NO. _____

IN THE COURT OF APPEALS
THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

***IN RE* MAYOR LYLE NELSON**

RELATOR

ORIGINAL PETITION FOR WRIT OF MANDAMUS

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IN THE INTEREST OF TIME, ORAL ARGUMENT IS NOT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

RELATOR:
MAYOR LYLE NELSON
Relator is the Mayor of Bastrop, Texas and the subject of a Recall Petition submitted to Respondent Interim City Secretary, Irma Parker, who certified the petition as sufficient. Mayor Nelson can be contacted through his counsel of record.

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RESPONDENT:
IRMA PARKER
Irma Parker is the Interim City Secretary for the City of Bastrop who certified as sufficient a recall petition for the removal of Relator Mayor Lyle Nelson.

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STATEMENT OF THE CASE

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July 26, 2024	Counsel for Relator Mayor Lyle Nelson sent a demand to the Bastrop City Secretary to declare the Petition insufficient for lack of signer's affidavit on each page. Exh-Rel-4
August 13, 2024	Respondent Interim City Secretary submitted a staff report to the City Council declaring the Petition insufficient for lack of a signer's affidavit on each page. Exh-Rel-5
September 3, 2024	Petition circulators submitted a "Supplementary" recall petition to the City Secretary. Exh-Rel-7
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STATEMENT ON MANDAMUS JURISDICTION

THIS COURT HAS SPECIFIC JURISDICTION OVER THIS ELECTION ISSUE

The Bastrop City Charter requires, before a recall election of a City official can be called, that a sufficient petition be submitted by the City Secretary to the City Council. Both the Courts of Appeals and the Texas Supreme Court have jurisdiction to issue writs of mandamus "to compel the performance of any duty imposed by law in connection with the holding of an election...." Tex. Elec. Code § 273.061; *see also*, Tex. Const., art. V, § 6 (providing original jurisdiction as may be prescribed by law).

The Bastrop City Charter is such a "law" applicable to Tex. Elec. Code § 273.061; *see In re Woodfill*, 470 S.W.3d 473, 481 (Tex. 2015); *Howard v. Clack*, 589 S.W.2d 748, 750 (Tex. App.—Dallas 1979, no writ) (holding that a duty imposed by city charter is a duty "imposed by law" under the predecessor statute to Tex. Elec. Code § 273.061). Respondent Interim City Secretary has a nondiscretionary duty to reject the Supplementary Recall Petition as insufficient under the Bastrop City Charter, § 10.07. The sufficiency of the recall petition is a question of law for which this Court has original jurisdiction.

ISSUE PRESENTED

Because the Supplementary Recall Petition lacks a valid Signer's Truth Affidavit on each page of the Petition as required by Bastrop City Charter § 10.07, the Interim City Secretary has a nondiscretionary duty to certify the Petition as insufficient and has no authority to declare an insufficient Petition as sufficient. *Bejarano v. Hunter*, 899 S.W.2d 346, 350 (Tex. App.—El Paso 1995, no writ) ("We find that the city clerk's duty to apply the statutory requirements to all applications, and reject those that are insufficient, is ministerial. The clerk possesses no discretion to ignore or amend either the city charter or state election law…. Failure to perform her duty subjects [the City Secretary] to mandamus." *citing* Tex. Elec. Code § 273.061).

APPENDIX AND VERIFIED RECORD REFERENCES

Appendix Exhibits [Attached]	APP.TAB XX
Verified Trial Court Record [Filed Separately]	**VR: 0001** et seq.

STATEMENT OF FACTS

SUMMARY OF KEY FACTS

Lyle Nelson was elected Mayor of Bastrop in a run-off on June 8, 2024 and took office on June 20, 2024. Within just 2 months, political opponents, including some members of the City Council, began efforts to overturn the election by setting up a recall effort. However, the justification, or lack thereof, for this recall effort is not what is at issue in this case. This case is solely about whether, upon review of the face of the recall petition—which, if sufficient, would trigger a recall election—the Interim City Secretary has a nondiscretionary duty to hold that the recall petition is insufficient.

Applicable Law

The two key laws at issue are Bastrop City Charter § 10.07 and Tex. Elec. Code § 277.004. The applicable part of Charter § 10.07 says:

> Section 10.07 Power of Recall
> […]
> The petition shall be signed and verified in the manner required for an initiative petition, shall contain a general statement of the grounds upon which the removal is sought and one of the signers of each petition paper shall make an affidavit that the statements made therein are true. VR:0025

Tex. Elec. Code § 277.004 says:

> Sec. 277.004. EFFECT OF CITY CHARTER OR ORDINANCE. Any requirements for the validity or verification of

> petition signatures in addition to those prescribed by this chapter that are prescribed by a home-rule city charter provision or a city ordinance are effective only if the charter provision or ordinance was in effect September 1, 1985. [1]

After having first decided, on August 13, 2024, that the recall petition was insufficient (*see* VR:0142-0143) because it lacked compliance with Bastrop City Charter § 10.07 (which speaks to the requirement for certain affidavits to be included on each page of the petition form), the Respondent City Secretary decided on September 15, 2024 (*see* VR: 0345) that Section 10.07 of the Charter was preempted by Tex. Elec. Code § 277.004 (which speaks solely to the validity and verification of petition *signatures*). The Respondent further decided that, for the 91 pages of the 97-page petition missing a Signer's Truth Affidavit, the Circulators could "creatively" comply with Section 10.07 by simply adding their *duplicated* signatures to each page as a "signer" and then executing the Signer's Truth Affidavit for that page. The City Secretary reached that decision despite, after being asked how she handled duplicate petition signatures, answered, "Duplicate signatures were not counted." VR: 0356. Yet, without counting the 91 duplicate signatures "creatively" added by the Circulators in order to provide a Signer's Truth Affidavit to each of those pages, the Supplementary Recall Petition still lacks the required number of

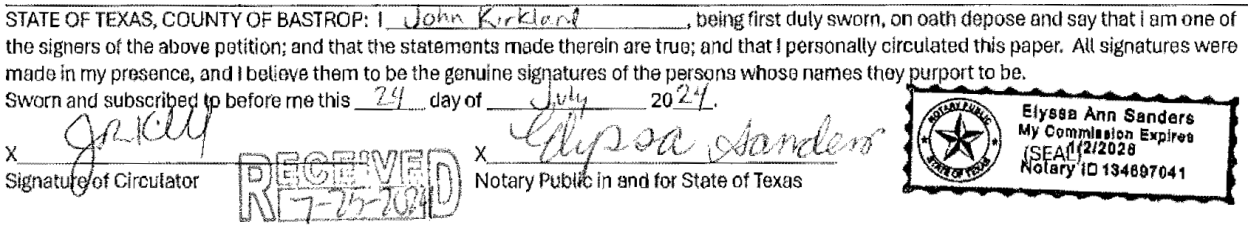
[1] It is undisputed that the Bastrop City Charter did not exist on September 1, 1985.

signer affidavits.

THE JULY 25TH RECALL PETITION AND CERTIFICATION OF INSUFFICIENCY

The first recall petition was submitted on July 25th to the City Secretary. Exh. Relator-3 (VR: 0042 – 0138). The petition did not contain a Signer's Truth Affidavit as required by Charter § 10.07. Instead, the petition contained a Circulator's Affidavit (also required by Charter § 10.07) that was amended to include the statement "and that the statements made therein are true" as was required by the Charter to be affirmed by a "Signer" of the Petition.

Sample Circulator's Affidavit (VR: 0043): [2]


STATE OF TEXAS, COUNTY OF BASTROP: I John Kirkland, being first duly sworn, on oath depose and say that I am one of the signers of the above petition; and that the statements made therein are true; and that I personally circulated this paper. All signatures were made in my presence, and I believe them to be the genuine signatures of the persons whose names they purport to be.
Sworn and subscribed to before me this 24 day of July 2024.
X _____ Signature of Circulator
RECEIVED 7-25-2024
X _____ Notary Public in and for State of Texas
Elyssa Ann Sanders My Commission Expires 12/2028 Notary ID 134697041
[SEAL]

On 6 pages, the Circulator also signed, as a voter Signer, on that page, but on 91 of the petition pages, no one who signed the petition form as a voter Signer on that page signed a Signer's Truth Affidavit. On July 26, 2024, Relator's counsel pointed out the deficiency—that 91 of the 96 pages in the Petition lacked the Charter-required

[2] The Circulators of the recall petition included Mayor Pro-Tem John Kirkland and Council Members Kevin Plunkett and Cynthia Meyer who, together, constitute a voting majority of the Bastrop City Council.

Signer's Truth Affidavit—and demanded the petition be declared insufficient. VR: 0139 – 0141. On August 13, 2024, the City Secretary submitted a Staff Report to the City Council in which she said:

> While the petition contains a sufficient number of valid signatures, it is **insufficient** because it does not include the required affidavits. An attestation of truth from a signer of each page of the petition is required for each page (citing Charter § 10.07). (emphasis in original) VR: 0142.

The City Council received the report but took no action. VR: -151 (Council meeting minutes, August 13, 2024, Item 14E).

THE SEPTEMBER 3, 2024 SUPPLEMENTARY RECALL PETITION & CERTIFICATION OF SUFFICIENCY

On September 3, 2024, the Circulators submitted an amended petition. VR: 0154 – 0344. Amending a recall petition, after it is declared insufficient, is allowed by Charter § 10.08 if submitted within 10 days after being found insufficient. (*see* Charter at VR: 0025). As explained by the petition Circulators:

> This supplementary petition amends the previously submitted petition by reciting verbatim each individual paper of the *original* petition and amending on additional signature line to each paper. (underlined emphasis added) VR: 0154. [3]

In other words, to "comply" with the Signer Affidavit required by the Charter, the

[3] It seems to be undisputed by the Charter's phrase "each paper" means "each page."

Circulators added their own signatures on each petition page as an additional voter signature, necessarily creating a duplicate voter signature each time they did that.

For example, John Kirkland signed the original-and-resubmitted petition on page 1 both as a circulator and as a voter signer and relied on the modified Circulator's Affidavit to constitute both the Circulator's affidavit and Signer's Truth Affidavit. VR: 0156 (bearing John Kirkland's signature on line 1 of the petition page No. 1 (upper righthand corner) and in the Circulator's Affidavit at the bottom of that page. As a result, Relator did not challenge the validity of that, Page 1, of the petition. However, for the Supplementary Recall Petition, John Kirkland purported to add his signature to the petition a second time—a duplicate—to Page 2 of the Petition (for which he was the Circulator), but which he did not originally sign as a voter signer. *Compare* VR: 0158 (Page 2 of the Petition, showing no signature by John Kirkland as a voter signer) and VR: 0157 (on which John Kirkland purports to add his signature as a voter signer to Page 2 of the Petition). This "creative" tactic was used throughout the remainder of the Supplementary Recall Petition.

Mayor Pro-Tem Kirkland and Councilmember Plunkett are avid political opponents of Mayor Nelson who led the recall petition drive. They signed a Signer's Truth Affidavit on 65 of the 96 petition pages, meaning Kirkland's signature *as a voter signer* (to be distinguished from signing as a "circulator") is duplicated 49

times and Plunkett's signature is duplicated 16 times in the petition, as are other circulators' signatures.

On September 15, 2024, Relator's counsel sent a demand to the City Secretary that she declare the Supplementary Recall Petition insufficient for failure to comply with Charter § 10.07 and that she refuse to count the duplicate signatures added to the supplement for any purpose at all, including the requirement for the Signer's Truth Affidavit. VR: 0346 – 0347. At the City Council meeting on September 17, 2024, the City Secretary presented a letter/email she had sent on September 13, 2024 to Circulator John Kirkland, addressed to him in his *official* capacity as "Mayor Pro-Tempore Kirkland," saying:

> I am writing to inform you that I have reviewed the Petition you presented in July 2024. I certify that your Petition is sufficient to present to the voters at a May 2025 Election. VR: 0345

The City Secretary asserted, based on an email (dated August 13, 2024) from Chuck Pinney, an attorney with the Secretary of State's Office, that whether Charter § 10.07 had to be complied with depends on whether that provision was in effect on September 1, 1985, which it was not. *See* VR: 0038 – 0039. The City Secretary did not indicate to the Council at the meeting that that email had been superseded by the Secretary of State's office on August 21, 2024, after concluding that the Secretary of State could not advise the City on the applicability of Charter § 10.07 "because it

rests in part on interpretation of the city charter." VR: 0034.

The Secretary of State changed its position about opining on Charter § 10.07 after receiving an email from, Rezzin Pullum, an attorney with the City Attorney's law firm, questioning whether Tex. Elec. Code § 277.004 (dealing with validity of petition *signatures*) would preempt a home-rule City Charter provision dealing with requirements for inclusion of affidavits related to the *form* of a *recall* petition. VR: 0036 – 0037. Mr. Pullum's email cited *City of Sherman v. Hudman*, 996 S.W.2d 904 (Tex. App.—Dallas 1999) for the proposition that "the charter requirements other than those effecting the validity or verification of petition signatures would be applicable and mandatory. Thus, the attestation of truth speaks in terms of attesting to the belief of the truth of the recall grounds and only applies to the validity of the recall petition." VR: 0037.

At the Council meeting on September 17, 2024, the City Secretary indicated that she had received opinions on these legal issues from the City Attorney and another attorney. The City Secretary said, "I can't say that we just ignored him, but we did …that was just another opinion." VR: 0356.

If a recall election was to be held, it would have to be ordered by the City Council no later than February 14, 2025, 78-days prior to the uniform election date of May 3, 2025. *See* Tex. Elec. Code § 3.005(c). Therefore, before that deadline,

Relator is hopeful this Court will obtain briefing and render a decision on the application for a writ of mandamus ordering the City Secretary to declare the recall petition insufficient. Thus, there would be no predicate basis on which the City Council could order a recall election.

ARGUMENT & AUTHORITIES

SUMMARY OF THE BASIS FOR MANDAMUS RELIEF

> A writ of mandamus will issue to compel a public official to perform a ministerial act. An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion.

Anderson v. City of Seven Points, 806 S.W.2d 791, 793 (Tex. 1991). Such is the case of the duty of the Bastrop City Clerk to reject as insufficient, the recall petition at issue in this case for failure to comply with Charter § 10.07.

Relator contends that the Supplementary Recall Petition is insufficient on its face, for lack of a valid Signer's Affidavit as required by Charter § 10.07. This claim is within the Court's jurisdiction for mandamus relief. *See Bejarano v. Hunter*, 899 S.W.2d 346, 349 (Tex. App.—El Paso 1995, no writ):

> While appellate courts have no ability to resolve factual disputes in a mandamus action, where a petition is lacking on its face, we may issue mandamus ordering a certifying official to reject the would-be candidate's application. [citation omitted].

