THOMAS F. KUMMER
Nevada Bar No. 1200
MARK E. FERRARIO
Nevada Bar No. 1625
TAMI D. COWDEN
Nevada Bar No. 8994
CHRISTOPHER MILTENBERGER
Nevada Bar No. 10153
KUMMER KAEMPFER BONNER RENSHAW & FERRARIO
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169
Telephone: (702) 792-7000
Facsimile: (702) 796-7181

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DWAYNE CHESNUT, an individual; JOHN CAHILL, an individual; VICKY BIRKLAND, an individual; JOHN BIRKLAND, an individual; PATRICIA MONTGOMERY, an individual; LYNN WARNE, an individual; NEVADA STATE EDUCATION ASSOCIATION, a Nevada nonprofit cooperative corporation;

Plaintiffs,

vs.

DEMOCRATIC PARTY OF NEVADA, a Nevada nonprofit cooperative association.

Defendant.

Case No. 2:08-cv-00046-JCM-PAL

REPLY IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Dwayne Chesnut, John Cahill, Vicky Birkland, John Birkland, Patricia Montgomery, Lynn Warne, and the Nevada State Education Association (hereinafter "Plaintiffs"), by and through their counsel, Kummer Kaempfer Bonner Renshaw & Ferrario,

submit this *Reply* in Support of their *Application for Temporary Restraining Order and Emergency Motion for Preliminary Injunction.*

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Democratic Party of Nevada (the "Party"), and Defendant Intervenor Democratic National Committee ("DNC") (collectively, Defendants) present a number of arguments intended to confuse and distract from the true issue here.[1] However, the flurry of procedural objections cannot detract from the simple truth revealed before the Court: the Party's plan to give as much as ten times the voting power to a portion of Clark County party voters violates the equal protection guarantees of the U.S. and Nevada constitutions.[2]

The Plan as now espoused by the Party and the DNC violates U.S. and Constitutional equal protection guarantees, as well as other state law requirements. Ironically, however, the Delegate Selection Plan *actually* approved by the Party's central committee, and the DNC, contained precisely the delegate allocation for the At-Large Precincts the Plaintiffs advocate in this suit.[3]

FACTS RELEVANT TO ADOPTION OF THE PLAN

The Charter of the Democratic Party of Nevada requires the State Central Committee to create a Delegate Selection Rules Committee. Exhibit 2 to Plaintiffs' Motion, Charter, Article

---

[1] Plaintiffs will reference the Opposition filed by the Party (received at 1:47 pm, Jan. 16, 2007, *sans* exhibits, and filed at 2:06 pm.) as "Party Brief" and the Opposition filed by the DNC as the "DNC Brief."

[2] Both the Party and the DNC appear to labor under the misapprehension that the Plaintiffs' challenge to the At-Large Precinct caucuses is based upon their role in determining a preference for a presidential candidate. However, Plaintiffs challenge the illegal caucuses for all of their representative purposes, including the reasons fort he caucuses acknowledged in the Party's brief – selection of delegates to the county convention, and thence, to the state convention, where Party platform issues will be determined. Indeed, the injury alleged by the NSEA specifically relates to the dilution of the vote of its members with respect to advancing its goals for education within the Party's platform.

[3] Both the Party and the DNC appear to labor under the misapprehension that the Plaintiffs' challenge to the At-Large Precinct caucuses is based upon their role in determining a preference for a presidential candidate. However, Plaintiffs challenge the illegal caucuses for all of their representative purposes, including the reasons acknowledged in the Party's brief – selection of delegates to the county convention, and thence, to the state convention, where Party platform issues will be determined. Indeed, the injury alleged by he NSEA specifically relates to the dilution of the vote of its members with respect to advancing its goals for education within the Party's platform.

KUMMER KAEMPFER BONNER RENSHAW & FERRARIO
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169

XV, § 1. The Delegate Selection Rules Committee is tasked with the job of recommending revisions to the Party's delegate selection process. *Id.* Article XV, § 3. The revisions proposed by the Delegate Selection Rules Committee must be "presented to and adopted by the State Central committee as required by the Democratic national committee." *Id.* Article XV, § 3; *see also*, DNC's Regulations of the Rules and Bylaws Committee, Reg. 2.2.[4] attached hereto as Exhibit 13.

