

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

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

v.

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

Defendant.

CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY

DEPUTY

Cause No. A06CA459 SS

DEFENDANT'S MOTION FOR PARTIAL STAY PENDING APPEAL

Defendant, Tina J. Benkiser, in her capacity as Chairwoman of the Republican Party of Texas ("RPT" or "Benkiser"), by counsel, hereby files her Motion for Partial Stay of the Court's grant of a preliminary injunction in favor of Plaintiffs, and shows the Court as follows:

INTRODUCTION

On July 6, 2006, this Court permanently enjoined RPT from:

1. Declaring Tom DeLay ineligible as the Republican candidate for the general election ballot for United States House of Representatives from Texas District 22 to be held on November 7, 2006;
2. Certifying to the Texas Secretary of State any candidate other than Tom DeLay to appear on the ballot in the 2006 general election as the Republican Party nominee for the United States House of Representatives from Texas District 22; and
3. Certifying to the Texas Secretary of State that Tom DeLay is ineligible to be the Republican Party nominee for the United States House of Representatives from Texas District 22, or if she has already done so, Defendant is enjoined to withdraw any certification that Tom DeLay is ineligible.

Because time is of the essence in this case, RPT respectfully requests this Court to stay its injunction prohibiting RPT from declaring Tom DeLay ineligible to be the Republican Party nominee for the United States House of Representatives from Texas District 22 and prohibiting RPT from engaging in the preliminary steps required to fill a vacancy in a nomination. RPT requests this

partial stay so that it can be prepared to move forward should the Court of Appeals decide that DeLay is ineligible and that the vacant nomination may be filled by another nominee. RPT does not ask this Court to stay the injunction prohibiting RPT from certifying to the Secretary of State Delay's ineligibility and certifying another nominee. Thus, the essence of this Court's decision will remain in effect.

As set out below, RPT has satisfied the requirements necessary for demonstrating that a partial stay should be granted.

ARGUMENT

I. Standard for Granting Stay.

A moving party is entitled to a stay pending appeal if it can show that:

- (1) it is likely to succeed on the merits;
- (2) it will suffer irreparable injury if the stay is not granted;
- (3) the stay will not substantially harm the other parties; and
- (4) the stay will serve the public interest.

National Treasury Employees Union v. Von Raab, 808 F.2d 1057, 1059 (5th Cir. 1987) (citation omitted). "However, this court has not applied these factors in a rigid, mechanical fashion." *Id.* (citing *United States v. Baylor Univ. Medical Center*, 711 F.2d 38, 39 (5th Cir. 1983)). "Indeed, in *Ruiz v. Estelle*, 650 F.2d 555 (5th Cir. 1981), this Court held that the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Id.* (citing *Baylor Univ. Medical Center*, 711 F.2d at 39)(other citation omitted).

II. RPT Satisfies the Stay Requirements.

In the event that the Court of Appeals decides that DeLay is ineligible and may be replaced by another candidate, there are a number of steps RPT must go through before this can be effected, and RPT must fulfill these requirements according to statutory deadlines. RPT must declare DeLay ineligible on or before the 74th day before election day. TEX. ELECTION CODE §§ 145.003, 145.035.

RPT may then replace DeLay using the procedures in TEX. ELECTION CODE § 145.003. This process could easily consume twenty-eight days. The following timeline would likely apply:

- Day 1: Galveston and Brazoria Counties (“the Counties”) give notice to the precinct chairmen in District 22 in their respective counties. Galveston County, pursuant to its bylaws, must give ten days notice of the meeting.
- Days 6-11: The Counties hold their meeting and choose District Executive Committee members.
- Day 12: RPT gives five days’ notice of the District Executive Committee Meeting.
- Days 17-21: The District Executive Meeting is held and a replacement nominee is chosen.
- Day 22: If the nominee is already on the November ballot, RPT contacts the nominee’s county chairman regarding calling a meeting of precinct chairmen in the affected district to replace that person on the ballot.
- Day 23: The affected county chairman gives five days’ notice to the precinct chairmen whose precincts lie within the affected area.
- Day 28: The affected county meeting is held to choose a replacement nominee for the November ballot.

The deadline for declaring DeLay ineligible is August 25, 2006. TEX. ELECTION CODE § 145.035. RPT must certify a replacement nominee to the Secretary of State by September 1, 2006. (See Texas Secretary of State Amicus Letter.) Given the time it will take RPT to fulfill the requirements in choosing a replacement nominee, or *nominees* if the replacement candidate is already on the ballot, as is likely, the Court of Appeals decision in RPT’s favor would have to issue before August 4, 2006. TEX. ELECTION CODE § 145.036(b)(3). If the decision is issued after this date and a partial stay is not granted, RPT will suffer serious and irreparable harm if it cannot complete the candidate replacement process before the State’s deadline.

In contrast, TDP would not be harmed in any way by a partial stay. RPT asks only that it be allowed to engage in the preliminary steps necessary before it can certify a replacement candidate.

It does not ask for allowance to actually certify the candidate to the Secretary of State. The preliminary steps taken by RPT would be of no consequence to TDP.

If the Court of Appeals decides against RPT, the only harm suffered by the parties will be that RPT will have wasted its time, a risk it is willing to take. In contrast, if the appellate court issues a decision in favor of RPT after August 4, 2006, and a stay is not granted, RPT will be irreparably harmed if it cannot meet the deadline for choosing and certifying a replacement candidate for the November election.

In addition, a stay will serve the public interest. As the Supreme Court has noted, the primary concern with ballot access restrictions is that they “limit the field of candidates from which voters might choose.” *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (citation omitted). If a stay is not granted and RPT cannot meet the State’s certification deadline, the choice of candidates on the ballot will be limited and voters will be harmed. Therefore, granting a stay will further the public’s interest in competitive elections and choice of candidates.

Finally, as set out in the preceding argument, RPT has presented a “substantial case on the merits when a serious legal question is involved and [has] show[n] that the balance of equities weighs heavily in favor of granting the stay.” *Id.* (citations omitted).

Defendant’s counsel certifies that they have conferred with Plaintiffs’ counsel and have attempted in good faith to obtain their consent to refrain from opposing this motion. Plaintiff’s counsel has not consented.

WHEREFORE, because RPT has met the requirements necessary for granting a stay, it respectfully prays that this Court GRANT Its Motion for Partial Stay Pending Appeal, and GRANT RPT any such other relief to which it may be justly entitled at law or in equity.

Dated: July 11, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

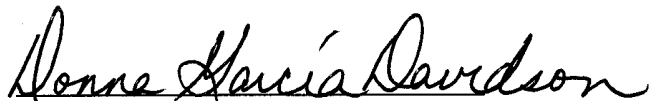
The undersigned hereby certifies that a true and correct copy of the foregoing Motion for Partial Stay Pending Appeal has been served on the following *via* e-mail and first class mail on this the 11th day of July, 2006.

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ORDER ON DEFENDANT'S MOTION FOR PARTIAL STAY PENDING APPEAL

On this ____ day of July, 2006, came on to be heard Defendant's Motion for Partial Stay Pending Appeal. The Court, having considered the Motion and pleadings filed herein, is of the opinion that this motion should be GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Tina J. Benkiser's, in her official capacity as Chairwoman of the Republican Party of Texas', Motion for Partial Stay Pending Appeal.

SIGNED this _____ day of July, 2006.

JUDGE PRESIDING