

**KIM BRIMER**

**Plaintiff**

v.

**STEPHEN C. MAXWELL, in his capacity  
as Chairman of the Democratic Party of  
Tarrant County, BOYD L. RICHIE, in his  
capacity as Chairman of the Texas  
Democratic Party, and WENDY R. DAVIS,**

**Defendants**

IN THE DISTRICT COURT

TARRANT COUNTY, TEXAS

JUDICIAL DISTRICT

FILED  
TARRANT COUNTY  
2008 JUL -3 AM 11:04  
THOMAS WILBERT  
DISTRICT CLERK

**PLAINTIFF'S ORIGINAL PETITION FOR DECLARATORY JUDGMENT  
AND  
APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTIVE RELIEF**

COMES NOW Plaintiff **KIM BRIMER** ("Brimer") and files this Original Petition for Declaratory Judgment and Application for Temporary and Permanent Injunctive Relief against Defendants **STEPHEN C. MAXWELL**, in his capacity as Chairman of the Democratic Party of Tarrant County, Texas ("Maxwell"), **BOYD L. RICHIE**, in his capacity as Chairman of the Democratic Party of Texas ("Richie"), and **WENDY R. DAVIS** ("Davis") and, in support thereof, would show as follows:

**DISCOVERY LEVEL**

1. Brimer intends that discovery (if any is necessary) be conducted under Level 3 of Rule 190 of the Texas Rules of Civil Procedure.

**PARTIES**

2. Brimer is an individual who resides in Tarrant County, Texas.
3. Maxwell is an individual who serves as Chairman of the Democratic Party of Tarrant County. He may be served with process at the Headquarters of the Democratic Party of

Tarrant County, 3004 W. Lancaster, Fort Worth, Tarrant County, Texas 76107; at his business address: 801 Cherry Street, Suite 3450, Fort Worth, Tarrant County, Texas 76102-6820; or at his residence: 5103 Shadow Glen Drive, Grapevine, Tarrant County, Texas 76051.

4. Richie is an individual who serves as Chairman of the Texas Democratic Party. He may be served with process at his business address: 516 Fourth Street, Room 102, Graham, Young County, Texas 76459; or at the Headquarters of the Texas Democratic Party, 505 W. 12<sup>th</sup> St., Suite 200, Austin, Travis County, Texas 78701.

5. Davis is an individual who resides in Tarrant County, Texas and may be served with process at 2737 Calder Court, Fort Worth, Tarrant County, Texas 76107.

### JURISDICTION

6. This is a suit to enforce the applicable provisions of the Texas Constitution and the Texas Election Code ("Election Code") and to prevent a violation of same. Article 3, Section 19 of the Texas Constitution expressly provides:

"No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature."

TEX. CONST. art. 3, §19. Further, Section 273.081 of the Election Code specifically vests this court with jurisdiction to enjoin a threatened violation of the Election Code, to wit:

"A person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring."

TEX.ELEC.CODE ANN. §273.081 (Vernon 2003).

### VENUE

7. Venue is proper in Tarrant County because (1) all or a substantial part of the events or omissions giving rise to the claim occurred in Tarrant County; (2) Maxwell regularly

carries out his duties as party chairman in Tarrant County; (3) Davis resides in Tarrant County; and, (4) Brimer resides in Tarrant County. See TEX. CIV. PRAC. & REM. CODE §§ 15.002(a)(1), (2), (4) (Vernon 2002).

#### FACTS

8. On or about May 1, 1999, Davis was elected to the Fort Worth City Council ("City Council"), and qualified as the council member for City Council District 9 on or about May 18, 1999. She was re-elected as the City Council District 9 representative in 2001, 2003, 2005 and 2007. Davis' last elected term of office does not expire until the City Council canvasses the election results of the May 2009 City of Fort Worth election (and any run-off elections, if necessary) and the candidate elected to represent City Council District 9 is duly declared elected, administered the oath of office in accordance with the Fort Worth City Charter ("City Charter"), and then duly qualified for office.