By the Party's own admission, the *only* Plan ever adopted by the State Central Committee was a *draft* Plan distributed prior to the March 31, 2007 State Central Committee Meeting in Reno. *See* Democratic Party of Nevada's Opposition, p.7, lines 23-24; *See also* Affidavits of John Birkland and Vicky Birkland attached hereto as Exhibits 14 and 15. This *draft* Plan is the Plan that is currently posted on the DNC's website. *See* Exhibit 3 to Plaintiffs' Motion, Draft Nevada Delegate Selection & Affirmative Action Plan, available at: http://www.democrats.org/a/2007/07/become_a_delega_31.php, last viewed January 16, 2008.

The Plan adopted by the State Central Committee on March 31, 2007 states, "The Nevada Party will establish separate At-Large-Precincts after determining the shift worker population in any county containing a large number of shift workers." *Id.* at p. 6, lines 31-33. The Plan also provides that "the number of delegate positions to the county convention from each At-Large-Precinct will then be calculated and be assigned based on actual attendance at each At-Large-Precinct caucus." *Id.* at p.6, lines 37-40. However, this Plan expressly states that "Delegates to the County Convention are elected by precinct caucus participants. State law provides the election of ***one delegate per 50 registered Democratic voters.*** [NRS]" *Id.* at p.7, lines 20-22

---

[4] "Each State Party Committee shall include the following documentation with the submission of its Plan to the RBC:...C. a statement from the State Democratic Chair certifying that the Plan as submitted to the RBC was approved by the State Party Committee; D. a copy of a press release

KUMMER KAEMPFER BONNER RENSHAW & FERRARIO
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169

(emphasis added). The Plan does not provide for any different formula for the allocation of delegates to At-Large Precinct caucuses separate from this pronouncement of ***one delegate per 50 registered Democratic voters.***

Any reasonable person reading the Plan that was passed by the State Central Committee would believe all precincts, including At-Large Precincts, would receive delegates on the proportion of one delegate per 50 registered Democratic voters, even if that was determined based on attendance at the At-Large Precincts. In fact, members of the State Central Committee believed this to be the case until as recently as early January of this year. *See* Affidavits of John Birkland and Vicky Birkland, Exhibits 14 and 15. The crux of Plaintiffs' case is that At-Large Precincts receive a substantially greater number of delegates to the county convention than all other precincts. That was not the scenario presented to the State Central Committee in the Plan circulated and adopted at the March 31, 2007 State Central Committee meeting so Plaintiffs had no reason to protest the Plan at that time.

As stated by the State Party, the next time the issue of the Delegate Selection Plan was discussed by the State Central Committee was at their August 11, 2007 meeting in Reno. *See* Democratic Party of Nevada's Opposition, pp. 7-8. The minutes of the August 11, 2007 meeting provide as follows:

> Nevada's Delegate Selection Plan will be up for the DNC Rules and Bylaws Committee to review on August 25th. Nevada's Executive Director Travis Brock will be representing us at the meeting. The Committee did a pre-review of the plan which recommended mostly stylistic changes and some additional detail related to caucus and convention procedures which the staff is incorporation into the plan prior to the RBC review.

Exhibit 17 to State Party's Opposition, p. 3. At no time during the meeting, as demonstrated by the minutes, is the Plan put up to the State Central Committee for a vote to adopt the Plan with

---

distributed by the State Party Committee announcing its adoption of the Plan and summarizing the major components of the Plan…"

KUMMER KAEMPFER BONNER RENSHAW & FERRARIO
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169

the changes. As such, any revisions that may have been made to the Plan at or prior to the August 11, 2007 meeting were never adopted by the State Central Committee as required by the Charter and DNC regulations. Regulation 2.9(C) of the DNC Regulations provides in relevant part:

> No amendment to a State Plan shall be effective unless the substance of the amendment is: (i) approved by all relevant national, state and State Party entities and the RBC at least thirty-five (35) days [sic], and (ii) conforms to all applicable state election procedures at least thirty days, prior to the time the amendment would be implemented.

