

NO. \_\_\_\_\_

**IN THE SUPREME COURT OF TEXAS**

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**IN RE KIM BRIMER**

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**PETITION FOR WRIT OF MANDAMUS**

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## TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL .....	ii
TABLE OF CONTENTS .....	iv
INDEX OF AUTHORITIES .....	vi
STATEMENT OF THE CASE .....	viii
STATEMENT OF JURISDICTION .....	x
ISSUES PRESENTED .....	xi
Did Respondents Violate Their Mandatory Duty to Declare Wendy Davis Ineligible as a Candidate for State Senate District 10 Pursuant to Article III, Section 10 of the Texas Constitution? .....	xi
A. The Provisions of the Texas Constitution Control the Eligibility of Davis. .....	xi
B. <i>Wentworth v. Meyer</i> Did not Decide the Issues Presented in this case. .....	xi
C. The Oath of Office Taken by Joel Burns on January 1, 2008 Did Not Qualify Him, on That Date, as the Successor to Davis as City Council Representative District 9. .....	xi
STATEMENT OF FACTS .....	1
ARGUMENT AND AUTHORITIES .....	3
Did Respondents Violate Their Mandatory Duty to Declare Wendy Davis Ineligible as a Candidate for State Senate District 10 Pursuant to Article III, Section 10 of the Texas Constitution? .....	3
A. The Provisions of the Texas Constitution Control the Eligibility of Davis. .....	3
B. <i>Wentworth V. Meyer</i> Did Not Decide the Issues Presented in this Case. .....	4
C. The Oath of Office Taken by Joel Burns on January 1, 2008 Did Not Qualify Him, on That Date, as the Successor to Davis as City Council Representative District 9. .....	11

PRAYER FOR RELIEF .....	15
APPENDIX .....	18

## INDEX OF AUTHORITIES

### CASES:

<i>Buchanan v. Graham</i> , 81 S.W.1237 (Tex. Civ. App. - 1904, no writ) .....	4
<i>City of Houston v. Todd</i> , 41 S.W.3d 289 (Tex. App. - Houston [1 <sup>st</sup> Dist. ] 2001, pet denied) ...	12
<i>City of La Porte v. State ex rel. Rose</i> , 376 S.W.2d 894, 906 (Tex. Civ. App.- Austin 1964), <i>rev'd in part on other grounds</i> , 386 S.W. 2d 782 (Tex. 1965) .....	13
<i>Ins. Co. of Pa. v. Moore</i> , 43 S.W.3d 77 (Tex. App.-Fort Worth 2001, no pet.) .....	13
<i>Jasper v. State</i> , 61 S.W.3d 413 (Tex.Crim.App. 2001) .....	7
<i>Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.</i> , 966 S.W. 2d 482 (Tex. 1998) .....	12
<i>Perkins v. State</i> , 367 S.W. 2d 140 (Tex. 1963). .....	12
<i>Phuong Thai Than v. State</i> , 918 S.W.2d 106 (Tex.App.-Fort Worth 1996, no pet.) .....	12
<i>Rossano v. Townsend</i> , 9 S.W. 3d 357 (Tex. App. - Houston [14 <sup>th</sup> Dist.] 1999, no pet) .....	12
<i>Stanford v. Butler</i> , 181 S.W.2d 269 (Tex.1944). .....	13
<i>Tarrant Appraisal Dist. v. Moore</i> , 845 S.W.2d 820 (Tex.1993) .....	13
<i>Tex. Water Comm'n v. Brushy Creek Mun. Util. Dist.</i> , 917 S.W.2d 19 (Tex.1996) .....	13
<i>Wentworth v. Meyer</i> , 839 S.W.2d 766 (Tex. 1992)(orig. proceeding) .....	5-7
<i>Willis v. Potts</i> , 377 S.W.2d 622 (Tex. 1964). .....	3

### STATUTES AND CONSTITUTION

Texas Constitution, Article III, § 19 .....	3, 4, 5, 6, 7, 10
Texas Constitution, Article XVI, §17. ....	4, 5, 10
Tex. Elect. Code Ann. §145.035 (Vernon Supp. 2007). ....	x

Tex. Gov' t Code § 311.026 .....	12
Tex. Gov't Code § 311.023 .....	12

OTHER AUTHORITIES

Fort Worth City Charter, Chapter III §8. ....	4, 10
OP. TEX. ATT'Y GEN. NO. 95-069 (1995). ....	8
OP. TEX. ATT'Y GEN. NO. 96-014 (1996) .....	8
OP. TEX. ATT'Y GEN. NO. 97-092 (1997). .....	8

## STATEMENT OF THE CASE

*Nature of the Case:*

This case concerns the eligibility of Wendy Davis as a candidate for Texas State Senate District No. 10 pursuant to Article III, Section 19 of the Texas Constitution.

*Parties to the Case:*

The Relator Brimer is the incumbent and Republican candidate seeking reelection to a new term for the State Senate District 10 on the general election ballot in the November 4, 2008 general election (C.R. 33). Davis was the sole candidate on the March 4, 2008 Democratic primary ballot for State Senate District 10 (C.R. 33). Respondent Stephen Maxwell ("Maxwell") is the chairman of the Democratic Party of Tarrant County. (C.R. 2). Respondent Boyd Richie ("Richie") is the chairman of the Texas Democratic Party (C.R. 2).

