

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

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IN THE COURT OF APPEALS FOR THE  
SECOND DISTRICT OF TEXAS  
FORT WORTH, TEXAS

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IN RE R. JOHN CULLAR, and THE TEXAS DEMOCRATIC PARTY  
Relators

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EMERGENCY PETITION FOR WRIT OF MANDAMUS

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## PREAMBLE

Relators request Brian Birdwell be declared ineligible because numerous public records indicate he was registered to vote in Virginia in 2006, that he did in fact vote there in 2006, and that the 2006 Virginia residency is supported by additional, corroborating public records. The Texas Constitution requires state senators reside in the state five years preceding their election. Because public records prove Brian Birdwell was a resident of Virginia at least in November, 2006, he is ineligible for election to the Texas Senate.

Should this Court permit Mr. Birdwell's candidacy under the uncontested facts of this case, it will have voided a provision in the State Constitution and it will have declared Texas a political free range where candidates from anywhere in the state can move to another area on a whim and seek public office. Candidates from out of state can similarly come here and seek election despite their legal residency in other states.

## STATEMENT OF THE CASE

Relator, R. John Cullar, is the Democratic Nominee for the 2010 General Election for the Office of Texas Senate, District 22. Relator, the Texas Democratic Party, is the political party that nominated R. John Cullar for election to the Office of Texas Senate, District 22. In this original proceeding, Relators seek a judicial declaration of ineligibility of the Republican Nominee for the General Election for the Office of Texas Senate, District 22. The Republican Nominee is Brian Birdwell, Real Party in Interest herein. Respondent is Steve Munisteri, Chairman of the Republican Party of Texas.

Brian Birdwell was a resident of the Commonwealth of Virginia from 2004 to, and including, 2006. Public records establish that Brian Birdwell voted in the 2006 General Election in Virginia and that Brian Birdwell registered as a “new voter” in Texas on June 13, 2007.

Article 3, §6 of the Texas Constitution requires that a candidate for Texas Senate must reside in Texas for at least five years immediately preceding the election. Therefore, Brian Birdwell is not an eligible candidate for the Office of Texas Senate, District 22 and the law requires he be declared ineligible and removed from the ballot.

## STATEMENT OF JURISDICTION

This Court has jurisdiction of this case pursuant to TEX. ELEC. CODE § 273.061 which permits a Court of Appeals to issue writs of mandamus in order to ensure compliance with the state's election laws. The Court also has jurisdiction under its general powers to issue writs and other orders as granted by Article 5 of the Texas Constitution and TEX. GOV. CODE § 22.221.

This Court is a correct venue for this proceeding pursuant to TEX. ELEC. CODE § 273.063 because the territory covered by the election is partly situated in this appeals court district. Senate District 22 includes Bosque, Coryell, Ellis, Falls, Hill, Hood, Johnson, McLennan, Navarro, and Somervell Counties. *See* [http://www.senate.state.tx.us/Icons/Dist\\_Maps/Dist22\\_Map.pdf](http://www.senate.state.tx.us/Icons/Dist_Maps/Dist22_Map.pdf) (accessed August 5, 2010). The Fort Worth Court of Appeals District includes Hood County. *See* TEX. GOV. CODE § 22.201(c).

## ISSUE PRESENTED

1. Should the Court issue a writ of mandamus declaring Brian Birdwell ineligible as a candidate for election to the Office of Texas Senate, District 22 because he has not been a resident of state for the consecutive five years preceding the election?

## STATEMENT OF FACTS

### Emergency Facts

On August 20, 2010, the ballot for the 2010 General Election will become final and this case will arguably become moot. *See* TEX. ELEC. CODE § 145.035 and <http://www.sos.state.tx.us/elections/laws/advisory2010-06.shtml> (accessed August 5, 2010). *See also, Brimer v. Maxwell*, 265 S.W.3d 926 (Tex. App. -- Dallas 2008). Relator, R. John Cullar, was made the nominee of the Texas Democratic Party last night, August 5, 2010. This proceeding was brought as soon as possible after the nomination of Mr. Cullar, the next morning. Because Texas Courts have found only nominees have standing to bring a challenge to the eligibility of another candidate in a given race, *Brimer*, 265 S.W.2d at 928, this Court should issue its ruling before August 20, 2010.

