

CASE NO. 2-08-018-CV

IN THE COURT OF APPEALS FOR THE
SECOND DISTRICT OF TEXAS
FT. WORTH, TEXAS

IN RE JAVIER CERDA, CULLEN COX and RICKEY TURNER
Relators

**BRIEF FOR RESPONDENTS
BOYD RICHIE AND ART BRENDER**

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I.
STATEMENT OF CASE

Article III, § 19, of the Texas Constitution provides that no one holding a “lucrative office” shall, during the “term” for which she is elected, be “eligible” to sit in the Texas Legislature. As an elected member of the Fort Worth City Council, Wendy Davis was holding a lucrative office. *See Willis v. Potts*, 377 S.W.2d 622, 625 (Tex. 1964) (holding that receiving compensation for services as a City Councilmember makes the office of councilmember a lucrative office under Art. III, § 19). This is the last legal point on which the Petitioners and Respondents agree.

Using the backdrop of the Texas Constitution’s holdover provision, Art. XVI, § 17, the Petitioners string together a list of legally insupportable claims and assumptions. The Petitioners argue that whether Wendy Davis was holding her Fort Worth City Council position at the time she applied to run as a candidate for Texas Senate District 10 in the Democratic Party Primary is to be determined as of the time she filed the first of her two applications for the District 10 candidacy. They argue that her holdover status as a councilmember continued even after her duly elected and certified successor, Joel Burns, first took the oath of office for Fort Worth City Council District 9, on January 1, 2008. Finally, their entire argument rests on the assumption that Article III, § 19’s prohibition is triggered when the candidate *files* to run for the legislative office instead of when the term of that legislative office begins.

Each argument is unsupportable factually and legally.

II.
ISSUES PRESENTED

1. Do non-candidate registered voters have standing to bring this action?
2. Does Article III, § 19, make Wendy Davis ineligible to be elected to the Texas Legislature by the voters of Texas Senate District 10 under the facts of this case?
3. Do the circumstance surrounding the swearing-in of a candidate's replacement in their former office establish conclusive facts such that a Democratic Party official had the clear and unmistakable duty to declare the candidate ineligible?
4. Would a declaration of ineligibility in this case serve the public interest?
5. Does the unreasonable delay by Petitioners in requesting an equitable mandamus bar the relief requested?

III.
STATEMENT OF FACTS

Wendy Davis has served the citizens of the City of Fort Worth as a city councilperson since 1999. Building on her outstanding service to the community, Ms. Davis sought election to the Texas Senate, District 10. On August 9, 2007, at a Fort Worth City Council Meeting, Ms. Davis announced her resignation and her intention to seek election to the Texas Senate. On August 10, 2007, Ms. Davis sent a letter to her supporters announcing her resignation and intentions on another office. *See* attached Appendix 1.

In order to fill the pending vacancy on City Council, a special election was called for and held on November 6, 2007. Because none of the candidates received a majority of the vote, a run-off election was held on December 18, 2007. After the final canvas of the election results, it was determined that Joel Burns had been elected to replace Ms. Davis on the Fort Worth City Council. The Certificate of Election issued to Mr. Burns by the Mayor and City Secretary of the City of Fort Worth, attached hereto as Appendix 2, certified Mr. Burns' election as of December 27, 2007. At that time, Mr. Burns was eligible to take office.

As the replacement elections were unfolding, Wendy Davis filed a ballot application with Tarrant County Democratic Party Chairman Art Brender (Respondent herein) to seek election as the Democratic Party Nominee for the Texas Senate, District 10. This application was filed on December 3, 2007. At the time the application was received by Respondent Brender, it was well known in the community that Ms. Davis had resigned her seat on City Council and a very public and hard fought replacement election was underway.

On January 1, 2008, Joel Burns was sworn in as the Wendy Davis' replacement on the Fort Worth City Council. Attached hereto as Appendix 3 is the oath of office he executed that day. Attached hereto as Appendix 4 is the Statement of Elected Officer Joel Burns executed that day.

Hearing of Mr. Burns's swearing-in, Wendy Davis sent a letter to the Fort Worth City Secretary on January 1, 2008, relinquishing the councilmember position and "any and all emoluments of said office." *See* attached Appendix 5.

