



**TDCAA**

# **Post-Election Litigation**

Jonathan Fombonne & Seth Hopkins  
Harris County Attorney's Office

May 10, 2023



## Voting in the wild west.

Voting in Texas was once a wild affair. There were few rules and no secret ballots. Voters voted by voice at the courthouse with boisterous (often drunken) campaigning, and an occasional brawl.

# Texas Election Code

Today, the Texas Election Code has 17 titles that regulate elections in great detail. Under Tex. Elec. Code 1.0015, elections must “be uniform and consistent throughout this state to reduce the likelihood of fraud in the conduct of elections, protect the secrecy of the ballot, promote voter access, and ensure that all legally cast ballots are counted.”

These regulations have resulted in the proliferation of litigation.

# Summary

1. TROs/Injunctions
2. Mandamus
3. Ch. 247 lawsuits
4. Election contests

# Potential Sources of Litigation

1. Voter Qualifications (Title 2)

*Kiehne v. Jones*, 247 S.W.3d 259 (Tex. App.—El Paso 2007, pet denied) (Loving County candidate won by one vote after non-resident landowners illegally voted in election).

2. Early Voting (Title 7)

3. Voting Systems (Title 8)

4. Candidate qualifications (Title 9)

5. Recounts (Title 13)

6. Election Contests (Title 14)

# Equitable Relief: Injunctions and Mandamus

Most litigation is filed by candidates or others who claim irregularities in the election process and seek a court order to alter that process.



# Equitable Relief: Injunctions and Mandamus

## **Injunction.**

Private right of action to protect private rights.

“A person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring.” Tex. Elec. Code § 273.081.

## **Mandamus.**

Tex. Elec. Code § 273.061, et al. allows a party to seek mandamus “to compel the performance of any duty imposed by law in connection with the holding of an election or political party convention...”

# Injunctions: TRO, Temporary, & Permanent

- **Temporary Restraining Order.** Affidavit or verified complaint showing immediate and irreparable injury, loss, or damage before notice and a hearing.
- **Temporary injunction.**
- **Permanent injunction.**

Tex. R. Civ. P. 680, et seq.





# Injunctions are private rights.

*City of El Paso v. Tom Brown Ministries*

505 S.W.3d 124 (Tex. App.—El Paso 2016, no pet.)

El Paso Mayor John Cook tried to enjoin church from circulating recall petition against him under § 253.094. When that provision was declared unconstitutional, the church tried to sue El Paso under 42 U.S.C. § 1983. Case dismissed because the Election Code only gave Cook a private right of action for injunction—so the City could not be liable.

# Injunction example: Mail-in ballots.

---

*State of Texas v. Chris Hollins*

Supreme Court No. 20-0729

The Election Code permits mail-in ballots for people who expect to be out of the county on election day, have a physical condition that prevents voting in person, are at least 65 years old on election day, or confined in jail. Eligible voters must request an application for a mail-in ballot.

# Injunction example: Mail-in ballots.

*State of Texas v. Chris Hollins*

Supreme Court No. 20-0729

Harris County sent applications for mail-in ballots to every registered voter. The state sought a TRO and temporary injunction to prevent Harris County from mailing ballots to anyone who had not specifically requested one.

The trial court and court of appeals denied the injunction, and the state sought a petition for review to the Supreme Court.

# Injunction example: Mail-in ballots.

*State of Texas v. Chris Hollins*

Supreme Court No. 20-0729

Harris County argued the Election Code did not prohibit good customer service by sending education material, and the mailer had "flashing red sirens" explaining who could submit an application.

# Injunction example: Mail-in ballots.

## *State of Texas v. Chris Hollins* Supreme Court No. 20-0729



How did the Supreme Court rule?

# Injunction example: Mail-in ballots.

*State of Texas v. Chris Hollins*

Supreme Court No. 20-0729

"We conclude that the Election Code does not authorize the mailing proposed by the Harris County Clerk."

Counties are agents of the state with limited power. The Election Code provides detailed instructions to conduct vote-by-mail, and counties do not have the implied power to send unsolicited applications.

