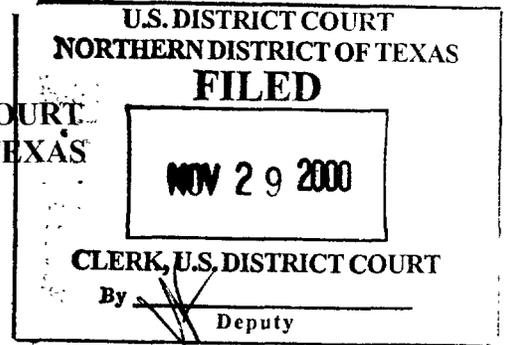


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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



STEPHEN B. JONES, et al,

Plaintiffs,

GOVERNOR GEORGE W. BUSH
in his capacity as Candidate for
President, et al,

Defendants.

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CIVIL ACTION NO.
3:00-CV-2543-D

**PLAINTIFFS' BRIEF IN SUPPORT
OF THEIR APPLICATION FOR PRELIMINARY INJUNCTION**

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**CIVIL ACTION NO.
3:00-CV-2543-D**

**PLAINTIFFS' BRIEF IN SUPPORT
OF THEIR APPLICATION FOR PRELIMINARY INJUNCTION**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW, plaintiffs Stephen B. Jones, Linda D. Lydia and Caroline Franco, who make and file this brief in support of their application for a preliminary injunction, in accordance with the order of this Court dated November 27, 2000, and in support thereof would respectfully show the Court as follows:

1. Requirements for Injunctive Relief

This suit seeks injunctive relief against the thirty two individuals who have been elected to represent the State of Texas as Presidential Electors for the year 2000. The four requirements for a preliminary injunction are well-established:

- (1) the movant must establish a substantial likelihood of success on the merits.
- (2) there must be a substantial threat of irreparable injury if the injunction is not granted.
- (3) the threatened injury to the plaintiff must outweigh the threatened injury to the defendant; and

(4) the granting of the preliminary injunction must not disserve the public interest.

Cherokee Pump & Equip., Inc. v. Aurora Pump, 38 F.3d 246, 249 (5th Cir. 1994)

2. Plaintiffs Have a Substantial Likelihood of Prevailing on the Merits

A. Bush and Cheney are Both Inhabitants of the Same State as the Electors

Plaintiffs seek to enjoin the defendant Electors from cast their votes for President and Vice President in a manner that is in violation of the proscriptions contained within the Twelfth Amendment to the Constitution of the United States. The Twelfth Amendment states:

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves....

Plaintiffs allege that defendants Bush and Cheney are both inhabitants of the State of Texas, the same state as each of the Electors. Plaintiffs request that the Court take judicial notice of the fact that the defendant George W. Bush is presently serving as the duly elected Governor of the State of Texas. The Texas Constitution requires the Governor to reside in Austin, Texas “at all times.” TEX. CONST. ART IV, §13.

Plaintiffs also request that the Court take judicial notice of the fact defendant Electors are the duly elected presidential electors of the State of Texas. Texas law requires presidential electors to be qualified voters in the State of Texas. TEX. ELEC. CODE §192.002(a)(1). To be a qualified voter in Texas, a person must be a resident of the State of Texas. TEX. ELEC. CODE §11.002(5). The Texas Election Code defines “residence” at length:

§1.015. Residence

(a) In this code, “residence” means domicile, that is, one’s home and fixed place of habitation to which one intends to return after any temporary absence.

(b) Residence shall be determined in accordance with the common-law rules, as enunciated by the courts of this state, except as otherwise provided by this code.

(c) A person does not lose the person's residence by leaving the person's home to go to another place for temporary purposes only.

(d) A person does not acquire a residence in a place to which the person has come for temporary purposes only and without the intention of making that place the person's home.

TEX. ELEC. CODE §1.015.

This is a simple case, although one of first impression, involving a request that the Court interpret the word “inhabitant” as used in the Twelfth Amendment to the United States Constitution, and that the Court make fact findings regarding the inhabitation of the defendants. Regardless of the precise definition of the word “inhabitant,” it is beyond dispute that Governor Bush and the defendant Electors are each inhabitants of the State of Texas. The sole disputed issue before this Court is the plaintiffs' contention that defendant Cheney is also an “inhabitant” of the State of Texas for purposes of the Twelfth Amendment. To decide this issue, the Court must discern the meaning of the word and then apply the largely undisputed evidence.