The following day, January 2, 2008, the last day to file for a place on the ballot, Wendy Davis filed another ballot application with respondent Brender that in all respects complies with the law.

Despite the public nature of all these events, Petitioners waited until January 11, 2008, to pursue their complaint erroneously filing their initial challenge at the Texas Supreme Court. On January 14, 2008 the Supreme Court denied Petitioners' Request for Mandamus without prejudice to re-file in the Court of Appeals. Petitioners then waited two more days before filing the instant case on January 16th, a full two weeks after what they claim was the erroneous determination of eligibility.

In this case, Petitioners argue that Wendy Davis should have been declared ineligible by Respondent Art Brender. Petitioners claim, without directly stating, that Ms. Davis' January 2, 2008 timely and accurate ballot application ought to be ignored and that the earlier December 3, 2007 ballot application controls and that further, because Ms. Davis was a City Council person on December 3rd, she was ineligible for the office she seeks. Petitioners would have the Court ignore the subsequent events and the simple fact that before the end of the filing period, Wendy Davis filed a complete and accurate ballot application that on its face entitled her to a place on the ballot. Petitioners would further have the Court ignore the requirement of the Texas Election Code that

ineligibility must be “conclusively established” by another “public record” other than the ballot application. At best, Petitioners’ argument is that Wendy Davis ought to be barred as a candidate despite her continuous and good faith effort to resign her former office and despite the fact that, at this point under any set of possible facts, she has been replaced in that office and no longer holds it under any conceivable argument.

IV.
ELECTION LAW STANDARD OF REVIEW

Petitioners seek the Court’s reversal of the Tarrant County Democratic Party Chair’s decision not to declare Wendy Davis ineligible. The statute for declaration of ineligibility requires:

- (f) A candidate may be declared ineligible only if:
 - (1) the information on the candidate's application for a place on the ballot indicates that the candidate is ineligible for the office; or
 - (2) facts indicating that the candidate is ineligible are conclusively established by another public record.

TEX. ELEC. CODE ANN. § 145.003(f) (emphasis added). None of these criteria exists in this case. Indeed, Petitioners did not even present a “public record” to Respondent Brender in their request to declare Ms. Davis ineligible. Petitioners state in their brief that this case presents “issues upon which election officials desperately need guidance for the courts.” *See* Mandamus Pet. at vii. Therefore, Petitioners contend that the legal matters raised by this case are unclear. If that is true, it was not conclusively established to Respondent Brender that Ms. Davis was ineligible.

In a mandamus action of this nature, all the Court must determine is whether Respondent Art Brender was presented with a public record that conclusively established Real Party in Interest Wendy Davis' ineligibility. *See In Re Jackson*, 14 S.W.3d 843, 848 (Tex.App.-Waco [10th Dist.] 2000). In other words, the Court is to judge the actions of Respondent Brender to determine if he had a clear and unequivocal duty to declare the Real Party in Interest Davis ineligible. Any doubt or lack of clarity on the matter requires the Court to uphold the actions of Respondent Brender. Any doubt or lack of clarity on the matter does not present a case for mandamus; rather, if there is any case at all, it is for a district court.

Texas Election Code Section 273.061 vests this Court with jurisdiction to issue writs of mandamus in connection with election proceedings against any public officer or officer of a political party, to compel the performance of any duty imposed upon them in connection with the holding of a primary election. *See* TEX. ELEC. CODE ANN. § 273.061 and Rel. Pet. at 5. In order for the writ to issue, however, the duty of the receiving officer must be one clearly fixed and required by law. *See Oney v. Ammerman*, 458 S.W.2d 54 (Tex. 1970). Relator has the burden of unequivocally proving he is entitled to issuance of the writ of mandamus. *See Wortham v. Walker*, 133 Tex. 255, 128 S.W.2d 1138, 1151 (1939). If his right is doubtful, it must first be established in some other form of action. *Id.*

Moreover, an appellate court may not deal with disputed areas of fact in a mandamus proceeding. *See West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978). Where a

fact dispute exists, the district court is the appropriate forum. *See In Re Alford Chevrolet-Geo*, 997 S.W.2d 173, 179 (Tex. 1999); *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990); and *Sparks v. Busby*, 639 S.W.2d 713, 716 (Tex.App. -- Tyler 1982, no writ).

