

No. \_\_\_\_\_

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In The  
**Supreme Court of United States**

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

*Applicants,*

v.

DEMOCRATIC PARTY OF TEXAS, BOYD RICHIE, CHAIRMAN OF THE DEMOCRATIC PARTY OF  
TEXAS, PHIL WILSON, SECRETARY OF STATE OF TEXAS

*Respondents.*

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**EMERGENCY APPLICATION FOR STAY AND/OR INJUNCTION  
PENDING THE FILING AND DISPOSITION OF A PETITION FOR A  
WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT**

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITED AUTHORITIES	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING REQUESTED RELIEF	6
ARGUMENT IN SUPPORT	6
CONCLUSION	11

## TABLE OF CITED AUTHORITIES

<i>Anderson v. Celebreeze</i> , 460 U.S. 780 (1983).....	7
<i>Araneta v. United States</i> , 478 U.S. 1301 (1986).....	6
<i>Barnes v. E-Systems</i> , 501 U.S. 1301 (1991), later proceeding (US) 1991 US LEXIS 4097.....	6
<i>California Democratic Party v. Jones</i> , 530 U.S. 567 (2000).....	<i>passim</i>
<i>Tashjian v. Republican party of Conn.</i> , 479 U.S. 208 (1986).....	8
26 U.S.C. § 9033(c)(1).....	FN1
28 U.S.C.A. §2101(f).....	6
11 C.F.R. §9033.5(b).....	FN1
SUP. CT. R. 11.....	4
SUP. CT. R. 23.....	4

## EMERGENCY MOTION FOR STAY

TO: THE HONORABLE JUSTICE ANTONIN G. SCALIA, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND JUSTICE FOR THE FIFTH CIRCUIT

Pursuant to SUP. CT. R. 23, Applicants Dennis J. Kucinich, Kucinich for President 2008, Inc. and Willie Nelson, hereby petition for an order staying any and all attempts by Respondent Texas Democratic Party to apply its nominee loyalty oath requirement to exclude Applicant Kucinich from appearing on the Democratic Party primary election ballot in the State of Texas pending the filing and final disposition of Applicants' Petition to this Court pursuant to SUP. CT. R. 11 for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. In support of this Application, Applicants state as follows:

### STATEMENT OF THE CASE

1. The underlying facts are not in dispute. On December 28, 2008, Applicant Dennis J. Kucinich applied for a place on the Texas Democratic Party primary ballot using the form promulgated by the Texas Democratic Party (hereafter, "TDP"). Applicant Kucinich crossed out the statement: "I further swear that I will *fully support* the Democratic nominee for President, whoever that shall be" (emphasis supplied) (hereafter, "Loyalty Oath"). On January 2, 2008, Applicant Kucinich was informed by TDP that he would not appear on the Texas Democratic Primary ballot solely because he had failed to execute the Loyalty Oath.

2. On January 3, 2008, Applicants brought suit in United States District Court for the Western District of Texas at Austin, claiming that TDP's Loyalty Oath

requirement was in derogation of Applicants' rights of speech, association, and Equal Protection. The District Court held an immediate hearing and set an expedited schedule.

3. On January 11, 2008, following briefing by the parties, the District Court held a hearing on Applicants' request for permanent injunction. That same day, the District Court entered a Final Judgment, without opinion, denying all relief sought by Applicants.

4. On January 14, 2008, Applicants filed a Notice of Appeal, seeking appeal to the United States Court of Appeals for the Fifth Circuit, as well as an Emergency Motion for Injunction Pending Appeal with the District Court seeking the placement of Applicant Kucinich's name on the Texas Democratic primary ballot pending the resolution of the litigation herein.

5. On January 15, 2008, Respondent Texas Secretary of State filed a Memorandum opposing Applicant-Appellants' Motion for Injunction. That same day, Applicant-Appellants filed a Reply in support of their Emergency Motion for Injunction Pending Appeal in response to a Memorandum Contra filed by Respondent Texas Secretary of State.

6. According to the Texas Secretary of State, primary election ballots must be printed so that they may be mailed to overseas voters, including those serving in the military, on January 19, 2008. Further, the primary election in the State of Texas will be held on March 4, 2008. As a result of these time constraints, the constitutional rights of Applicant Kucinich, Applicant Nelson, and all of Applicant Kucinich's supporters will be forever lost before this Court is able to consider the merits of the Petition for Writ of Certiorari unless the relief requested herein is granted.

## **REASONS FOR GRANTING REQUESTED RELIEF**

7. When a final judgment or decree of any court is subject to review by the United States Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to permit a party to obtain a writ of certiorari from the Supreme Court. 28 U.S.C.A. §2101(f).

8. The decision to grant or deny a stay pending certiorari rests in the Court's sound discretion. *Barnes v. E-Systems*, 501 U.S. 1301 (1991), later proceeding (US) 1991 US LEXIS 4097.