*Prior Proceedings:*

This case was originally brought in the 236<sup>th</sup> District Court of Tarrant County as a petition for declaratory judgment and request for injunctive relief in which Relator (Plaintiff/Appellant in the case below) Kim Brimer ("Brimer") challenged Wendy Davis's ("Davis") eligibility to run for State Senate District 10 in the November 4, 2008 general election (C.R. 2-14). The Honorable Tom Lowe, presiding judge of the 236<sup>th</sup> Judicial District Court in Tarrant County, conducted a trial on July 22, 2008 based on stipulated facts and exhibits. On that same date, the Trial Court entered a Final Judgment, and made Findings of Fact and Conclusions of Law in which the Trial Court held that Davis was eligible to run for State Senate District 10 in the November 4, 2008 general election (C.R. 252-263). Brimer timely perfected an appeal by filing a Notice of Appeal on July 24, 2008 (C.R. 265-267) together with an unopposed Motion to Accelerate the Appeal. The Appeal is pending in the Court of



Appeals Second District of Texas in cause number 02-08-00305 CV. The Court of Appeals Ordered the Appellant's Brief filed on or before August 19, 2008 and the Appellees' Briefs filed 20 days thereafter. (TAB A) Brimer filed his brief on August 8, 2008 which makes the Appellees' Briefs due on August 28, a date after deadline to remove Ms. Davis's name from the ballot even if she is declared ineligible.

*Actions from Which Relator Seeks Relief*

Respondents have refused to declare Wendy Davis ineligible to be a candidate for State Senator for Texas Senate District 10 despite Article III, Section 19 of the Texas Constitution which renders her an ineligible candidate for the Legislature. Relator seeks a writ of mandamus ordering Respondents to comply with their ministerial duty to declare Ms. Davis ineligible to be candidate for State Senator.

## **STATEMENT OF JURISDICTION**

The Court has jurisdiction of this action under Texas Election Code §273.061 which confers original jurisdiction over petitions seeking writs of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election.

There is an appeal pending in the Court of Appeals Second District of Texas from the 236<sup>th</sup> District Court in which Relator originally brought suit. However, there is an urgent necessity which requires filing this original action in the Supreme Court because of impending deadlines. The Court of Appeals issued a briefing schedule which provides that the Appellant's (Relator herein) brief was due on or before August 19, 2008 and the Appellees' briefs due 20 days thereafter (TAB A attached hereto). Appellant Brimer, Relator herein, filed his brief on August 8, 2008. Under the current order of the Court of Appeals, the Appellees' Briefs are not due until August 28, 2008. Brimer filed on August 13, 2008 an opposed Motion to Reconsider Order on Acceleration and Suggesting an Emergency to which there has been no response (TAB A ). Section 145.035 of the Texas Election Code provides that the last day on which a candidate's name "shall be omitted from the ballot if the candidate withdraws, dies, or is declared ineligible" is on or before the 74<sup>th</sup> day before the general election. See TEX.ELEC.CODE ANN. §145.035 (Vernon Supp. 2007). The 2008 General Election will occur on November 4, 2008. The 74<sup>th</sup> day prior to the Election is August 22, 2008. Under the Court of Appeals existing order the deadline would pass before the response briefs are due, much less allow time for a decision and potential consideration by this Court.

There are no fact issues to be determined. The 236<sup>th</sup> District Court proceeded to trial on Agreed Stipulations of Facts and Exhibits A-O. One additional Exhibit, "Exhibit P", a certified copy of the Fort Worth City Charter, was introduced by agreement at the trial. The Agreed

Stipulations and Exhibits are attached hereto as TAB B and show the page numbers stamped as part of the Clerk's Record. TAB B also includes a copy of Exhibit P, a certified copy of the City Charter.

### **ISSUES PRESENTED**

Did Respondents Violate Their Mandatory Duty to Declare Wendy Davis Ineligible as a Candidate for State Senate District 10 Pursuant to Article III, Section 10 of the Texas Constitution?

- A. The Provisions of the Texas Constitution Control the Eligibility of Davis.
- B. *Wentworth v. Meyer* Did not Decide the Issues Presented in this case.
- C. The Oath of Office Taken by Joel Burns on January 1, 2008 Did Not Qualify Him, on That Date, as the Successor to Davis as City Council Representative District 9.

## STATEMENT OF FACTS

Wendy Davis ("Davis") was elected to the Fort Worth City Council in 1999 and re-elected as the City Council District 9 representative in 2001, 2003, 2005, and 2007 (C.R. 29).<sup>2</sup> On May 12, 2007 Davis was re-elected to the City Council for a two year term, the vote was canvassed on May 22, 2007 and Davis took the oath of office on May 29, 2007 at the first Council meeting after the meeting at which the vote was canvassed (C.R. 29). As a representative for City Council District 9, Davis was entitled to and received an annual salary of \$25,000 plus other benefits (C.R. 29). During the August 9, 2007 City Council meeting Davis made a public announcement that she was seeking election to the Texas State Senate in the 10<sup>th</sup> Senatorial District (C.R. 29, 40). Davis filed her Candidate/Officeholder Campaign Finance Report and Designation of Treasurer on August 9, 2007 with the Texas Ethics Commission (C.R. 30, 74). On November 6, 2007 the City of Fort Worth conducted a special election to fill the City Council District 9 position for the remainder of Davis's two year term (C.R. 30). A run-off election was held on December 18, 2007 and Joel Burns ("Burns") received a majority of the votes cast (C.R. 30). At a special meeting of the City Council on December 27, 2007, the City Council canvassed the results of the run-off election and declared that Burns had won the election for the District 9 seat (C.R. 30, 31). At that same meeting, Mayor Mike Moncrief advised Burns that the oath of office would be administered to Burns during the January 8, 2008 City Council meeting (C.R. 31, 81). During the election and run-off election to determine her successor, Davis continued to serve in her elected City Council position, drew her salary,