Finally, any statutory or constitutional provision restricting the right to hold office “must be *strictly construed against ineligibility*.” *Wentworth v. Meyer*, 839 S.W.2d 766, 767 (Tex. 1992) (emphasis added). The Supreme Court reiterated this fundamental doctrine of election law as recently as 2006, in *In Re Francis*, 186 S.W.3d 534, 542 (Tex. 2006) (“provisions that restrict the right to hold office must be strictly construed against ineligibility”).

V. **ARGUMENT**

A. Petitioners lack standing.

Since 1928 when the Texas Supreme Court decided *Allen v. Fisher*, 9 S.W.2d 731, 118 Tex. 38 (1928), it has been the law that only candidates in an election, or the State itself, can seek relief from a Court concerning the eligibility of a candidate. In *Allen*, the plaintiff, a registered voter, was seeking a finding of ineligibility for a candidate. At that time, state laws permitted “any voter” to bring suit to enforce the election laws. *See Id.* at 733. Despite this specific grant of authority by the Legislature, the Texas Supreme Court held that an ordinary voter lacked standing to bring any claim concerning eligibility. The Court found the state statute that attempted to confer standing was unconstitutional since

it permitted a citizen to bring suit on “a matter of public concern exclusively.” *Id.* at 734.

The Amarillo Court of Appeals summarized *Allen*:

Our courts have followed the rule that challenges to the eligibility of candidates "are matters of public concern, [and] must be prosecuted by the state." Status as a citizen or voter is not sufficient to confer standing to bring such a challenge and a statute purporting to grant such a right is in conflict with our constitution and invalid.

In Re Jones, 978 S.W.2d 648 (Tex.App.-Amarillo 1998).

A raft of cases recognized the same legal principle *Jones* recognizes: a voter who is not a candidate for the office at issue lacks to challenge a candidate’s eligibility to run for the office. *See Colvin v. Ellis City Repub Exec Comm*, 719 S.W.2d 265 (Tex.App.-Waco 1986); *Blackmon v. Harland*, 656 S.W.2d 239 (Tex.App. – Tyler 1983); *Lemons v. Wylie*, 563 S.W.2d 882 (Tex.Civ.App. – Amarillo 1978); *Parchman v. Rodriguez*, 458 S.W.2d 239 (Tex.Civ.App. – Tyler 1970); *Adkins v. Rawls*, 182 S.W.2d 509 (Tex.Civ.App.-Waco 1944). There is simply no authority holding otherwise. Since the Petitioners here are in precisely the same position as the voters whose challenges were rejected in this unbroken line of cases, they lack standing to pursue this mandamus effort.

B. The January 2nd ballot application is the key filing.

The Court must determine which ballot application to consider in judging Respondent Brender’s actions. The somewhat blurred assertion¹ that Ms. Davis’ second

¹ The Petitioners aver that Ms. Davis merely “purported” to withdraw her initial candidacy filing of December 3rd when she re-filed her candidacy application on January 2nd. Mandamus Pet. at 5. Thus, they assert, she “failed to effectively withdraw” her candidacy at any point after her December 3rd filing. *Id.* After this discussion, the Petitioners continue to insinuate, without ever being blunt about it, that the December 3rd filing, not the January 2nd one, is the date to which this Court should look in assessing their challenge. *See* Mandamus Pet. at 6 (“on December 3 ... Ms. Davis filed to become a candidate”).

application to run for District 10, filed on January 2nd, is a nullity has already been rejected by the members of the Court designated to sit as the panel on this case. *See In re Ducato*, 66 S.W.3d 558 (Tex.App.—Fort Worth 2002) (orig. proceeding). In *Ducato*, this Court held that a candidate may file more than one application for the same office and that, if the second application meets the statutory requirements, it is sufficient to place the applicant's name on the ballot. *Id.* at 561.