# **Mandamus: Skip the trial court.**

“The supreme court or a court of appeals may issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer.”

Tex. Elec. Code § 273.061

---

# But think twice before starting in the Supreme Court.

Under § 273.063, the action should begin in the court of appeals. However, under Tex. R. App. P. 52.3, the action can be filed in the Supreme Court in the first instance if there is a compelling reason.

“Impending election deadlines, including deadlines for the printing of ballots, present compelling circumstances to bypass the court of appeals.” *In re Jones*, 2018 WL 549531 (Tex. 2018).



# Elements of Mandamus.

---

(1) Must identify a non-discretionary duty imposed by law.

(2) There cannot be any other remedy at law.

Meant for circumstances "involving manifest and urgent necessity and not for grievances that may be addressed by other remedies.

*In re Murrin Bros. 1885 Ltd.*, 2019 WL 6971663, at \*2 (Tex. Dec. 20, 2019).

# What is a duty imposed by law?

Limited to a “duty imposed by a constitution, statute, city charter, or city ordinance.”

*In re Republican Party of Tex.*, 605 S.W.3d 37, 48 (Tex. 2020).

# Mandamus example: Drive-thru voting.

*In re Pichardo and In re Hotze*

Supreme Court Nos. 20-0815 and 20-00819.

The Election Code permits curbside voting if a voter is sick, has a physical disability, or voting inside a polling location would create a likelihood of injuring the voter's health. During COVID-19, Harris County promoted social distancing by permitting voting in a vehicle parked inside parking structures and semi-permanent tents.

Concerned voters and candidates sought mandamus to stop the practice and throw out nearly 127,000 votes cast this way.

# Mandamus example: Drive-thru voting.

*In re Pichardo and In re Hotze*

Supreme Court Nos. 20-0815 and 20-00819.

Harris County responded that:

- (1) The Election Code permits voting in "any stationary structure" or "movable structure" (such as parking tents)
- (2) Relators waited until 25 percent of the registered voters returned their ballots before filing suit, and
- (3) Relators have not shown particularized harm.

# Mandamus example: Drive-thru voting.



Is this a structure?  
How did the Supreme Court rule?

# Mandamus example: Drive-thru voting.

*In re Pichardo and In re Hotze*

Supreme Court Nos. 20-0815 and 20-00819.

The Supreme Court denied the petition and emergency stay without opinion. The votes were counted.

However, Justice Devine dissented that structures required something more substantive. He also suggested that the voting technically occurred in a vehicle—rather than the structure where it was parked.

# Combined injunction/mandamus example: Extending voting hours.

*In re State of Texas*

Supreme Court No. 22-0997

On November 8, 2022, the Texas Organizing Project obtained a TRO ordering Harris County to extend voting hours to 8 p.m. on election day because of long lines. The Attorney General filed a petition for writ of mandamus, and the Supreme Court stayed the order and directed that votes cast by people not inside polling places at 7 p.m. be segregated.

# Combined injunction/mandamus example: Extending voting hours.



Should polls be permitted  
to stay open an hour late?  
How did the Supreme  
Court rule?



# Combined injunction/mandamus example: Extending voting hours.

*In re State of Texas*

Supreme Court No. 22-1044

- Supreme Court had ordered after-7pm votes to be segregated.
- In separate mandamus filed two weeks later, State asked that the after-7 votes not be included in the canvass.
- Supreme Court ordered that the votes be included, but that the parties file a separate report with the Court showing the vote breakdown for after-7pm votes.

# Checklist for Defending against Equitable Relief

Even if a person seems to satisfy the elements for injunction or mandamus, carefully review these two defenses.



# Checklist for Defending against Equitable Relief

## Is there standing?

Element of subject matter jurisdiction that can be raised at any time and any manner. Relator must show:

- (1) Injury in fact that is "concrete and particularized" and "actual or imminent"
- (2) Injury must be "fairly traceable" to the defendant's challenged actions, and
- (3) It must be "likely, as opposed to merely speculative that the injury will be redressed by a favorable decision."

*Heckman v. Williamson Cty*, 369 S.W.3d 137, 154-155 (Tex. 2012).