Exhibit 13.

As demonstrated by the State Party's opposition, Appendix C that sets forth the formula for the allocation of delegates was never part of a Plan that was adopted by the State Central Committee, a relevant State Party entity required to approve any amendment to an adopted Delegate Selection Plan. The State Party's Opposition stresses that the allocation formula for delegates to the At-Large Precinct caucuses was provided to each of the presidential campaigns. *See* Democratic Party of Nevada's Opposition, pp. 8; 12, n.1. However, this is totally irrelevant as no campaign is a party to this action. What is relevant, however, is that the State Party failed to present a final Plan including the delegate allocation formula for At-Large Precincts to the State Central Committee. The Party made amendments to the Plan adopted on March 31, 2007 without the approval of the State Central Committee. Allegedly, the Party simply placed a revised Plan that was never adopted on its website that had these significant changes to the allocation of delegates to the At-Large Precincts. This does not meet the requirement of amending an adopted Plan as required by the DNC regulations. Exhibit 13, Reg. 2.9. As a result, the amendments, including Appendix C, were never properly adopted by the State Central Committee as required by the Charter and DNC regulations.

KUMMER KAEMPFER BONNER
RENSHAW & FERRARIO
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169

As soon as Plaintiffs learned of the disproportionate allocation of delegates to the At-Large Precinct caucuses that was added to the Plan without approval of the State Central Committee, Plaintiffs immediately challenged this inequitable system that violated their rights to equal protection. *See* Affidavits of John Birkland, Vicky Birkland, and John Cahill Exhibits 14, 15, and 16. Since the Party did not properly inform its members of the substantial changes to the Plan adopted on March 31, 2007, it was not unreasonable for Plaintiffs to fail to discover the unequal distribution of delegates to At-Large Precincts until recently.

I. LACHES DO NOT PRECLUDE THIS ACTION

Laches is an equitable defense to a civil action requiring a defendant to *establish* both (1) lack of diligence by the plaintiff, and (2) prejudice to the defendant. *Costello v. United States,* 365 U.S. 265, 282, (1961). The reasonableness of delay is measured from the time a plaintiff knew or should have known about the potential claim *Kling v. Hallmark Cards Inc.*, 225 F.3d 1030 (9th Cir. 2000). The Ninth Circuit stated:

> An indispensable element of lack of diligence is knowledge, or reason to know, of the legal right, assertion of which is "delayed." There must, of course, have been knowledge on the part of the plaintiff of the existence of the rights, for there can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend.

225 F.3d at 1036 (internal quotations and citations omitted.).

The Party takes considerable pains to show that those Plaintiffs who were central committee members – Chesnut, Cahill and the Birklands—approved the Plan. However, the Party fails to acknowledge that the Plan approved in March 31, 2007 was the Draft Plan posted at the DNC website. The Draft Plan stated that delegates would be allocated at on a 1 delegate for 50 voters basis. See Exhibit 3 to Plaintiffs' Motion. Thus, these Plaintiffs approved a plan that ***did not contain*** the disproportionate allocation scheme to which they here object. Similarly, the materials sent to the NSEA for use in its training activities did not inform the reader that there

KUMMER KAEMPFER BONNER RENSHAW & FERRARIO
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169

would be any disproportionate allocation.

Indeed, while Defendants claim the Plan was approved as early as March, 2007, the "plan" approved at that time did not contain the offending disproportionate allocation of delegates. See "Draft Plan, Exhibit 3 to Plaintiffs' Motion. As late as October, 2007, the Party made announcements regarding the number of delegates and precincts involved in the January 19, 2008 caucuses, without mention of the At-Large Precincts. See Announcement, Application Exhibits 10 and 11 to Plaintiffs' Motion. It was only in January, 2008 that Defendants announced the locations of the At-Large Precincts, and thus, only then that it could be determined that these Precincts did not appear on the official state map of Precincts. See Map, Exhibit 12 to Plaintiffs' Motion. Moreover, that map itself was available only in December, 2007.