The Petitioners present no argument that the January 2nd application is flawed in any respect. Neither do Petitioners offer evidence that a public record was presented to Respondent Art Brender, with respect to the January 2nd application that would have conclusively established Ms. Davis' ineligibility. Thus, particularly in light of *Ducato*, the Court must look to Ms. Davis's January 2nd filing as the determinative filing for purposes of evaluating the constitutional claim in this suit.

C. Joel Burns was “duly qualified” as the councilmember for City Council District 9 when he took the oath of office on January 1st.

Joel Burns received the majority of votes cast in a run-off election held on December 18th. The City Council canvass of the votes occurred in a special council session on December 27th, with the result that Joel Burns won. The certificate of election that must be provided under TEX. ELECTION CODE § 67.016(a) to the “candidate who is elected to an office” as determined by the canvass was given to Joel Burns on the

morning of December 27th. Joel Burns was administered the oath of office for his council seat on January 1st by a retired state judge.²

Thus, by December 27th, there had been formal certification that someone had been elected to the office Wendy Davis had resigned from. By January 1st, Joel Burns had taken the oath to serve in that office, administered by a legally authorized person.³ Thus, at a minimum, unless the January 1st oath-taking by Councilmember Burns was legally invalid, Mr. Burns had “duly qualified” for the council position formerly held by Ms. Davis and was immediately able to enter upon the duties of the office Ms. Davis had formerly held. *See State ex rel. Bickford v. Cocke*, 54 Tex. 482, 1881 WL 9709, at *3 (1881) (distinguishing right to an office and right to enter upon duties of office). *McGuire v. Hughes*, 452 S.W.2d 29, 32 (Tex.Civ.App.—Dallas 1970, no writ) (indicating that, at a minimum, taking oath makes one “duly qualified” for the office).

Therefore, by the morning of January 1st at the latest, Ms. Davis had been replaced as a Fort Worth City Council member. Article XVI, § 17, only applied to her as a councilmember until her successor was duly qualified. This means that on January 2nd, when her *Ducato*-validated second state senatorial candidacy application for District 10 was filed with the Chair of the Tarrant County Democratic Party, Ms. Davis was not holding any lucrative office within the meaning of Article III, § 19.

² A retired judge of a court of record is authorized to administer an oath in Texas by TEX. GOV'T CODE § 602.002(2).

³ The Texas Constitution requires that, before they may “enter upon the duties of their offices,” all elected officials in Mr. Burns’s shoes shall take an oath. *See* TEX. CONST. Art. XVI, § 1(a).

Under *Wentworth v. Meyer, supra*, Ms. Davis’s term as a councilmember had ended before she filed for her legislative candidacy. Article III, § 19’s restrictions ceased applying to Ms. Davis as of January 1st because that constitutional provision’s language does not “prevent[] eligibility where an officeholder has resigned before running for the legislature.” *Id.* at 768.⁴ Even if *Wentworth v. Meyer*, did not answer the direct question presented in this case, the Court’s reasoning and compliance with the longstanding rule that decisions ought to be made in favor of eligibility is instructive. The Court reasoned:

Therefore, it follows that if a constitutional provision uncertain of meaning is susceptible of two reasonable interpretations, the least exclusionary must be utilized.

Wentworth, 839 S.W.2d at 769 (Gonzalez concurring).

The Petitioners ignore this principle by arguing that the January 1st oath was illegal. *See Mandamus Pet.* at 4. Their argument is that the Fort Worth City Charter, in Chapter III, Section 5, requires that the oath of office to an elected councilmember can only be administered at the first City Council meeting after a canvass of the election results.

The Fort Worth City Charter, however, does not in any way dictate that the first City Council meeting after the election results are canvassed is the *only* permissible time and place for administering the oath to a newly-elected councilmember. The following are the relevant portions of the City Charter:

⁴ The Petitioners repeatedly refer to the lead *Wentworth* opinion as a “plurality” opinion. *Mandamus Pet.* at 7. This is incorrect. It is the opinion of the Court, not merely of less than a majority of the justices of the Court. Nothing in the decision indicates that the lead opinion is only a plurality opinion. Justice Hecht expressly refers to it as the “opinion for the Court.” *Id.* at 772. Reviewing the various concurrences validates Justice Hecht’s reference.