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<sup>2</sup> Agreed Stipulations of Fact were filed with the Court together with Exhibits A through O and appear in the Clerk's Record (C.R. 38-126). At trial it was stipulated that those Exhibits were authentic and admissible and were admitted by the Court as Exhibits A through O and appear in the Reporter's Record as such. In addition, Exhibit P, a certified copy of the Fort Worth City Charter was admitted by agreement and appears as Exhibit P in the Reporter's Record. A certified copy of the entire Clerk's Record is filed with the clerk of the Supreme Court. The Agreed Stipulations and Exhibits A through P are attached to the Petition as TAB B of the Appendix.

retained her office and staff, and attended and participated as a voting member of the City Council at City Council meetings (C.R. 30). On December 3, 2007 Davis filed with Art Brender (“Brender”), the then Chairman of the Tarrant County Democratic Party, her sworn application to appear on the March 4, 2008 Democratic Party General Primary Ballot as a candidate for the State Senate District 10 (C.R. 30, 78). On December 31, 2007 members of the public challenged Davis’s eligibility as a candidate for Senate District 10 and asked Brender to declare Davis ineligible for a place on the Democratic primary ballot (C.R. 31, 82). On January 1, 2008 a retired Justice of the Second Court of Appeals administered an oath to Burns at Burns’s residence and Burns faxed to the City of Fort Worth a copy of the oath he had taken (C.R. 31).

On January 2, 2008 Davis filed a second application for a place on the Democratic Primary as a candidate for the State Senate District 10 and paid a second filing fee (C.R. 32, 96). On January 8, 2008 the City Council conducted its regularly scheduled meeting, which was the first meeting after the meeting at which the City Council canvassed the vote from the run-off election of December 18, 2007 (C.R. 32). After Mayor Mike Moncrief convened the regular meeting of the City Council on the evening of January 8, 2008, the first order of business was a vote to approve minutes for several prior City Council meetings (C.R. 32). The minutes show that the minutes were approved by a unanimous vote of 8-0 (C.R. 33, 100). After the approval of the minutes, the City Secretary administered the oath of office to Burns, after which he assumed his place on the dais (C.R. 33, 100). On January 2, 2008 Davis delivered to the City of Fort Worth a letter referencing Burns’s oath of office on January 1, 2008 and directing that she not receive any salary for the period thereafter (C.R. 32, 97). On January 11, 2008 the City of Fort Worth paid Davis her salary up to and including January 4, 2008. On March 4, Davis was the sole candidate on the Democratic primary ballot for State Senate District 10 (C.R. 33).

Relator Brimer is the incumbent and Republican candidate seeking election to a new term for the State Senate District 10 on the general election ballot in the November 4, 2008 general election (C.R. 33).

### **ARGUMENT AND AUTHORITIES**

**Did Respondents Violate Their Mandatory Duty to Declare Wendy Davis Ineligible as a Candidate for State Senate District 10 Pursuant to Article III, Section 10 of the Texas Constitution?**

**A. The Provisions of the Texas Constitution Control the Eligibility of Davis.**

Article III, § 19 of the Texas Constitution provides as follows:

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.

Since 1964, when a sitting member of the Fort Worth City Council was declared ineligible to run for the State Senate, it has been known that this provision of the Constitution is a problem for the eligibility of incumbent members of a city council, and certainly members of the Fort Worth City Council, seeking to run for the state legislature. *Willis v. Potts*, 377 S.W.2d 622, 625 (Tex. 1964).

It is undisputed that Wendy Davis ran for and was reelected to a term for two years as a member of the Fort Worth City Council in May 2007. It is undisputed that she announced at a City Council meeting in August of 2007, less than 4 months after her election, her intention to resign from her position as a member of the City Council and commenced to campaign for election to the State Senate. It is undisputed that Davis's resignation did not end her term of

office based on the applicable "holdover provisions" of the Texas Constitution and City Charter, which state:

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

Article XVI §17, Texas Constitution

.. If a member of the council shall become a candidate for nomination or election to any public office, other than that of council person, 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 City Charter, Chapter III, §8.

As a matter of law, a candidate elected to an office becomes "qualified" for same by taking the oath of office in the manner prescribed by law. See *Buchanan v. Graham*, 81 S.W.1237, 1239 (Tex. Civ. App. - 1904, no writ) (statute impliedly fixes the time within which elected candidates were "required to qualify by taking the necessary oath of office"). Therefore, in accordance with the "holdover provisions" set forth in the Texas Constitution and the City Charter, Davis continued to hold her City Council office until January 8, 2008, when her duly elected replacement became duly qualified by taking the official oath of office in the manner required by the City Charter. Yet, beginning on August 9, 2007, Davis announced her candidacy and began running for the Texas Legislature. Moreover, as early as December 3, 2007, but no later than January 2, 2008, Davis filed to become a candidate for the State Senate District 10. In reality, Davis became a candidate for the Legislature at the same time she continued to hold office and exercise her duties as a member of the City Council. Davis's actions run afoul of Article III, § 19 of the Texas Constitution.