Party members who are not insiders, such as Mr. Birkland and Ms. Warne, could not have known of the various machinations involving the Plan. They would have had to rely on the public information provided by the Party, which, until the week the Complaint in this matter was filed, consisted only of the statutorily determined Precincts and delegate allocations. Public information regarding the At-Large Precincts has been only recently revealed – and even that requires considerable research to find.

Furthermore, it was only with the announcement of the nine At-Large Precincts that it became probable, if not certain, that the disproportionate allocation of delegates would occur. Initially, only two At-Large Precincts were planned. A small number of such precincts increased the chances of more than 4000 voters participating. If more than 4000 participate in a single At-Large Precinct, then the 1 delegate for 50 persons allocation would be applied. However, as can be seen by Exhibit 17 p.2, only 1000 participants are expected for the At-Large Precinct to be held at the Bellagio. If the prediction is true, and typical of the At-Large Precincts, then there

KUMMER KAEMPFER BONNER
RENSHAW & FERRARIO
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169

will be 1 delegate for fewer than fifty persons at the At-Large Precincts, unlike every other Clark County precinct.

The affidavits from Plaintiffs Cahill, John Birkland and Vicky Birkland all state that they became aware of the disproportionate allocation in January 2008. Moreover, Mr. Cahill states that he relied on the Party officials drafting the Plan to conform it to state law. In light of these circumstances, the Party has failed to sustain its burden to show Plaintiffs unduly delayed filing their action.

Nor has the Party shown it has been prejudiced by this action. Indeed, one simple solution to the major disproportionate allocation issue would be to follow the Draft plan actually approved by the Central Committee, and allocate the At-Large Precinct delegates at the standard, Clark County 1 delegate to 50 voters standard.[5] An additional equal protection issue might be easily resolved by allowing other participants to attend caucuses outside their home precincts where they are precluded by work from attending those home precincts caucuses. Thus, allowing public employees, including members of the NSEA, to attend a caucus held in the school or other public building such employees are *required* to man to facilitate the caucuses would alleviate another equal protection concern raised by the Plan's unfair scheme. No prejudice to the Party, DNC or indeed, any of the At-Large Precinct participants, could possibly be claimed with these solutions.

Moreover, since the Plan was amended as recently as January 11, 2008 the very date this action was filed, it is obvious that it is no hardship for the DNC or the Party to make last minute adjustments to the Plan.

Laches should be "invoked sparingly in suits brought to vindicate the public interest." *Apache Survival Coalition v. United States,* 21 F.3d 895, 905-06 (9th Cir.1994) (internal

[5] This solution does not, of course, address the illegality of the At-large Precincts under state law; it would, however, resolve the most egregious of the equal protection issues.

KUMMER KAEMPFER BONNER RENSHAW & FERRARIO
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169

quotation marks and citations omitted) (collecting cases). A suit to prevent disproportionate allocation of voting power is surely one that vindicates a public interest. Here, where neither the Party nor the DNC cannot show a lack of diligence or unreasonable delay, nor undue prejudice, Defendants have failed to establish that laches should prevent relief in this action.

II. THE PARTY'S ACTIONS CONSTITUTE STATE ACTION.

The DNC's efforts to separate the Party from its entanglement with state action are unconvincing. The DNC has not even bothered to argue that the Party and the state of Nevada are engaged in a joint action in conducting the caucuses. See DNC Brief, at pp. 5-6. Satisfaction of even one of the tests is sufficient to find state action. *Kirtley v. Rainey,* 326 F.3d 1088, 1093-96 (2003).