B. The Constitutional Definition of “Inhabitant”

No Court has ever been called upon to construe the word “inhabitant” as used in the Twelfth Amendment. The well-settled rule in construing the Constitution is to give effect to the intent of the framers. *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). This intent is to be determined from the text itself; if the text is not ambiguous, a Court may not look beyond the text to determine its meaning. *Id.* Another cardinal rule of constitutional interpretation helpful in this case is the requirement to construe all provisions in context. *United States v. Balsys*, 524 U.S. 666, 673 (1998).

The constitutional requirement that at least one of the candidates for President and Vice-President voted on by the electors “shall not be an Inhabitant of the same State with themselves” was continued in the Twelfth Amendment unchanged from the original provision found in Article II, Section 1. In this context, it can safely be inferred that the framers intended the word to carry the same meaning for each use throughout the Constitution.

It also seems clear that the framers did not intend the meaning of the word “inhabitant” to vary from state to state, which would defeat the very purpose of a national constitution. Consequently, the word must be defined as a matter of federal common law, and not based on the law of any particular state.

Perhaps the most extensive and authoritative discussion of the meaning of the word “inhabitant” was written by now-Supreme Court Justice Stephen Breyer, in *United States v. Maravilla*, 907 F.2d 216 (1st Cir. 1990). In that case, the court noted that the word “inhabitant” had been construed in different contexts to cover a wide range of different relationships between a person and a place, and that the word had often been given conflicting definitions, depending on context. *Id.*, at 224. For example, “inhabitant” means domiciliary in the Virgin Islands, *see Burch v. Burch*, 195 F.2d 799, 804 (3d Cir. 1952), but a distinction between inhabitant and domiciliary was drawn in Oregon. *See Oregon & California Ry. Co.*, 5 F. 523, 526 (D. Or. 1881). “Inhabitant” and “citizen” are synonymous in Maryland, *see Standard Stoker Co. v. Lower*, 46 F.2d 678, 683 (D. Md. 1931), but not in Iowa. *See Harris v. Harris*, 205 Iowa 108, 215 N.W. 661, 663 (1927).

Most significantly, Justice Breyer also examined the use of the word “inhabitant” in the Constitution, and considered two early Congressional election contests which were required to determine whether a member-elect was an “inhabitant” of the state that elected him. The first

case cited concluded that “To be an inhabitant within the meaning of this section of the Constitution, if it does not mean resident or citizen, certainly means more than sojourner, which is all that can be claimed for [the member-elect]” See [Case of] Pigott (1863), in D. Bartlett, Cases of Contested Elections in Congress 463, 464 (1865). The second case goes to the heart of defendant Cheney’s claim. In that case, The Committee on Elections, explaining the distinction between “citizen” and “inhabitant,” stated: **“the latter appellation {‘inhabitant’} is derived from habitation and abode, and not from the political privileges persons are entitled to exercise.”** [Case of] Bailey (1824), in M. Clarke & D. Hall, Cases of Contested Elections in Congress 411, 416 (1834), quoted with approval in *United States v. Maravilla*, 907 F.2d at 225. Thus it seems clear that a mere change of voter registration or driver’s license, being “political privileges” are entitled to little or no weight in determining whether a person is truly an “inhabitant” of a state for purposes of the Constitution.

That legal privileges or citizenship have no bearing in interpreting the use of the word “inhabitant” is also clear from the case law interpreting the use of the same word in some of our oldest statutes. In *United States v. Contreras*, 950 F.2d 232, 243 (5th Cir. 1991), for example, the Fifth Circuit construed the word “inhabitant” in 18 U.S.C. §242, which in turn derives from the nation’s very oldest criminal law to protect constitutional rights. It held that indicia of legal citizenship were not a relevant criteria in determining whether a person was an inhabitant under the statute, because the law was meant to protect aliens who permanently live here.

Similarly, the United States Supreme Court held, early in our nation’s history, that the word “inhabitant” as used in a jurisdictional statute had no relationship to the rights of citizenship, because it included aliens who lived here and excluded citizens who live abroad. *Tolan v. Sprague*, 37 U.S. 300, 341 (1838).

