice whether to associate with the party and assume the obligation to vote a certain way at the national convention, *Kucinich* has a choice whether to associate with TDP and assume an obligation to support TDP's nominee." (Dist.Ct.Op. pp. 7-8.) The Supreme Court's decision in Lopez-Torres makes clear that district court erroneously determined that it could apply the analysis for party rules relating to *elector* participation to a situation pertaining to party rules touching on *candidate* participation. Unlike restrictions on electors only, restrictions on ballot access impact both candidates and electors, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." Bullock, 405 U.S. at 143. To that end, echoing a rule that united Hamilton and Madison, the United States Supreme Court has identified that its primary concern with ballot access restrictions is that they "limit the filed of candidates from which voters might choose." Id.

Indeed, unlike TDP's electors, the President of the United States, "is an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states….Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people." 1 Story § 627. The President of the United States is an officer of the entire union. U.S. Term Limits v. Thornton (1995), 514 U.S. 779, 803, 115 S.Ct 1852, 1855. States thus "have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president…. It is no original prerogative of state power to appoint a representative, a senator, or president for the union." Id. at 803-04. The rule that emerges is that the State can control its own *internal process* through control of its own *electors*, *i.e.*, Ray. There is, however, no support for the proposition that the State can exercise control over the *national process* through the control of a *national candidate* by any method other than requiring an established modicum of support.[13]

[13] In fact, Kucinich's candidacy for the Democratic nomination was specifically recognized by the Federal government. On December 17, 2007 the Commissioners of the Federal Election Commission (FEC) adopted a Certification unanimously approving Plaintiff Kucinich's matching fund application based on a 20-state "Threshold Submission" that included the State of Texas. By excluding Plaintiff Kucinich from participation in the Texas Democratic primary, thus reducing the number of primaries available for Plaintiff Kucinich to compete in, Defendant Texas Democratic Party's action undermines the purposes of the federal law governing financing of presidential primary elections. The likelihood of the loss loss of eligibility for matching funds is increased by the exclusion from a primary, which further limits the opportunity of a

In the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. Anderson v. Celebreeze (1983), 460 U.S. 780, 794-95, 103 S.Ct. 1564, 1573. The President and Vice President of the United States are the only elected officials who represent all the voters in the Nation. Id. Moreover, the impact of votes cast in each State is affected by the votes cast for the various candidates in other States. Id. In a Presidential election a State's enforcement of more stringent ballot access requirements has an impact beyond its own borders. Id. Thus, the State has a *less important interest* in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries. Anderson, 460 U.S. at 794-95 (emphasis supplied.) Indeed, the Supreme Court has recognized "the pervasive national interest in the *selection of candidates* for national office, and this *national interest is greater than any interest of an individual State*." Cousins, 419 U.S. at 490 (emphasis supplied.) As Justice Scalia has observed, "[c]ontrol any cog in the machine and you can halt the whole apparatus." McConnell v. F.E.C. (2003), 540 U.S. 93 (SCALIA, J., concurring in part, dissenting in part).

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candidate whose fundraising ability is already limited by statute to compete for the nomination.

Ultimately, it is clear that even if the proper Anderson/Burdick analysis were undertaken, any interest identified by the TDP in support of its Oath could not rise so high as to defeat Kucinich's. If left unchecked, the district court's analysis would permit a nefarious state political committee that is seeking to increase its influence over the national selection process to simply promulgate rules, that need not survive the checks and balances of the legislative process, designed to exclude certain candidates from the opportunity to win any of the state's convention delegates - benefiting favored candidates both by artificially increasing their delegate count and simultaneously limiting the universe of winnable delegates available to disfavored candidates. The rule of Anderson/Burdick was designed precisely to prevent those charged with control of the mechanics of the process from controlling the outcome of the election.