9. A stay may be granted when: (1) there is a reasonable probability that four justices will vote to grant certiorari; (2) there is a fair prospect that a majority of the justices will find the decision below erroneous; and (3) a balancing of the equities weighs in the petitioner's favor. *Araneta v. United States*, 478 U.S. 1301 (1986).

10. There is a reasonable probability that four justices will vote to grant certiorari, and a fair prospect that a majority of the justices will find the decision below erroneous because Applicants have been denied their fundamental constitutional rights.

## **ARGUMENT IN SUPPORT**

11. Applicants have been denied their fundamental constitutional rights in that:

- a. TDP's Loyalty Oath requirement violates the First and Fourteenth Amendments to the Constitution because it is a content-based prior restraint on speech; preventing any statements by Applicant Kucinich in the future that may be perceived as non-supportive of the

Democratic nominee. At a minimum, the Loyalty Oath is effectively an oath of silence, requiring as a matter of personal honor that the candidate agree to remain silent, rather than disagree with the ultimate party nominee on any position or public policy issue. As such, it undermines the open exchange of views necessary to a healthy democracy. It is particularly onerous on an applicant such as Mr. Kucinich who, as a Member of Congress, has a duty to speak out on issues of importance to the people of his district and the Nation; even if his views differ from the position of the nominee of the Democratic Party. Alternatively, the Loyalty Oath compels speech by Applicant Kucinich by requiring him to “fully support” the nominee. “Support” requires affirmative action. Further, the Loyalty Oath conditions present association, *i.e.* the opportunity to appear on the primary election ballot, on Applicant Kucinich surrendering his right of association with all except the Democratic nominee after the primary election and further compels future association with the nominee. The exclusion of a candidate also burdens the associational rights of voters because an election campaign is a means of disseminating ideas as well as attaining political office. *Anderson v. Celebrezze*, 460 U.S. 780, 787-88 (1983).

- b. TDP’s decision to exclude applicant Kucinich from the primary election ballot solely because he refused to execute its Loyalty Oath dilutes his support beyond the borders of the State of Texas because it

precludes his opportunity to compete for one of the largest slates of delegates and impacts his ability to qualify for federal matching funds.<sup>1</sup>

- c. In the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983). 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. *Id.*
- d. The Court has recognized that "the constitutional rights of those composing the party cannot be disregarded. *California Democratic Party v. Jones*, 530 U.S. 567, FN4. While there is no associational interest in selecting a candidate of a group to which one does not belong, *see Jones* at FN5: "[t]he ability of the *members* of the [Party] to select their own candidate ... unquestionably implicates an associational freedom," *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 235-36 (1986)(SCALIA, J., dissenting); "[t]he *members* of a recognized political party unquestionably have a constitutional right to select their nominees for public office." *Timmons v. Twin cities Area New Party*, 520 U.S. 351, 371 (STEVENS, J., dissenting). The decision of the TDP and its Chairman to exclude Applicant Kucinich

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<sup>1</sup> Applicant Kucinich has established a sufficient threshold of support to receive federal matching funds in accordance with 26 U.S.C. § 9033(c)(1) and 11 C.F.R. §9033.5(b). In fact, Applicant Kucinich's receipt of matching funds was based on a 20-state "Threshold Submission" that included the State of Texas.



prevents members of the TDP, such as Applicant Nelson, from voting for their selected nominee for public office.

- e. TDP has offered no state interest supported by its Loyalty Oath requirement. Rather, TDP asserted, and the District Court determined, that the burden on Applicants' rights was minimal because the Loyalty Oath is unenforceable in the future, despite that it is being enforced presently to deny Applicant Kucinich access to the ballot.
- f. The burden imposed by the Loyalty Oath on Applicant Kucinich is extraordinary because TDP requires its execution in order to appear on the Texas Democratic primary ballot for individuals seeking nomination to the office of President of the United States. Presumably, TDP has some expectation that those executing the sworn notarized oath will abide by it, whether "enforceable" or not in the future. Accordingly, the burden on Applicant is real and not "minimal." Conversely, if the burden is minimal, which it can only be if compliance with the Loyalty Oath is neither expected, nor enforced, then the Loyalty Oath requirement is meaningless and does not serve a legitimate party/state interest. Either way, TDP's Loyalty Oath requirement fails to withstand constitutional muster.
- g. TDP's Loyalty Oath requirement violates the guarantee of Equal Protection because it applies only to Democratic Party candidates for President of the United States within the State of Texas. TDP requires no Loyalty Oath for candidates seeking nomination or election to state

or local office. If the oath serves a legitimate party/state interest, then why does the TDP not require it of candidates for state and local office as a condition for appearing on the ballot?