Chapter III, Section 4. Vacancies in the City Council; how filled.

...

Such new council members, when *duly qualified and elected*, shall serve for the unexpired period of the terms of the council members whose offices are being filled.

...

Chapter III, Section 5. Meetings of council and committees open to public; quorum; regulations of proceedings; council to provide rules of procedure.

...

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.

...

Chapter III, Section 8. Relating to City Councilpersons accepting different office and providing for forfeiture of offices and positions of aspirants for compensated office.

...

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 and any appointive officer or employee of the city who shall become a candidate for nomination or election to any public office shall immediately forfeit the office or employment held under the city.

...

Chapter XXVII, Section 26. Miscellaneous

...

the officers declared 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 of office prescribed by law.

...

Chapter XXVII, Section 26, of the City Charter, in fact, establishes a fast-track for newly elected council members by permitting swearing-in “immediately.” Chapter III, Section 5, the provision upon which Petitioners’ entire claim is based, speaks only of the new council, referring to the situation when the first City Council in Fort Worth was elected. Chapter III, Section 5, uses the terms “qualified” and “elected” – both in the past tense -

to establish when council members can begin their service after they are qualified, not to establish the earliest point at which they may be qualified.

Under the Chapter XXVII, Section 26 Charter provision, the mayor is compelled to call a special meeting of the council within a week of the election if a council session is not otherwise scheduled. Those declared to be elected at that special meeting are “entitled to qualify *immediately*” upon the council’s declaration of the election results and upon taking of the oath. *See Id.* (emphasis added). Petitioners do not attempt to explain the meaning of this important Charter provision or reconcile it with their impossible position.

Thus, from the moment he was certified the election winner (on the morning of December 27th), Joel Burns was “entitled” to qualify for the position by taking the oath. Under the City Charter, Councilmember Burns could have waited until the regularly scheduled council session on January 8th, but he was not required to do so. Instead, he was given an express entitlement to take the oath sooner to qualify for the office to which he had been elected. He exercised this entitlement on January 1st when retired Justice John Hill administered the oath as authorized under the Texas Government Code.⁵

The Petitioners’ effort to evade the validity of the January 1st swearing-in is not only unsupported by the words and structure of the Fort Worth City Charter; it is fundamentally at odds with the governing principle that legislation, including city ordinances and charters, are to be construed in favor of candidate eligibility. The

⁵ In Chapter 27, § 32, of the charter, the people of Fort Worth also make it plain that the powers enumerated in the charter are “in addition to the powers” available to home rule cities under the Texas Constitution and the general laws of the state.

Petitioners' argument is that Chapter III, Section 5, of the charter creates a closed system for the administration of oaths to elected councilmembers, restricted to one time and one place. Nothing in the language of the provision itself supports this interpretation. Another provision contradicts their argument by establishing an entitlement to taking the oath immediately upon completion of the canvass. It would take a doubly restrictive approach to the City Charter, at odds with the plain language of the relevant provisions, to reach the conclusion urged by the Petitioners. Even if the Court were to stretch the language that far, the Supreme Court in cases such as *Wentworth* and *Francis* have held otherwise. Therefore, the Court should reject the Petitioners' argument to void *Wentworth's* rule. In any event, Petitioners have failed to prove how this would have "conclusively established" Ms. Davis' ineligibility.

D. Article III, § 19, does not address this situation.

Implicit – and necessary – to the Petitioners' argument to force Ms. Davis off the primary ballot is the premise that the test to be "eligible to the Legislature" under Article III, § 19, is based on eligibility as of the date of filing for the office, not eligibility as of the date the office term would begin. Yet, by the constitutional provision's own language, if the "term" of the lucrative office held by the legislative candidate ends before that candidate can begin serving the term of the legislative office being sought, then the prohibition is simply inapplicable. The latter is the situation here, even under the Petitioners' argument that Ms. Davis's term as a councilmember did not end until the January 8th swearing-in of Joel Burns to her former position.