Additionally, the oath required in Ray applied to candidates for nomination as state presidential and vice-presidential primary *elector*, not to a candidate seeking the national nomination. See Ray v. Blair (1952), 343 U.S. 214, 72 S.Ct. 654. Therefore, the analysis in Ray construed the *Twelfth Amendment* and not the First Amendment. In addition, it is important to note that the oath in Ray was much less restrictive than the one in the instant case. A candidate for the position of Democratic primary presidential

elector was only required to "aid and support" the nominee. Id at 218. This is in stark contrast to the oath required by the TDP for presidential primary candidates, where the candidate must swear to "*fully support* the Democratic nominee." A delegate in Ray was also clearly required to support the national nominee. Id at 230. Under TDP's loyalty oath, Kucinich is required to blindly stand in *full* support of the nominee, acting as vessel for any policy initiative and/or political statement that nominee chooses to make. The use of the word "fully" completely changes the dynamic from an oath where a person could support more than one person publicly as long as he voted for the nominee at the party convention, to a severely restrictive oath where everything Kucinich says and does must be in support of the nominee. Ray's construction of the application of the Twelfth Amendment to a general support oath taken by a state party member seeking to represent the state at a national convention is neither "instructive" nor "binding" in resolving Kucinich's First and Fourteenth Amendment claims against TDP's sworn obligation of full support to an unknown individual by a candidate seeking the presidential nomination. The Anderson/Burdick analysis is specific to "consider[ations of] the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment that the Plaintiff seeks to vindicate." Burdick, 504 U.S. at 433; see also, Kirk, 84 F.3d at 182.

Ray is inapposite.

Just as a city government could not condition the entry into a city park upon an individual's willingness to execute an oath of loyalty to the mayor, TDP may not condition access to its ballot upon an individual's willingness to execute an oath of loyalty to its nominee. As the First Amendment ensures that those seeking the nation's highest office are free to spread their message and convince the public that they are right for the job; political parties may not trample on its spirit, or letter, by conditioning ballot access upon a candidate's pledge of loyalty.

From the first town hall meetings in New Hampshire to the first Tuesday in November, millions of public dollars and countless hours are spent choosing a President of the United States. For good or ill, the government has become inextricably involved with this process – pervasively regulating all stages of the campaign and providing, among other things, public financing for candidates, security for candidates, and salaries to incumbents and their staffs during the long campaign season. The American people, including the people of Texas, are the taxpayers who finance this grand spectacle – and they should be able to participate fully in it. The government, through the political parties or otherwise, should not, and constitutionally must not, be in the position of excluding constitutionally

qualified candidates; thus preventing meaningful participation by their modicum of support, simply because a candidate refuses to sign a loyalty oath in favor of the King, a state's nominee, or anyone else.

ARGUMENT

ISSUE THREE: Whether the district court erred in its application of the Anderson/Burdick analysis in holding that the Fourteenth Amendment's Equal Protection Clause was not violated even though no similar oath is required for Democratic candidates seeking offices other than President or for any Republican candidate seeking nomination in the Texas primary election.

A. Standard of Review

Under this Court's analysis, the jurisprudence of the Supreme Court "clearly establish the constitutionality of conditioning ballot access on a preliminary showing of a substantial modicum of popular support, the validity of such requirements, absent any particularly invidious feature, will usually present a "how much" rather than a "whether" question." Dart v. Brown, 717 F.2d 1491, 1503 (5th Cir.1983). This Court has read Anderson to "suggest[ ] that generally applicable, evenhanded measures restricting ballot access to candidates making a preliminary showing of substantial support are not 'constitutionally suspect.'" Dart, 717 F.2d at 1500. "This, in turn, appears to militate against application of the strict scrutiny test to measures of that particularly variety." Id. The "whether" question, *i.e.*, the strictest scrutiny, is thus reserved for instances where ballot access is conditioned upon anything other than a showing of a substantial modicum of popular support.