**B. *Wentworth v. Meyer* Did Not Decide the Issues Presented in this Case.**

In *Wentworth v. Meyer*, 839 S.W.2d 766 (Tex. 1992) (orig. proceeding) this Court held that resignation prior to the end of the officeholder's elected term ends the ineligibility otherwise imposed by Article III, §19. However, the Court left unresolved the issue of whether the officeholder must resign the lucrative office *before* filing to run for the Legislature. *Wentworth* also did not concern the related question of whether a candidate who resigns a lucrative office before filing to run for the Legislature but continues to hold office under the Constitutional "holdover" provision, Article XVI, §17, *after* filing, is thus made ineligible by Article III, §19. Instead, the sole question addressed in *Wentworth* was "whether article III, section 19 of the Texas Constitution renders Wentworth ineligible because of [the] overlap" of his sought-after senate term with what **would have been** (but for his resignation) the previous term of his appointment to the Board of Regents of the Texas State University System ("Board of Regents")—a position that he vacated via resignation on May 10, 1988 and was subsequently filled by a duly-qualified successor. See *Wentworth*, 839 S.W.2d at 766-767. Wentworth won the Republican nomination for State Senator from District 26 on April 24, 1992, nearly four (4) years after his resignation from the Board of Regents and almost eighteen (18) months after being elected to his second term in the House of Representatives. *Id.* at 767. Wentworth's eligibility for the State Senator nomination was challenged in May 1992 by the State Chairman of the Republican Party of Texas. *Id.*

A majority of the Supreme Court ruled that Wentworth's resignation from the Board of Regents almost four (4) year before his candidacy for the Texas Senate, which included a duly qualified successor being appointed to Wentworth's Board of Regents seat, ended the constitutional prohibition on his running for the Legislature. In a three-member plurality



opinion, joined by Justices Hightower and Hecht, Justice Cook noted that the purpose of section 19, which was to protect the Legislature from undue influence by certain officeholders, was not advanced by denying legislative office to a candidate who had resigned his position four years earlier, had been replaced by a duly qualified appointee, and had since served as a state representative. *Id.* at 767-768.

Justice Hecht, who wrote a separate concurring opinion, summarized the Court's decision by noting that five members of the Court had ruled "that article III, section 19 of the Texas Constitution does not prohibit an officeholder who resigns his position from serving in the Legislature during a time when he would otherwise have remained in his former office." *Id.* at 772. Justice Hecht further noted that the word "term" as used in the constitutional provision most logically referred "to an officeholder's time of service." *Id.* at 775.

Justice Cornyn, whose concurring opinion was joined by Justice Hecht, also appeared to join in the plurality opinion endorsed by Cook, Hightower and Hecht, "but for reasons in addition to those expressed in the plurality's opinion." *Id.* at 776. In his concurring opinion, Justice Cornyn concluded that article III, section 19 disqualified only persons " 'holding a lucrative office,' which Wentworth plainly is not." *Id.* at 778 (emphasis in original). He also pointed out that Wentworth had once held a lucrative office, but was no longer doing so when the chairman of the Republican Party determined he was disqualified. *Id.*

Justice Gonzalez, in his concurring opinion, maintained that the officeholder must relinquish the lucrative office before filing for a legislative office:

Today's opinion should not...be viewed as license to hang onto one office while prospecting for another...One who has filed for an office without resigning a current office with an overlapping term risks disqualification which later resignation after the filing deadline would not cure.

*Id.* at 771.<sup>3</sup>

The *Wentworth* Court did not predicate its finding of eligibility on the notion that the phrase "eligible to the Legislature" in article III, section 19 of the Texas Constitution meant eligibility *at the time the legislative term begins* as opposed to eligibility *to run for or seek to serve in the Legislature*. Instead, the plurality<sup>4</sup> and concurring opinions in *Wentworth* are laced with references to lucrative officeholders that are "running," "seeking," "campaigning," "prospecting," and/or "filing for" a legislative office, thereby indicating that the Court would not hesitate to prohibit officeholders from running for the Legislature under article III, section 19 of the Texas Constitution. See, e.g., *Id.* at 766 ("...resignation prior to *running* for office...") (emphasis added); *Id.* at 767 ("...he is free to *run* for legislative office...") (emphasis added); *Id.* at 768 ("...the opportunity to *run* for the state senate..."; "...where an officeholder has resigned before *running* for the legislature."; "...which prevent a[n] officeholder from *running* for the legislature once resigning office.") (emphasis added); *Id.* at 769 ("...language does not prevent those who have resigned from their offices from *running* for the legislature.") (emphasis added); *Id.* at 770 ("...I have concerns that the restriction on *running* for office..."; "...holding office while *seeking* a seat in the legislature..."; "...holding office and deciding cases while at the same time *seeking* votes for the legislature..."; "...prohibition only applies to those *running* for the legislature. A current officeholder is free to resign and *run* for any other office in the state."; "...license to hang onto one office *while prospecting* for another."; "One has *filed* for an office without resigning...") (emphasis added) (Gonzalez, J, concurring).

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<sup>3</sup> Justices Mauzy and Gammage likewise concurred in the result, but for reasons different from those expressed by the five other Justices. *Id.* at 771-772, 780.

<sup>4</sup>

A plurality opinion is not the opinion of the Court and, therefore, is not binding precedent. See *Jasper v. State*, 61 S.W.3d 413, 421 (Tex.Crim.App. 2001); *Rabago v. State*, 75 S.W.3d 561, 562 (Tex.App.--San Antonio 2002, pet. ref'd).