### 2010 Election Facts, Senate District 22

On January 13, 2010, the incumbent Senator for District 22, Kip Averitt, announced he was withdrawing from the November General Election. *See* App. at 8. Since the filing deadline was January 4, 2010, the candidates were already set for this race. *See* TEX. ELEC. CODE § 172.023(a). The Texas Democratic Party did not nominate a candidate for this office and there was one Republican candidate in addition to Senator Averitt running, Darren Yancy. *See* App. at 8.

However, Senator Averitt did not formally withdraw from the Primary and he was on the ballot when votes were cast on March 2, 2010; Senator Averitt garnered 60.08% of

the vote. *See* <http://elections.sos.state.tx.us/elchist.exe> (accessed August 5, 2010). Because Senator Averitt won the election and he had not formally withdrawn, he became the Nominee of the Republican Party of Texas for the 2010 General Election for the Office of State Senator, District 22.

On March 17, 2010, Senator Averitt resigned his office but continued to withhold formally withdrawing from the 2010 General Election. *See* App. at 9. The vacancy in office set up a May 8, 2010 Special Election to choose a candidate to complete the old term of office for Senate District 22. *See id.* The date for this Special Election was set on May 8, 2010. *See id.* David Sibley, the incumbent Senator for this office immediately prior to Senator Averitt, announced for the office. *See id.* Brian Birdwell also announced for the office. *See id.* Immediately, Mr. Yancy and Mr. Sibley raised questions concerning the eligibility of Mr. Birdwell on the basis that he was a recent, voting resident of Virginia. *See id.* Despite the serious questions raised about Mr. Birdwell's eligibility, he continued in the race and Respondent, the Republican Party of Texas, took no action to declare Mr. Birdwell ineligible. *See* App. at 13-24. Every Republican candidate in the race publicly expressed reservations concerning Mr. Birdwell's residency and eligibility. *See id.*

Evidently Mr. Birdwell knew he had an eligibility issue because in April, Mr. Birdwell filed a "friendly suit" seeking declaratory judgment that he was eligible. Upon information and belief, the suit was styled *In Re Birdwell*. Upon information and belief,

there were no other parties. Neither the Texas Democratic Party, R. John Cullar, nor any Democratic Party official was given notice of the suit. Senior Judge William Brigham granted the declaratory relief in a case the court was without jurisdiction to hear because the matter was not ripe and the case did not amount to a case and controversy.

Brian Birdwell ultimately prevailed in a June 22, 2010 runoff of the special election to complete Senator Averitt's old term. *See* <http://elections.sos.state.tx.us/elchist.exe> (accessed August 5, 2010) and App. at 25. Even after the special election, Senator Averitt re-affirmed publicly that he feared Mr. Birdwell would be declared ineligible by the courts. *See* App. at 25-27. Respondent Munisteri continued to take no action and in fact, his spokesman, Bryan Preston, publicly declared Respondent would not consider Mr. Birdwell's eligibility under TEX. ELEC. CODE § 145.003. *See* App. at 46

Senator Averitt initially publicly questioned whether he would actually withdraw from the 2010 General Election ballot as he promised because he was worried Mr. Birdwell was ineligible for the office. *See* App. at 30-33. On June 25, 2010, Senator Averitt finally withdrew from the 2010 General Election by forwarding a written withdrawal to the Texas Secretary of State. *See* App. at 36. *See also*, TEX. ELEC. CODE § 145.033. The Republican Party of Texas was permitted to fill the vacancy in the Republican nomination because no other party had a nominee for the office. *See* TEX.

ELEC. CODE § 145.036(b)(2). The Texas Democratic Party was also permitted to choose a nominee. *See* TEX. ELEC. CODE § 145.036(c).

On July 2, 2010, Mr. Birdwell was sworn in to complete Mr. Averitt's old term. *See* <http://www.senate.state.tx.us/75r/senate/members/dist22/dist22.htm> (accessed August 5, 2010).

On July 23, 2010, the Republican County Executive Committee selected Mr. Birdwell as the Republican Nominee for the 2010 General Election. *See* App. at 45 and <http://corsicanadailysun.com/local/x2105965105/Birdwell-chosen-for-November-ballot> (accessed August 5, 2010).

On August 5, 2010, the Democratic County Executive Committee selected R. John Cullar as the Democratic Nominee for the 2010 General Election.