In 1982, the Texas Attorney General concluded in a formal opinion that Article III, § 19, does not apply to the situation of a candidate for legislative office in which the “term” of the current lucrative office held by that candidate ends before the term of the legislative office. TEX. ATT’Y GEN’L OP. MW-513 (1982), at 3. This conclusion was based in part on Supreme Court decisions construing the constitutional provision, particularly *Kirk v. Gordon*, 376 S.W.2d 560 (Tex. 1964), which explained that “[i]t is the fact that the term of office ... to which he was elected conflicts with the term of office of members of the House of Representative which controls.” 376 S.W.2d at 562. While the Supreme Court overruled *Kirk v. Gordon* in *Wentworth v. Meyers*, it only did so to the extent it conflicted with the *Wentworth* decision. 839 S.W.2d at 768.

There is no conflict between the aspect of *Kirk v. Gordon* addressed in the 1982 Attorney General Opinion and *Wentworth*’s holding that “term” as used in Article III, § 19, extends only to the point that the legislative candidate still holds the lucrative office which is being left because of the candidacy. In fact, these two aspects of the constitutional provision mesh perfectly, as demonstrated by the facts of this case.

Under the Petitioners’ own proffered interpretation of the Fort Worth City Charter, Ms. Davis’s successor in office not only took the councilmember seat on January 8th; he *had* to take it then as a matter of law. Thus, still working from the Petitioners’ own argument (which is not accepted here), at the time Ms. Davis filed for Senate District 10 on January 1st, the longest she could possibly be in holdover status as a member of the Fort Worth City Council was January 8th – a week away. Yet, the term of the senatorial

seat she is seeking would not commence until nearly a year later. Thus, even under the legal position set forth by the Petitioners, there could not be an overlap between her position as Fort Worth City Councilmember and the office of State Senator for District 10. Since the underlying purpose of the Article III, § 19, rule is to protect the legislature from undue influence by certain officeholders, *Wentworth*, 839 S.W.2d at 767, that purpose would not be undermined by the worst-case scenario set forth by the Petitioners.⁶ Under the facts of this case, there is no way Ms. Davis could possibly still be serving as a councilmember from Fort Worth at the time she would to take office as Senator for District 10. The situation here, therefore, parallels in many ways the timing issue in *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 592-594 (5th Cir. 2006) in which that court found that the future determination of candidate's eligibility for office was too speculative to support an administrative declaration of eligibility.

Interpreting Article III, § 19, as urged, implicitly but necessarily, by the Petitioners would threaten its constitutionality. In the right circumstance, the provision could be wielded as little more than an incumbent protection weapon to clear out large swaths of potential political competitors who have proven their ability to get elected by the public

⁶ Justice Hecht's concurrence in *Wentworth* highlights why Ms. Davis's situation in this case does not conflict with the underlying purpose of the constitutional prohibition at issue:

The period of disqualification no longer depends upon the fixed term of the office previously held, the disparities in treatment of officeholders in similar circumstances disappear, and legislative office is not singled out for special protection from among all offices which could be held. *The effect of the provision is to prohibit a person from holding legislative office and any other lucrative office in this state, the federal government, or a foreign country at the same time.* The obvious, and legitimate, purpose of the provision is to maintain the separation of powers in this State and to remove the Legislature from the influence of federal and foreign governments.

Id. at 775 (emphasis added).

to other offices in the legislative incumbent's own territory. For the provision to be triggered, there must be a real conflict in overlapping terms thus the only rational basis for its existence. Additionally, it would trigger the equal protection concerns articulated by Justice Gonzales in his *Wentworth* concurrence. *Id.* at 771.⁷

E. Granting Mandamus fails to serve the public interest.

Despite their hyper-technical and technically flawed argument for removing Ms. Davis from the primary ballot, Petitioners fail to state how the relief requested, if granted, would serve the public interest. Every step in the Petitioners' legal path requires the opposite of what the Supreme Court has dictated as the underlying presumption. That is, the Petitioners' argument rests on the rejected principle that every possible interpretive choice a court faces in an election dispute must be resolved against eligibility, not for it. The Petitioners' effort inevitably brings to mind the admonition from the Supreme Court in *Francis*:

The public interest is best served when public offices are decided by fair and vigorous elections, not technicalities leading to default. Beginning every election cycle with lawsuits and publicity about efforts to toss candidates off and on the ballot sends an unfortunate message that elections are more about civic entertainment than civic duty.