There is ample evidence to satisfy the elements of the joint action test, in light of Nevada's mandate that precinct caucuses occur, the interrelationship between voting registration and the caucus process, and the use of many public resources to advertise and conduct the caucuses. Indeed, as the DNC's own Delegate Selection Rules demonstrate, the very ability for Nevada voters to participate in the caucus process requires *state* action, as participation is contingent upon a "publicly recorded" preference for the Democratic Party. See Exhibit A to DNC Brief, p. 3, ¶2.A.1. The method used by Party members in Nevada to "publicly record" such a preference is to check off the "Democrat" box on the voter registration form. NRS § 293.518. In fact, Nevada *requires* each voter to express a preference for a political party, or to affirmatively state a lack of preference. *Id.*

Moreover, the DNC simply plays a disingenuous game of semantics when it claims that Nevada does not empower the state party to use caucuses to select delegates to the National Convention. DNC Brief, p. 5. Nevada *requires* major political parties to hold the very caucuses at issue here. NRS § 293.133. The delegates chosen at the caucus will, of course, eventually lead

to the choice of delegates to the national convention. But these delegates will also lead to the selection of delegates to the state convention, where the state Party's platform will be determined. Moreover, the DNC's claims that the Party is not entitled to have its nominee appear on the general ballot is more misleading semantics. The National Convention may ultimately make the choice of nominee, but it is the *Party*'s role as a "major political party" in Nevada that entitles that candidate a place on *Nevada*'s general election ballot, without the need to jump through the procedural hoops imposed upon independent candidates. *Compare*, NRS § 298.020 with NRS § 298.109.

Even more disingenuous, if not deliberating misleading, is the DNC's attempted sleight of hand in its efforts to convince this Court that the Supreme Court's last pronouncement on the state action issue, *Morse v. Republican Party of Virginia,* 517 U.S. 186 (2000), does not hold that party nominating procedures, whether through primary or delegate selection, *are* subject to federal regulation. See DNC Brief, pp. 6-7. The DNC carefully lifts a passage from the *Morse* opinion that purportedly "distinguishes" the Supreme Court's prior decision in *Williams v. Democratic Party of Georgia*, 409 U.S. 809 (1972), and cites the passage to suggest that where nomination of a presidential candidate is involved, the oversight is less stringent.[6] However, the DNC fails to inform this court that immediately *after* the passage it cites, the *Morse* court goes on to state that the logic of the *Williams* decision ***supports*** the *Morse* decision (and thus, the ruling sought by Plaintiffs here.) This is because the basis of the *Williams* court's conclusion that national party selection rules did not have to be precleared under the Voting Act was, simply, because at that time, *there were no administrative rules governing the procedure to obtain such preclearance. Morse*, 517 U.S. at 202. In inviting this Court to follow *Williams,* the DNC fails to inform this court that in *Morse*, where the district court had, in fact, followed the

[6] Even if *Williams* and *Morse* truly stood for such an illogical theory of application of constitutional law, the fact that the caucuses here included state Party issues would negate the DNC's theory.

KUMMER KAEMPFER BONNER RENSHAW & FERRARIO
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169

Williams decision, the Supreme Court expressly found the district court to have *erred* in doing so. *Morse*, 517 U.S. at 203.

Party nominating procedures are subject to regulation when the state has ceded or delegated to the party the methods of determining the candidates. Nevada's election code cedes substantial portions of that process to the Party, specifically including the method of allocating precinct delegates to the county caucuses. Accordingly, such allocation by the Party constitutes state action.

A. There is no Rational Relationship Between the Stated Goal of Increasing Minority Participation and the Allocation Scheme Used in the Appendix C of The Plan.

Defendants claim that even if they were state actors, the appropriate scrutiny for their disproportionate voting scheme is the rational relationship test, whereby the challenged practice need be rationally related to a legitimate purpose. See DNC Brief, p. 9; Party Brief, p. 18. The DNC goes so far as to quote *Ripon Society Inc. v. Nat'l Republican Party*, 525 F. 2d 567, 586-537 (D.C. Cir. 1975), wherein the court stated, "the Equal Protection Clause, assuming it is applicable . . . is satisfied if the representational scheme and ***each of its elements*** rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." DNC Brief, at 9 (emphasis added). However, neither Defendant explains how the *element of the Plan that violates the equal protection clause* – **the disproportionate allocation**—is purportedly rationally related to the stated goal of increasing participation. Plaintiffs do agree that increasing participation is a legitimate goal, and applaud such a effort to the extent it could achieve it. But that goal cannot *legitimately* be made by decreasing the franchise of other voters.