9. The office of City Council for the City of Fort Worth constitutes a "lucrative office," as such term is defined in the Texas Constitution, because the incumbent is paid an annual salary of \$25,000 and receives other benefits for service as a City Council member, including an office and staff.

10. Less than four (4) months after being re-elected to represent City Council District 9, Davis announced her intent to resign during the August 9, 2007 City Council meeting. Moreover, during this same meeting and within the City Council chambers, Davis declared her candidacy for State Senate District 10. Notwithstanding Davis' announcement of her intent to resign, Article 16, §17 of the Texas Constitution, which is commonly referred to as the "holdover" provision, states:

All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.

TEX. CONST. art. 16, §17. Moreover, Chapter III, Section 8 of the City Charter states, in pertinent part:

...If a member of the council shall become a candidate for nomination or election to any public office, other than that of councilperson, he/she shall forfeit his place in the council; but shall continue to hold the office until a successor is duly qualified in cases in which such holdover is required by state law ... .

FORT WORTH, TEX., CITY CHARTER, CHAPTER III, §8. In accordance with these provisions, Davis remained in her elected City Council position after her announcement of intended resignation and began her candidacy for State Senate District 10. She retained her office and staff, drew her salary, and attended and participated as a voting member of the City Council meetings.

11. Pursuant to Chapter III, Section 4 of the City Charter, "[v]acancies in the City Council shall be filled by special elections from the districts whose places have been vacated."

FORT WORTH, TEX., CITY CHARTER, CHAPTER III, §4. The special elections to fill City Council vacancies must occur on the first available election date specified in the Texas Election Code unless an emergency special election is requested and permission granted from the Governor of the State of Texas. *Id.* In that regard, on or about November 6, 2007, the City of Fort Worth conducted a special election to fill City Council District 9 for the remainder of Davis' term. However, because none of the candidates received a majority of the votes cast, a run-off election was set for December 18, 2007.

12. On or about October 2, 2007, Davis' chief of staff, Kristi Wiseman, sent an email from a City email account declaring that Davis' intended last day as holder of the City Council District 9 seat would be January 8, 2008.

13. On December 3, 2007, while continuing to perform her duties as City Council member for City Council District 9, Davis filed with Art Brender ("Brender"), the then-Chairman of the Democratic Party of Tarrant County, her sworn application to appear on the March 4, 2008 Democratic Party General Primary Ballot as a candidate for State Senate District 10.

14. On or about December 18, 2007, the run-off election for City Council District 9 was conducted and Joel Burns ("Burns") received a majority of the votes cast. Thereafter, at a special City Council meeting on or about December 27, 2007, the City Council canvassed the election results of the run-off election. The City Council minutes for the December 27, 2007 City Council meeting reflect that, after presentation of the "Certificate of Election," Mayor Mike Moncrief advised Burns that he would be administered the Oath of Office during the January 8, 2008 City Council meeting.

15. Chapter III, Section 5 of the City Charter states, in pertinent part:

At the first City Council meeting after the City Council meeting canvassing the election results, the elected members of the new Council shall meet at City Hall and take the oath of office.

FORT WORTH, TEX., CITY CHARTER, CHAPTER III, §5. After the election results were canvassed, the next regularly scheduled meeting of the City Council was scheduled for January 8, 2008. The City Council declared its intention to qualify Burns for the City Council by giving him the oath of office at the January 8, 2008 City Council meeting. Therefore, in accordance with the holdover provisions of the Texas Constitution and City Charter as set forth herein, Davis remained in office as the council member for City Council District 9 until Burns was sworn in on January 8, 2008 at the first City Council meeting after the City Council meeting canvassing the election results.

16. The latest date to apply for a place on the Democratic Party General Primary Ballot was on January 2, 2008 at 6:00 p.m. Because Davis' term as City Council member would not expire until after the January 2<sup>nd</sup> filing deadline, she was ineligible to be a candidate for State Senate District 10 under Article 3, Section 19 of the Texas Constitution.

