LIBERTY INSTITUTE

January 6, 2011

The Honorable Larry Taylor
Chairman, Texas House Republican Caucus
P.O. Box 2910
Austin, Texas 78768-2910

Dear Chairman Taylor:

Recently, certain members of the Texas House of Representatives have written letters to you raising questions about the proposed House Republican Caucus vote to support a candidate for the office of Speaker of the House. These members, however, provide no basis for or analysis of their questions. This letter addresses the members' questions and provides legal analysis in support.

In summary, the objections to the Republican Caucus meetings are without substance. The caucus may meet and make its own decisions and is constitutionally empowered and protected to do so, without interference.

1. **The House Republican Caucus holding a secret ballot poll among its members for determining who shall represent the majority party as Speaker of the House is constitutional.**

There are two independent and constitutionally sufficient reasons the House Republican Caucus meeting and holding a secret ballot poll regarding the Speaker of the House is permissible. First, the House Republican Caucus is not a part of the Texas House of Representatives, but is instead an independent organization that advances the political and ideological interests of its members. Second, the House Republican Caucus has a right under the United States Constitution to join together in furtherance of their common political beliefs, including their political preference for who shall be the Speaker of the House.

The House Republican Caucus is *not* a part of the Texas House of Representatives. The only place in Texas' statutes in which the term "caucus" is used is in the Texas Election Code. Texas Election Code § 259.009 specifies that a "contribution to or expenditure by a legislative caucus, as defined by Section 253.0341, is not considered to be an officeholder contribution or officeholder expenditure for purposes of this title." The term "officeholder" includes "political committee." *See* Tex. Elec. Code § 251.001.

Furthermore, even if the House Republican Caucus were treated as a legislative body, the effect would be to deny freedom of association and speech to the political party in power at the time. The majority party would no longer be able

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to freely decide and implement its policy decisions, unconstitutionally making the freedom of association, as the Supreme Court stated, "an empty guarantee."[1]

"The Supreme Court has long recognized that the First Amendment protects 'the freedom to join together in furtherance of common political beliefs.'[2] A fundamental and necessary element of this freedom is the ability of a political party to make its own decisions: 'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'[3] Of particular importance are a political party's decisions surrounding the process of selecting its nominee, for a 'party's choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support." *Miller v. Cunningham,* 512 F.3d 98, 104 (4th Cir. 2007).

2. The Texas Open Meetings Act does not apply to a meeting of the House Republican Caucus no matter how many members attend the meeting.

The Texas Open Meetings Act does not apply to a private meeting of the House Republican Caucus because the House Republican Caucus, as detailed above, is not a legislative body. If the caucus is not a legislative body, then it is not subject to the Texas Open Meetings Act, or any other limitation placed on government bodies. But even if the caucus with the yet to be seated, or, more accurately, "almost members" of the House of Representatives is considered to be a legislative body, the caucus still has all of the constitutional protections granted to the Texas Legislature, and the caucus is again *not* subject to the Texas Open Meetings Act.

It is a fundamental principle that the separation of powers doctrine prevents the judiciary from interfering with the legislature in matters constitutionally delegated to the legislature—these cases are nonjusticiable.[4] The Texas Constitution delegates to each legislative House the power to establish the rules for its own proceedings.[5] Because the Texas Constitution delegates the authority to set House procedures to the House, and because one legislature is not bound by the acts of a previous legislature, only the House may determine whether the Texas Open Meetings Act should apply to any meeting of the House.[6] Because the Texas Open

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[1] *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 122 n.22 (1981)

[2] *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 214 (1986).

[3] *Democratic Party of United States,* 450 U.S. at 122 n.22.

[4] *See, e.g., Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.,* 176 S.W.3d 746 (Tex., Nov. 22, 2005); *Baker v. Carr,* 369 U.S. 186 (1962).

[5] Tex. Const. Art. III, § 11.

[6] *See Abood v. League of Women Voters of Alaska,* 743 P.2d 333 (Alaska 1987) (holding that the judiciary cannot enforce the Alaska Open Meetings Act against the legislature because it is a nonjusticiable political question); *Moffitt v. Willis,* 459 So.2d 1018 (Fla. 1984) (holding that the delegation of power by the Florida

Meetings Act (or any other Texas statute) may not be enforced against the Texas House of Representatives, then the same is true of the House Republican Caucus were it to be treated as a legislative body.