As this Court recognized in Dart, courts have invalidated rules providing different methods of ballot access that hinge on the party affiliation of the candidate. Dart, 717 F.2d at 1500. In other words, as the district court recognized, in order to secure a place on the ballot, Kucinich had to either do something not required of all candidates seeking the presidential nomination at the primary election, or be compelled to adopt independent status. Id. Further, "[w]here the restrictions burden not only candidate ballot access but also other important constitutionally protected rights, application of the strict scrutiny test seems clearest. Id.

B. The District Court Should Have Applied Strict Scrutiny and Determined That the Oath Violates Kucinich's Fourteenth Amendment Right to Equal Protection

The Oath violates the Fourteenth Amendment's Equal Protection clause because no similar oath is required for either TDP candidates for offices other than President or Republican candidates for President in the Texas primary. Again, even though TDP asserted no interest sought to be protected, the district court erroneously determined that Kucinich bore the burden, finding: (1) "than an oath requirement is reasonably related to a legitimate legislative objective" – albeit while failing to articulate how this oath is related to any legitimate legislative objective or what such objective was, and (2) that Kucinich "has not demonstrated that he is being treated

differently than similarly-situated people" because "he is being treated like every other person seeking the Democratic nomination for President." (Dist.Ct.Op. p. 11.) There is no support for the proposition that a violation of Equal Protection rights can be cured by narrowing the class over and over until a constitutional application is achieved.

The distinction between members of different parties seeking the same office, *i.e.*, President of the United States, and the distinction between members of the same party seeking different offices impermissibly burdens First Amendment rights recognized by the Supreme Court as fundamental – the right to vote and the freedom of association. See Dart, 717 F.2d at 1498. As in the case at bar, in each of these cases the rule at issue prevented a candidate from appearing on the ballot – ballot access was completely denied. See id. Indeed, Anderson, relied upon by the district court, held that constitutional rights are burdened as "[t]he exclusion of candidates *also burdens voters' freedom of association*, because an election campaign is an effective platform for the expression of views … and the candidate serves as a rallying-point for like minded citizens. Anderson, 460 U.S. at 787-88 (emphasis supplied.)

As this Court has held, "[t]he ballot's only significance [is] in electing candidates. It was a candidate, not a party, ballot." Dart, 717 F.2d at 1499.

When a candidate is denied access to the ballot, the members of that party are denied the right to cast votes for the candidate whom they support. Id. The candidate's placement is a requisite for party members to achieve their goal of having their political ideology implemented. By denying Kucinich a place on the ballot any political association undertaken by his supporters could not have been directly related to furthering a fundamental political purpose – to get Kucinich elected. See id. at 1500.

Even if, *arguendo*, the Equal Protection claim is to be analyzed under the full three prong Anderson/Burdick test, the Oath at issue fails to pass constitutional muster. As this Court has determined in analyzing the "character and magnitude" of the asserted injury, the equal protection clause affords the right not to be subjected to invidious or irrational discrimination with respect to the opportunity to cast a meaningful vote for the candidate of one's choice and to meaningfully associate for the advancement of political beliefs. Dart, 717 F.2d at 1504. Undertaking this analysis particularly draws out the vagueness claims, discussed *supra*, because the burden placed on the candidate is unique to each individual candidate. Because Kucinich reasonably takes the Oath seriously, the resulting "character and magnitude" of the injury as to him is qualitatively and quantitatively most severe, as it forms the sole basis for his exclusion from the ballot even despite his

established modicum of support. In response TDP has asserted no justification for its Oath requirement. Rather, the district court found that other cases like Ray that upheld an oath requirement must thus stand for the proposition that all oaths pass constitutional muster as a matter of law. But, as the Storer Court noted, there is "no litmus-paper test" in this area and that a "[d]ecision in this context, as in others, is very much a matter of degree." Storer, at 730. That degree is easily resolved by considering this Court's admonition that "[t]he ballot's only significance was in electing candidates." Dart, 717 F.2d at 1499. Particularly in a primary election, as a race that is not structured as a race between the parties, the balance must weigh in favor of the candidates.