17. On or about December 31, 2007, via written correspondence directed to Brender, a member of the public challenged Davis' eligibility as a candidate for State Senate District 10 and asked that Brender declare Davis ineligible for a place on the 2008 Democratic primary ballot.

18. On or about January 1, 2008 (New Year's Day), a former Court of Appeals Justice, acting without any authorization by the City Council and/or approval of the City Attorney, and in direct contradiction to the City Charter, attempted to administer an oath to Burns at Burns' residence. The validity of this oath was challenged by a member of the public for the reason that it was not administered in the manner required by Chapter III, Section 5 of the City Charter.

19. By letter dated January 2, 2008, Brender denied the challenge to Davis' candidacy for State Senate District 10, stating the issue presented in this case had not been decided by any court.

20. Further, on January 2, 2008, Davis attempted to withdraw her December 3, 2007 filing as a candidate for State Senate District 10. However, she failed to file a written withdrawal request with Brender as required by section 172.052 of the Election Code. As a result, Davis failed to effectively and legally withdraw as a candidate for State Senate District 10 at any time after she filed her initial application with Brender on December 3, 2007. That fact notwithstanding, on January 2, 2008 and prior to the 6:00 p.m. filing deadline, Davis filed a

second candidacy application and paid a second filing fee to be placed on the Democratic primary ballot as a candidate for State Senate District 10.

21. On or about January 8, 2008, the City Council conducted its regularly scheduled meeting at which time Burns was to take the oath of office. However, apparently after consultation with the City Attorney, the City Council declined to allow Burns to attend either the pre-Council meeting scheduled for 3:00 p.m. as the City Council District 9 representative or the Executive Session of the City Council that convened at 5:30 p.m. and preceded the regular session.

22. According to City Council meeting minutes, the mayor convened the regular meeting of the City Council on the evening of January 8, 2008. At the time of the commencement of this meeting, the City Council minutes do not reflect that any City Council District 9 representatives were present. However, actions reported later in the minutes reflect that Burns was present.

23. After the call to order, invocation and pledge, the first order of business of the City Council was a vote to approve minutes for several prior City Council meetings. The minutes show that the minutes for the prior meetings were approved by a unanimous vote of 8-0. The ninth vote, representing City Council District 9, was not cast because, at the time, Burns had not yet been properly sworn in.

24. After approving the minutes of prior City Council meetings, and in accordance with the applicable provisions of the City Charter, the mayor administered the oath of office to Burns. At this time, Burns became duly qualified for office and was allowed to take his seat as a councilperson. Thus, Davis' tenure as City Council member for City Council District 9 did not end until Burns became duly qualified for office on January 8, 2008.

25. According to the City's payroll records, Davis was paid for her services as a City Council member after the State Senate filing deadline of January 2, 2008.

26. On or about March 4, 2008, Davis was on the ballot for the Democratic primary as the sole Democratic candidate for State Senate District 10. Thereafter, on or about April 28, 2008, Richie filed with the Secretary of State of Texas the Official Canvass Votes Report of the March 4, 2008 Democratic Primary Election, which indicated that Davis received all of the votes cast.

#### CAUSE OF ACTION

27. Brimer incorporates by reference as if fully copied and set forth herein each and every fact set forth in Paragraph Nos. 8 through 26 above.

28. Davis was elected to the City Council on May 12, 2007 for a two-year term. The vote for the May 2007 election was canvassed by the City Council at its May 22, 2007 meeting. Pursuant to the City Charter, Davis became fully qualified for her term on May 29, 2007 upon taking the oath of office at during the first City Council meeting after the meeting at which the vote was canvassed. According to the City Charter, Davis would remain in office until her successor was duly elected for office and administered the oath of office in accordance with the law following the election of May 2009. On August 9, 2007, shortly after her two-year term began, while sitting in her Council seat, Davis announced her intention to resign from the City Council and her announced candidacy to run for State Senate District 10. Consistent with her announcement, Davis filed her Candidate/Officeholder Campaign Finance Report and Designation of Treasurer on August 9, 2007 with the Texas Ethics Commission; thus, confirming her candidacy. Davis' announcement of her intended resignation did not end her term of office. Under the holdover provisions of the City Charter and the Texas Constitution set forth herein,