The Court explained that if the petition at issue "is fatally incomplete on its face" then, "absent other complicating factors" the Court will "have jurisdiction to grant mandamus here." *Id.* In *Bejarano,* the City Clerk decided to certify petitions that did not have voter registration numbers nor the required signer's statement that they knew the purpose for which they had signed the petition. *Id.* at 348. As in this case, in *Bejarano*, "The city clerk's responsibilities are likewise outlined in both the election code and the city charter." *Id.* at 350. The Court held:

> We find that the city clerk's duty to apply the statutory requirements to all applications, and reject those that are insufficient, is ministerial. The clerk possesses no discretion to ignore or amend either the city charter or state election law. […] Accordingly, having disregarded the law because it did not suit her own notion of what a petition should contain, the city clerk accepted [the] petition, and certified [it]. This she had no discretion to do; she was required by the state and city laws to inform [the applicant] that her application was insufficient ….

The Court emphasized that the City Clerk's compliance with the city charter is mandatory:

> In the event that we have not made our holding in this matter sufficiently clear, we restate it: compliance with state election laws and the city charter is mandatory. The clerk's duty to reject all insufficient applications […] is ministerial. […] Failure to perform her duty subjects [the City Secretary] to mandamus. Tex. Elec. Code Ann. § 273.061. *Id.*

The City Secretary has a nondiscretionary duty to enforce the Bastrop City Charter § 10.07 by invalidating the recall petition.

Relator Has No Adequate Remedy on Appeal

> For mandamus to issue, a relator must show that it has no adequate remedy by appeal. An appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments.

In re Union Carbide Corp., 273 S.W.3d 152, 156 (Tex. 2008). In this case, both the interests of the Relator (to require the City Secretary to perform her nondiscretionary duty and invalidate the recall petition) and those of the City of Bastrop and its taxpayers are served by the benefits of mandamus relief on the questions of law in this case. Otherwise, a comedy of errors may occur if a recall election proceeds that should never have occurred because it is based on an invalid, insufficient petition. If an election is ordered, there will be a cost to taxpayers; Relator would be instantly removed from office if the invalid election results in such removal, even before an election contest could be filed and finally decided. *See* City Charter § 10.10 (if the recall election is successful, "the Council shall immediately declare the office vacant.") VR: 0026.

Obtaining an early decision, via mandamus, of the sufficiency of the petition that would initiate the recall election is far more equitable and makes more efficient use of the resources of the parties and the judiciary than proceeding to a potential election contest, assuming *arguendo* that an election contest is even allowed if the initiating recall petition is invalid. *See* Tex. Elec. Code § 221.003(a) (restricting

grounds for an election contest to whether the results of the final canvass were "the true outcome" of the election or was the election tainted by some misconduct or error by someone "officially involved *in the administration of the election*."). With such restrictive language for an election outcome, it is not certain at all that, if Mayor Nelson is removed at an election based on the City Secretary's erroneous certification of the recall petition, he has an adequate remedy on appeal to file an election contest.

Mayor Nelson is also confident that, when the truth is known, he would prevail with the voters and defeat a recall election. This is all the more reason a mandamus decision now on the validity of the recall petition now outweighs any detriments there may be to such mandamus relief. Regardless of how a recall election would turn out, there is no adequate remedy on appeal if the election process is allowed to proceed based on an insufficient recall petition. And it is not in the public interest.

PROPERLY CONSTRUED, TEX. ELEC. CODE § 277.004 DOES NOT PREEMPT THE BASTROP CITY CHARTER RECALL PETITION AFFIDAVIT REQUIREMENT

The City Secretary decided that Charter § 10.07 is invalid and unenforceable because, she asserts, it puts additional requirements, beyond Tex. Elec. Code Ch. 277, for the "validity or verification of petition signatures." In fact, Charter § 10.07 does nothing more than to require the form of the recall petition to contain a

statement of the grounds for recall and to have multiple voters attest to truth of the alleged grounds for recall. The point missed by the City Secretary is that the recall petition must comply both with the City Charter requirements for the content of the petition and the Election Code requirements to determine which signatures are valid. "Determining whether a city charter provision conflicts with the state election code presents us with a pure question of law, which we review de novo." *Austin Police Ass'n v. City of Austin*, 71 S.W.3d 885, 888 (Tex. App.—Austin 2002, no pet.).

THE BASTROP CITY CHARTER CONTAINS REQUIREMENTS FOR THE "FORM" OF RECALL PETITIONS SEPARATE FROM REQUIREMENTS FOR WHAT CONSTITUTES VALID "SIGNATURES."

The City Secretary contends that she was not required to enforce Charter § 10.07 because it was not in effect on September 1, 1985 and is, thus, preempted by Tex. Elec. Code § 277.004. This contention was, and is, without merit. The City Charter is akin to the "City's Constitution" and is approved by the voters of the City. All of its provisions must be respected, especially by city officials on whom falls the duty to enforce it.

It seems to have gotten lost in the emotionally-charge politics of the recall campaign, that the voters of the City of Bastrop built into their "Constitution" protections and requirements that must be met before an elected official's election will be submitted to another election called to overturn the previous election. It may

be that the petition Circulators do not want Mayor Nelson to continue to serve for the remaining 3 years to which he was elected, but the City Charter's recall process must be *strictly* followed. *See Bejarano v. Hunter*, 899 S.W.2d 346, 349 (Tex. App.—El Paso 1995, no writ)

There are several safeguards in the Bastrop City Charter to guard against mob lynching parties directed at recalling elected officials such as Mayor Nelson. For example, City Charter section 10.07 requires a recall petition to be "signed and verified in the manner required for an initiative petition." The initiative provision in Charter § 10.03 requires, *inter alia*, that each page of the petition contain a "statement of the circulator that he/she personally circulated the foregoing paper, that all the signatures appended thereto were made in his/her presence and that he/she believes them to be the genuine signatures of the persons whose names they purport to be." VR: 0023, 0024. Charter § 10.07 has 2 additional requirements specifically for recall petitions; (a) that the petition "contain a general statement of the grounds upon which the removal is sought," and (b) that "one of the signers of each petition paper shall make an affidavit that the statements made therein are true."

Thus, the Bastrop City Charter clearly distinguishes between recall petition "circulators" and recall petition "signers." In interpreting the Bastrop City Charter, this honorable Court must assume that each word was used intentionally. *See Fort*

Worth Transp. Auth. v. Rodriguez, 547 S.W.3d 830, 838 (Tex. 2018)("We read statutes contextually to give effect to every word, clause, and sentence, because every word or phrase is presumed to have been intentionally used with a meaning and a purpose.")

The City Secretary misconstrued "circulator" and "signer" to be one and the same, even though, in doing so, she allowed, and considered valid, the duplicate signatures on scores of the petition pages. *See In re Holcomb*, 186 S.W.3d 553, 555 (Tex. 2006) ([…] we hold a petition containing duplicate signatures is invalid […]."); *Cohen v. Rains*, 745 S.W.2d 949, 954 (Tex. App.—Houston [14th Dist.] 1988, no writ) (duplicate signatures on a petition don't count).

The People of Bastrop, in making their City Charter to be somewhat restrictive on recalling their elected officials—a matter that is not contained in state law and was not required to be allowed at all in the City Charter—chose to require a high threshold for the number of required signatures, 25% of the registered voters, and top of that two distinct affidavits on each page: One affidavit by the Circulator and another affidavit to be signed by at least one voter who signed that page to attest to the truth of the grounds on which the petition sought the official's removal. In adopting their City Charter, the People of Bastrop rightly placed restrictions on what would constitute a sufficient recall petition. They require that the petition state the

grounds for recall, and they require that more than just a few zealous circulators of the petition attest to the truth of the grounds for recall. One way to ensure there is widespread believe in the truth of the stated grounds for recall—and not just that there were voters who wanted to have another election—is require that, if there are 96 pages to a recall petition, then 96 voters—one on each petition page—must believe and attest to the truth of the grounds for recall.

With the blessing of the City Secretary, the Circulators of the recall petition at issue here were allowed to violate the standards for recall petitions set by the People of Bastrop in their City Charter.

It is important to note that even if one of these 3 conditions for the *form* of a recall petition was not met, but all the signature lines contained the information required by Tex. Elec. Code § 277.002, e.g., address, date of birth/voter I.D. number, date of signature, the *signatures* on that page would be valid, but the petition itself would not be. In other words, there was an insufficient number of voters who attested to the truth of the grounds for recall. If the Court were to accept the City Secretary's position that the Signer's Truth Affidavit is not required in order the certify the petition as sufficient, then by the same reasoning, the City Secretary could ignore whether the recall petition stated any grounds for the removal of the officials or

contained a Circulator's affidavit. This would lead to flippant petitioning for recall and potential fraud in signing the petitions.

CHARTER § 10.07 AND TEX. ELEC. CODE CH. 277 ARE NOT IN CONFLICT.

The Texas Supreme Court has clearly addressed how to construe state statutes and city charters when it is alleged they are in conflict. "We presume a home-rule city charter provision to be valid, and the courts cannot interfere unless it is unreasonable and arbitrary, amounting to a clear abuse of municipal discretion." *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002), as supplemented on denial of reh'g (Aug. 29, 2002). The Court said:

> A city charter provision that attempts to regulate a subject matter a state statute preempts is unenforceable to the extent it conflicts with the state statute. However, if the Legislature decides to preempt a subject matter normally within a home-rule city's broad powers, it must do so with "unmistakable clarity." Accordingly, *courts will not hold a state law and a city charter provision repugnant to each other if they can reach a reasonable construction leaving both in effect*. (emphasis added). *Id.*

Tex. Elec. Code chapter 277 concerns what *signatures* can be considered valid for purposes of petitions that are ordered by law outside the Election Code. Section 277.004 says that Chapter 277 preempts any home-rule city charter provision that would impose additional "requirements for the validity or verification of petition *signatures*" than those imposed in that chapter. For example, if a city charter required that, for a petition *signature* to be valid, the petition had to include the signer's Social

Security number, that charter provision would be void as in conflict with the *signature* validity requirements of Chapter 277. However, if a recall petition contains *signatures* that are valid, but the *form* of pages in the recall petition are missing the required statements and affidavits, then the recall petition is insufficient.

Tex. Elec. Code Ch. 277 merely establishes a statewide standard for what information is required for a petition *signature* to be considered valid. When it comes to recall petition, the Bastrop City Charter—legitimately and without conflict with the Elections Code—establishes its standards for (a) how many (valid) signatures overall must appear in the petition, (b) what statements (such as grounds for recall) must appear in the petition, (c) how many voters must attest to the truth of the grounds for recall by requiring one voter per petition page to so swear (*i.e.*, Charter § 10.07), and (d) that the Circulator of each page swear to witnessing the signatures and to the belief that the signatures are legitimate. These are all important safeguards against voters being tricked, as Relator believes they were in this case, into signing a recall petition based on false allegations.

PRAYER

For these reasons, Relator Mayor Lyle Nelson asks the Court to grant this Writ of Mandamus and order Respondent Irma Parker in her official capacity as Interim City Secretary of the City of Bastrop to declare the Recall Petition (Exh.

Relator-3) and the Supplementary Recall Petition (Exh. Relator-7) insufficient based on the requirements of the Bastrop City Charter, and grant Relator such other relief to which, by law or equity, he is entitled and award court costs to Relator.

Respectfully submitted,

/s/ Bill Aleshire
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TEX. R. APP. P. 52.3(J) CERTIFICATION

Pursuant to Tex. R. App. P. 52.3(j), the undersigned certifies that he has reviewed the above Petition for Writ of Mandamus and concluded that every factual

statement in the petition is supported by competent evidence included in the attached verified record and appendix.

/s/ Bill Aleshire
BILL ALESHIRE

CERTIFICATE OF COMPLIANCE

The undersigned herby certifies that this document was computer generated and the word count of the document, except for those items "excluded" by section Tex. R. App. P. 9.4(i)(2)(D), is 4,155 based on the count of the computer program used to prepare the document.

/s/ Bill Aleshire
BILL ALESHIRE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served electronically on the following counsel of record for Respondent on September 21, 2024:

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/s/ Bill Aleshire
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APPENDIX INDEX

ELECTION CODE

TITLE 16. MISCELLANEOUS PROVISIONS

CHAPTER 277. PETITION PRESCRIBED BY LAW OUTSIDE CODE

Sec. 277.001. APPLICABILITY OF CHAPTER. This chapter applies to a petition authorized or required to be filed under a law outside this code in connection with an election.

Added by Acts 1987, 70th Leg., ch. 54, Sec. 16(c), eff. Sept. 1, 1987. Amended by Acts 1993, 73rd Leg., ch. 728, Sec. 81, eff. Sept. 1, 1993.

Amended by:

Acts 2009, 81st Leg., R.S., Ch. 1235 (S.B. 1970), Sec. 25, eff. September 1, 2009.

Sec. 277.002. VALIDITY OF PETITION SIGNATURES. (a) For a petition signature to be valid, a petition must:

(1) contain in addition to the signature:

(A) the signer's printed name;

(B) the signer's:

(i) date of birth; or

(ii) voter registration number and, if the territory from which signatures must be obtained is situated in more than one county, the county of registration;

(C) the signer's residence address; and

(D) the date of signing; and

(2) comply with any other applicable requirements prescribed by law.

(b) The signature is the only information that is required to appear on the petition in the signer's own handwriting.

(c) The use of ditto marks or abbreviations does not invalidate a signature if the required information is reasonably ascertainable.

(d) The omission of the state from the signer's residence address does not invalidate a signature unless the political subdivision from which the signature is obtained is situated in more than one state. The omission of the zip code from the address does not invalidate a signature.

(e) A petition signature is invalid if the signer signed the petition earlier than the 180th day before the date the petition is filed.

(f) The signer's residence address and the address listed on the signer's registration are not required to be the same if the signer is eligible to vote under Section 11.004 or 112.002.

Added by Acts 1987, 70th Leg., ch. 54, Sec. 16(c), eff. Sept. 1, 1987. Amended by Acts 1993, 73rd Leg., ch. 728, Sec. 82, eff. Sept. 1, 1993; Acts 1997, 75th Leg., ch. 1349, Sec. 73, eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 1316, Sec. 43, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 1107 (H.B. 2309), Sec. 1.25(a), eff. September 1, 2005.

Acts 2021, 87th Leg., R.S., Ch. 711 (H.B. 3107), Sec. 97, eff. September 1, 2021.

Sec. 277.0021. MEANING OF QUALIFIED VOTER. A reference in a law outside this code to "qualified voter" in the context of eligibility to sign a petition means "registered voter."

Added by Acts 1989, 71st leg., ch. 483, Sec. 1 , eff. Sept. 1, 1989.