# Checklist for Defending against Equitable Relief

**Standing: Proving injury.**

The concrete and particularized injury must include "an interest in a conflict distinct from that of the general public." *In re Pichardo*, 2020 WL 5950178, at \*1 (Tex. App.--Houston [14th Dist.] Oct. 8, 2020, no pet.)

A person does not have a concrete or particularized injury just because he is a voter or concerned citizen—or even an official poll watcher.

*Bickham v. Dallas County*, 612 S.W.3d 663 (Tex. App.--Dallas 2020, pet. denied).

# Checklist for Defending against Equitable Relief

---

Proposed legislation would expand standing.

- Senate Bill 220/House Bills 549 & 1877 would broaden standing under § 273.081 (injunctions) to "a person, including a candidate, a political party, or a state, county, or precinct chair of a political party, who is being harmed or is in danger of being harmed..."
- It would create special visiting emergency election judges to be appointed and required to hear emergency hearings as soon as one hour after being filed.

# Checklist for Defending against Equitable Relief

## Is the claim moot?

Equitable relief in an election contest becomes moot “where the contest cannot be tried [and] a final decree issued in time for it to be complied with by election officials.” *Garmon v. Tolbert*, 614 S.W.3d 190, 195 (Tex. App.—Tyler 2020, pet. denied).

# Checklist for Defending against Equitable Relief

Is the claim moot?

Texas adopted the *Purcell* Doctrine, which prohibits challenges to election procedures when an election is imminent and there is "inadequate time to resolve the factual disputes." *See In re Khanoyan*, 637 S.W.3d 762 (Tex. 2022).

The goal is to prevent "serious disruption of election process" and "confusion." *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968).

# Ch. 247 Lawsuits

- New procedure established in 2021 (Senate Bill 1)
- A candidate alleging fraud by another candidate (or their agents) under certain provisions can file suit under Chapter 247 and receive \$1,000 damages per election code violation and attorney's fees.
- Fraud in this chapter includes:
  - Falsifying a voter registration application (TEC 13.007)
  - Casting an illegal vote (TEC 64.012)
  - Providing unlawful assistance to a voter (TEC 64.036)
  - Fraudulent use of BBM (TEC 84.0041)
  - Influencing a voter's exercise of casting a ballot; causing a voter to be registered under false pretenses; preventing an eligible voter from casting a ballots (TEC 276.013)



# Election Contests

- What is an election contest?
  - Suit between a losing candidate (“contestant”) and winning candidate (“contestee”) challenging results of the election. (TEC 232.003)
    - Can include more than one contestant if a runoff is required (TEC 232.003(a)(2))
  - Can also be suit challenging results of a ballot measure.
  - Can happen in primary, runoff, or general election
  - Doesn’t apply to elections for U.S. Senate or House, or presidential primaries.
- Law:
  - Texas Election Code §§ 221, 231-233, 241-243

# Election Contests (cont.)

## Rule:

Sec. 221.003. SCOPE OF INQUIRY. (a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome because:

- (1) illegal votes were counted; or
- (2) an election officer or other person officially involved in the administration of the election:
  - (A) prevented eligible voters from voting;
  - (B) failed to count legal votes; or
  - (C) engaged in other fraud or illegal conduct or made a mistake.

(b) In this title, "illegal vote" means a vote that is not legally countable.

(c) This section does not limit a provision of this code or another statute expanding the scope of inquiry in an election contest.

# Election Contests (Cont.)

---

- “To set aside the outcome of an election, the contestant must prove by clear and convincing evidence that a violation of the election code occurred, and it materially affected the outcome of the election.” *McCurry v. Lewis*, 259 S.W.3d 372 (Tex. App.—Amarillo 2008, no pet.).
  - Burden on contestant is “a heavy one, and the declared results of an election will be upheld in all cases except where there is clear and convincing evidence of an erroneous result.” *Willet v. Cole*, 249 S.W.3d 585 (Tex.App.—Waco 2008, no pet.).
  - Must produce in the mind of the trier of fact a “firm belief and conviction” as to the truth of the allegations to be proven. *Olsen v. Cooper*, 24 S.W.3d 608 (Tex.App.—Houston [1st Dist.] 2000, no pet.).