As to Kucinich's Equal Protection claim, Anderson supports triggering strict scrutiny, thus the full balancing test applicable to Equal Protection challenges for ballot access requirements conditioned upon a showing of some modicum of support need not be undertaken.[14] Even if it is, the result is the same. TDP advanced no interest in support of its Oath. To the contrary, the party asserted and the district court held that the Oath was unenforceable. Thus, it can protect no interest and must necessarily fail

[14] This is not to say that the three prong Anderson/Burdick test should not be applied in resolving Kucinich's First Amendment Associational and Speech claims. However, if the Court were to apply strict scrutiny to reverse the district court's decision with respect to Kucinich's Equal Protection claim, it necessarily need not reach the Anderson/Burdick balancing analysis in resolving the associational and speech claims.

either a strict scrutiny or balancing analysis.

The Equal Protection Clause requires states to treat all similarly-situated people alike. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985). The district court's suggestion that Kucinich could avoid exclusion by simply running for President as an independent or as a Republican only support Kucinich's assertion that those seeking the presidency in the Texas primary are subject to varying standards in direct derogation of the right of equal protection.

CONCLUSION

For the reasons above, Kucinich respectfully requests this Court reverse the decision of the district court and find TDP's Oath violates the First and Fourteenth Amendments to the United States Constitution both facially and as applied to the facts of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donald J. McTigue, certify that today, March ___ , 2008, a copy of the brief for appellants, and the official record in this case, consisting of one (1) volume of pleadings and one (1) volume of transcript, were served via third-party commercial courier for delivery within three calendar days upon:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7(c), undersigned counsel certifies that this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b).

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_____

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Case No. 8-50038

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DENNIS J. KUCINICH; KUCINICH FOR PRESIDENT 2008, INC.; WILLIE NELSON

Plaintiffs-Appellants,

v.

TEXAS DEMOCRATIC PARTY; PHIL WILSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE; BOYD L. RICHIE

***Defendants-Appellees*.**

Appeal from the United States District Court
for the Western District of Texas at Austin

ADDENDUM CONTAINING STATUTES

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U.S.C.A. Const. Amend. I-Full Text

United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances (Refs & Annos)
Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S.C.A. Const. Amend. XIV-Full Text

United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement (Refs & Annos)
AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice

President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by

law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

26 U.S.C.A. § 9033

I.R.C. § 9033

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle H. Financing of Presidential Election Campaigns (Refs & Annos)
Chapter 96. Presidential Primary Matching Payment Account (Refs & Annos)
§ 9033. Eligibility for payments

(a) Conditions.--To be eligible to receive payments under section 9037, a candidate shall, in writing--

(1) agree to obtain and furnish to the Commission any evidence it may request of qualified campaign expenses,

(2) agree to keep and furnish to the Commission any records, books, and other information it may request, and

(3) agree to an audit and examination by the Commission under section 9038 and to pay any amounts required to be paid under such section.

(b) Expense limitation; declaration of intent; minimum contributions.--To be eligible to receive payments under section 9037, a candidate shall certify to the Commission that--

(1) the candidate and his authorized committees will not incur qualified campaign expenses in excess of the limitations on such expenses under section 9035,

(2) the candidate is seeking nomination by a political party for election to the office of President of the United States,

(3) the candidate has received matching contributions which in the aggregate, exceed $5,000 in contributions from residents of each of at least 20 States, and

(4) the aggregate of contributions certified with respect to any person under paragraph (3) does not exceed $250.

(c) Termination of payments.--

(1) General rule.--Except as provided by paragraph (2), no payment shall be made to any individual under section 9037--

(A) if such individual ceases to be a candidate as a result of the operation of the last sentence of section 9032(2); or

(B) more than 30 days after the date of the second consecutive primary election in which such individual receives less than 10 percent of the number of votes cast for all candidates of the same party for the same office in such primary election, if such individual permitted or authorized the appearance of his name on the ballot, unless such individual certifies to the Commission that he will not be an active candidate in the primary involved.