The Attorney General has attempted to further analyze the questions presented in *Wentworth*. In a 1995 letter opinion, for example, the Attorney General discussed *Wentworth* at length and noted that while Justice Gonzalez took a strict view that resignation must always precede a filing deadline, other opinions suggested that a later resignation might suffice to end the constitutional ineligibility. OP. TEX. ATT'Y GEN. NO. 95-069 (1995). In that regard, the Attorney General concluded as follows.

"Article III, section 19 as interpreted in *Wentworth*, does not disqualify the holder of a lucrative office from running for the legislature even though the term of the lucrative office overlaps the legislative term, if the officeholder *resigns* from the lucrative office *before filing for the legislature*."

*Id.* at p. 5 (emphasis added); *accord* OP. TEX. ATT'Y GEN. NO. 97-092 (1997).

In so ruling, however, the Attorney General further elaborated on what constituted "resignation."

In referring to "resignation" from the lucrative office, we will not overlook the effect of article XVI, section 17, the holdover provision, which provides that "[a]ll officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified." Even though an officer resigns and his resignation is accepted by the appropriate authority, the law operates to continue him in office until his successor *qualifies*. [emphasis added] [citation omitted] A holder of a lucrative office who resigns the office to run for the legislature in reliance on *Wentworth v. Meyer* may be disqualified from the legislative office until his or her successor has *qualified*. [emphasis added] As Justice Cook expressly noted, *Wentworth's* position as regent was filled by someone else. 839 S.W.2d at 769. Thus, the effect of article XVI, section 17 was not an issue in *Wentworth*.

*Id.* at p. 4, n. 3.

In a 1996 letter opinion, the Attorney General ruled that the holdover provision in the Texas Constitution overrides the effect of a Fort Worth City Charter provision stating that a council member's becoming a candidate for nomination or election to other public office requires immediate forfeiture of his/her place on the Council. OP. TEX. ATT'Y GEN. NO. 96-014

(1996).<sup>5</sup> Therefore, as a matter of law, Davis's term on the City Council ended on January 8, 2008, when her successor, Burns, was qualified for office upon being administered the oath of office in the manner prescribed by the City Charter.

The fact that Wentworth had resigned from his appointment to the Board of Regents prior to the end of his term and that his successor to the Board was duly appointed, qualified, and seated before Wentworth began his run for State Senate District 26 were clearly determinative factors in the Court's analysis. Moreover, the fact that Wentworth was serving his *second* term in the House of Representatives made declaring him ineligible for a Senate race seem inequitable, if not absurd. The facts in the instant case are dramatically different than those in *Wentworth* and must be analyzed based on the correct interpretation of the *Wentworth* Court's holding.

Unlike *Wentworth*, Davis had not resigned her position on the Fort Worth City Council ("City Council") and her successor was not duly elected and qualified before she began her candidacy for State Senate District 10. Instead, Davis filed her Candidate/Officeholder Campaign Finance Report and Designation of Treasurer with the Texas Ethics Commission and announced her intention to run for State Senate District 10 at the City Council meeting on August 9, 2007, and commenced to campaign for the Senate, all of which occurred nearly: 1) four (4) months before she filed with Art Brender ("Brender") on December 3, 2007, her sworn application to appear on the March 4, 2008, Democratic Party General Primary Ballot as a candidate for State Senate District 10 (hereinafter "First Candidacy Application"); 2) almost five (5) months before Davis filed with Brender another sworn application to appear on the March 4, 2008 Democratic Party General Primary Ballot as a candidate for State Senate District 10

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<sup>5</sup> As noted elsewhere herein, Chapter III, section 8 of the current Fort Worth City Charter has a "holdover" provision similar to the Constitutional provision.

("Second Candidacy Application") on January 2, 2008; and 3) almost five (5) months before her successor, Joel Burns ("Burns"), was duly elected and qualified. (C.R. 255-257). Under all of these scenarios, following Davis's announcement during the August 9, 2007 City Council meeting, Davis continued to serve in her elected City Council position after she commenced to campaign for the State Senate. She retained her office and staff, drew her salary, and attended and participated as a voting member of the City Council at City Council meetings. (C.R. 255).

In addition to her continued actual service on the City Council, Davis continued to hold her office as the representative for City Council District 9 under the "holdover" provisions in Article XVI, section 17 of the Texas Constitution and Chapter III, section 8 of the Fort Worth City Charter ("City Charter"). Davis continued to exercise her duties and enjoy the benefits of office as a member of the City Council, thereby constituting a violation of Article III, section 19 of the Texas Constitution, which states 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. III, §19. Moreover, on January 11, 2008, the City deposited \$831.86 into Davis's bank account to compensate her for serving on the City Council. This amount included compensation for serving on the City Council up to and including January 4, 2008, which Davis retained for nearly six (6) months. (C.R. 257).

In summary, in the case at bar, Davis attempted to resign her council seat in August 2007, but continued to perform the full duties and enjoy the full benefits of her position as the representative from City Council District 9 under the holdover provisions of the Texas Constitution and the City Charter. Davis retained her office and staff, drew her salary, and attended and participated as a voting member of the City Council at City Council meetings. Davis's time of service on the City Council clearly continued after she had commenced her campaign for State

Senate District 10 in August 2007. Her service as City Council District 9 representative did not end until January 8, 2008, when her successor was duly qualified for office and administered the oath of office in accordance with Chapter III, Section 5 of the City Charter. Consequently, Davis's actions clearly establish that she has not avoided the ineligibility provisions of Article III, section 19 of the Texas Constitution as a candidate for State Senate District 10.