Sec. 277.0022. WITHDRAWAL OF SIGNATURE. (a) A signer may not withdraw the signature from a petition on or after the date the petition is received by the authority with whom it is required to be filed. Before that date, a signer may withdraw the signature by deleting the signature from the petition or by filing with the authority with whom the petition is required to be filed an affidavit requesting that the signature be withdrawn from the petition.

(b) A withdrawal affidavit filed by mail is considered to be filed at the time of its receipt by the appropriate authority.

(c) The withdrawal of a signature nullifies the signature on the petition and places the signer in the same position as if the signer had not signed the petition.

Added by Acts 1993, 73rd Leg., ch. 728, Sec. 83, eff. Sept. 1, 1993.

Sec. 277.0023. SUPPLEMENTING PETITION. (a) Except as

provided by Subsection (b), a petition may not be supplemented, modified, or amended on or after the date it is received by the authority with whom it is required to be filed unless expressly authorized by law.

(b) If a petition is required to be filed by a specified deadline, the petitioner may file one supplementary petition by that deadline if the original petition contains a number of signatures that exceeds the required minimum number by 10 percent or more and is received by the authority with whom it is required to be filed not later than the 10th day before the date of the deadline. The authority shall notify the petitioner as to the sufficiency of the petition not later than the fifth regular business day after the date of its receipt.

Added by Acts 1993, 73rd Leg., ch. 728, Sec. 83, eff. Sept. 1, 1993.

Sec. 277.0024. COMPUTING NUMBER OF SIGNATURES. (a) Except as provided by Subsection (b), if the minimum number of signatures required for a petition is determined by a computation applied to the number of registered voters of a particular territory, voters whose names appear on the list of registered voters with the notation "S", or a similar notation, shall be excluded from the computation.

(b) The signature of a voter whose name appears on the list of registered voters with the notation "S", or a similar notation, is considered valid if the voter:

(1) is otherwise eligible to vote in the territory; and

(2) provides a residence address located in the territory.

Added by Acts 1995, 74th Leg., ch. 797, Sec. 43, eff. Sept. 1, 1995.

Amended by:

Acts 2021, 87th Leg., R.S., Ch. 711 (H.B. 3107), Sec. 98, eff. September 1, 2021.

Sec. 277.003. VERIFYING SIGNATURES BY STATISTICAL SAMPLE. If a petition contains more than 1,000 signatures, the city secretary or other authority responsible for verifying the

signatures may use any reasonable statistical sampling method in determining whether the petition contains the required number of valid signatures, except that the sample may not be less than 25 percent of the total number of signatures appearing on the petition or 1,000, whichever is greater. If the signatures on a petition circulated on a statewide basis are to be verified by the secretary of state, the sample prescribed by Section 141.069 applies to the petition rather than the sample prescribed by this section.

Added by Acts 1987, 70th Leg., ch. 54, Sec. 16(c), eff. Sept. 1, 1987.

Sec. 277.004. EFFECT OF CITY CHARTER OR ORDINANCE. Any requirements for the validity or verification of petition signatures in addition to those prescribed by this chapter that are prescribed by a home-rule city charter provision or a city ordinance are effective only if the charter provision or ordinance was in effect September 1, 1985.

Added by Acts 1987, 70th Leg., ch. 54, Sec. 16(c), eff. Sept. 1, 1987.

 KeyCite Yellow Flag - Negative Treatment
Distinguished by Toubaniaris v. American Bureau of Shipping, Tex.App.-Hous. (1 Dist.), October 29, 1998

589 S.W.2d 748
Court of Civil Appeals of Texas, Dallas.

Charles HOWARD, Margie Howard, Joe Langfitt, Barbara Langfitt, David Bolton, Gayle Dunn, Robert Dunn, Frank Robertson, Betty Pryon, David Mitchell, Janet Mitchell, Jim Thornhill, and Helene Thornhill, Relators,
v.
Charles CLACK, George Drum, Corky Crowder, Larry Holley, Charles Palmore, Joe Regian, Gwen Smale, Dale Stringfellow, and Martin Suber, as Members of the City Council of the City of Garland, Texas, Respondents.

No. 20196.
|
Oct. 3, 1979.

Synopsis
Voters in city of Garland brought action for writ of mandamus to compel city council to hold an election seeking recall of one of its members. The Court of Civil Appeals, Guittard, C. J., held that: (1) phrase "laws of this state" as used in mandamus statute encompasses a duty imposed by charter adopted under Home Rule Amendment; (2) under provision of city charter that secretary was to examine recall petitions to ascertain if they were signed by requisite number of qualified voters and was to attach a certificate showing result of such examination and if petition were sufficient the secretary was to submit the same to city council which "shall" order and fix the date for holding the election, the city council did not have authority and discretion to review the sufficiency of the recall petition and decline to call an election if it determined that the petition did not have the requisite number of genuine signatures; and (3) even if charter failed to confer on any agency authority to determine whether any signatures were fraudulent, such circumstance would not justify judicial recognition of such authority in the council.

Mandamus granted.

West Headnotes (5)

[1] **Mandamus**🔑Municipalities and municipal officers in general

Phrase "laws of this state" as used in mandamus statute does not limit Court of Civil Appeals' jurisdiction to enforcement of duties imposed by law of statewide scope but includes a duty imposed under a city charter adopted pursuant to the Home Rule Amendment. Vernon's Ann.Civ.St. arts. 1174, 1735a; Vernon's Ann.St.Const. art. 11, § 5.

1 Case that cites this headnote

[2] **Mandamus**🔑Appointment or removal of public officers or employees

Court of Civil Appeals had jurisdiction to issue writ of mandamus compelling city council to comply with ministerial duties imposed on it by city charter in connection with recall elections. Vernon's Ann.Civ.St. art. 1735a.

2 Cases that cite this headnote

[3] **Municipal Corporations**🔑Proceedings and Review
Public Employment🔑Petition or other application

Under provision of city charter that secretary was to examine recall petitions to ascertain if they were signed by requisite number of qualified voters and was to attach a certificate showing result of such examination and if petition were sufficient the secretary was to submit the same to city council which "shall" order and fix the date for holding the election, the city council did not have authority and

discretion to review the sufficiency of recall petition and decline to call an election if it determined that the petition did not have the requisite number of genuine signatures Vernon's Ann.St.Const. art. 11, § 5.

6 Cases that cite this headnote

[4] **Municipal Corporations**Proceedings and Review
Public Employment Petition or other application

Even if city charter failed to confer authority on any city agency to determine whether signatures on a recall petition were fraudulent, such would not justify judicial recognition of such authority in city council where no such authority was otherwise expressed or implied in the charter. Vernon's Ann.St.Const. art. 11, § 5.

4 Cases that cite this headnote

[5] **Mandamus**Appointment or removal of public officers or employees

Writ of mandamus would issue to compel city council to hold election for recall of one councilman where city charter imposed on council a mandatory, ministerial duty to order a recall election on presentation of a petition accompanied by a certificate of the city secretary that the petition was sufficient and it was undisputed that the secretary had made such a certificate and that the council had refused to order the election. Vernon's Ann.Civ.St. art. 1735a.

7 Cases that cite this headnote

Attorneys and Law Firms

***749** John W. Bryant, Bryant & Beaty, Dallas, for relators.

John F. Boyle, Jr., Dallas, for respondents.

Before GUITTARD, C. J., and CARVER and STOREY, JJ.

Opinion

GUITTARD, Chief Justice.

Relators in this original petition for mandamus are voters in the city of Garland who have sought to invoke the provisions of the ***750** city charter for recall of one of the members of the city council. Their petition for recall was certified by the city secretary as containing the names of the requisite number of voters, but the city council has refused to call an election after making its own examination of the petition and determining that some of the purported signatures are not genuine and that others are of persons who have sought to withdraw their names. Relators seek a writ of mandamus under article 1735a, Tex.Rev.Civ.Stat.Ann. (Vernon Supp. 1978-1979), on the ground that after the city secretary certified the petition as containing the requisite number of names, the city council had no discretion to review the sufficiency of the petition and had only a ministerial duty to call an election. We agree with this interpretation of the charter. Accordingly, we grant the writ.

Jurisdiction

[1] [2] Before discussing the merits of the petition for mandamus, we must consider respondents' objection that we have no jurisdiction under article 1735a because duties imposed by the charter are not duties imposed by "the laws of this state." We disagree. The statute gives us jurisdiction to issue the writ against public officers "to compel the performance, in accordance with the laws of this state, of any duty imposed upon them, respectively, by law, in connection with the holding of any general, special, or primary election . . . ." This statute cannot properly be interpreted as limiting our jurisdiction to enforcement of duties imposed by laws of statewide scope. A city with a charter adopted under the Home Rule Amendment, Tex.Const. art. XI s 5, has legislative powers not dependent on the general laws of the state. Lower Colorado River Authority v. City of San Marcos, 523 S.W.2d 641, 643-44 (Tex.1975); City of Beaumont v.

Bond, 546 S.W.2d 407, 409 (Tex.Civ.App. Beaumont 1977, writ ref'd n.r.e.). Such a charter is declared by statute to be a "public act," and all courts are required to take judicial notice of it. Tex.Rev.Civ.Stat.Ann. art. 1174 (Vernon 1963); City of Dallas v. Megginson, 222 S.W.2d 349, 351 (Tex.Civ.App. Dallas 1949, writ ref'd n.r.e.). Consequently, a duty imposed by such a charter is a duty "imposed by law" within article 1735a, on which our jurisdiction rests. Nelson v. Welch, 499 S.W.2d 927, 928 (Tex.Civ.App. Houston (14th Dist.) 1973, no writ) (appellate court had jurisdiction, but denied mandamus on merits).

Merits

[3] Having determined that we have jurisdiction, we must consider the principal question, that is, whether the city council has authority and discretion to review the sufficiency of the petition for recall and decline to call an election if it determines that the petition does not have the requisite number of genuine signatures. We conclude that it has no such authority.

The pertinent provision of the charter is section 93, which provides:

> Any member or all members of the council (including the mayor) may be recalled and removed from office by the electors qualified to vote for a successor of such incumbent by the following procedure:
>
> A petition signed by qualified voters entitled to vote for a successor to each member sought to be removed, equal in number to twenty-five (25) per cent of the number of votes cast at the last regular municipal election for that office which is the subject of the petition, shall be filed with the city secretary; provided that not less then eight hundred (800) signatures shall be required in the case of council members and not less than two thousand (2,000) signatures shall be required in the case of the mayor. Such petition shall contain a general statement of the ground for which the removal is sought. The signatures to the petition need not all be appended to one paper, but each signer shall add to his signature his place of residence, giving the street and number. One of the signers to each paper shall make oath before an officer competent to administer oaths that each signature is that of the person whose name it purports to be. Within ten (10) days ***751** from the filing of such petition, The city secretary shall examine the same and, from the list of qualified voters, ascertain whether or not the petition is signed by the requisite number of qualified voters, and, if requested to do so, the council shall allow him/her extra help for that purpose. He/she shall attach to said petition a certificate showing the results of such examination. If by the city secretary's certificate, the petition is shown to be insufficient, it may be amended within ten (10) days from the date of such certificate by obtaining additional signatures. The city secretary shall, within ten (10) days after such amendment is filed, in case one is filed with him/her, make like examination of the said amended petition and, if his/her certificate shall show same to be insufficient, shall be returned to the person filing same and shall not be subject to amendment.
>
> If the petition be found sufficient, the city secretary shall submit the same to the council without delay and the council, in the event the mayor or council member named in said petition fails to resign, Shall order and fix a date for holding the election . . . . (Emphasis added)

Respondents contend that this provision limits the city secretary's authority to the purely ministerial task of comparing the names appearing in the petition with the list of qualified voters to ascertain whether the requisite number of qualified names appear and that she has no authority to decide whether any of the purported signatures are genuine. Further, respondents argue that in order to prevent fraud, some agency of the city must have authority before the election is called to determine whether the signatures are genuine, and that only the city council is in a position to make such a determination since it is authorized by section 21(i) of the charter to "(s)ummons and compel the attendance of witnesses and the production of books and papers before it whenever it may deem necessary for the more effective discharge of its duties."

We cannot agree with respondents because we find nothing in the charter expressly authorizing the city council to take any action with respect to a recall election other than that provided in section 93, which requires the council to order the election whenever the city secretary presents a certificate stating that the petition has been examined and found sufficient. Neither do we find any implied authority for the council to make its own investigation and determination of the sufficiency of the petition. Respondents point to no general language of the charter from which such authority can be implied as incidental. They rely on the council's authority in section 21(i) to compel the attendance of witnesses and the production of books and papers. This authority is limited to situations in which such action is deemed "necessary

for the more effective discharge of its duties." We find no duties imposed on the council concerning a recall election that would make appropriate the exercise of such powers.

[4] With respect to respondents' argument concerning protection against fraud, we need not consider whether the city secretary has authority to determine whether any of the signatures are fraudulent. Even if the charter fails to confer such authority on any agency of the city, that circumstance would not justify judicial recognition of authority in the council that cannot be found, either expressly or impliedly, in the provisions of the charter. Fraud, if it exists, may be dealt with as such. If discovered in time, it may be made an issue in the recall election. Criminal penalties are also available.

Our holding on this point is supported by the decision of the Supreme Court in Weatherly v. Fulgham, 153 Tex. 481, 271 S.W.2d 938, 940 (1954), in the analogous situation of a petition by an independent candidate for a place on the general election ballot. The court held that the Secretary of State, who had the statutory duty to examine the petition and certify the candidate for a place on the ballot, had no authority to inquire into facts outside the record for ***752** the purpose of determining whether any of the signatures were forged or procured by fraud. The court pointed out that if forgery or fraud was committed, criminal penalties were available.

Good reason exists to explain why the people of Garland granted no such power to their city council. Section 93 provides that if the secretary finds the petition insufficient, and so certifies, the petitioners are allowed ten days from the date of the certificate to amend the petition by obtaining additional signatures. Respondents concede that if the secretary's certificate states that the certificate is sufficient, and the council rejects it as insufficient as a result of its own investigation, no such time for amendment would exist. It would be unreasonable to construe section 93 as permitting the petitioners to be thus deprived of their right to amend.

Moreover, to imply authority on the part of the council to make the ultimate determination of sufficiency of the petition would commit the decision to a body that could not be considered impartial. Every recall petition affects at least one of the council members directly, and contemporaneous petitions with respect to other members might well affect a majority, or, indeed, all members of the council. In that situation, each member of the council would be called on to vote on the sufficiency of petitions calling for recall of other members. Rather than create that possibility, the drafters of section 93 apparently intended to commit the responsibility of determining sufficiency of the petition to the city secretary, an impartial officer not subject to recall. We construe the charter in accordance with that evident intent.