In *Zambrino v. Galveston, H. & S.A. Ry. Co.*, 38 F. 449, 453 (W.D. Tex. 1889), the Court defined an inhabitant as **“One who dwells or resides permanently in a place, or has a fixed residence, as distinguished from an occasional lodger or visitor,”** for purposes of an old railroad labor statute. The Court rejected the notion that “inhabitant” and “resident” were synonymous, and suggested that an inhabitant was akin to a domiciliary: **“While an individual can have but one domicile, he may have many residences....”** *Id.*, at 453.

The case cited by the defendant Cheney in his motion to dismiss further supports the notion that “inhabitant” must be defined under federal common law and not with respect to state laws on residency. *Schafer v. Townsend*, 215 F. 3d 1031 (9th Cir. 2000). That case, in fact, struck down a state residency law as unconstitutional. The case does *not* hold, as defendants suggest, that “inhabitant” and “resident” are synonymous. To the contrary, it reflects that the framers thought both words vague, but the word “inhabitant” less so. *Id.*, at 1036n.5. The California statute was struck down because it required residency on a date earlier than the Constitution required the candidate to be an “inhabitant.” *Id.*, at 1037. The Court also noted that only the victor in the election had to be an inhabitant, and that others could not be barred from running. *Id.* If anything, the case makes clear that compliance with state voter registration laws (required under the invalid California statute) is separate and distinct from being an “inhabitant” under the Constitution. The case offers no test or criteria for determining how to become an “inhabitant.”

There being no definitive resolution of the issue in past decisions, plaintiffs contend that the best definition of “inhabitant,” and the one most likely to correspond to the framers’ intent, is to equate “inhabitant” with “domiciliary.” The defendants suggest as much in their motion to dismiss, and plaintiffs are willing to accept the criteria and definition cited by them, namely, that **a change in domicile requires the concurrence of**

(1) a physical presence at the new location; and (2) an intention to remain there indefinitely, or the absence of any intention to go elsewhere. *Coury v. Prot*, 85 F. 3d 244, 250 (5th Cir. 1996); *Holmes v. Sopuch*, 639 F. 2d 431, 433 (8th Cir. 1981)(en banc); accord: *Gilbert v. Davis*, 235 U.S. 561, 569 (1915).

The Supreme Court has long held that once a domicile is established, the person alleging a change in domicile has the burden of proving the change. *Desmare v. United States*, 93 U.S. 605, 610 (1876). Plaintiffs contend that defendant Cheney, having long established his domicile in Texas, cannot meet his burden that he has changed his domicile to Wyoming, and has thus become an inhabitant of that State under the Constitution.

C. There is Substantial Evidence that Cheney is Still an Inhabitant of Texas

In answers to discovery, defendant Cheney appears to contend that he changed his domicile and became an inhabitant of the State of Wyoming on July 21, 2000, the date he changed his voter registration and driver's license from Texas to that State. He also allegedly told the Secret Service that it was his primary residence on July 25, 2000 and retired from his job in Dallas the next month. Plaintiffs would show that these factors, which are the sole factual basis for his claim, are insufficient as a matter of law to show a change of domicile and transform Cheney into an "inhabitant" of Wyoming. Alternatively, plaintiffs would show that this evidence is substantially outweighed by other evidence that Cheney's declaration of intent to inhabit Wyoming was a sham, and that Cheney's true intent at all relevant times was to move directly from Texas to Washington, D.C. to serve as Vice-President of the United States.

Defendant Cheney continues to own and occupy a home in Highland Park, Texas to this very day. (A11). The tax appraisal records for Dallas County, Texas show that

defendant Cheney and his wife own a home at 3812 Euclid Avenue, and that they have claimed a tax exemption on this property as their residence homestead for the year 2000 and for every prior year, going back at least to 1996. (A11,13). Under the Texas Tax Code, the tax exemption for a residence homestead may not be claimed unless the owner occupies the property as his primary residence. TEX. TAX CODE §11.13(j)(1)(D).

Cheney's claim of homestead (A13), his voter registration(A15), his driver's license (A5), his income tax return (A6), his place of employment(A33), and where he receives his mail (A5-6) all rather clearly establish Texas as the State of Cheney's domicile at least through July 21, 2000. What evidence is there to show that Cheney thereafter was physically presence in Wyoming with "an intention to remain there indefinitely, or the absence of an intention to go elsewhere?" None.