**C. The Oath of Office Taken by Joel Burns on January 1, 2008 Did Not Qualify Him, on That Date, as the Successor to Davis as City Council Representative District 9.**

Joel Burns was the winning candidate to succeed Ms. Davis on the City Council. The vote of the run-off election was canvassed at a special meeting of the City Council on December 27, 2007 (C.R. 80, 81). At that special meeting, Mayor Moncrief advised Mr. Burns that he would receive his "Oath of Office" at the January 8, 2008 meeting of the City Council, the next meeting of the Council (C.R. 81). On January 1, 2008 Mr. Burns had a retired Justice administer the oath to him (C. R. 31). On December 31, 2007 members of the public had challenged Davis's eligibility as a candidate for Senate District 10 and asked the then Chairman of the Tarrant County Democratic Party to declare her ineligible (C.R. 31, 82). Thus the Davis campaign was on notice that she had a problem.

Chapter Three (entitled "The City Council"), Section 5 of the Fort Worth City Charter provides that "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" ( Exhibit P, pp. 6-7). This same Section further provides that "[T]he Council shall determine its own rules of procedure. . . . . ( Exhibit P, p7).

Chapter 27 (entitled "Miscellaneous"), Section 26 of the Fort Worth City Charter provides in relation to any elections in general that "the election of officers to be elected at such election

shall be entitled to qualify immediately after the declaration of the council of the result of the election and upon taking the oath as prescribed by law” (Exhibit P, p 36).

It is obviously necessary to construe these provisions in determining whether the oath of office that Joel Burns took on January 1, 2008 was sufficient to qualify him as the successor in office to Wendy Davis. Texas courts construe city charter provisions “according to the rules governing the interpretation of statutes generally.”<sup>6</sup> *City of Houston v. Todd*, 41 S.W.3d 289, 297 (Tex. App. - Houston [1<sup>st</sup> Dist. ] 2001, pet denied). The main objective in construing a statute is to “determine and give effect to the intent of the lawmaking body.” *Id* at 297-98 (citing *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W. 2d 482, 484 (Tex. 1998)). Courts seek to “give effect to each sentence, clause, and word of a statute if reasonable and possible.” *Rossano v. Townsend*, 9 S.W. 3d 357, 363 (Tex. App. - Houston [14<sup>th</sup> Dist.] 1999, no pet) (citing *Perkins v. State*, 367 S.W. 2d 140, 145 (Tex. 1963)).

Another guiding principle of statutory construction provides that if a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both but if the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail. Tex. Gov’t Code § 311.026. A corollary is that the specific will control over the general especially if it is enacted later in time. *Phuong Thai Than v. State*, 918 S.W.2d 106, 108 (Tex.App.-Fort Worth 1996, no pet.).

Courts have also followed the Texas legislature’s guidance with regard to the appropriate factors to consider when construing a state statute as set forth in Tex. Gov’t Code § 311.023. *Todd*,

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<sup>6</sup> Matters of statutory construction are questions of law for the court to decide. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989) (cited by *City of Houston v. Todd*, 41 S.W. 3d 289, 297 (Tex. App. - Houston[1st Dist.]2001, pet denied.)).

41 S.W.3d at 298, 301. Among those factors is administrative construction of the statute. Tex. Gov't Code § 311.023 (6). "The construction given to a statute by the administrative agency charged with its execution is entitled to serious consideration if it is reasonable, consistent with the Legislature's intent, and does not contradict the plain language of the statute." *Ins. Co. of Pa. v. Moore*, 43 S.W.3d 77, 81-82 (Tex.App.-Fort Worth 2001, no pet.) (citing Tex. Gov't Code Ann. § 311.023(6) (Vernon 1998) and *Tex. Water Comm'n v. Brushy Creek Mun. Util. Dist.*, 917 S.W.2d 19, 21 (Tex.1996)). "Construction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute. *Stanford v. Butler*, 181 S.W.2d 269, 273 (Tex.1944)." *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex.1993).

Realtor respectfully suggests that the same deference given to an administrative agency in construing a statute should be given to a City in construing a provision of its own city charter. Obviously, the City is not only the body which interprets and enforces the provisions of the charter in the first place but it is also the legislative body which was responsible for enacting the ordinance originally. Indeed, the Austin Court of Appeals has opined that the opinions of those enforcing a city charter provision is persuasive. "Although not binding on the court, a construction placed on an ambiguous provision by City or State officers in carrying out the provisions of a charter is entitled to persuasive force, and will ordinarily be upheld unless clearly erroneous." *City of La Porte v. State ex rel. Rose*, 376 S.W.2d 894, 906 -907 (Tex. Civ. App.- Austin 1964), *rev'd in part on other grounds*, 386 S.W. 2d 782 (Tex. 1965).