This construction is directly supported by Young v. State, 87 S.W.2d 520, 522 (Tex.Civ.App. Fort Worth 1935, writ ref'd), which held that the board of aldermen of the city of Wichita Falls had no discretion in the matter of calling a recall election because a charter provision similar to that now before us imposed the duty of determining and certifying the sufficiency of the recall petition on the city clerk rather than on the board of aldermen. Since writ of error in that case was "refused" without qualification, the decision must be regarded as authoritative. We see no conflict between Young and cases cited by appellee, such as City Commission of Pampa v. Whatley, 366 S.W.2d 620 (Tex.Civ.App. Amarillo 1963, no writ) and Vetters v. State, 255 S.W.2d 588 (Tex.Civ.App. San Antonio 1953, no writ). In Whatley the provisions of the charter are not quoted, and we cannot determine whether they were similar to section 93. Vetters stands for the rule that the city secretary's duties under a charter provision similar to section 93 are ministerial, but our holding in this case is consistent with a characterization of the duties of the Garland city secretary as ministerial.

[5] We find that section 93 imposes on the Garland City Council a mandatory, ministerial duty to order a recall election on presentation of a petition accompanied by a certificate of the city secretary that the petition is sufficient. The undisputed evidence shows that the secretary has made such a certificate and that the city council has refused to order the election. Consequently, the writ of mandamus will be issued.

Mandamus granted.

All Citations

589 S.W.2d 748

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APP TAB C

899 S.W.2d 346
Court of Appeals of Texas,
El Paso.

Manuel BEJARANO, Relator,
v.
Carole HUNTER, City Clerk, Respondent.

No. 08–95–00109–CV.
|
April 27, 1995.

Synopsis
Candidate for city council sought mandamus relief, requesting that Court of Appeals order city clerk to remove name of opponent from ballot for noncompliance with filing requirements. The Court of Appeals held that: (1) clerk lacked discretion to grant insufficient application, but (2) beginning of early voting had rendered issue moot.

Mandamus denied.

West Headnotes (7)

[1] **Mandamus** Announcing candidacy, placing names on ballot, and filing and certifying ticket

Although appellate courts have no ability to resolve factual disputes in mandamus action, where petition is lacking on its face, Court of Appeals may issue mandamus ordering certifying official to reject would-be candidate's application.

6 Cases that cite this headnote

[2] **Public Employment** Elective office

Statutory requirements concerning candidacy for public office are mandatory, and must be strictly construed to ensure compliance.

1 Case that cites this headnote

[3] **Mandamus** Announcing candidacy, placing names on ballot, and filing and certifying ticket
Municipal Corporations Application for and making of appointment in general
Public Employment Election or appointment

City clerk lacked discretion to accept applications for candidacy for city office that did not fully comply with application requirements, and so was subject to mandamus for accepting insufficient application. V.T.C.A., Election Code §§ 141.062–141.065, 273.061; El Paso, Tex., City Charter § 2.2(E).

5 Cases that cite this headnote

[4] **Appeal and Error** Want of Actual Controversy

Capable of repetition yet evading review exception to mootness doctrine applies where act challenged is of such short duration that meaningful review cannot be obtained before issue becomes moot, and there is reasonable expectation that same action will occur again if not addressed.

3 Cases that cite this headnote

[5] **Mandamus** Mandamus Ineffectual or Not Beneficial

Although issue of whether candidate's opponent's name should have been stricken from ballot for failing to fully comply with application requirements was moot, Court of

Appeals would address issue on merits under capable of repetition yet evading review exception to mootness doctrine, since city clerk's longstanding refusal to comply with application law that clerk considered superfluous and unnecessary rendered matter capable of repetition, and tight time constraints for bringing challenge, which allowed only fleeting opportunity for appellate review, met evading review requirement. V.T.C.A., Election Code §§ 141.062–141.065, 273.061; El Paso, Tex., City Charter § 2.2(E).

10 Cases that cite this headnote

[6] **Action** Moot, hypothetical or abstract questions

Case becomes moot when any right which might be determined by judicial tribunal could not be effectuated in manner provided by law.

1 Case that cites this headnote

[7] **Mandamus** Mandamus Ineffectual or Not Beneficial

Although there was good cause to challenge grant by city clerk of application for candidacy for public office that did not meet application requirements, action was moot since early voting had begun. V.T.C.A., Election Code §§ 141.062–141.065, 273.061; El Paso, Tex., City Charter § 2.2(E).

2 Cases that cite this headnote

Attorneys and Law Firms

***347** Michael R. Gibson, El Paso, for relator.

Laura P. Gordon, Asst. City Atty., El Paso, for respondent.

Victor M. Firth, Mounce & Galatzan, El Paso, for real-party-in-interest.

Before the court en banc.

OPINION

In this original proceeding in mandamus relator Manuel Bejarano, a candidate for El Paso city council, district 6 in the May 1995 election, requests that we order the El Paso city clerk to remove the name of his opponent, Barbara Perez, from the ballot.[1] We find that although candidate Perez's petition in lieu of filing fee is insufficient on its face, the start of early voting has mooted the controversy. We therefore deny mandamus relief, ordering that both candidates remain on the ballot.

ANARCHY IN E.P.

This controversy results from the El Paso city clerk's conscious decision to ignore the requirements of state law and of the city charter, coupled with a candidate's apparent indifference to her own responsibility under those laws. Arrogance, ineptness, confusion, and carelessness have combined here to needlessly complicate the electoral process. Gamesmanship, although encompassing valid legal strategy, has compounded the difficulty and precluded the remedy relator seeks. The undisputed facts follow.

Barbara Perez is the incumbent in the race for El Paso city council, district 6 (the lower valley district). On February 20, 1995, the first day for filing as a candidate in the May 1995 city election, she filed her application for a place on the general election ballot with city clerk Carole Hunter. Rather than pay the $250 filing fee, Perez filed a petition in lieu thereof. Her petition included forty-seven signatures, only seventeen of which included the signer's voter registration number along with other identifying information. Each signature was on a form supplied by the Texas Secretary of State; the top of each page contained blanks for the appropriate candidate's name, the office sought, and the election date. Despite clear instructions accompanying the forms that this information

must be filled out for each page of signatures obtained, of seven pages containing signatures ***348** in Perez's petition only two were completed.

City clerk Hunter accepted Perez's application, and certified her name to be placed on the 1995 city election ballot. By the clerk's own admission, she did not require that Perez's petition include the voter registration numbers of its signatories; neither did she require that signature pages include the completed declaration that the signatory knew the purpose for which he or she signed. In her affidavit before this Court, Hunter stated that she did not require such information because:

> There is no requirement in the Charter or state law that the candidates [sic] name be at the top of every page, although the form states that such information should be filled in.
>
> . . . . .
>
> I informed Ms. Perez and other similarly situated candidates for city office that their petitions, which did not contain voter registration numbers, complied with the City Charter. I did so using my discretion as the City Clerk in determining the validity of the petition.
>
> If I believed that voter registration numbers were required, I could have filled those in. In fact, one candidate for a city representative position, Jesus Terrazas, requested that I give him access to the voter registration ballots so that he could fill in the voter registration numbers. I informed Mr. Terrazas that he did not need that information and that I could verify the signatures without that information. I have been accepting petitions without voter registration numbers for several years.
>
> In my opinion, the requirement that voter registration numbers be placed on a nominating petition is a superfluous and unnecessary requirement....

The filing period for city elections closed on March 22, 1995. One other candidate, Manuel Bejarano, filed an application to run for the lower valley seat. On March 23, 1995, Hunter certified both candidates to be placed on the ballot. Also on March 23, Bejarano obtained a copy of Perez's petition. On March 24, his lawyer sent clerk Hunter a letter informing her that he believed Perez's petition was insufficient. Hunter made no reply to this letter. On April 7, 1995, the period to file as a write-in candidate expired. That day, Bejarano filed a mandamus action against the city clerk in the 171st District Court of El Paso County, asking that Perez's name be removed from the ballot.

Candidate Perez obtained counsel and a number of legal maneuvers ensued in the district court. Perez attempted removal to federal district court, with remand the same day; the sitting judge was disqualified;[2] the presiding judge quickly appointed a visiting judge; Perez exercised a strike of that judge under Tex.Gov't Code Ann. § 74.053 (Vernon Supp.1995); the presiding judge appointed a second visiting judge, and scheduled the case for hearing on April 14, 1995 (which was both Good Friday and the last working day before the beginning of early voting). Bejarano requested mandamus against the regional presiding judge from this Court on April 13, asking that the district court be ordered to hold an immediate hearing. We denied mandamus on the grounds that any action by the district court would be void, as it possessed no jurisdiction over a challenge to a ballot application. Tex.Elec.Code Ann. § 273.061 (Vernon 1986). On Friday, April 14, 1995 at approximately 9 a.m., Bejarano filed in this Court another motion for leave to file a petition for writ of mandamus, this time against the El Paso city clerk, Carole Hunter. He did not serve the city attorney or real-party-in-interest Perez until 11:28 a.m. This Court granted leave to file, requested full briefing by all parties to be submitted by Monday, April 17, and scheduled oral argument for Tuesday, April 18, 1995. Argument from relator Bejarano, the City of El Paso, and real-party-in-interest Perez was heard by this Court en banc on that date.

349** ***JURISDICTION

[1] As a threshold matter, we note that jurisdiction to compel an election officer to remove a candidate's name from the ballot is vested in the appellate courts. The Texas Election Code provides:

> 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 Ann. § 273.061 (Vernon 1986).

Numerous mandamus cases in the appellate courts have addressed the very issue before us here: whether an application for a place on the ballot must be rejected because the petition in lieu of filing fee was defective. *See Strachan v. Lanier,* 867 S.W.2d 52, 53 (Tex.App.—Houston [1st Dist.] 1993) (orig. proceeding);

Cohen v. Strake, 743 S.W.2d 366, 367 (Tex.App.—Houston [14th Dist.] 1988) (orig. proceeding); *Gray v. Vance*, 567 S.W.2d 16, 17 (Tex.Civ.App.—Fort Worth 1978) (orig. proceeding). While appellate courts have no ability to resolve factual disputes in a mandamus action, where a petition is lacking on its face, we may issue mandamus ordering a certifying official to reject the would-be candidate's application. *Strachan*, 867 S.W.2d at 53. Thus, if Perez's petition is fatally incomplete on its face as Bejarano suggests (and absent other complicating factors), we have jurisdiction to grant mandamus here.

THE CITY CLERK'S DUTIES

[2] [3] The Texas Election Code allows a home-rule city, such as El Paso, to establish its own requirements for ballot place applications in city elections. Tex.Elec.Code Ann. § 143.005 (Vernon Supp.1995). Although the city has established its own rules through the city charter, the requirements for a petition in lieu of filing fee are almost identical to those required under state law.[3] *Compare* Tex.Elec.Code Ann. § 141.063(2) (Vernon 1986) *with* El Paso City Charter § 2.2(E). A candidate for city office may secure a place on the ballot by filing an application for a place on the general election ballot and paying a $250 filing fee. El Paso City Charter § 2.2(D). A candidate may avoid the filing fee by filing a petition in lieu thereof containing twenty-five valid signatures along with the application. Tex.Elec.Code Ann. §§ 141.062–141.065 (Vernon 1986); El Paso City Charter § 2.2(E). Statutory requirements concerning candidacy for public office are mandatory, and must be strictly construed to ensure compliance. *Wallace v. Howell*, 707 S.W.2d 876, 877 (Tex.1986); *Jones v. Mather*, 709 S.W.2d 299 (Tex.App.—Houston [14th Dist.] 1986) (orig. proceeding); *Gray*, 567 S.W.2d at 17.

Requirements concerning the validity of a petition in lieu of filing fee require that:

> (a) To be valid, a petition *must:*
>
> (1) be timely filed with the appropriate authority;
>
> (2) contain valid signatures in the number required by this code; and
>
> (3) comply with any other applicable requirements for validity prescribed by this code.
>
> (b) A petition may consist of multiple parts. Tex.Elec.Code Ann. § 141.062 (Vernon 1986) [emphasis added].

A signature on a petition is valid if:

> (1) Except as otherwise provided by this code, the signer, at the time of signing, is a registered voter of the territory from which the office sought is elected or has been issued a registration certificate for a registration that will become effective in that territory on or before the date of the applicable election;
>
> ***350** (2) the petition includes the following information with respect to each signer:
>
> (A) the signer's residence address;
>
> (B) *the signer's voter registration number* ...
>
> (C) the date of signing; and
>
> (D) the signer's printed name;
>
> (3) the part of the petition in which the signature appears contains the affidavit required by Section 141.065;
>
> (4) each statement that is required by this code to appear on each page of the petition appears, at the time of signing, on the page on which the signature is entered; and
>
> (5) any other applicable requirements prescribed by this code for a signature's validity are complied with. Tex.Elec.Code Ann. § 141.063 (Vernon 1986) [emphasis added].

The city clerk's responsibilities are likewise outlined in both the election code and the city charter. Again, under the two laws her duties are identical in almost every respect. Under the city charter:

> Within five days after the filing of a nominating petition, the City Clerk *shall* notify the candidate and the person who filed the petition, if other than the candidate, whether it satisfies the requirements prescribed by this Charter. If a petition is found insufficient, the City Clerk *shall* return it immediately to the person who filed it with a statement certifying wherein it is insufficient. El Paso City Charter § 2.2(E) [emphasis added].

We find that the city clerk's duty to apply the statutory requirements to all applications, and reject those that are insufficient, is ministerial. The clerk possesses no discretion to ignore or amend either the city charter or state election law. Nevertheless, the city clerk has averred

that she decided voter registration numbers were "superfluous and unnecessary," and that she would not require them on candidate applications. Similarly, she has wholly ignored the requirement that each page of a petition bearing signatures contain, at the time of signing, the candidate's name, office sought, and election date.[4] Accordingly, having disregarded the law because it did not suit her own notion of what a petition should contain, the city clerk accepted Perez's application and petition, and certified her name to be placed on the ballot. This she had no discretion to do; she was required by the state and city laws to inform Perez that her application was insufficient, and return it to her within five days of receiving it. Had the clerk complied with her ministerial duty, Perez would have had ample time to correct the deficiencies and file a new application before the filing deadline. Failing to perform that duty, the clerk set the stage for a completely avoidable comedy of errors.

In the event that we have not made our holding in this matter sufficiently clear, we restate it: compliance with state election laws and the city charter is mandatory. The clerk's duty to reject all insufficient applications for a place on the ballot is ministerial. Perez's petition in lieu of filing fee was insufficient as a matter of law, and city clerk Hunter was required to reject it. Failure to perform her duty subjects Hunter to mandamus. Tex.Elec.Code Ann. § 273.061 (Vernon 1986).