The next day, on August 6, 2010, when this Court's clerk opened for business, Relators filed their Emergency Petition for Writ of Mandamus seeking a declaration of ineligibility for Brian Birdwell. This proceeding was initiated immediately after the Texas Democratic Party had a candidate for this race and therefore had standing to bring same. *See Brimer v. Maxwell*, 265 S.W.3d 926, 928 (Tex. App. -- Dallas 2008) *citing Allen v. Fisher*, 118 Tex. 38, 41, 9 S.W.2d 731, 732 (1928).

#### Residency Facts, Brian Birdwell

It is undisputed Brian Birdwell was born in Texas on November 3, 1961.

Beginning in November of 1998, public records reveal Mr. Birdwell began voting in elections in Tarrant County, Texas. *See* App. at 5. Mr. Birdwell, though stationed outside of the state due to active service in the United States Army, continued to vote in Tarrant County, Texas, as a resident thereof, until and including the November 2, 2004 General Election. *See id.*

However, public records in Virginia reveal that on February 20, 2004, Mr. Birdwell registered to vote in Prince William County. *See* App. at 1. On his application, Mr. Birdwell listed 6039 Gholson Bridge Ct, Manassas, Virginia, 20112 as his residence address. *See id.* This same record reflects Mr. Birdwell did not take the steps to cancel his Virginia voter registration until June 5, 2008. *See Id.*

The Virginia public records reveal Mr. Birdwell voted as a resident and citizen of the Commonwealth of Virginia on November, 2, 2004, May 14, 2005, November 8, 2005 and November 7, 2006. *See* App. at 2.<sup>1</sup> Further, the public records reveal Mr. Birdwell voted a “Full Ballot” in November of 2006 and not just a ballot of federal candidates. *See id.*

Also, on March 3, 2006 and again on April 1, 2007, Mr. Birdwell requested and received a resident fishing license when a non-resident license was available. *See* App. 3-4. The licenses state thereon that it is a crime under Virginia law to request a resident

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<sup>1</sup> The public records reveal Mr. Birdwell voted in Texas and Virginia in November of 2004. *Compare* App. at 2 and App. at 5. Mr. Birdwell has said publicly that his brother must have accidentally voted for him in Texas in 2004. *See* App. at 44. Resolution of this issue is unnecessary since the alleged double voting occurred outside the five year residency window at issue in this case.

fishing license if the applicant is not, in fact, a resident. *See id.* *See also*, VA. CODE § 29.1-337.1.

Not until, June 13, 2007 did Mr. Birdwell again seek voter registration in Texas. *See* App. at 6. This time in Hood County. *See id.* The official public record of Mr. Birdwell's 2006 Texas Voter registration bears his signature and his selection as a "new" registrant and not a "change" or "replacement" registrant. *See id.* Since June 13, 2007, Mr. Birdwell has consistently voted in Hood County. *See* App. at 7.

Therefore, at the very earliest, Mr. Birdwell did not become a resident of Texas again until November 8, 2006, the day after he voted last in Virginia, and more likely June 13, 2007, the day when he requested registration as a new voter in Texas.

## ARGUMENT

### A. THE COURT SHOULD ISSUE MANDAMUS RELIEF BECAUSE BRIAN BIRDWELL IS NOT AN ELLIGIBLE CANDIDATE.

The Texas Constitution provides in Article 3, Section 6:

Sec. 6. QUALIFICATIONS OF SENATORS. No person shall be a Senator, unless he be a citizen of the United States, and, at the time of his election a qualified voter of this State, and shall have been a resident of this State five years next preceding his election, and the last year thereof a resident of the district for which he shall be chosen, and shall have attained the age of twenty-six years.

Therefore the Framers clearly intended members of the Texas Senate to have five years of consecutive residency immediately before the Senate election in order to be eligible to seek election as the Senator.

Texas Election Code § 1.015 leaves the determination of residency to the Courts and issues a few limitations:

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

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

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

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

(e) A person who is an inmate in a penal institution or who is an involuntary inmate in a hospital or eleemosynary institution does not, while an inmate, acquire residence at the place where the institution is located.

Texas Courts have typically fixed the residence of a candidate or voter in the place the voter intended to reside. *See State v. Fischer*, 769 S.W.2d 619, 623-4 (Tex. App. -- Corpus Christi 1989) *citing Mills v. Bartlett*, 377 S.W.2d 636 (Tex. 1964). The Corpus Christi Court of Appeals explained:

Volition, intention, and action are factors to be considered in determining where a person resides and these factors are equally pertinent in denoting the permanent residence or domicile. Neither bodily presence nor intention, standing alone, will suffice to create residence, but at the moment the two coincide, the residence is fixed and determined.