# Election Contests (Cont.)

- Contestant must not only prove that there were violations of the law or voting irregularities, but also that they “did in fact materially affect the results of the election.” *Goodman v. Wise*, 620 S.W.2d 857 (Tex.App.—Corpus Christi 1981, no pet.).
- What does this mean?
  - To reverse, need to prove the correct result.
  - For new election, need to prove a “different result would have been reached by counting or not counting certain specified votes or irregularities were such as to render it impossible to determine the will of the majority of the voters participating.” *Ware v. Crystal City Independent Sch. Dist.*, 489 S.W.2d 190 (Tex.Civ.App.—San Antonio 1973, writ dism’d).

# Election Contest (Jurisdiction)

- Default rule: district court (TEC 221.002(b))
  - Judge selected from outside any county that covers part of the contested race's territory (TEC 231.004)
- Senate/House
  - Both for statewide officer elections (TEC 221.002(b))
  - Senate for state senate races (TEC 221.002(c))
  - House for house races (TEC 221.002(d))
- Governor: election of presidential electors (TEC 221.002(3))
- Appeals: courts of appeals, only for contests in district court (TEC 221.002(f))

# **Election Contests (Rules in District Court)**

- Generally: rules of civil procedure apply (TEC 231.002)
- Bench trial (TEC 231.005)
- Can compel election officers/custodians of election records to testify or produce materials beyond normal distance rules (TEC 231.006)

# Election Contests (Rules in Legislature)

## Republican Texas House candidate's election complaint tossed after he fails to pay fee

Mike May was one of more than 20 losing candidates in Harris County who filed election contests, citing reports of Election Day issues.

BY POOJA SALHOTRA JAN. 11, 2023 4 PM CENTRAL



- TEC 241
- Petition must be filed no later than seventh day after canvass.
  - Copy must be delivered to parties by personal delivery or registered or certified mail.
- Secretary of state serves as recipient of service.
- Contestant must file security with the secretary of senate or chief clerk of the house

# Election Contests (Rules in Legislature) (Cont.)

- Presiding officer of the senate/house appoints:
  - a master of discovery to supervise discovery, issue process, receive evidence, etc.
  - a special committee to hear the contest.
- Master must be a member of the house in which contest is pending.
- Master may (on its own motion or on motion of the committee) determine whether petition is frivolous. If so, it may report to committee for further action.
- Committee investigates the issues raised the contest, and hears evidence presented by parties.
- Committee issues a report to the relevant house. Senate/House vote on outcome and remedy.
  - Committee may take action depending on the status of legislative session.



# Election Contests (Timing)

- Filing periods:
  - Earliest day to file: day after election day (TEC 232.008(a))
  - Last day to file:
    - General election w/o runoff: 45 days after canvass date (or date records are publicly available under TEC 1.012)
    - Primary/runoff: 15 days after canvass date (or date records are publicly available under TEC 1.012)
- Contestant must deliver copy of petition to secretary of state by the same deadline.
  - This is non-jurisdictional. *Honts v. Shaw*, 975 S.W.2d 816 (Tex.App.—Austin 1998).
- Answer must be filed not later than 10am on 10<sup>th</sup> day after date of service of citation or fifth after after the canvass, whichever is later. (TEC 232.010)

# Election Contests (Timing) cont.



- Special accelerated rules for Primary/Runoff elections (TEC 232.012)
  - Answer due not later than 10am on fifth day after service of citation.
  - Court sets the contest for trial for a date not later than the fifth day after the date by which contestee must answer.
  - Court may not grant a continuance in the trial except:
    - One (10 day maximum) for good cause; or
    - By consent of the parties
- Rescheduling runoffs (TEC 232.013)
  - Court sets runoff date if it determines lack of time prevents proper conduct of the runoff on the regularly scheduled date.
  - Must be on same day of the week as the regularly scheduled runoff.