Additionally, if the House Republican Caucus is treated as a legislative body, then the Texas Speech and Debate Clause[7] provides immunity against prosecution or lawsuit for the legislators. The Texas Speech and Debate Clause is interpreted in light of the federal Speech and Debate Clause.[8] While this issue has not been considered in Texas, the Court of Appeals of Michigan, interpreting a speech and debate clause "substantially similar to that of the United States Constitution," found that legislators cannot be held personally liable under Michigan's Open Meetings Act, even though their act explicitly applied to legislators.[9] Similarly, the Tennessee Supreme Court found that "a legislator's immunity from suit when performing his or her legislative duties prevents the courts from making the Legislature justify its decision to hold closed sessions."[10]

3. **The Caucus itself will determine under its own rules who may participate because such a determination is protected by the United States Constitution and not subject to any laws of Texas or any other jurisdiction.**

For the reasons stated above, the Caucus and its meeting receive broad protection under the United States Constitution. Furthermore, there are no laws of Texas or any other jurisdiction that require a private political meeting to include

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constitution to the Florida legislature to set its own internal procedure renders the application of any non-constitutional statute against the legislature a nonjusticiable political question); *Des Moines Register and Tribute Company v. Dwyer,* 542 N.W.2d 491 (Iowa 1996) (holding that the constitutionally delegated power to establish its own rules and procedures makes the issue of whether the Iowa legislature is subject to Iowa's Open Meetings Act a nonjusticiable political question); *Hughes v. Speaker of the New Hampshire House of Representatives,* 876 A.2d 736 (N.H. 2005) (holding that New Hampshire's Right-to-Know law could not be enforced against the New Hampshire legislature because the legislature was delegated power to adopt its own "rules of proceedings" and because statutes of one legislature are not binding on subsequent legislatures); *Mayhew v. Wilder,* 46 S.W.3d 760 (Tenn. 2001) (holding that the Tennessee Open Meetings Act could not be enforced against the Tennessee legislature because the "legislature has unlimited power to act in its own sphere, except so far as restrained by the Constitution of the state and of the United States" and because the judiciary is "expected to eschew the normal political process, and to lean over backward to avoid encroaching on the legislative branch's power").

[7] Tex. Const. Art. III, § 21.

[8] *In re Perry,* 60 S.W.3d 857 (Tex., Oct. 22, 2001).

[9] *Wilkins v. Gagliardi,* 556 N.W.2d 171 (Mich. App. 1996).

[10] *Mayhew,* 46 S.W.3d at 776.

any particular person. Even if such laws did exist, they would be unconstitutional under the federal constitution. As the Supreme Court stated,

> "There can no longer be any doubt that 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). "And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States." *Williams v. Rhodes,* 393 U.S. 23, 30–31 (1968). Moreover, "[any] interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957); see *NAACP v. Button,* 371 U.S. 415, 431 (1963).

Cousins v. Wigoda, 419 U.S. 477, 487–88 (1975). In *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442 (2008), the Supreme Court expounded upon a political party's freedom of association, stating that "a party's right to exclude is central to its freedom of association, and is never more important than in the process of selecting its nominee" (internal quotes omitted).

4. The Caucus meeting and its private poll among its members regarding who best fits its political and ideological agenda and thus should be advanced as the preferred party choice for Speaker of the House does not risk violating the Speaker Statute or raise any issues regarding redistricting.

Because the Caucus is a private political meeting, any restrictions on the speech or penalties for the speech of those in attendance is a violation of the United States Constitution. *See Free Market Foundation v. Reisman,* 573 F. Supp. 2d 952, 954 (W.D. Tex. 2008) (stating that "impinge[ments] on the protected freedoms of expression and association ... can be especially problematic" when applied to groups because they can "severely inhibit collective political activity by preventing a group from using contributions by small donors to provide meaningful assistance to any individual candidate"). Secondly, the collective political choice of who shall be the Caucus's preferred candidate for the position of Speaker of the House is also protected by the federal Constitution. "The right of members of a political party to gather ... in order to formulate proposed programs and nominate candidates for political office is at the very heart of the freedom of assembly and association...." *Cousins,* 419 U.S. at 491 (Rehnquist, J., concurring).[11]

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[11] *Citing NAACP v. Alabama,* 357 U.S. 449 (1958); *Bates v. Little Rock,* 361 U.S. 516 (1960); and *Healy v. James,* 408 U.S. 169 (1972).

Ultimately, the Texas constitution requires that the "House of Representatives shall, when it first assembles, organize temporarily, and thereupon proceed to the election of a Speaker from its own members."[12] The process is not specified. "It is the final product of the legislature that is subject to review by the courts, not the internal procedures. ... Just as the legislature may not invade [the judiciary's] province of procedural rulemaking for the court system, [the judiciary] may not invade the legislature's province of internal rulemaking. ... A member of the legislature can raise a point of order regarding a violation of any of the rules of the house or senate. That is the proper forum for determining the propriety of the activities..."[13]

I trust that this letter answers the concerns that have previously been expressed to you. The House Republican Caucus is a private entity, capable of setting its own rules and determining its own membership. Its decisions are not binding on the State. The vote of the full Texas House of Representatives is what selects the Speaker of the House, and having a caucus vote will not diminish the efficacy of that full vote.

Thank you,

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[12] Tex. Const. Art. III, § 9(b).
[13] *Abood*, 743 P.2d at 339 n.3 (quoting *Moffitt*, 703 P.2d at 1021–22).