Davis continued to hold her City Council office until January 8, 2008, when her duly elected replacement became qualified by taking the official oath of office in the manner required by the City Charter. However, as early as December 3, 2007, but in no event later than January 2, 2008, Davis filed an application to become a candidate for State Senate District 10 in the Texas Legislature. In effect, Davis sought to become a candidate for the Legislature at the same time she continued to hold a "lucrative office", exercise her duties and enjoy the benefits of office as a member of the City Council.

29. Davis' actions constitute a violation of Article 3, Section 19 of the Texas Constitution in that no person "holding a lucrative office under ... this State ... shall during the term for which he is elected or appointed, be eligible to the Legislature." TEX. CONST. art. 3, §19. There is no dispute that Davis' position on the City Council constituted a "lucrative office." See *Willits v. Potts*, 377 S.W.2d 622, 627 (Tex. 1967). Thus, the only question presented is whether the overlapping of Ms. Davis' service as a City Council member and her candidacy for State Senate District 10 brought her within the prohibition of Article 3, Section 19.

30. Brimer is the incumbent and sole Republican candidate for State Senate District 10. As such, Brimer is a person whose rights, status, or other legal relations are affected by those constitutional provisions, statutes, municipal ordinances and/or city charter provisions set forth herein with respect to the eligibility of a candidate for State Senate District 10. In that regard, Brimer seeks a judicial determination of Davis' eligibility and legal right to run as a candidate for State Senate District 10 for the November 2008 Texas general election pursuant to the aforementioned constitutional provisions, statutes, municipal ordinances and/or city charter provisions in accordance with the Texas Uniform Declaratory Judgments Act.

31. Further, by statute, Plaintiff is entitled to temporary and permanent injunctive relief to prevent the Defendants from violating or otherwise assisting in the violation of the express requirements of the Election Code and the Texas Constitution. Brimer will be harmed without the intervention of this Court's equitable injunctive power. Therefore, Brimer seeks temporary and permanent injunctive relief directing Defendants to disqualify Davis from the November 2008 general election and to not place Davis' name on the ballot for the November general election.

#### **CONDITIONS PRECEDENT**

32. All conditions precedent to Brimer's right to recovery have been performed or have occurred.

#### **PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Brimer requests that Defendants be cited to appear and answer herein and, upon final hearing, that Brimer receive judgment as follows:

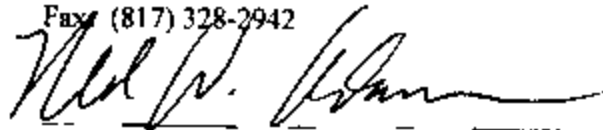
1. A declaration that Davis is ineligible and without any legal right to run as a candidate for State Senate District 10 for the November 2008 Texas general election pursuant to the constitutional provisions, statutes, municipal ordinances and/or city charter provisions set forth herein;
2. That Brimer's request for a temporary and permanent injunction be granted and that an order be entered compelling Defendants Maxwell and Richie to promptly certify in writing the declaration of Defendant Davis' ineligibility to the canvassing authority for the election and promptly give written notice to Defendant Davis of the declaration of ineligibility as required under section 145.003 of the Election Code;
3. That Defendants and their agents, servants, employees, representatives, and all other persons, firms or corporations in active concert or participation with Defendants, be ordered to remove Defendant Davis' name from the ballot for the November 2008 Texas general election;
4. Brimer's reasonable and necessary attorneys' fees incurred through trial and through any appeal taken to the court of appeals and/or the Texas Supreme Court, as permitted by Chapter 37 of the Texas Uniform

Declaratory Judgments Act, or as otherwise recoverable by contract,  
common law and/or statute;

5. Prejudgment and post-judgment interest, if any, as provided by law;
6. All costs of suit; and
7. Such other and further relief, special or general, legal or equitable, to which Brimer may show himself to be justly entitled.