THE CANDIDATE'S RESPONSIBILITIES

Having concluded that the city clerk deliberately declined to perform ministerial duties required of her by both the election code and the city charter, we turn now to the comportment of the candidate Barbara Perez. First, we emphasize that it is the *candidate*, not the city clerk, who is primarily responsible and accountable for properly completing and timely filing her election application, including the petition if she elects not to pay the $250 filing fee (a decision this candidate no doubt deeply regrets in hindsight). Although the city clerk is charged with reviewing the application, in the end it is the candidate ***351** who must insure that it complies with the state and local law. If she does not, she is at risk of having her candidacy rejected; if not by the clerk, then by the court if an enterprising opponent seeks her removal from the ballot. It is the candidate's responsibility because it is the candidate's name that will (or will not) appear on the ballot.

Here, it is manifest that the petition submitted by Perez did not comply with the law. Most signatories failed to supply their voter's registration numbers, which are required under both the present election code and city charter. A candidate for city council wishing to avoid a filing fee must obtain twenty-five signatures with voter's registration numbers, here from among 68,000 constituents. Perez may find this requirement oppressive and arbitrary. If so, she had two alternatives: pay the $250 filing fee, or challenge the constitutionality of the requirement in court. She did neither.

Second, we turn to what we find to be Perez's far more serious omission: her failure to complete the statement at the top of each page of signatures, *before* asking voters to sign.[5] Although Perez signed the required circulator's affidavit, which states that she "called each signer's attention to the above statements and read them to him [sic] before the signer affixed his [sic] signature," for most pages of her petition this affirms only that she read a statement which was missing all the crucial information a voter needed before signing. We cannot assume that the circulator supplied information missing from the face of the petition itself. A voter may sign only one petition per electoral office. Informing voters of the name, electoral race, and election which they are choosing to so endorse is a vital part of the petition process. Failing to do so risks confusion (at best) and deception (at worst). A voter should never be asked to sign a blank endorsement; by doing so he or she gives up a right, and should be asked to do so only in a way that reflects a knowing choice. Thus, the declaration at the top of each petition page is not a mere technicality, nor a hurdle serving no real purpose: it serves a purpose important to its *signatories*, informing them in writing of the candidate for whom they sign, and of those candidates for whom they cannot sign henceforth. A small but significant civil right is relinquished; this is not trivial, and the challenge of such an omission cannot be shrugged off as merely technical. The candidate *must* provide her supporters with this information.

MOOTNESS

[4] [5] Although we conclude that the controversy between these individual parties became moot with the beginning of early voting, we have addressed its merits because it falls within a classic category of cases which are an exception to the mootness doctrine: those capable of repetition yet evading review. *See Roe v. Wade*, 410 U.S.

113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Pilcher v. Rains*, 853 F.2d 334, 335 n. 1 (5th Cir.1988). The "capable of repetition yet evading review" exception applies where the act challenged is of such short duration that meaningful review cannot be obtained before the issue becomes moot. *General Land Office v. OXY U.S.A.*, 789 S.W.2d 569, 571 (Tex.1990); *Click v. Tyra*, 867 S.W.2d 406, 408 (Tex.App.—Houston [14th Dist.] 1993) (orig. proceeding). In addition, there must be a reasonable expectation that the same action will occur again if not addressed. *Click*, 867 S.W.2d at 408. Given the city clerk's long-standing refusal to comply with the law, together with her sworn statements that a declaration of the petition's purpose is not required and voter registration numbers are "superfluous and unnecessary," we find this matter is capable of repetition.

Although candidates for city office have apparently been submitting insufficient applications for ballot placement for years, and the clerk has been approving them for just as long, this is the first legal challenge to these practices. The tight time constraints for bringing a challenge, and the two-year election cycle, create only a fleeting opportunity for appellate review. We therefore conclude ***352** that this matter also meets the "evading review" requirement. We may rarely determine the merits of a controversy where they will no longer effect the outcome of the particular dispute before us; this is one of those rare times. Thus, although we find that Perez's petition was insufficient, and that the clerk failed to perform her ministerial duty of rejecting her application, we also find that her name should not be stricken from the ballot, as early voting has already begun.

The last day for challenging a candidate's ballot application is the day before the beginning of absentee voting by personal appearance (early voting) for the election for which the application is made. Tex.Elec.Code Ann. § 141.034 (Vernon Supp.1995). Here, early voting began April 17, 1995. Relator properly invoked the mandamus jurisdiction of this Court for the first time on April 14, 1995 (Good Friday), three days (two of which were Passover and Easter) before early voting began.[6] This Court could not afford all parties time to fully brief the issues, nor could we properly consider the issues after briefing, before early voting began. Bejarano never requested a stay of early voting, which might have preserved the possibility of striking Perez's name from the ballot before voting began. Once the first early vote was cast with Perez's name as a candidate for city council, any order altering the ballot would interfere with the orderly process of the election. *See Smith v. Crawford*, 747 S.W.2d 938, 940 (Tex.App.—Dallas 1988) (orig. proceeding).

[6] [7] The only relief Bejarano has requested of this Court is that Perez be removed from the ballot. A case becomes moot "when any right which might be determined by the judicial tribunal could not be effectuated in the manner provided by law." *Smith*, 747 S.W.2d at 940. Where voting has begun, we believe the rights of the voters to an accurate, reliable ballot must override Bejarano's right to challenge his opponent's insufficient application for a place on that ballot. The requested relief in this particular case is therefore moot and we cannot grant it, even where there is good cause for the challenge. *See id.; Price v. Dawson*, 608 S.W.2d 339, 340 (Tex.Civ.App.—Dallas 1980, no writ); *Tafolla v. City of Uvalde*, 428 S.W.2d 486, 487 (Tex.Civ.App.—San Antonio 1968) (orig. proceeding); *Cummins v. Democratic Executive Committee of Lampasas County*, 97 S.W.2d 368, 369 (Tex.Civ.App.—Austin 1936, no writ).

CONCLUSION

This controversy is thick with allegations and accusations that the provisions of the election code and city charter are merely hypertechnical, archaic rules intended to prevent fair access to the ballot. We unanimously disagree. The purpose of meticulous adherence to the law is not to deprive willing candidates from their place on the ballot; the purpose is to ensure equal treatment of all candidates and to protect voters from fraud. Elected officials serve at the pleasure of the voting public and it is the rights of voters which must be vigorously preserved. Although there is no hint of fraud or deception in this case, and we imply none, we cannot analyze the purpose of the rules in a vacuum. We speak not to the merits or capabilities of either contender in the race before us. Instead, we must inspect the voting process in the wider context of overall fair elections. If the election officers of this state are accorded broad discretion in accepting insufficient petitions for one candidate in one election, that discretion also allows them to refuse insufficient petitions for another candidate which may be viewed by that clerk, for political or personal reasons, as an undesirable candidate. There is no constraint on this power if clerks are granted authority to interpret the law at their whim. No clerk is justified in stating, under oath, that she has determined an election requirement is "superfluous and ***353** unnecessary." Imagine the outrage if a clerk disallowed a petition lacking voter registration numbers in the handwriting of the signatory, as required by the city charter, while the same clerk accepted the

opponent's petition and offered to fill in the voter registration numbers as authorized by the election code. Such discretionary application of the rules invites discrimination. And while we note that in the record before us, the city clerk has treated all candidates equally, the very fact that she believes herself free to interpret the election laws as she sees fit demonstrates the potential for abuse.

Further, the caption at the top of each signature page of a petition has an important purpose in protecting the voter. A failure to apprise the signatory of the name, ballot position, and election date of the candidate for whom support is sought can lead to chaos. Suppose an unscrupulous candidate omits the notice or leaves blank the declaration of the candidate's name and position sought, to find at the end of a successful day she has more than enough names to ensure a ballot position. What prevents that candidate from giving (or selling) her extra signatures to another candidate for another office? This possibility leads us to the conclusion that the rules were designed for a cogent and necessary purpose; they are neither hypertechnical nor archaic. While we recognize that the voters want to choose among the full range of qualified candidates, and that many may view this challenged process as an interference with that right, we caution that without this process, meaningful safeguards are abandoned. Democracy requires a fair election; that requirement is not a technicality. We cannot allow rules designed to protect the process to be ignored at the whim of an individual.

We have determined the merits of this action because the circumstances here meet the "capable of repetition yet evading review" exception to the mootness doctrine. We deny Bejarano's requested relief, as the inception of early voting rendered this particular controversy moot. Both candidates will remain on the ballot, and the voters may choose between them, having been fully informed of each actor's contribution to this electoral free-for-all.

The Court will entertain no motions for rehearing.

All Citations

899 S.W.2d 346

Footnotes

1 Although the relief relator requests is that the city clerk be "directed ... to remove the Real Party In Interest's name from the 1995 El Paso General Election Ballot," we believe the ministerial act which the clerk may perform is actually that of declaring the candidate's application for office insufficient. El Paso City Charter § 2.2(D). Such a declaration would presumably require removal of the would-be candidate's name from the ballot. Because of the outcome we reach in this case, we do not address the question of whether Bejarano's petition properly requests relief directed against a party that can perform it.

2 Judge Peca apparently disqualified himself under the belief that this was an election contest proceeding under Tex.Elec.Code Ann. § 221.001 (Vernon Supp.1995), which does require that a judge from another jurisdiction be appointed to hear the contest. Tex.Elec.Code Ann. § 231.004 (Vernon 1986). This proceeding is not an election contest, however, and remedy is by mandamus to the appellate courts.

3 The city charter states that the application shall be filed "in accordance with the laws of Texas," thus referring back to the election code. El Paso City Charter § 2.2(D). The charter does differ from the state election code in one important respect: it requires that the voter registration number be completed by the signer, while the state code allows the number to be filled in later, by another person. Perez has challenged the constitutionality of the state code provision, but has not so challenged the city charter provision. We therefore do not address whether the more stringent city charter provision is unconstitutional under *Pilcher v. Rains,* 853 F.2d 334, 336–37 (5th Cir.1988).

4 Although the election code does not specifically recite this requirement, we find that the provisions of Tex.Elec.Code Ann. §§ 141.063(4), 141.064, 141.065(1), and 141.066(a) (Vernon 1986) imply that each petition page must contain this information at the time each signature is obtained.

5 The declaration read: “Signing the petition of more than one candidate for the same office in the same election is prohibited.” “I know that the purpose of this petition is to entitle _____ to have his [sic] name placed on the ballot for the office of ____ for the _____ election.”

6 Bejarano strategically waited for the expiration of both the filing deadline for ballot position and write-in candidacy before commencing his legal challenge. His clear purpose was to prevent Perez from curing her errors. This decision resulted in insufficient time for this Court to act. Bejarano filed his petition on the last possible working day, he then inexplicably waited two and one-half more hours before serving notice on the City of El Paso and his opponent. Having chosen to wait until his opponent could not cure her petition, he must accept the consequences of that choice.

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81 S.W.3d 794
Supreme Court of Texas.

In re San Juanita SANCHEZ, Pete Garcia, and Esperanza Lopez Flores, Relators.

No. 02–0317.
|
April 22, 2002.
|
Supplemental Opinion on Denial of Rehearing Aug. 29, 2002.

Synopsis
Candidates for mayor and city commissioners of home-rule city filed petition against city secretary for writ of mandamus claiming that charter's deadline, rather than deadline in Election Code, applied to their applications. The Supreme Court held that Election Code's forty-five day deadline did not preempt home-rule city charter's thirty-day deadline for candidates' applications for mayor and city commissioners.

Writ conditionally granted, and motion for rehearing denied.

West Headnotes (11)

[1] **Municipal Corporations**🔑Conflict with charter or act of incorporation
Municipal Corporations🔑Appointment or Election
Public Employment🔑Election or appointment

Election Code's forty-five day deadline did not preempt home-rule city charter's thirty-day deadline for candidates' applications for mayor and city commissioners, and, thus, the charter's deadline was enforceable; the Code permits a city charter to prescribe requirements in connection with a candidate's application for a place on the ballot. V.T.C.A., Election Code §§ 143.005, 143.007, 143.008, 144.005(a).

1 Case that cites this headnote

[2] **Municipal Corporations**🔑Local legislation

Home-rule cities possess the full power of self government and look to the legislature for limitations on their power, not for grants of power.

19 Cases that cite this headnote

[3] **Municipal Corporations**🔑Particular Powers and Functions

Courts presume a home-rule city charter provision to be valid and cannot interfere unless it is unreasonable and arbitrary, amounting to a clear abuse of municipal discretion.

4 Cases that cite this headnote

[4] **Municipal Corporations**🔑Concurrent and Conflicting Exercise of Power by State and Municipality

City charter provision that attempts to regulate a subject matter a state statute preempts is unenforceable to the extent it conflicts with the state statute.

10 Cases that cite this headnote

[5] **Municipal Corporations**🔑Local legislation

If the legislature decides to preempt a subject matter normally within a home-rule city's broad powers, it must do so with unmistakable clarity.

17 Cases that cite this headnote

[6] **Municipal Corporations** Conflict with charter or act of incorporation

Courts will not hold a state law and a city charter provision repugnant to each other if they can reach a reasonable construction leaving both in effect.

4 Cases that cite this headnote

[7] **Municipal Corporations** Consent of local authorities or voters

When a home-rule city establishes its own election application requirements, the only Election Code application requirement that the city must retain is a statement that the candidate is aware of the nepotism law; city need not retain any other application requirement, including the timely filing requirement. V.T.C.A., Election Code §§ 141.031, 141.031(4)(L), 143.005(b), 143.007.

1 Case that cites this headnote

[8] **Municipal Corporations** Consent of local authorities or voters

Election Code's timing requirements do not prohibit a home-rule city from adopting a different filing deadline for municipal elections than the forty-five-day deadline prescribed by the Code. V.T.C.A., Election Code §§ 143.005, 143.007.

[9] **Municipal Corporations** Consent of local authorities or voters

Exception in statute stating forty-five-day deadline for candidate's application for a place on the ballot, "except as otherwise provided by this code" does not refer only to the deadline for a special election to fill a vacancy; rather, the exception also refers to statute which allows home-rule cities to adopt a filing deadline. V.T.C.A., Election Code §§ 143.005, 143.007, 201.054(a).

[10] **Municipal Corporations** Consent of local authorities or voters

Statute which permits a city charter to prescribe requirements in connection with a candidate's application for a place on the ballot for an office of a home-rule city allows home-rule cities to adopt a filing deadline and allows more than differences in the application form for a place on the ballot. V.T.C.A., Election Code § 143.005.

2 Cases that cite this headnote

[11] **Municipal Corporations** Appointment or Election
Public Employment Election or appointment

Supreme Court's decision that Election Code's forty-five day filing deadline did not preempt home-rule city charter's thirty-day deadline for candidates' applications was not a change in the law and, therefore, did not require submission to the United States Department of Justice for pre-clearance; the Supreme Court merely interpreted the Code's language. Voting Rights Act of 1965, § 4(f)(2), 42 U.S.C.A. § 1973b(f)(2); V.T.C.A., Election Code §§ 143.005, 143.007.