A representative of the real estate company that has listed his Texas home for sale states that defendant Cheney listed the home for sale on November 16, 2000 as an "owner occupied" home. (A23,25). She also directly controverts his claim that the house is under contract to be sold. In fact, she states that the house is overpriced to the point where it will not sell anytime soon. (A24).

Other than his change of voter registration and driver's license, Cheney admits that his contacts with Wyoming have not changed. He is an apparently wealthy man who has maintained three residences simultaneously, in Texas, Wyoming and Virginia. (A7). The home in Wyoming that he now claims is his domicile is the same one he had before, when he was clearly an inhabitant of Texas. (A7). The car he has in Wyoming is the same one he had there before. (A4-5). His two Texas automobiles have not been moved to Wyoming or reregistered there. (A4-5). He is not forwarding his mail from Texas to

Wyoming, but says he will forward his mail from Texas to Washington. (A8). His billing address is being changed directly from Texas to Washington. (A8).

Perhaps the most critical evidence of all, however, is defendant Cheney's admission that he remained employed at Halliburton Corporation in Dallas, Texas until August 16, 2000 (A4), past the date on which he changed his voter registration (A7), and his admission that the sole reason he left Halliburton was to become Vice-President of the United States. (A6). The continuation of his long-time employment in Texas beyond the date on which he changed his voter registration belies any contention that he intended to remain in Wyoming permanently and indefinitely as of July 21, 2000. The fact that the *sole* reason for leaving his long-time employment in Texas was to move to Washington, D.C., even if temporarily, excludes the possibility that Cheney left his Texas employment to live permanently in Wyoming. It is simply impossible for Cheney to have formed an honest present intention to live in Wyoming indefinitely after having admitted that he left his permanent Texas employment solely to go to Washington. There is not a single day that Cheney can point to where he physically resided in Wyoming with the intent to remain there indefinitely. The very day he appeared in Wyoming to change his voter registration, he already knew he had to return to Texas to continue his employment. He also knew that he was leaving that employment, not to return to Wyoming, but to go to Washington.

D. As of What Date Must "Inhabitation" be Determined?

The parties have all assumed to this point that December 18, 2000, the date on which the electors cast their vote, is the date on which Cheney's inhabitation must be determined. There is no textual or common law support for this proposition. In fact, as

Schafer v. Townsend makes clear, Article I, Section 2 of the Constitution expressly sets forth the time at which a Member of Congress-elect must be an inhabitant of the State which elected him. *Schafer v. Townsend*, 215 F. 3d at 1037. Both the Twelfth Amendment, and the language of Article II, Section 1 from which it derives, are notable for the omission of similar language.

The defendant Electors, being the Republican slate of candidates for elector, and being chosen solely by virtue of popular votes for Bush and Cheney, became committed to vote for the Bush-Cheney ticket from the moment that the Texas Secretary of State certified the ticket's place of the ballot. There is no reason why this date, or the date of the election on November 7, 2000, or the date the election results were certified and the electors appointed, November 14, 2000, are not equally relevant to determining when the course toward constitutional violation became irreversible and imminent.

In any event, the date as of which inhabitancy must be established is probably immaterial under the facts of this case. On every day from July 21, 2000 forward, defendant Cheney's intent was to move to Washington to serve as Vice-President. While this temporary move would clearly be insufficient to change his domicile to Washington, it prevents him from having formed an intent to "stay" in Wyoming indefinitely. Although this Court prevented the plaintiffs from obtaining discovery on exactly when and how often Cheney has been in Wyoming from July 21, 2000 to the present, there is no day, either before or after the election, on which he could have travelled to Wyoming with a present intent to remain indefinitely, since the intent to leave pre-existed his arrival.