Respectfully submitted,

ADAMS, LYNCH & LOFTIN, P.C.  
3950 Highway 360  
Grapevine, Texas 76051  
Phone: (817) 552-7742  
Fax: (817) 328-2942



Neal W. Adams  
State Bar No. 00874000  
Jerry D. Bullard  
State Bar No. 03323015

ATTORNEYS FOR PLAINTIFF

**AFFIDAVIT**

STATE OF TEXAS           §  
  §  
COUNTY OF TARRANT   §

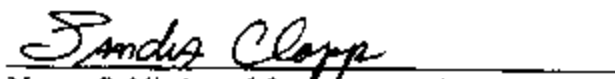
Before me, the undersigned notary public, personally appeared Kim Brimer, who upon his oath said:

1. My name is Kim Brimer. I am over eighteen (18) years of age, of sound mind, and fully competent to make this affidavit.

2. I have read the above Plaintiff's Original Petition for Declaratory Judgment and Application for Temporary and Permanent Injunctive Relief (the "Petition"). The factual statements contained in paragraphs 8-11, 13-17, 19, and 26 of the Petition are based upon my own personal knowledge and are true and correct.

  
\_\_\_\_\_  
Kim Brimer.

SUBSCRIBED AND SWORN TO BEFORE ME on July 2, 2008 to certify which witness my hand and official seal.

  
\_\_\_\_\_  
Notary Public in and for the State of Texas



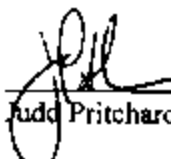
**AFFIDAVIT**

STATE OF TEXAS                   §  
   §  
COUNTY OF TARRANT         §


Before me, the undersigned notary public, personally appeared Judd Pritchard, who upon his oath said:

1. My name is Judd Pritchard. I am over eighteen (18) years of age, of sound mind, and fully competent to make this affidavit.

2. I have read the above Plaintiff's Original Petition for Declaratory Judgment and Application for Temporary and Permanent Injunctive Relief (the "Petition"). The factual statements contained in paragraphs 8 through 26 of the Petition are based upon my own personal knowledge and are true and correct.

  
\_\_\_\_\_  
Judd Pritchard

SUBSCRIBED AND SWORN TO BEFORE ME: on July 2, 2008 to certify which witness my hand and official seal.

  
\_\_\_\_\_  
Notary Public in and for the State of Texas



**ADAMS, LYNCH & LOFTIN, P.C.**  
**ATTORNEYS AND COUNSELORS AT LAW**  
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 • Civil Appellate Law

July 3, 2008

District Clerk, Tarrant County  
 ATTN: Civil File Desk  
 401 W. Belknap  
 Fort Worth, Texas 76196

Via Hand Delivery

*Re: Kim Brimer, Plaintiff, v. Stephen C. Maxwell, in his capacity as Chairman of the Democratic Party of Tarrant County, Boyd L. Richie, in his capacity as Chairman of the Texas Democratic Party, and Wendy R. Davls, Defendants; Our File No. 08436*

Dear Clerk:

Enclosed please find the original and seven (7) copies of Plaintiff's Original Petition For Declaratory Judgment and Application For Temporary And Permanent Injunctive Relief ("Original Petition"). Please file the Original Petition, return four (4) of the file stamped copies to me and retain the remainder of the copies for three Citations to be issued.

Also enclosed is our firm's Check No. 13236 in the amount of \$258.00 in payment of the filing fee and the fee for issuing three Citations. Please prepare the Citations and return them to me. I will then make arrangements for service of process.

Thank you for your assistance in this regard. Should you have any questions, please do not hesitate to contact me.

Sincerely,

ADAMS, LYNCH & LOFTIN, P.C.

  
 Jerry D. Bullard

FILED  
 TARRANT COUNTY  
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 THOMAS A. WILDER  
 DISTRICT CLERK

Enclosures

cc: The Honorable Kim Brimer

Neal W. Adams (Firm)