When applying these various factors to consider in construing the Fort Worth City Charter, the questions are (1) can the provisions regarding oath of office be reconciled, (2) if there is a conflict, which is the specific provision, (3) which provision was enacted later in time and (4) how does the City of Fort Worth interpret the provisions. Chapter 3, §5 of the Charter specifies that the



oath of office for the "City Council members" shall take place at the first meeting of the Council following the canvassing meeting. Chapter 27 § 26 provides that "officers" shall be entitled to qualify immediately after the declaration by the Council and upon taking the oath. In the second provision "immediately" is not defined and does not otherwise give any specific direction as to the intended meaning of the term. It could be read to mean immediately upon taking the oath, whenever that might be, or to mean as soon as possible, i.e at the next meeting of the City Council, which in this matter occurred on January 8, 2008. If there is any conflict between the two provisions, then we look to see which is the more specific and which was enacted later in time. Chapter 3 of the Fort Worth City Charter is entitled "THE CITY COUNCIL" and contains provisions for "members" of the Council. It specially states that the oath of office will be taken at the Council meeting after the canvas, thus providing for a date certain and uniform. Section 5 of the Chapter 3 was last amended on May 13, 2006. On the other hand, Chapter 27 is entitled "MISCELLANEOUS", its provisions are general in nature and are derived from an earlier charter. The term "officers" in Section 26 could apply to any elected offices the City wished to create, not just to "members" of the City Council.

As noted it is also persuasive as to how the City of Fort Worth interpreted its Charter. At the special meeting of the Council on December 27, 2007 to canvas the vote, Mayor Moncrief advised Joel Burns that he would be administered the oath of office at the next meeting, January 8, 2008 meeting of the Council. Mr. Burns was present at the meeting and the minutes reflect that he stated he "looked forward to getting up everyday and working for the City of Fort Worth" (C.R. 81). Mayor Moncrief advised Mr. Burns that he would receive his "Oath of Office" during the January 8, meeting (C.R. 81). There was no suggestion that it would be appropriate for Mr. Burns to take the oath prior to that date. At the January 8, 2008 meeting, the meeting commenced without Mr. Burns at the dais and it was not until prior minutes had been approved and the City Secretary

administered the oath of office that Mr. Burns was allowed to assume a place as a member of the City Council. Thus, it was apparent that the City did not operate under the assumption that the oath of office Mr. Burns had taken on January 1 and faxed to the City Secretary on that date was sufficient to qualify Mr. Burns as the successor to Ms. Davis. It is also instructive that the City of Fort Worth continued to pay Ms. Davis her salary as a council member after January 1, 2008.

In summary, the court can harmonize the two provisions of the Fort Worth City Charter, apply the specific over the general, the later over the older and/or give effect to how the City of Fort Worth interpreted and enforced its own Charter. In any case there is an inevitable conclusion that the oath Mr. Burns took on January 1 was not an authorized procedure under the Charter and did not qualify him as the successor to Ms. Davis. Ms. Davis, as a matter of law, remained the City Council member from District 9 until Mr. Burns took the qualifying oath on January 8, 2008.

#### **PRAYER FOR RELIEF**

For the foregoing reasons, Realtor requests this Court issue a Writ of Mandamus compelling the Respondents to rule Wendy Davis ineligible to run as a candidate for the State Senate, to deliver to Wendy Davis written notice of the reason for the rejection and to certify in writing a declaration of ineligibility to the canvassing authority for the election. See Texas Election Code §145.003. Realtor further requests such other relief as to which the Realtor may be entitled.

Respectfully submitted,

BY:



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served by E-Mail and Certified Mail to each counsel listed below on this 15th day of August, 2008.

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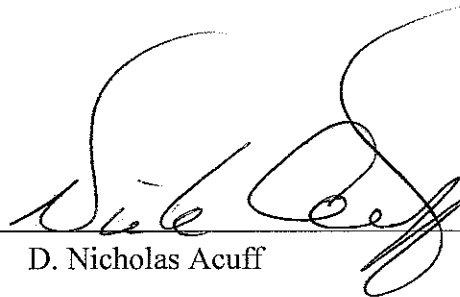
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BY:



D. Nicholas Acuff

## APPENDIX

TAB A - Briefing Scheduling of the Court and Appeals and Appellants Motion to Reconsider Order on Acceleration of Appeal.

TAB B - Agreed Stipulations of Facts and Exhibits.

**TAB A**



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 02-08-00305-CV**

**KIM BRIMER**

**APPELLANT**

**V.**

**STEPHEN C. MAXWELL, IN HIS  
CAPACITY AS CHAIRMAN OF THE  
DEMOCRATIC PARTY OF  
TARRANT COUNTY, AND BOYD L.  
RICHIE, IN HIS CAPACITY AS  
CHAIRMAN OF THE TEXAS  
DEMOCRATIC PARTY, AND  
WENDY R. DAVIS**

**APPELLEES**

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**FROM THE 236TH DISTRICT COURT OF TARRANT COUNTY**  
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**ORDER**  
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We have considered the "Appellant's Unopposed Motion To Accelerate Appeal."

The motion is **GRANTED IN PART**. See TEX. R. APP. P. 40.1(c) (allowing court to give precedence to case in the interest of justice); TEX. ELEC. CODE ANN. § 145.035 (Vernon Supp. 2007) ("A candidate's name shall

be omitted from the ballot if the candidate . . . is declared ineligible on or before the 74<sup>th</sup> day before election day.”).

It is **ORDERED** that the appellant’s brief is due **August 19, 2008**. The appellees’ briefs shall be due twenty (20) days from the filing of the appellant’s brief. After all appellees’ briefs are filed, the case will be submitted on the earliest practicable date upon notice to the parties. See TEX. R. APP. P. 39.9.

The clerk of this court is directed to transmit a copy of this order to the attorneys of record.

DATED July 31, 2008.

PER CURIAM



NO. 02-08-00305 CV  
IN THE COURT OF APPEALS  
SECOND DISTRICT OF TEXAS

---

KIM BRIMER

Appellant

v.