Attorneys and Law Firms

***795** Israel Ramon, Jr., Law Office of Israel Ramon, for relators.

Jose R. Guerrero, Leo Montalvo, Jesus Ramirez, Montalvo & Ramirez, for respondent.

PER CURIAM.

In this mandamus proceeding, relators seek a writ directing San Juan's City Secretary, Vicki Ramirez, to accept their applications and place their names on the ballot for the upcoming city commission election. Ramirez refused to accept relators' applications, claiming they were untimely. Although relators submitted their applications after the deadline in Election Code section 143.007, relators did submit them before the filing deadline San Juan's Home Rule Charter prescribed. On April 17, 2002, we issued an order conditionally granting relief, with opinion to follow, because early voting began that day. We now hold that Texas Election Code section 143.005 permits a home-rule city to set a deadline for filing applications for municipal elections that differs from the deadline contained in Election Code section 143.007. Because relators timely submitted their applications under San Juan's Charter, Ramirez was required to accept them and place relators' names on the ballot.

I

Relator San Juanita Sanchez seeks to run for mayor in San Juan's May 4, 2002, general election. Relators Pete Garcia and Esperanza Lopez Flores seek to run for city commissioner in the same election. San Juan is a home-rule city, and its voters have adopted a Home Rule Charter. *See* Tex. Const. art. XI, § 5; *see also* Tex. Loc. Gov't Code § 51.072. Under San Juan's Charter, relators had until thirty days before election day, which was April 4, 2002, to file their applications for a place on the ballot. The Charter Article X, section 10.07 provides, in relevant part: "Any qualified person who desires to become a candidate for election to a place on the City Commission shall file with the City Secretary at least thirty (30) days prior to ***796** the election an application for his name to appear on the ballot."

On March 21, 2002, before the Charter's filing deadline, relators informed Ramirez that they intended to file their applications. Ramirez would not accept them, stating they were untimely under Election Code section 143.007. Section 143.007 provides, in relevant part: "Except as otherwise provided by this code, an application for a place on the ballot must be filed not later than 5 p.m. of the 45th day before election day." Tex. Elec.Code § 143.007(a). Ramirez claimed that section 143.007 controlled over the Charter and required relators to file their applications by March 20, 2002—forty-five days before election day. Because Ramirez would not accept relators' applications in person, relators mailed them to her on March 27, 2002.

Relators then sought mandamus relief in the court of appeals, seeking to require Ramirez to accept their applications and place their names on the ballots. That court denied relief without opinion. Relators next filed a mandamus petition with this Court. We conditionally granted relief, indicating that this opinion would follow.

II

[1] The parties do not dispute that relators filed their applications before the Charter's deadline, but after the deadline set forth in Election Code section 143.007. Accordingly, we decide the legal question of which filing deadline applies to relators' applications. *See In re Canales,* 52 S.W.3d 698, 701 (Tex.2001). We can then determine whether Ramirez had a duty to accept relators' applications and place their names on the ballot. *See* Tex. Elec.Code § 273.061.

III

[2] [3] Home-rule cities, such as San Juan, derive their powers from the Texas Constitution. *See* Tex. Const. art. XI, § 5; *see also* Tex. Loc. Gov't Code § 51.072. They possess "the full power of self government and look to the Legislature not for grants of power, but only for limitations on their power." *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas,* 852 S.W.2d 489, 490–91 (Tex.1993). We presume a home-rule city charter provision to be valid, and the courts cannot interfere unless it is unreasonable and arbitrary, amounting to a clear abuse of municipal discretion. *See City of Brookside Village v. Comeau,* 633 S.W.2d 790,

792 (Tex.1982); *City of Houston v. Todd,* 41 S.W.3d 289, 295 (Tex. App–Houston [1st Dist.] 2001, pet. denied).

[4] [5] [6] A city charter provision that attempts to regulate a subject matter a state statute preempts is unenforceable to the extent it conflicts with the state statute. *See Dallas Merchant's and Concessionaire's Ass'n,* 852 S.W.2d at 491. However, if the Legislature decides to preempt a subject matter normally within a home-rule city's broad powers, it must do so with "unmistakable clarity." *Id.* Accordingly, courts will not hold a state law and a city charter provision repugnant to each other if they can reach a reasonable construction leaving both in effect. *Id.*

We must determine whether the Election Code preempts the Charter's thirty-day filing deadline. We start with Election Code section 141.031, which enumerates the "general requirements" that a candidate's application must satisfy. Tex. Elec.Code § 141.031. For example, a candidate's application must be in writing, be signed and sworn to by the candidate, and must include the candidate's name, occupation, and office sought. *Id.* § 141.031(1), (2), (4). Another general requirement ***797** is that the application must "be timely filed with the appropriate authority." *Id.* § 141.031(3). Thus, section 141.031's plain language makes "timely fil[ing]" a requirement for a valid application. As we recently stated in *In re Gamble,* "the candidate has a duty to file a compliant application before the filing deadline." 71 S.W.3d 313, 318 (Tex.2002).

Section 141.031 does not specify when an application is "timely filed." However, section 143.007 requires a candidate to file an application no later than the forty-fifth day before election day, "[e]xcept as otherwise provided by this code." Tex. Elec.Code § 143.007(a). Thus, section 143.007 acknowledges that other Election Code sections may provide exceptions to the forty-five day filing deadline.

Section 143.005 embodies just such an exception. It governs applications for home-rule city office—the type of office at issue here. *Id.* § 141.005. Section 143.005(a) provides that "[a] city charter may prescribe requirements in connection with a candidate's application for a place on the ballot for an office of a home-rule city." *Id.* § 143.005(a). Accordingly, the Election Code expressly allows home-rule cities, such as San Juan, to establish their own application requirements in municipal elections. *See Bejarano v. Hunter,* 899 S.W.2d 346, 349 (Tex.App.-El Paso 1995, orig. proceeding).

Here, San Juan chose to establish a filing deadline that differs from the deadline in Election Code section 143.007. Instead of section 143.007's forty-five day deadline, San Juan's Charter requires a candidate to file an application with the City Secretary "at least thirty (30) days prior to the election day." The Charter's filing deadline does not conflict with the Election Code. Instead, section 143.005 expressly authorizes San Juan to establish a different filing date. *See* Tex. Elec.Code § 143.005(a).

Certainly, the Election Code does not preempt with "unmistakable clarity" San Juan's ability to prescribe a different filing deadline. *See Dallas Merchant's and Concessionaire's Ass'n,* 852 S.W.2d at 491. We reject Ramirez's contention that Election Code sections 144.005 and 143.008 show the Legislature "clearly reserved for itself regulation in this area." Section 144.005 provides: "[e]xcept as otherwise provided by law," an application for office other than a county or city office must be filed no later than the forty-fifth day before election day. Tex. Elec.Code § 144.005(a). Ramirez states that Election Code section 1.005(10) defines "law," as meaning, among other things, "city charter." *Id.* § 1.005(10). Ramirez argues that, if the Legislature intended to allow home-rule cities to create exceptions to section 143.007's deadline, it would have used the phrase "other law" rather than "as otherwise provided by this code." *Compare* Tex. Elec.Code § 144.005, *with* § 143.007.

Ramirez's argument lacks merit. Section 144.005 does not apply to municipal elections and does not govern here. Moreover, Ramirez's argument presumes no other Election Code provision allows home-rule cities to adopt their own filing deadlines for municipal elections. But, as we have explained, section 143.005 does just that. Thus, section 144.005 in no way suggests that the Legislature intended to preempt home-rule cities from adopting their own filing deadlines.

We reach the same conclusion about section 143.008. Section 143.008 applies to candidates for city office "with a four-year term," and states:

> If at the deadline prescribed by Section 143.007 no candidate has filed an application for a place on the ballot for an ***798** office, the filing deadline for that office is extended to 5 p.m. of the 40th day before election day.

Tex. Elec.Code § 143.008(a), (b).

Section 143.008 applies only when section 143.007's deadline applies. And, section 143.007's deadline does not apply when a home-rule city charter prescribes a different filing deadline than does section 143.007. Accordingly, section 143.008 does not apply here, and does not preempt home-rule cities from adopting their own filing deadlines under section 143.005.

[7] In fact, under Election Code section 143.005(b), when a home-rule city establishes its own application requirements, the only Election Code application requirement that the city must retain is a statement that "the candidate is aware of the nepotism law, Chapter 573, Government Code." *Id.* § 143.005(b). Consequently, the Election Code prohibits a home-rule city from adopting a charter provision that does not require a candidate's application to contain this statement. *Id.* § 141.031(4)(L). However, section 143.005(b) unambiguously states that "[t]he other provisions of Section 141.031 do not apply." *Id.* § 141.005(b). Therefore, a home-rule city need not retain any other application requirement in section 141.031, including "timely fil[ing]" under section 143.007. *Id.*

This construction of the Election Code gives effect to both the Election Code and San Juan's Charter provisions, without holding one filing deadline repugnant to the other. *See Dallas Merchant's and Concessionaire's Ass'n,* 852 S.W.2d at 491. It also gives appropriate deference to the broad discretionary powers the Texas Constitution gives to home-rule cities. *See id.*

We accordingly conclude that San Juan's Charter filing deadline applies here. Ramirez does not dispute that relators attempted to file their applications within that deadline. Further, the only reason Ramirez gave for rejecting relators' applications was the deadline in Election Code section 143.007. We therefore hold that Ramirez was required to accept the applications and place relators' names on the ballot.

Without hearing oral argument, we conditionally granted the writ by order issued April 17, 2002, and directed Ramirez to accept relators' applications and place their names on the ballot. *See* Tex.R.App. P. 52.8(c). As we noted in that order, the writ will not issue unless Ramirez does not comply with our decision.

Justice HANKINSON did not participate in the decision.

Supplemental Opinion on Motion for Rehearing

PER CURIAM.

We deny relators' motion for rehearing. But by this supplemental opinion, we address the three arguments the Texas Secretary of State makes in her amicus brief filed in support of rehearing.

I

The Secretary of State argues that our holding, which allows a home-rule city to prescribe a different filing deadline for municipal elections from that prescribed by Texas Election Code section 143.007, will have adverse effects that reach beyond this case. For example, the Secretary of State asserts that federal law requires election ballots to be mailed to military and overseas voters no later than thirty days before election day. *See* 42 U.S.C. § 1973ff–1. The Secretary of State asserts that because we have upheld San Juan's filing deadline of thirty days before election day to apply for a place on the ***799** ballot, it is impossible to comply with this federal law.

The Secretary of State contends that, compounding this problem, Texas Election Code section 146.054 requires that write-in candidates be given five days after the filing deadline for their applications to be received. Therefore, under San Juan's thirty-day filing deadline, the application process cannot close until twenty-five days before election day. And the ballot printing process can only begin on the twenty-fourth day before election day. According to the Secretary of State, six days after federal law requires the ballots to be mailed, the ballots will be sent to the printer. As a result, the Secretary of State argues that our holding effectively allows home-rule cities to violate federal law.

We disagree. First, our opinion in no way suggests that a home-rule city is free to violate federal law when setting an application deadline for a place on the ballot in a municipal election. Second, the only authority the Secretary of State cites as requiring her to mail ballots to military and overseas voters no later than thirty days before election day is 42 U.S.C. § 1973ff–1. But that statute is inapplicable here.

42 U.S.C. § 1973ff–1 provides that each state shall:

> (1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections *for Federal office;*
>
> (2) accept and process, with respect to any election

> *for Federal office,* any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election;
>
> (3) permit overseas voters to use Federal write-in absentee ballots (in accordance with section 1973ff–2 of this title) in general elections *for Federal office;* and
>
> (4) use the official post card form (prescribed under section 1973ff of this title) for simultaneous voter registration application and absentee ballot application.

42 U.S.C. § 1973ff–1 (emphasis added). Thus, 42 U.S.C. § 1973ff–1 only applies to elections for federal office, not to municipal elections in home-rule cities. Moreover, 42 U.S.C. § 1973ff–1 does not require the Secretary of State to mail ballots to military and overseas voters thirty days before election day. Rather, it requires military and overseas voters to submit voter registration applications to the "appropriate State election official" not less than thirty days before election day. 42 U.S.C. § 1973ff–1(2).

We have found no provision requiring the Secretary of State to mail ballots to military and oversea voters in municipal elections for home-rule cities thirty days before election day. In fact, Texas Election Code section 101.004(e) states that military personnel and individuals domiciled in Texas but temporarily living outside the territorial limits of the United States may request a ballot for an election by submitting a "federal postcard application" by the thirtieth day before election day. *See* Tex. Elec.Code §§ 101.001–101.004. If the voter timely submits such an application, then the balloting materials must be airmailed to the voter. *See* Tex. Elec.Code § 101.007. But if the voter can request balloting materials up to the thirtieth day before election day, the Secretary of State cannot be required to mail ballots thirty days prior to election day. Thus, we ***800** are unpersuaded that our opinion has created a conflict with federal law or allows home-rule cities to violate federal law.

The Secretary of State also contends that our opinion will have adverse effects by allowing home-rule cities to set any filing deadline they want. The Secretary of State asserts that the Election Code requires early voting to begin seventeen days before election day. *See* Tex. Elec.Code § 85.001. Because write-in candidates are allowed an additional five days after the filing deadline to submit their applications, the Secretary of State argues that, depending on the deadline the home-rule city adopts, it might become impossible for the printed ballots to be ready for early voting.

The Secretary of State's argument does not warrant granting rehearing in this case. The Secretary of State does not contend that San Juan's thirty-day filing deadline runs afoul of the Election Code's early voting deadlines. Instead, she expresses concern about other home-rule cities possibly adopting deadlines shorter than San Juan's that could impact early voting and the Election Code's other timing requirements. But such a case is not before us.

[8] Moreover, we agree that the Election Code contains certain timing requirements that home-rule cities must meet when selecting a filing deadline to apply for a place on the ballot in a municipal election. We did not suggest otherwise in our initial opinion. Those timing requirements, however, do not prohibit a home-rule city from adopting under section 143.005 a different filing deadline for municipal elections than the forty-five-day deadline prescribed under section 143.007. Indeed, the Secretary of State concedes that political subdivisions other than counties and cities can adopt their own filing deadlines under section 144.005. But she offers no explanation about why that does not create a conflict with the Election Code's other timing requirements.

II

The Secretary of State next argues that our opinion interprets Election Code section 143.007 in a way that contravenes legislative intent. The Secretary of State asserts that Texas Election Code section 31.003 requires her to "obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code." The Election Code defines "law" as "a constitution, statute, city charter, or city ordinance." Tex. Elec.Code § 1.005(10). Thus, the Secretary of State contends, the Legislature intended that uniformity should govern the interpretation of election laws contained in city charters.