*Id.* These cases are often difficult to resolve as there is competing evidence of residency. For example, in *Mills*, the seminal Texas Supreme Court authority on the subject, the Court found entering into a contract to be a law partner at a firm in a particular

geographic region made that person a resident thereof when that evidence was coupled with evidence of intent to reside there. *See Mills*, 377 S.W.2d 636, 640 (Tex. 1964).

When, as is the case here, the Court can consider public records of actual voter registration and voting history, there is no difficulty resolving residency. It has been Texas law for over 40 years that a person's voter registration and voting history is conclusive as to that person's residence. *See McClelland v. Sharp*, 430 S.W.2d 518, 519-20 (Tex. Civ. App. -- Houston [14th] 1968)(original proceeding) *re-affirmed Culberson v. Palm*, 451 S.W.2d 927 (Tex. Civ. App. -- Houston [14th] 1970)(original proceeding).<sup>2</sup>

The Supreme Court has cited *McClelland* favorably. *See Garcia v. Carpenter*, 525 S.W.2d 160 (Tex. 1975)(original proceeding). The Supreme Court has cited *McClelland* while finding that public records reveal a candidate ineligible. *See Sears v. Bayoud*, 786 S.W.2d 248 (Tex. 1990) (original proceeding).

The Dallas Court of Appeals has also held that voter registration history is conclusive as to a candidate's residence. *See Witherspoon v. Pouland*, 784 S.W.2d 951, 954 (Tex. App. -- Dallas 1990) (original proceeding). The Tyler Court of Appeals has similarly so found. *See Nixon v. Slagle*, 885 S.W.2d 658, 661-62 (Tex. App. -- Tyler 1994) (original proceeding). Finally, the Waco Court of Appeals found past voter history conclusive on residency but it determined when the law permitted voting in a past precinct without giving up residence, voter history alone would not be conclusive. *See In*

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<sup>2</sup> In *Hayes v. Harris County Democratic Executive Committee*, 563 S.W.2d 884 (Tex.Civ.App. — Houston [14th Dist.] 1978, orig. proceeding), the Houston Court also found that a public record of a felony conviction was sufficiently conclusive.

*Re Jackson*, 14 S.W.3d 843, 847 (Tex. App. -- Waco 2000) (original proceeding). There is no statute in Virginia or Texas that saves Mr. Birdwell's candidacy under *In Re Jackson*.

Out of state Courts have similarly found voter registration and voting history to be conclusive as to a person's residence. *See Neely v. Board of Election Commissioners*, 371 Ill.App.3d (2007) and *People v. Platt*, 117 N.Y. 159, 22 N.E. 937 (1889).

The public records before the Court reveal that Mr. Birdwell sought voter registration in Virginia as a resident on February 20, 2004. *See* App. at 1. Mr. Birdwell voted in Virginia on November, 2, 2004, May 14, 2005, November 8, 2005 and November 7, 2006. *See* App. at 2.

Also, on March 3, 2006 and again on April 1, 2007 Mr. Birdwell requested and received a resident fishing license when a non-resident license was available. *See* App. 3-4. The licenses state thereon that it is a crime under Virginia law to request a resident fishing license if the applicant is not, in fact, a resident. *See* Id. *See also*, VA. CODE § 29.1-337.1. Not until, June 13, 2007 did Mr. Birdwell again seek voter registration in Texas and he does so as a new resident and not as a transfer from elsewhere in the state. *See* App. at 6.

Article II, § 1 of the Virginia Constitution requires voters in the Commonwealth to be residents of the state. Residency according to their Constitution "requires both domicile and a place of abode." The state's laws also require residency to vote in the

state and a given precinct. *See* VA. CODE § 24.2-101. The law states, “To establish domicile, a person must live in a particular locality with the intention to remain. A place of abode is the physical place where a person dwells.” *Id.* A registrant must swear to their application and the application must inform the registrant that voting in more than one jurisdiction is a felony. *See* VA. CODE § 24.2-418. *See also*, App. at 51-4. Furthermore, Virginia Law finds that a voter registration is *conclusive evidence* of a person’s eligibility to vote if it is not challenged within six months. *See* VA. CODE § 24.2-434. Therefore, in order to vote in Virginia, Mr. Birdwell was a resident and he so swore. A voter is not an eligible registrant in Texas if he is registered elsewhere. *See* TEX. ELEC. CODE § 16.031.