Of course, Defendants have not made the attempt to argue that the allocation scheme—which certainly was not advertised to the general public or to the rank and file members of the

KUMMER KAEMPFER BONNER RENSHAW & FERRARIO
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169

Democratic party, as even central committee members were not aware of it—was deliberately imposed in order to increase attendance. Indeed, no one reading the DNC brief would even be aware of its existence. The Party Brief, in contrast, while not making the argument, places the disparity in a different light. The party brief focuses on the differences in voter to delegate distribution in regular precincts and At-large precincts—wholly ignoring the fact that At-Large Precinct participants (or at least those who were previously registered as Democrats) have already been included in the delegate allocation for their home precincts. Thus, the At-Large Precinct caucus will have two delegates allocate on their behalf – once for their registration, and then again for their participation.

In light of these obvious disparities in treatment, it does not surprise Plaintiffs that neither Defendant chose to defend the allocation scheme, but instead, chose to defend the participation goals. But the very authority upon which Defendants rely, Ripon Society, requires that ***each*** element of the challenged practice be rationally related to the legitimate goal. Defendants fail to show that the test is satisfied. Accordingly, even if the rational relationship test were appropriate, Defendants cannot salvage their ill-conceived allocation scheme.

III THE FIRST AMENDMENT CANNOT SHIELD DEFENDANTS' UNCONSTITUTIONAL ACTIONS.

Discriminatory practices in candidate selection process are not shielded by First Amendment associational rights. Taken to its logical extreme, the Party's and DNC's claim that they are free to make such rules for caucuses as its desires would allow it not only to exclude voters on the basis of employment, as the Plan does here, but on any basis, such as race, religion, or gender. However, the multitude of cases addressing this issue are actually quite clear and easily reconcilable: the DNC's associational rights end when those rights are employed, as they are here, unconstitutionally.

The DNC triumphantly presents a short litany of cases that basically same the one thing:

KUMMER KAEMPFER BONNER RENSHAW & FERRARIO
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169

a state may not require a Party to seat national convention delegates that were chosen in a manner that *conflicts* with the rules of that Party. *Cousins v. Wigoda,* 419 U.S. 477 (1975) (state requires delegates to be chosen through open primary, rather than closed caucus method); *Democratic Party of U.S. v. Wisconsin (LaFollette), 450 U.S. 107* (1980) (state required open primary contrary to party rules); and *DiMaio v. DNC*, No 8:07 cv 1552T (N.D. Fla. Oct. 5, 2007) (refusal to seat national convention delegates chosen in primary occurring prior to period allowed by DNC not state action). See also, *LaRouche v. Fowler*, 77 F. Supp. 2d 80 (D.D.C. 1999)(preclearance requirements under Voting Rights Act, whereby certain jurisdictions must obtain "preclearance" of changes in voting laws to prevent discrimination, did not apply to DNC rule requiring bona fide membership in party to be a presidential candidate.).

The DNC plays its disingenuous games again with its characterization of *Nelson v. Dean*, No. 4:07cv427 (N.D. Florida, Dec. 14, 2007) (state could not require party to seat delegates chosen at primary occurring prior to party's rules). That district court judge made no ruling on the issue of state action. The Court did, however, note that the issue was far from as clear cut as the DNC would like to pretend. See Exhibit 18,

Here, Plaintiffs make no attempt to impose a rule antithetical to those of the DNC. On the contrary, a fair and honest assessment of the allocation method employed for the At-large Precincts would support Plaintiffs' position and would be entirely consistent with the DNC's goals of ensuring fair and *equal* opportunity to participate for its members – and indeed, entirely consistent with the Plan the Party's central committee actually approved. Plaintiffs' goal here is just like those presented in the White Primary cases – to end a discriminatory practice.