According to the Secretary of State, Election Code section 143.005 allows home-rule cities to adopt differences only in the application form for a place on the ballot—not the filing deadline. The Secretary of State also points to Texas Education Code section 11.055, which provides for a forty-five-day deadline for filing an application for school-related elections. Tex. Educ.Code § 11.055. According to the Secretary of State, elections for an

independent school district or community college can be combined with a city election. By providing the same deadline for both city and school elections, the Election and Education Codes work together to encourage joint elections, thereby lowering election costs.

[9] In addition, the Secretary of State asserts that the Legislature knew how to alter filing deadlines because it did so for political subdivisions other than counties and cities in Election Code section 144.005. It provided there that "[e]xcept as otherwise ***801** provided by law, an application for a place on the ballot must be filed not later than 5 p.m. of the 45th day before election day." Thus, the Secretary of State contends that the Legislature knew how to be clear when excepting a political entity from the forty-five-day deadline. The Secretary of State contends that section 143.007's language—"[e]xcept as otherwise provided by this code"—refers to the deadline for a special election to fill a vacancy under Texas Election Code section 201.054.

Section 201.054(a) provides:

> A candidate's application for a place on a special election ballot must be filed not later than:
>
> (1) 5 p.m. of the 31st day before election day, if election day is on or after the 36th day after the date the election is ordered; or
>
> (2) 5 p.m. of a day fixed by the authority ordering the election, which day must be not earlier than the fifth day after the date the election is ordered and not later than the 20th day before election day, if election day is before the 36th day after the date the election is ordered.

According to the Secretary of State, the Legislature intended that political subdivisions other than counties and cities could set their own filing deadlines. But the Legislature intended the forty-five-day deadline to apply to cities and counties, except for special elections.

[10] As mentioned, the Secretary of State interprets section 143.005 as allowing home-rule cities to adopt differences only in the application form for a place on the ballot. But the Election Code indicates otherwise. The Legislature provided in section 143.005(b) that the only Election Code application requirement a home-rule city must retain is a statement that "the candidate is aware of the nepotism law, Chapter 573, Government Code." *See* Tex. Elec.Code §§ 141.031(4)(L); 143.005(b). And the "other provisions of Section 141.031 do not apply." Tex. Elec.Code § 143.005(b). Those "other provisions" include "timely fil[ing]." *See id.* § 141.031(3). The Legislature could have said in section 143.005(b) that the home-rule city must also retain the "timely fil[ing]" requirement of section 143.007, but it did not do so.

The Secretary of State further attempts to limit section 143.007's phrase—"[e]xcept as otherwise provided by this code"—to section 201.054. While section 201.054 may be included in section 143.007's exception, that exception is broader than the Secretary of State suggests. For example, section 143.007 does not state "[e]xcept as otherwise provided by section 201.054." The exception we relied upon is contained in section 143.005, and that is a provision "otherwise provided by this code."

Further, the Secretary of State may be correct that the Education Code and the Election Code allow elections for an independent school district or community college to be combined with a city election to lower election costs. But neither the Secretary of State nor the Education and Election Codes suggest that this is mandatory. Presumably, a home-rule city is aware that it can combine such elections if the filing deadlines are the same, which will save it money. But that does not change the conclusion that section 143.005 permits a home-rule city to adopt a different filing deadline for municipal elections than what section 143.007 prescribes. Here, if San Juan's voters decide it would be better to have combined elections, they can amend the City Charter to provide a forty-five-day filing deadline for municipal elections.

III

[11] The Secretary of State's last argument is that the Court's ruling effects a ***802** change in the law requiring submission to the Department of Justice. The Secretary of State asserts that in a 1983 election law opinion, the Secretary of State determined that state election law prevails over conflicting provisions of city charters. Since the Election Code became effective in 1986, the Secretary of State's interpretation of the forty-five-day filing deadline has been that it prevents home-rule cities from adopting their own application deadlines. The Secretary of State asserts that this interpretation was sent to the Justice Department in a 1985 letter stating:

> The revised law [section 143.007] standardizes the filing deadline for a candidate's application for a place on the ballot for a city office. The section provides a deadline of the 45th day before election day rather than the 31st day before election day, to allow for the authority's obtaining ballots in time to start sending out

absentee mail ballots as soon as possible after the 45th day preceding the election pursuant to section 86.004.

The Secretary of State contends that our opinion reaches a different conclusion and represents a change in the State's election law. The Secretary of State asserts that federal law requires changes in state election laws, whether those changes occur by legislation or through court order, to be submitted to the Justice Department for pre-clearance. *See, e.g.*, 42 U.S.C. §§ 1973b(f)(2) and 1973c. The Secretary of State asserts that she is responsible for submitting those changes, and if this Court's judgment becomes final, that change must be submitted to the Justice Department.

Our opinion does not change the State's election law. We were called upon only to interpret the existing Election Code's language. And we concluded that section 143.005 authorizes San Juan's City Charter's provision prescribing a thirty-day filing deadline, instead of the forty-five-day filing deadline prescribed by section 143.007.

Moreover, the Secretary of State's letter sent to the Justice Department in 1985 provides: "[t]he revised law [section 143.007] standardizes the filing deadline for a candidate's application for a place on the ballot for a city office...." But the letter does not state that section 143.007 standardizes the filing deadline for a candidate's application for a place on the ballot for a "home-rule" city office. This distinction is significant because that same letter provides that section 143.005 "authorizes a home-rule city by charter to prescribe requirements for a candidate's application for a place on the ballot for a city office...." Thus, the Secretary of State made clear to the Justice Department in 1985 that home-rule cities could prescribe their own requirements for a candidate's application for a place on the ballot in municipal elections. And under Election Code section 143.005, those "requirements" include filing deadlines. In any event, if the Secretary of State does not think that the 1985 submission is accurate under our construction of the Election Code, she may, of course, determine that the submission should be amended.

Relators' motion for rehearing is denied.

All Citations

81 S.W.3d 794, 45 Tex. Sup. Ct. J. 596, 45 Tex. Sup. Ct. J. 1257

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996 S.W.2d 904
Court of Appeals of Texas,
Dallas.

THE CITY OF SHERMAN, Mayor Julie Ellis Starr, Former Mayor Harry Reynolds, and City Clerk Helen Friend, Appellants,
v.
Carl HUDMAN, Sherman Police Association, Mike Roberts, J.W. Bain, and Sherman Firefighters Association, Appellees.

No. 05–95–01600–CV.
|
June 25, 1999.

Synopsis
Police and firefighters brought declaratory judgment action against city, seeking injunctive and mandamus relief on ground that city did not have authority to call election pursuant to initiative petition to repeal their collective bargaining rights. Following election, they amended petition to add election contest to suit. City filed plea to the jurisdiction. The 15th Judicial District Court, Grayson County, Fry, J., denied plea and entered judgment declaring repeal election void. City appealed. The Court of Appeals, Moseley, J., held that: (1) allegation that city lacked statutory authority to hold repeal election fell within ambit of Declaratory Judgments Act; (2) city, in conducting repeal election, was required to comply with form and content requirements for petitions as set forth in election code; (3) there was sufficient evidence that city violated election code by allowing supplementation of petition to repeal, and thus, city clerk was without authority to certify petition; (4) city's failure to comply with city charter provision, which required initiative petition form to contain full text of ordinance to be repealed, precluded city clerk from certifying petition; and (5) even if election requirements were directive and not mandatory, city failed to substantially comply with them, and thus, election was void.

Affirmed.

West Headnotes (32)

[1] Municipal Corporations Initiative

Issues raised by appeal challenging authority of city to call election to repeal collective bargaining rights of police and firefighters and challenging election results themselves were not moot, even though subsequent unchallenged election repealed rights, where outcome of appeal would determine whether the parties were subject to collective bargaining during the period between the two elections.

[2] Pleading Plea to the Jurisdiction

A plea to the jurisdiction contests the trial court's authority to determine the subject matter of the cause of action.

[3] Courts Presumptions and Burden of Proof as to Jurisdiction

The plaintiff bears the burden of alleging facts affirmatively showing the trial court has subject-matter jurisdiction.

[4] Pleading Plea to the Jurisdiction

When deciding to grant a plea to the jurisdiction, a trial court must look solely to the allegations in the petition.

[5] **Pretrial Procedure** Want of jurisdiction

Dismissing a cause of action for lack of subject-matter jurisdiction is only proper when it is impossible for the plaintiff's petition to confer jurisdiction on the trial court.

[6] **Appeal and Error** Subject-matter jurisdiction

Because the question of subject-matter jurisdiction is a legal question, appellate court reviews de novo the trial court's ruling on a plea to the jurisdiction.

[7] **Appeal and Error** Subject-matter jurisdiction

When reviewing a ruling on a plea to the jurisdiction, Court of Appeals must determine whether a party has met its burden of pleading facts showing the trial court has subject-matter jurisdiction over the pending controversy.

[8] **Appeal and Error** Pleading and dismissal

When reviewing a ruling on a plea to the jurisdiction, Court of Appeals takes allegations in the pleadings as true and construes them in favor of the pleader.

[9] **Election Law** Power to Confer and Regulate

The holding of an election and the election procedure are part of the political powers of the state; except as provided by statute, the judiciary has no control over the election process.

[10] **Election Law** Limitations and laches

A void election is subject to collateral attack at any time.

1 Case that cites this headnote

[11] **Election Law** Ordering or calling election

If a governmental entity was wholly without authority to call an election, the election held pursuant to such an order is void.

[12] **Election Law** Ordering or calling election

An order for an election that is void for lack of authority to call that election cannot be valid for any purpose.

[13] **Election Law** Effect of Irregularities or Defects

In a collateral attack on the validity of an election, the court may not inquire into latent defects in the petition process; however, where the defect is substantial, appears on the face of the petition, and shows the governing entity's lack of statutory authority to call an election, any election held pursuant thereto is void.

[14] **Declaratory Judgment** Elections

A challenge to the statutory authority to hold an election may be brought by way of a declaratory judgment action.

[15] **Declaratory Judgment** Elections

Police and firefighters' allegation that city lacked statutory authority to hold election to repeal their collective bargaining rights fell within ambit of Declaratory Judgments Act, even though pleadings also alleged wrongdoing and fraud in the election process, where pleadings alleged defects that were apparent on the face of the petition forms. V.T.C.A., Civil Practice & Remedies Code § 37.004.

1 Case that cites this headnote

[16] **Municipal Corporations** Initiative procedure

While allegations of wrongdoing and fraud in the process of the election were proper subjects of an election contest, the allegation by police and firefighters that city had no statutory authority to hold the election to repeal their collective bargaining rights was not. V.T.C.A., Election Code § 221.003.

[17] **Municipal Corporations** Initiative procedure

Police and firefighters did not prematurely file election contest, which challenged results of election to repeal their collective bargaining rights, by amending after the election their pre-election pleadings, which challenged city's authority to hold the election, where pre-election pleadings did not assert grounds constituting an election contest.

[18] **Trial** Effect as verdict

Findings of fact entered in a case tried to a court have the same force and dignity as a jury's verdict upon special issues.

[19] **Appeal and Error** Application of law to or in light of facts

Court of Appeals does not review a trial court's conclusions of law for factual sufficiency.

[20] **Appeal and Error** Plenary, free, or independent review
Appeal and Error Application of law to or in light of facts

When reviewing the trial court's legal conclusions, Court of Appeals evaluates them independently, determining whether the trial court correctly drew the legal conclusions from the facts.

[21] **Municipal Corporations** Initiative procedure

City, in conducting election to repeal collective bargaining rights for police and firefighters, was required to comply with form and content requirements for petitions as set forth in election code. V.T.C.A., Election Code § 277.001 et seq.; V.T.C.A., Local Government Code §

174.005.

[22] **Municipal Corporations** Initiative procedure

Petition requirements of election code apply to repeal petitions brought under local government code setting forth requirements for adoption and repeal of collective bargaining rights for police and firefighters, to the extent election code requirements do not conflict with requirements contained in the local government code. V.T.C.A., Election Code § 277.001 et seq.; V.T.C.A., Local Government Code §§ 174.005, 174.053.

[23] **Municipal Corporations** Initiative procedure

Petition to repeal collective bargaining rights for police and firefighters was essentially a petition by electors requesting city to pass an ordinance calling for a repeal election, and thus was an initiative petition that was subject to charter provisions relating to petition requirements for initiative petitions, where city was a home-rule city and its charter provisions relating to petition requirements were in effect on September 1, 1985. V.T.C.A., Election Code § 277.004.

[24] **Municipal Corporations** Mode of exercise of powers in general

A municipal government acts through the passage of ordinances, which are municipal bylaws passed by the governing body of the municipality for the regulation, management, and control of its affairs and those of its citizens; therefore, for a city to hold an election, the city council must pass an ordinance calling for the election.

[25] **Municipal Corporations** Initiative procedure

There was sufficient evidence that city violated election code by allowing supplementation of initiative petition to repeal collective bargaining rights for police and firefighters, and thus, city clerk was without authority to certify petition, where 37 petition forms were submitted, date stamps on forms indicated they were filed at various dates and times, and city treated such forms as one petition. V.T.C.A., Election Code § 277.0023(a).

1 Case that cites this headnote

[26] **Municipal Corporations** Initiative procedure

City's failure to comply with city charter provision, which required initiative petition form to contain full text of ordinance to be repealed, precluded city clerk from certifying petition to repeal collective bargaining rights for police and firefighters, even though petition was entitled referendum petition, and not initiative petition.

[27] **Municipal Corporations** Initiative procedure

City failed to comply with city charter provision requiring petition to identify a single committee of five electors as responsible for circulating and filing petition, and thus, city clerk was without authority to certify initiative petition to repeal collective bargaining rights for police and firefighters, where petition forms contained more than one committee of five electors.

[28] **Statutes** Plain Language; Plain, Ordinary, or Common Meaning

When interpreting statutes, courts are directed to give words their ordinary meaning.

[29] **Municipal Corporations** Initiative procedure

Election statutes and city charter regarding petitions used mandatory language, such as "may not" and "shall contain," in setting forth requirements for properly calling an election, and thus, such requirements were mandatory for initiative petition to repeal collective bargaining rights for police and firefighters. V.T.C.A., Election Code § 277.001 et seq.

[30] **Election Law** Construction and Operation
Municipal Corporations Construction of charters and statutory provisions

Courts are to construe the provisions of election statutes and city charters that relate to voters as directory whereas the provisions which relate to what is required of candidates are mandatory.

[31] **Municipal Corporations** Initiative procedure

Even assuming requirements for petitions, as set forth in election statutes and city charter, were merely directive and not mandatory, city failed to substantially comply with such requirements, and thus, initiative petitions were insufficient to confer authority on city to call election to repeal collective bargaining rights for police and firefighters and election was void, where no single petition form contained required number of signatures, none of the petition forms contained the full language of the proposed ordinance to be voted upon, and the forms contained different committees of five electors. V.T.C.A., Election Code § 277.001 et seq.