Moreover, just as Courts have long sought to pierce sham attempts to create or destroy diversity jurisdiction, this Court should not permit defendant Cheney's rather

obvious attempt to evade the requirements of the Constitution by playing “Musical States.”. To allow a nominee for President or Vice-President to change his domicile, and thus his state of inhabitation, by a mere declaration of intent after he becomes a candidate – or worse, after the election – would completely eviscerate the Constitutional inhabitation requirement that has existed since our Nation’s founding

3. There is a Substantial Threat of Irreparable Injury

Texas law requires presidential electors for a political party to be affiliated with that party. TEX. ELEC. CODE §192.002(b). The elector candidates must be nominated in accordance with the rules of the affiliated political party. TEX. ELEC. CODE §192.003. The set of elector candidates that are elected presidential electors corresponds to candidates for President and Vice-President receiving the most votes. TEX. ELEC. CODE §§192.005, 192.035.

Plaintiffs request the Court to take judicial notice of the fact that George W. Bush and Richard Cheney are the Republican Party candidates for President and Vice-President, respectively. Plaintiffs further request the Court to take judicial notice of the fact that George W. Bush and Richard Cheney received the most votes in Texas for President and Vice-President, respectively. This information was widely reported and can be found at the website for the Texas Secretary of State.

Electors are appointed by the states. U.S. Const., Article II, section 1, clause 3; *see also Anderson v. Celebrezze*, 460 U.S. 780 (1983). Under Texas law, the defendants Electors hold their office and their ability to vote for President and Vice-President solely by virtue of the votes cast by Texas voters for President and Vice-President. TEX. ELEC. CODE §§192.005, 192.035. Thus, the defendant Electors were necessarily the Republican slate of elector candidates, and

hold office solely by virtue of the Bush-Cheney ticket winning the most votes in Texas. Thus, it is highly likely that the defendant Electors will cast their votes for George W. Bush for President and Richard Cheney for Vice-President, and thus violate the Twelfth Amendment, unless enjoined by this Court from doing so.

There is no other remedy that will prevent the constitutional violation. There is no remedy at law, as no price can be paid to compensate for the violation of the Constitution and the consequent unlawful and unconstitutional election of either or both George W. Bush and Richard Cheney to the offices of President and Vice-President.

4. The Threatened Injury to Plaintiffs Outweigh any Threat to the Defendant Electors

The Supreme Court has made clear that presidential electors do not enjoy an unfettered right to vote as they please. *Ray v. Blair*, 343 U.S. 214 (1952). There is no injury done to them by requiring them to comply with the Constitution. This is greatly outweighed by the harm occasioned by having the nation's highest offices filled in a manner contrary to our most fundamental law. As plaintiffs noted in their response to defendants' motions to dismiss. The plaintiffs also have standing to assert the injury that will be suffered by the non-defendant candidates for President and Vice-President. *See Anderson v. Celebrezze*, 460 U.S.780, 786 (1983); *see also Bullock v. Carter*, 405 U.S. 134, 143 (1972). These candidates for our nation's highest offices will suffer the greatest Constitutional harm imaginable if they are denied those very offices solely by reason of a Constitutional violation.

5. A Preliminary Injunction Will Not Disserve the Public Interest

The public interest is best served by preventing violations of the Constitution. *Smith v. Wade*, 461 U.S. 30, 36 (1983). A preliminary injunction to prevent such a violation would therefore advance, rather than disserve, the public interest.

6. Conclusion

Even with the limited discovery of facts and time available to plaintiffs, the evidence clearly shows that defendants Bush and Cheney are both inhabitants of Texas, as are the defendant presidential electors. A vote for both halves of the Bush-Cheney ticket by the electors would clearly violate the Twelfth Amendment to the Constitution and should be enjoined.

Respectfully submitted,

JONES & ASSOCIATES, P.C.

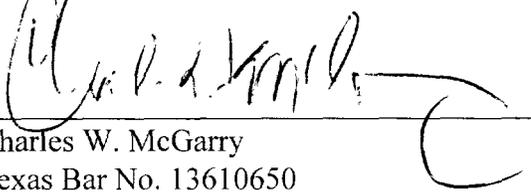
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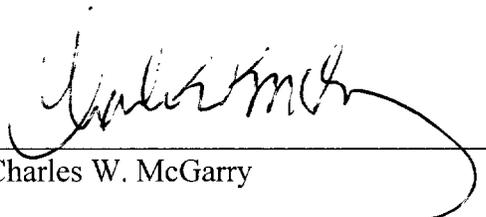
Certificate of Service

This is to certify that on this 29th day of November, 2000, a true and correct copy of the foregoing instrument was delivered to the following counsel of record by hand delivery or facsimile:

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