Francis, 186 S.W.3d at 542. In other words, the public interest is served best when elections consist of a fair exchange of ideals that allow voters to choose who will best serve them. Granting Petitioners the relief they seek undermines this public interest.

⁷ "The only conceivable state interest in barring these candidacies would be the purely impermissible one of protecting Texas legislative seats against outside competition." quoting *Clements v. Fashing*, 457 U.S. 957, 979 (1982) (Brennan, J., dissenting).

F. Petitioners' complaints concerning the swearing in of Joel Burns amounts to a procedural concern.

Petitioners must establish that Respondent Brender had a clear, legal duty to declare Ms. Davis ineligible. In order to establish that duty, Petitioners must prove Respondent Brender was presented with a conclusive public record that established Ms. Davis alleged ineligibility. Instead, Petitioners complain that Ms. Davis was made ineligible by virtue of the circumstances surrounding the swearing-in of Ms. Davis' replacement on the Fort Worth City Council. Petitioners fail to present sufficient evidence to the Court to prove the allegations they make as outlined *supra*. More importantly, Petitioners fail to explain how this created a clear, legal duty for Respondent Brender to declare the candidate ineligible.

In effect, Petitioners complaints amount only to procedural complaints concerning the swearing-in of a replacement for Ms. Davis. The swearing in of Joel Burns was timely and complied with law. But even if it didn't, the failure was merely procedural and was not a violation of substantive law. When this is the situation, a mandamus should not issue. *See In Re Dupont*, 142 S.W.3d 528 (Tex. App. – Fort Worth 2004) (finding that alleged violation of parliamentary rules that governed the meeting at which an executive committee considered making a replacement nominee was merely procedural and not the concern of the Courts.). In any event, the Court's consideration of the procedural intricacies serves no public purpose except to deny voters a fair choice.

G. Petitioners' unreasonable delay in bringing this action requires the denial of relief.

This primary election cycle is shorter than usual. The primary election date is March 4th while the filing deadline was January 2, 2008. Despite this shortened schedule, Petitioner waited until January 11th to file with the Texas Supreme Court which was dismissed for failure to file first in the Court of Appeals. It was January 16th before Petitioners sought relief from the correct court. This nine to fifteen day delay in seeking an emergency mandamus is not explained by the Petitions. Failure to swiftly seek mandamus is grounds to deny relief. *Cheney v. United States Dist. Court*, 542 U.S. 367 (2004) (where Applicant has slept on his rights, laches may bar a petition for writ of mandamus, especially where the delay is prejudicial to the other party or to the rights of other persons). Ms. Davis' first ballot application was filed on December 3, 2007. Since that time, Petitioners have known of Ms. Davis status. Petitioner's offer no explanation for failing to seek relief until well after the filing deadline.

The Texas Secretary of State's office recently filed pleadings in another election matter. The case made its way through the federal courts and was ultimately concluded last Friday, January 18, 2008 by a ruling in the United State Supreme Court. Attached as Appendix 6 is the last pleading filed by the Secretary of State in that case. In this pleading the Secretary of State outlines the important deadlines and procedures to ensure the election goes smoothly. For example, mail-in ballots for overseas voters went out last Friday, January 18, 2008. The important concerns urged by the Texas Secretary of State were cause for inaction in that case as well as this one.

CONCLUSION AND PRAYER

For the foregoing reasons, Respondents Boyd Richie and Art Brender respectfully request the Court deny Petitioners mandamus or any other relief. Accordingly, Respondents BOYD RICHIE and ART BENDER respectfully prays that this Court deny the Petition for Writ of Mandamus and grant them other and further relief to which they may show themselves justly entitled.

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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 22nd day of January, 2008.

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APPENDIX

<u>Document</u>	<u>Tab Number</u>
Letter from Ms. Davis	1
Certificate of Election issued to Mr. Burns by the Mayor and City Secretary of the City of Fort Worth	2
Joel Burns Oath of Office	3
Statement of Elected Officer Joel Burns	4
Wendy Davis' letter to Fort Worth City Secretary on January 1, 2008	5
Secretary of State last Pleading	6