- h. TDP's Loyalty Oath is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment because it requires any candidate who wishes to participate in the Democratic primary election in the State of Texas to swear to "fully" support the Democratic nominee. It is not clear what activities Applicant Kucinich is required, or forbidden, to undertake in the future in exchange for the opportunity to appear on the Texas Democratic Party primary election ballot.
- i. TDP's Loyalty Oath is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment because it is not clear whether the "Democratic nominee" is the individual selected by the Democratic primary voters of the State of Texas, or the individual receiving a majority of delegates at the Democratic Party's national convention in August 2008.
- j. Whatever interest TDP's Loyalty Oath is intended to serve, it is not narrowly drawn to achieve that interest. For example, requiring an oath to support the positions or platform of the party for which the candidate seeks nomination, as opposed to requiring a candidate to take a sworn oath to support an *individual*, in order to appear on the primary election ballot would be more likely to advance whatever

interest TDP may hereafter assert while still protecting the constitutional rights of candidates and their party-member supporters.

- k. The net effect of TDP's Loyalty Oath requirement is to reduce the scope of choice available for nomination by the rank and file membership of the party, effectively assuring a range of candidates who are more "centrist" and changing the party's message. See *California Democratic Party v. Jones*, 530 U.S. 567. This is certainly no substitute for the ability of the party members to choose their own nominee. See *id.*

12. Primary ballots must be prepared so that overseas ballots may be mailed in four days (January 19, 2008). The decision of the District Court is essentially a death sentence for Applicant Kucinich's candidacy in the State of Texas and will impact his candidacy nationally. The potential for irrevocable harm is real and imminent.

13. While Applicant Kucinich and his Texas supporters face the ultimate harm of exclusion, no harm will accrue to Respondents if a recognized Democratic candidate seeking the party's nomination is permitted to appear on the ballot as a candidate for nomination by party members, especially since the disposition of any votes received will depend on the outcome of the litigation herein. The arguments of the Texas Secretary of State in opposition to this Motion in the District Court only further the point that it will be soon expensive and difficult, if not impossible, to add Applicant's name to the roster of candidates seeking the Democratic nomination in the Texas primary even if Applicants' appeal is successful.

14. There is no harm to the public, or to TDP, in including any number of qualified candidates in a primary election; for there can be no dilution where TDP's members are permitted to select their party's standard bearer. Conversely, to wrongly exclude even a single candidate impermissibly limits the choices available to TDP's membership and dilutes every other vote received by the excluded candidate.

### CONCLUSION

In its arguments to the District Court, TDP observed:

“[i]t was, after all, an oath that gave birth to this Nation, in the last sentence of the Declaration of Independence, ‘and *for the support of this Declaration*, with the firm reliance of the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.’ And so it was to the conscience of those Convention Delegates to spread across the nation and work dutifully to ensure the ideals described in the Declaration of Independence [and] give birth to a new nation. (Emphasis supplied).”

Indeed, the Declaration of Independence represented the American colonists' bold rejection of “full support” to an *individual* in favor of pledging that support to the *principles* in which they believed. And so it is here. In order to spread across the nation and work dutifully to ensure the ideals of the party whose nomination Applicant Kucinich seeks, he cannot constitutionally be obligated to support any individual at the expense of those principles. Any arguments by TDP in favor of its Loyalty Oath must necessarily miss the mark; for the party's strength is not in its loyalty to any *individual* but in its commitment to its *principles*. TDP recognizes as much, providing in its Statement of Principles, “[t]hat all Democrats are *bound* to defend, to protect, and to honor our nation, our state, and our Party, and when they are right, it is our privilege to sustain them, but where they err, *it is our duty to correct them*.” Art.I, Sec. (A)(6), Texas Democratic Party Rules. (Emphasis supplied). It is those *principles* that Applicant Kucinich seeks to

vindicate in this action, and in seeking the nomination. It is not for any *individual*, but for those *principles* that all those truly loyal to the party must be willing to “hang together.”<sup>2</sup> Indeed, TDP’s oath of *fealty* to the nominee does nothing to measure *fidelity* to the party.

Under these circumstances, the failure to grant the requested relief will deny Applicants effective relief because the primary election ballots will be prepared and voting will begin before the Court has had the opportunity to consider the merits of Applicants’ Petition for a Writ of Certiorari. Threatened with irreparable injury, the equities favor granting the requested relief while Applicants’ constitutional claims are reviewed by this Court. Applicants submit that Your Honor should stay the District Court decision and enjoin the application of TDP’s Loyalty oath requirement to Applicant Kucinich pending the filing and determination of Applicants’ Petition for a Writ of Certiorari directed to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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<sup>2</sup> At the signing of the Declaration of Independence, Benjamin Franklin is quoted as having replied to a comment by John Hancock that they must all hang together, “[y]es, we must, indeed, all hang together, or most assuredly we shall hang separately.”

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the Emergency Application has been furnished by electronic mail and overnight by third-party commercial carrier, this 16<sup>th</sup> day of January, 2008, upon:

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