# Election Contest (Remedies)

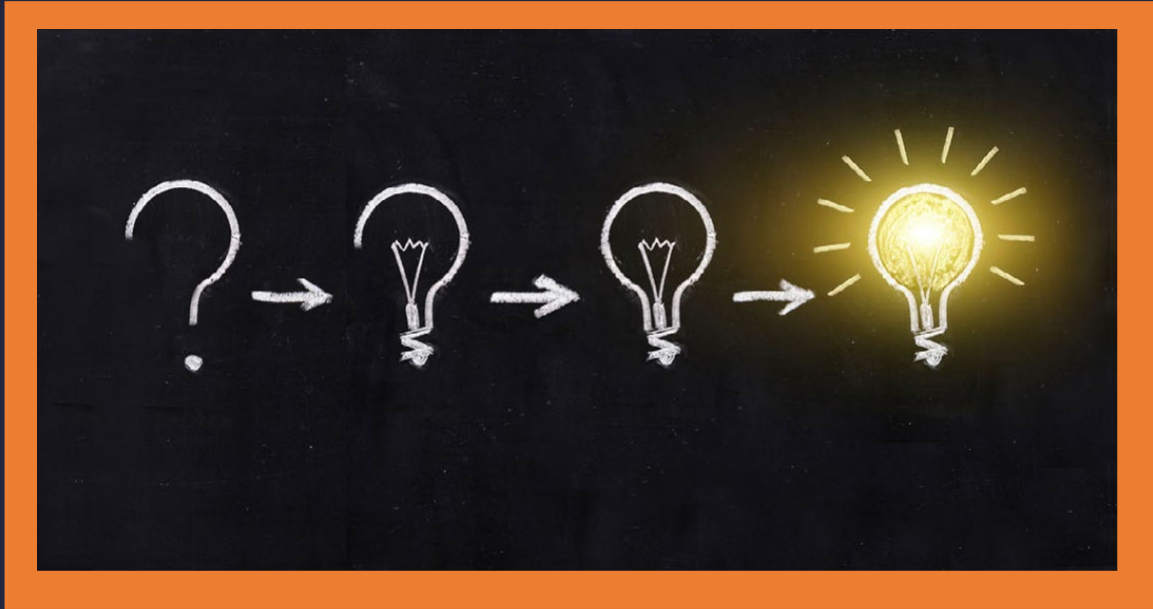
- Two types: reversals, or new elections
- Reversal: if the tribunal can determine the true outcome of the election, it “shall declare the outcome.” (TEC 221.012(a).)
- New election: “tribunal shall declare the election void if it cannot ascertain the true outcome of the election.” (TEC 221.012(b).)

# Election Contest Remedies (cont.)

- Procedures for new elections:
  - If court orders a new election, it must set the date for the new election “as soon as practicable after the judgment becomes final.” (TEC 231.007(a))
  - “the new election shall be held in the same manner as the contested election” (TEC 231.007(b))
  - District court may shorten the early voting period
  - District court may provide for additional notice requirements
- Candidates must be the same as in contested race (TEC 232.042)
  - But note exceptions in ch. 232, subchapter B

# Election Contest (Appeals)

- Only available for contests in district courts.
- Accelerated appeals in primaries (TEC 232.014):
  - Bond must be made by the fifth case after judgment is signed.
  - Judge may make any order to expedite an appeal that is reasonable or appropriate, including setting an accelerated briefing schedule.
  - Court of appeals' decision is not reviewable by Supreme Court.
- Accelerated appeals in general elections (TEC 232.015)
  - Trial or appellate court *may* accelerate the appeal.
  - Reviewable by the Supreme Court.
- Appeals suspends the order of a new election.



**Q&A**



# Stay connected with the HCAO

Follow us on social media & subscribe to our monthly newsletter directly on our website.



[cao.harriscountytexas.gov](http://cao.harriscountytexas.gov)



[harriscountyaoc](https://www.instagram.com/harriscountyaoc)



[HarrisCountyAttorney](https://www.facebook.com/HarrisCountyAttorney)



[harriscountyaoc](https://twitter.com/harriscountyaoc)



[harriscountyattorneysoffice](https://www.linkedin.com/company/harriscountyattorneysoffice)

**Thank you**