(2) Qualified campaign expenses; payments to Secretary.--Any candidate who is ineligible under paragraph (1) to receive any payments under section 9037 shall be eligible to continue to receive payments under section 9037 to defray qualified campaign expenses incurred before the date upon which such candidate becomes ineligible under paragraph (1).

(3) Calculation of voting percentage.--For purposes of paragraph (1)(B), if the primary elections involved are held in more than one State on the same date, a candidate shall be treated as receiving that percentage of the votes on such date which he received in the primary election conducted on such date in which he received the greatest percentage vote.

(4) Reestablishment of eligibility.--

(A) In any case in which an individual is ineligible to receive payments under section 9037 as a result of the operation of paragraph (1)(A), the Commission may subsequently determine that such individual is a candidate upon a finding that such individual is actively seeking election to the office of President of the United States in more than one State. The Commission shall make such

determination without requiring such individual to reestablish his eligibility to receive payments under subsection (a).

(B) Notwithstanding the provisions of paragraph (1)(B), a candidate whose payments have been terminated under paragraph (1)(B) may again receive payments (including amounts he would have received but for paragraph (1)(B)) if he receives 20 percent or more of the total number of votes cast for candidates of the same party in a primary election held after the date on which the election was held which was the basis for terminating payments to him.

(Added Pub.L. 93-443, Title IV, § 408(c), Oct. 15, 1974, 88 Stat. 1299, and amended Pub.L. 94-283, Title III, §§ 305(c), 306(b) (2), May 11, 1976, 90 Stat. 499, 500.)

PENAL CODE

CHAPTER 37. PERJURY AND OTHER FALSIFICATION

Sec. 37.01. DEFINITIONS. In this chapter:

(1) "Court record" means a decree, judgment, order, subpoena, warrant, minutes, or other document issued by a court of:

(A) this state;

(B) another state;

(C) the United States;

(D) a foreign country recognized by an act of congress or a treaty or other international convention to which the United States is a party;

(E) an Indian tribe recognized by the United States; or

(F) any other jurisdiction, territory, or protectorate entitled to full faith and credit in this state under the United States Constitution.

(2) "Governmental record" means:

(A) anything belonging to, received by, or kept by government for information, including a court record;

(B) anything required by law to be kept by others for information of government;

(C) a license, certificate, permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States;

(D) a standard proof of motor vehicle liability insurance form described by Section 601.081, Transportation Code, a certificate of an insurance company described by Section 601.083 of that code, a document purporting to be such a form or certificate that is not issued by an insurer authorized to write motor vehicle liability insurance in this state, an electronic submission in a form described by Section 502.153(i), Transportation Code, or an evidence of financial responsibility described by Section 601.053 of that code;

(E) an official ballot or other election record; or

(F) the written documentation a mobile food unit is required to obtain under Section 437.0074, Health and Safety Code.

(3) "Statement" means any representation of fact.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1991, 72nd Leg., ch. 113, Sec. 3, eff. Sept. 1, 1991; Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994; Acts 1997, 75th Leg., ch. 189, Sec. 5, eff. May 21, 1997; Acts 1997, 75th Leg., ch. 823, Sec. 3, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 659, Sec. 1, eff. Sept. 1, 1999; Acts 2003,

78th Leg., ch. 393, Sec. 21, eff. Sept. 1, 2003.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 1276, Sec. 2, eff. September 1, 2007.

PENAL CODE

CHAPTER 37. PERJURY AND OTHER FALSIFICATION

Sec. 37.10. TAMPERING WITH GOVERNMENTAL RECORD. (a) A person commits an offense if he:

(1) knowingly makes a false entry in, or false alteration of, a governmental record;

(2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record;

(3) intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record;

(4) possesses, sells, or offers to sell a governmental record or a blank governmental record form with intent that it be used unlawfully;

(5) makes, presents, or uses a governmental record with knowledge of its falsity; or

(6) possesses, sells, or offers to sell a governmental record or a blank governmental record form with knowledge that it was obtained unlawfully.