Thorough review of U.S. case law reveals a single published federal decision where the issue of the application of the constitutional requirement of "one person, one vote" applied in the lowest voting district level for determination of delegates to a party convention. In that case, the

KUMMER KAEMPFER BONNER RENSHAW & FERRARIO
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169

district court judge found that "one person, one vote" ***does*** apply. *Maxey v. Washington State Democratic Party,* 319 F. Supp. 673 (1970). "All integral phases of the state-created presidential-election process must conform to the one-man-one-vote principle. *Maxey,* 319 F. Supp. at 679, citing *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Gray v. Sanders*, 372 U.S. 368 (1963); *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

So basic and obvious an outcome was that reached in *Maxey*, apparently it was never even challenged by appeal to the Ninth Circuit. Moreover, two other courts, while not faced with that specific issue, staunchly indicated that ***at the precinct level***, one man, one vote must apply. See *Irish v. Democratic-Farmer-Labor Party of Minnesota,* 287 F. Supp. 794 (D. Minn., 1968), aff'd 399 F.2d 119 (8th Cir. 1968) and *Smith v. State executive Comm. Of Dem. Party of Ga.*, 288 F. Supp. 371 (N.D. Ga. 1968) (both turning denial of relief on fact that there was no allegation that one-man-one-vote principle had been violated in ***initial voting procedures in precinct level***, thereby indicting an assumption that precinct level voting required adherence to constitutional rule).

IV. THE EQUITIES FAVOR PLAINTIFFS.

Plaintiffs amply demonstrated in its Application that the balance of equities favors them. There is simply no prejudice to any party resulting from the elimination of all special privileges of the Enhanced Caucus Class, and their return to their position of equality with the Devalued Caucus class. Moreover, even less prejudice would accrue were this Court to narrowly tailor injunctive relief to address only the equal protection claims, rather than the state law violations. This Court could require an allocation consistent with that apportioned to the rest of Clark County party voters – 1 delegate for each 50. The Court could also require the Party to allow the participation in a caucus of employees assigned to man the public buildings in which caucuses are held. Such simple, easily undertaken relief alleviates the bulk of the equal protection claims,

while prejudicing absolutely no one.

V. THE PLAN DOES NOT COMPLY WITH STATE LAW.

The Party attempts to stretch reality in its efforts to avoid facing the fact that the plan it now espouses does not conform to Nevada law. The Party also goes to great lengths to avoid calling the At-large Party Precincts by that name, claiming they are not precincts at all, despite the repeated use of that name in its Plan. This elasticity is simply a result of having now discovered that the At-Large Precincts cannot does not comport with Nevada's use of that term. But *renaming* these new voting units of area is hardly an effective method to bring the plan into compliance. A Precinct is a defined term in the Election Code. The Party treats the At-Large Precincts as Precincts, including naming them as such, in all ways in which they do comport with Nevada law.

Additionally Plaintiffs have already acknowledged that the NRS 293.133 now cedes to the Party the method of allocation of delegates to the county convention. But nothing in that section allows the Party to fail to otherwise conform to proportionality requirements.

The Plan does not comport with Nevada law, and accordingly, its "adoption" – whenever such adoption of any plan other than the Draft Plan supposedly occurred—was *ultra vires*, and therefore, void.

. . .

. . .

. . .

. . .

. . .

. . .

. . .

KUMMER KAEMPFER BONNER
RENSHAW & FERRARIO
Seventh Floor
3800 Howard Hughes Parkway
Las Vegas, Nevada 89169

CONCLUSION

Plaintiffs have demonstrated their entitlement to injunctive relief. The only Delegate Selection Plan actually adopted by the Party's central committee was that posted on the DNC website. That plan sets forth a delegate allocation formula consistent with the relief requested by Plaintiffs. Accordingly, Plaintiffs respectively request this Court to grant Plaintiffs the injunctive relief.

DATED this 16th day of January, 2008.

KUMMER KAEMPFER BONNER RENSHAW & FERRARIO

BY: _____

THOMAS F. KUMMER
Nevada Bar No. 1200
MARK E. FERRARIO
Nevada Bar No. 1625
TAMI D. COWDEN
Nevada Bar No. 8994
CHRISTOPHER MILTENBERGER
Nevada Bar No. 10153
3800 Howard Hughes Parkway, Seventh Floor
Las Vegas, Nevada 89169
Attorneys for Plaintiffs