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

Appellees

Trial Court Cause No. 236-231160-08  
in the 236<sup>th</sup> District Court  
of Tarrant County, Texas,  
Honorable Tom Lowe, Judge Presiding

08/13/08 13:07

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**APPELLANT'S MOTION TO RECONSIDER ORDER ON ACCELERATION AND  
SUGGESTING AN EMERGENCY**

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TO THE HONORABLE SECOND DISTRICT COURT OF APPEALS:

Appellant KIM BRIMER asks the Court to reconsider its prior Order on Appellant's Unopposed Motion to Accelerate this Appeal.

1. This Court previously granted Appellant's Motion to Accelerate "in part" and ordered Appellant's Brief to be filed by August 19, 2008 and Appellees' Briefs to be filed 20 days after the filing of Appellant's Brief.

2. Appellant's Brief was filed on August 8, 2008 and served on Appellees on that date by email and by certified mail.

3. Under the current order of the Court, the Appellees' Briefs are not due until August 28, 2008. Section 145.035 of the Texas Election Code provides that the last day on which a candidate's name "shall be omitted from the ballot if the candidate withdraws, dies, or is declared ineligible" is on or before the 74<sup>th</sup> day before the general election, thereby demonstrating the need for an expedited resolution. See TEX.ELEC.CODE ANN. §145.035 (Vernon Supp. 2007). The 2008 General Election will occur on November 4, 2008. The 74<sup>th</sup> day prior the Election is August 22, 2008.

4. Thus, under the current order of this Court, the Appellees' Briefs would not be due and this Court would not render a decision regarding the eligibility of Appellee Davis until the after the deadline for Ms. Davis's name to be removed from the ballot. As a result the voters of Texas Senate District 10 will see Ms. Davis's name of the ballot even if she is ineligible as a candidate for the State Senate.

5. Given the significance of the issues in this matter, Appellant respectfully suggests that the current order is not in the best interest of justice to the parties or to the voting public.

6. Appellant moves this Court to revise its Order on acceleration and given the approaching deadlines requests that this Court treat the matter as an emergency and issue a new Order without delay.

#### CERTIFICATE OF CONFERENCE

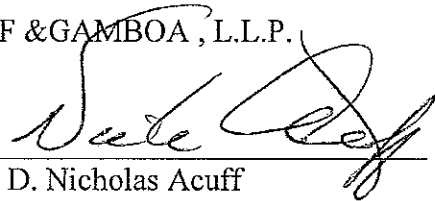
7. Last week the undersigned counsel received the letter attached hereto as Exhibit A from Robert Myers, one of Ms. Davis's attorneys. Yesterday, the undersigned counsel emailed all of the attorneys for Appellees inquiring as to when the responses briefs could be expected and stating an intention to file with this Court a motion to expedite the process. Mr. Hicks, an attorney

for Mr. Maxwell, responded by email that he was opposed to any such motion and Mr. Myers, the attorney for Ms. Davis, forwarded the letter attached hereto as Exhibit B via email. Thus the matter is submitted to Court.

Respectfully submitted,

ACUFF & GAMBOA, L.L.P.

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This is to certify that a true and correct copy of the foregoing document has been served by E-Mail and Fax to each counsel listed below, on this 13th day of August, 2008.

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July 29, 2008

\*No Attorney Certified in These  
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Mr. Nick Acuff  
Acuff & Gamboa, LLP  
2501 Parkview Drive Ste. 408  
Fort Worth, Texas 76102

re: Brimer v. Maxwell, et. al.

Dear Nick:

I just left word on your voice message system. Our side proposes that we enter into an agreed briefing schedule and submit the agreement to the Second Court. The proposed briefing schedule is that Appellant Brimer would file his brief by this Friday, August 1<sup>st</sup> and that the other parties would file their briefs by Tuesday, August 5<sup>th</sup>. Any reply briefs would then be due immediately at any time prior to submission. While we recognize that this is an aggressive schedule, the issues were fully briefed below as well as in January of this year. Please let me know if you are agreeable to this proposal and we will forward an agreement for your signature. Thank you for your courtesies.

Kindest regards,



Robert J. Myers

c: client  
Mr. Hicks  
Mr. Dunn  
Co-counsel

EXHIBIT A

# Robert John Myers & Associates

*Attorneys at Law*

West Fort Worth Law Center

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Mr. Nick Acuff  
Acuff & Gamboa  
2501 Parkview Drive, Ste. 405 re: Brimer v. Maxwell, et. al.  
Fort Worth, TX. 76102

Dear Nick:

We were very anxious to expedite the process when I wrote you and requested agreement on a briefing schedule well prior to the Court's issuance of its own scheduling order. Who is to say whether the Court would have honored our agreement had it been sent before they issued their own. In any event, to our disappointment, we did not present the Court with an agreement prior to their own scheduling order being issued.

Like Mr. Hicks, Wendy's counsel re-arranged numerous matters around the Court's order. Mr. Ray is on vacation, Mr. Wood involved in another pressing matter and I have scheduled out of town depositions in other cases for this and next week. We will endeavor to get Wendy's brief filed promptly, but I cannot promise you that it will be well in advance of the 28th for the reasons aforesaid.

For Wendy, at least, she does not wish to waive oral argument.

You may include this letter as part of your certificate of conference with Wendy's counsel with regard to whatever request for relief you file with the Court. Thank you for your courtesies.

Kindest regards,

  
Robert J. Myers

c: client  
Messrs. Wood and Ray  
Mr. Hicks  
Mr. Denn

San Antonio

Austin

Ft. Worth-Dallas

EXHIBIT B