(b) It is an exception to the application of Subsection (a)(3) that the governmental record is destroyed pursuant to legal authorization or

transferred under Section 441.204, Government Code. With regard to the destruction of a local government record, legal authorization includes compliance with the provisions of Subtitle C, Title 6, Local Government Code.

(c)(1) Except as provided by Subdivisions (2), (3), and (4) and by Subsection (d), an offense under this section is a Class A misdemeanor unless the actor's intent is to defraud or harm another, in which event the offense is a state jail felony.

(2) An offense under this section is a felony of the third degree if it is shown on the trial of the offense that the governmental record was a public school record, report, or assessment instrument required under Chapter 39, Education Code, or was a license, certificate, permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States, unless the actor's intent is to defraud or harm another, in which event the offense is a felony of the second degree.

(3) An offense under this section is a Class C misdemeanor if it is shown on the trial of the offense that the governmental record is a governmental record that is required for enrollment of a student in a school district and was used by the actor to establish the residency of the student.

(4) An offense under this section is a Class B misdemeanor if it

is shown on the trial of the offense that the governmental record is a written appraisal filed with an appraisal review board under Section 41.43(a-1), Tax Code, that was performed by a person who had a contingency interest in the outcome of the appraisal review board hearing.

(d) An offense under this section, if it is shown on the trial of the offense that the governmental record is described by Section 37.01(2)(D), is:

(1) a Class B misdemeanor if the offense is committed under Subsection (a)(2) or Subsection (a)(5) and the defendant is convicted of presenting or using the record;

(2) a felony of the third degree if the offense is committed under:

(A) Subsection (a)(1), (3), (4), or (6); or

(B) Subsection (a)(2) or (5) and the defendant is convicted of making the record; and

(3) a felony of the second degree, notwithstanding Subdivisions (1) and (2), if the actor's intent in committing the offense was to defraud or harm another.

(e) It is an affirmative defense to prosecution for possession under Subsection (a)(6) that the possession occurred in the actual discharge of official duties as a public servant.

(f) It is a defense to prosecution under Subsection (a)(1), (a)(2), or (a)(5) that the false entry or false information could have no effect on the government's purpose for requiring the governmental record.

(g) A person is presumed to intend to defraud or harm another if the person acts with respect to two or more of the same type of governmental records or blank governmental record forms and if each governmental record or blank governmental record form is a license, certificate, permit, seal, title, or similar document issued by government.

(h) If conduct that constitutes an offense under this section also constitutes an offense under Section 32.48 or 37.13, the actor may be prosecuted under any of those sections.

(i) With the consent of the appropriate local county or district attorney, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section that involves the state Medicaid program.

Acts 1973, 63rd Leg., p. 883, ch. 399, Sec. 1, eff. Jan. 1, 1974. Amended by Acts 1989, 71st Leg., ch. 1248, Sec. 66, eff. Sept. 1, 1989; Acts 1991, 72nd Leg., ch. 113, Sec. 4, eff. Sept. 1, 1991; Acts 1991, 72nd Leg., ch. 565, Sec. 5, eff. Sept. 1, 1991; Acts 1993, 73rd Leg., ch. 900, Sec. 1.01, eff. Sept. 1, 1994; Acts 1997, 75th Leg., ch. 189, Sec. 6, eff. May 21, 1997; Acts 1997,

75th Leg., ch. 823, Sec. 4, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 659, Sec. 2, eff. Sept. 1, 1999; Acts 1999, 76th Leg., ch. 718, Sec. 1, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 771, Sec. 3, eff. June 13, 2001; Acts 2003, 78th Leg., ch. 198, Sec. 2.139, eff. Sept. 1, 2003; Acts 2003, 78th Leg., ch. 257, Sec. 16, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 1364, Sec. 1, eff. June 18, 2005.

Acts 2007, 80th Leg., R.S., Ch. 1085, Sec. 2, eff. September 1, 2007.