The overwhelming and unanimous authority is that Mr. Birdwell’s voting in Virginia in 2006, coupled with the other public records, establishes his residency in Virginia during that time. As a result, Mr. Birdwell does not meet the Constitutional eligibility requirements for State Senate.

B. THE COURT SHOULD ISSUE MANDAMUS RELIEF BECAUSE DENYING SAME WOULD BE TO PRESUME MR. BIRDWELL COMMITTED MULTIPLE FELONIES.

Virginia Law makes it a felony to register to vote in more than one residence. *See* VA. CODE § 24.2-1004(C). Also, an application for registration in Virginia includes an oath of residency that, if false, is punishable by a felony. *See* VA. CODE § 24.2-418. False representation of residency on Virginia forms is an independent felony. *See* VA.

CODE § 24.2-1016. There are similar criminal offenses in Texas. *See e.g.*, TEX. ELEC. CODE § 13.007.

In the event the Court denies the Mandamus it will have implicitly found Mr. Birdwell's activities in Virginia were felonious. A person, separate from residency issues, is ineligible for election to office if they are a felon. *See* TEX. ELEC. CODE § 141.001. The Court should avoid a decision in this case that directly or implicitly finds Mr. Birdwell committed a felony.

### C. EQUITY REQUIRES THE ISSUANCE OF A MANDAMUS.

Mandamus proceedings are equitable in nature. *See Sears v. Bayoud*, 786 S.W.2d 248 (Tex. 1990) (original proceeding). Here, the Republican Party of Texas refused to perform their ministerial duty to determine the eligibility of candidates for its nomination. *See* App. at 46. The Republican Party of Texas continued to refuse to perform this legal duty even though every other candidate who sought the Republican nomination questioned Mr. Birdwell's eligibility. *See* App. at 8-50. This Court should not allow important provisions in the Texas Constitution and The Texas Election Code to be ignored.

Moreover, the most important issue is the election of a person who has the Constitutional connection to the district. Though this election is technically for a full term, as a practical matter, the elected Senator will only serve two years before standing

for re-election.<sup>3</sup> The upcoming Legislative Session will include apportionment. The most important attribute a candidate must possess during an apportionment session is the requisite time spent in the district with the corresponding relationship with its residents.

The Founders had excellent reasons to require a five year residency when they laid down that requirement in the Constitution. “The purpose of residency statutes is to ensure that governmental officials are sufficiently connected to their constituents to serve them with sensitivity and understanding.” *See Lewis v. Gibbons*, 80 S.W.3d 461 (Mo. 2002)(en banc). Courts have held they also serve the purposes of “preserv[ing] the purity of elections” and “prevent[ing] the control of state affairs by persons who have no pecuniary interest in them.” *See Hall v. Beals*, 292 F. Supp. 610, 614 (D. Colo. 1968) *citing Mauff v. People*, 52 Colo. 562, 123 P. 101 (1912) and *Merrill v. Shearston*, 73 Colo. 230, 214 P. 540 (1923). Not to enforce the residency provision when conclusive facts exist to show a lack of residency qualifications, will void the plain language of the Texas Constitution.

If the Court declines to grant relief in this case, residency is no longer a viable requirement for candidates of any office in the state.

#### PRAYER

WHEREFORE, PREMISES CONSIDERED, Relators, R. JOHN CULLAR and THE TEXAS DEMOCRATIC PARTY, pray that the Court grant their Emergency

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<sup>3</sup> Article 3, Section 3 of the Texas Constitution requires that a “new Senate” be elected after “every apportionment.”

Petition for Writ of Mandamus and issue a mandamus declaring Brian Birdwell ineligible to seek election to the Office of Texas Senate, District 22 for the 2010 General Election and further directing Respondent to remove Brian Birdwell as the nominee and to take such actions as are necessary before August 20, 2010 to have Brian Birdwell removed from the 2010 General Election Ballot.

Filed: August 5, 2010.

Respectfully submitted,

R. JOHN CULLAR and  
the TEXAS DEMOCRATIC PARTY

By: \_\_\_\_\_

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, pursuant to Tex. R. App. Pro. 9.5(a), a true and correct copy of the foregoing has been sent to all counsel of record and/or all interested parties, as listed below, by postage prepaid certified mail, return receipt requested, and/or by regular U.S. first class mail on this, the 6<sup>th</sup> day of August, 2010.

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APPENDIX

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