2 Cases that cite this headnote

[32] **Election Law** Construction and Operation

Substantial compliance with an election requirement cannot exist when there has been a complete lack of compliance and the purpose of the requirement has not been fulfilled.

Attorneys and Law Firms

***907** C. Robert Heath, Bickerstaff Heath Smiley Pollan Kever & McDaniel, Austin, for Appellant.

Roger D. Sanders, Sanders O'Hanlon & Motley, P.C., Sherman, B. Craig Deats, P.C., Austin, for Appellee.
Before Justices MALONEY and MOSELEY.[1]

***908 O P I N I O N**

Opinion By Justice MOSELEY.

The City of Sherman, Mayor Julie Ellis Starr, Former Mayor Harry Reynolds, and City Clerk Helen Friend (collectively "the City") appeal the trial court's judgment voiding the results of an election repealing the City's adoption of the Fire and Police Employee Relations Act.[2] In fifteen points of error, the City generally asserts (1) the trial court did not have jurisdiction to render a judgment, (2) the trial court applied incorrect legal findings of fact. For the reasons set forth below, we affirm the trial court's judgment.

BACKGROUND

In 1974, Sherman voters adopted the provisions of the Fire and Police Employee Relations Act. Under this act, police and firefighters are granted the right to organize and collectively bargain with the City regarding compensation, hours, and other conditions of employment.[3] Collective bargaining rights, once adopted, may be repealed only by an election called by the City after receiving a petition signed by a sufficient number of voters.[4]

In early 1995, the Sherman City Council sought repeal of collective bargaining rights for police and firefighters. According to testimony at trial, the City wanted to place the repeal measure on the May 6, 1995 general election ballot because a general election brought out a greater number of voters thereby increasing the probability that the repeal measure would pass. John Gilliam, the city attorney, prepared a petition form at the request of H.K. Lyde, a Sherman citizen active in the repeal effort. According to Gilliam, the petition form was drafted in an attempt to comply with state law and city charter requirements. The petition form called for "the repeal of collective bargaining rights for Sherman policemen and firefighters pursuant to section 174.053 of the local government code." Lyde and others circulated the multiple petition forms and obtained signatures. Thirty-seven separate petition forms were received by the city clerk's office between January 23, 1995 and February 8, 1995. When each form was submitted, it was stamped "received," and the time of receipt was noted. After receiving all thirty-seven petition forms, the city clerk, Helen Friend, verified the signatures and certified the thirty-seven forms as one petition. Friend testified she placed all the petition forms in a single file folder and intended to treat them as a single document.

After receiving the petition forms, the Sherman City Council passed Ordinance 4401 placing the collective bargaining repeal measure on the May 6, 1995 general municipal election ballot. During the first reading of the proposed ordinance at the city council meeting, questions arose about the validity of the sworn circulator affidavits on several of the petition forms. Specifically, it came to light that Mayor Reynolds had circulated some petitions and obtained signatures. Gilliam went to the city clerk's office to see if Mayor Reynolds had signed any circulator affidavits. Gilliam found no petition forms signed by Mayor Reynolds. However, Gilliam ascertained that Lyde had signed as circulator three petition forms that were actually circulated by Mayor Reynolds.

While at the city clerk's office, Gilliam also learned a woman named Virginia Evans had signed a circulator affidavit on a petition form she did not circulate. Evans had taken a petition form circulated by her employer to the city clerk's office for filing. The deputy clerk, Linda Ashby, noticed the circulator affidavit had not been signed and told Evans she needed to sign it. Evans informed Ashby she did not circulate the petition form and had not witnessed any of the signatures. Ashby consulted Friend about the matter, and ***909** Friend stated that for Evans to submit the petition form, she would have to sign the circulator affidavit. Ashby relayed this information to Evans. According to Evans, both Ashby and Friend watched her sign the circulator affidavit knowing she (Evans) had not circulated the petition form.[5]

Because of the problems, the City decided to disregard (but not officially decertify) the sixty-five signatures involved in the Lyde and Evans petition forms because the remaining petition forms collectively contained a total number of signatures that exceeded the minimum number of signatures required to call the election under section 174.053(a) of the local government code. City officials did not investigate any other circulator affidavits and represented they knew of no problems with the other petition forms. However, after the election, it was discovered that Lyde signed circulator affidavits on eight additional petition forms without actually witnessing the signatures thereon.

Before the election, the police and firefighters sought a temporary and permanent injunction, mandamus, and declaratory judgment in the district court on the ground the petition was invalid for failure to comply with applicable state law and city charter requirements. At the City's urging, the trial court declined to enjoin the election and abated the action until after the election on May 6, 1995. The repeal measure appeared on the May 6 ballot.

After the votes were canvassed, the City declared the repeal measure passed by 257 votes. Thereafter, the police and firefighters amended their pleadings to add an election contest to their suit. The City filed a plea to the jurisdiction asserting the trial court did not have jurisdiction because the election contest was filed before the election was held and, thus, was premature. The City further asserted the declaratory judgments act did not confer independent jurisdiction on the trial court. The trial court denied the City's plea to the jurisdiction.

The case was called to trial before the court and, after hearing evidence, the trial court entered findings of fact and conclusions of law. The trial court concluded that, to be legally sufficient, the petition had to meet the requirements of chapter 174 of the Texas Local

Government Code, chapter 277 of the Texas Election Code, and "all applicable provisions" of the Sherman City Charter. Because the petition forms did not comply with these requirements, the trial court concluded the City did not have statutory authority to call the repeal election and, therefore, the May 6, 1995 repeal election was void.

The trial court also found certain city officials involved in the election engaged in misconduct rising to the level of fraud such that the court could not ascertain the true outcome of the May 6 repeal election. Specifically, the trial court found the conduct of city officials in knowingly falsifying one circulator affidavit, failing to swear in the affiants of at least fifteen circulator affidavits, ignoring known false affidavits, failing to fully investigate the possibility that other false affidavits existed, and certifying unverified signatures, among other related misconduct, constituted election fraud. The trial court entered judgment declaring the May 6, 1995 repeal election void, setting aside the repeal election results, permanently enjoining the City from giving effect to the repeal election results, and awarding attorney's fees to the police and firefighters. The City now appeals this judgment.

MOOTNESS

[1] Following submission of this appeal, we requested the parties to submit additional briefing on whether the issues in this appeal are rendered moot by the results of a January 18, 1997 election repealing the collective bargaining rights for police and firefighters. After reviewing the ***910** briefs, the supplemental briefs, and the record, we conclude the issues raised by this appeal are not moot. Specifically, the outcome of this appeal will determine whether the parties were subject to collective bargaining during the period between the two elections. This issue is central to ongoing disputes between the parties, some of which have resulted in litigation. Accordingly, we will address the merits of this appeal.

JURISDICTION

In its first point of error, the City contends the trial court erred in overruling the City's pleas to the jurisdiction because the trial court did not have jurisdiction over the declaratory judgment suit filed by the police and firefighters. Specifically, the City argues the trial court lacked jurisdiction because the police and firefighters were, in essence, challenging the election results and any challenge to the results of an election may be brought only as an election contest. The City further maintains that, even if the suit was considered an election contest, the trial court did not have jurisdiction because the election contest was filed prematurely.

The police and firefighters respond that the trial court obtained jurisdiction over the declaratory judgment action because in their pleadings they asserted the City was wholly without authority to call and hold the repeal election. The police and firefighters further argue they did not amend their pleadings to allege an election contest until after the election; therefore, the election contest was timely filed.

A. Standard of Review

[2] [3] [4] [5] A plea to the jurisdiction contests the trial court's authority to determine the subject matter of the cause of action.[6] The plaintiff bears the burden of alleging facts affirmatively showing the trial court has subject-matter jurisdiction.[7] When deciding to grant a plea to the jurisdiction, a trial court must look solely to the allegations in the petition.[8] Dismissing a cause of action for lack of subject-matter jurisdiction is only proper when it is impossible for the plaintiff's petition to confer jurisdiction on the trial court.[9]

[6] [7] [8] Because the question of subject-matter jurisdiction is a legal question, we review *de novo* the trial court's ruling on a plea to the jurisdiction.[10] We must determine whether a party has met its burden of pleading facts showing the trial court has subject-matter jurisdiction over the pending controversy.[11] We take allegations in the pleadings as true and construe them in favor of the pleader.[12]

B. Applicable Law

[9] The holding of an election and the election procedure are part of the political powers of the state; except as provided by statute, the judiciary has no control over the election process.[13] Section 221.002 of the Texas Election Code gives the district court exclusive original jurisdiction of an election contest.[14] Section 221.003

prescribes ***911** the scope of inquiry in an election contest as follows:

> (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.

* * * * *

> (c) This section does not limit a provision of this code or other statute expanding the scope of inquiry in an election contest.[15]

A contestant may not file an election contest before the day after the election and must file it within thirty days of the date the official result of the contested election is determined.[16]

[10] [11] [12] However, a void election is subject to collateral attack at any time.[17] If a governmental entity was wholly without authority to call an election, the election held pursuant to such an order is void.[18] An order for an election that is void for lack of authority to call that election cannot be valid for any purpose.[19]

[13] [14] In a collateral attack on the validity of an election, the court may not inquire into latent defects in the petition process; however, where the defect is substantial, appears on the face of the petition, and shows the governing entity's lack of statutory authority to call an election, any election held pursuant thereto is void.[20] A challenge to the statutory authority to hold an election may be brought by way of a declaratory judgment action.[21]

Under the Texas Uniform Declaratory Judgments Act, "[a] court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."[22] The purpose of the declaratory judgments act is to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations."[23] The act permits interested persons to have a court determine any question of construction or validity arising under a statute and to obtain a declaration of the rights, status, or other legal relations thereunder.[24]

C. Discussion

[15] We first address the City's contention the trial court did not have jurisdiction over the declaratory judgment action. The City asserts that, because the police and firefighters are challenging the results of the May 6 election, their suit may be brought only as an election contest. However, the City concedes that, "if ***912** the governmental entity was wholly without authority to call the election so that the election was void (as opposed to voidable), then a declaratory judgment action might be proper." Our review of the pleadings shows that, although the police and firefighters challenged the election results, they also alleged that defects apparent on the face of the petition forms deprived the City of any statutory authority to call the election. The allegation that the City did not have authority to call the election is in addition to and separate from the allegations of wrongdoing and fraud in the process of the election which allegedly affected the outcome of the election.

[16] While allegations of wrongdoing and fraud in the process of the election are proper subjects of an election contest,[25] an allegation the City had no statutory authority to hold the repeal election is not.[26] Resolving such an allegation requires judicial interpretation and construction of the Fire and Police Employees Relations Act, the Texas Election Code, and the Sherman City Charter. Therefore, the allegation the City had no statutory authority to hold the repeal election falls within the ambit of the declaratory judgments act.[27] The police and firefighters alleged facts that, if true, entitled them to a declaratory judgment that the election was void.[28] Accordingly, we conclude the trial court did not err in denying the City's plea to the jurisdiction to the extent it complained the trial court did not have jurisdiction over the declaratory judgment action.

[17] We next address the City's contention that the trial court did not obtain jurisdiction over the police and firefighters' election contest because it was prematurely filed. On May 19, 1995, after the May 6 election and within the thirty-day period for bringing an election contest, both the police and firefighters amended their pleadings to add a claim that the election was void

because of fraud, illegal conduct, or mistake by the City which affected the repeal election's outcome. Before May 19, neither the police nor the firefighters asserted grounds constituting an election contest. Thus, contrary to the City's assertion, the police and firefighters did not contest the election results until after the election was held. The amended pleadings asserting an election contest were filed within the statutory period for bringing an election contest.[29] Accordingly, the trial court did not err in denying the City's plea to the jurisdiction on the ground that the election contest was prematurely filed. We overrule the City's first point of error.

STANDARD OF REVIEW

[18] In its remaining points of error, the City challenges the various findings of fact and conclusions of law entered by the trial court. Findings of fact entered in a case tried to a court have the same force and dignity as a jury's verdict upon special issues.[30] We apply the same standards in reviewing the legal and factual sufficiency of the evidence supporting the trial court's fact findings as we do when reviewing the legal and factual sufficiency of the evidence supporting a jury's answer to a special issue.[31] We do not substitute our ***913** judgment for that of the fact finder, even if we might have reached a different conclusion when reviewing the evidence.[32]

Instead, when addressing a legal sufficiency challenge we view the evidence in a light most favorable to the finding, consider only the evidence and inferences that support the finding, and disregard all evidence and inferences to the contrary.[33] We uphold the finding if more than a scintilla of evidence exists to support it.[34] In reviewing a factual sufficiency challenge, we examine all of the evidence and set aside a finding only if it is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust.[35]

[19] [20] We do not review a trial court's conclusions of law for factual sufficiency.[36] When reviewing the trial court's legal conclusions, we evaluate them independently, determining whether the trial court correctly drew the legal conclusions from the facts.[37] Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence.[38]

APPLICATION OF ELECTION CODE AND CITY CHARTER

In its fourth point of error, the City contends the trial court erred in concluding the repeal petitions did not comply with all applicable provisions of law. Under this point, the City argues the trial court erred in applying Texas Election Code and Sherman City Charter requirements to petitions seeking to repeal collective bargaining under chapter 174 of the Texas Local Government Code. The City asserts chapter 277 of the election code setting forth petition requirements is preempted by section 174.005 of the local government code and is therefore inapplicable to the repeal petition process.[39]

A. Application of Election Code

[21] Chapter 174 of the local government code sets forth the requirements for adoption and repeal of collective bargaining rights for police and firefighters. Section 174.005 provides:

> This chapter preempts all contrary local ordinances, executive orders, legislation, or rules adopted by the state or by a political subdivision or agent of the state, including a personnel board, civil service commission, or home-rule municipality.[40]

Section 174.053(a) provides the governing body of a political subdivision shall order an election for the repeal of collective bargaining rights on receiving a petition signed by the requisite number of qualified voters of the political subdivision.[41] Section 174.053 also provides language that must appear on the ballot and prescribes the number of signatures that must be obtained to conduct the election.[42] However, chapter 174 does not otherwise prescribe the form or content of the repeal petition.

Chapter 277 of the election code establishes minimum requirements for petitions "authorized or required to be filed under a ***914** law outside [the election code] in connection with an election ... "[43] Chapter 277 sets forth requirements for determining the validity of petition signatures,[44] withdrawing petition signatures,[45] supplementing the petition,[46] and computing and verifying the signatures.[47]

[22] The City argues chapter 277 of the election code is preempted by chapter 174 of the local government code. We disagree. By its terms, section 174.005 preempts only laws *contrary* to provisions contained in chapter 174.

Because chapter 174 is a law outside the election code that authorizes or requires a petition to be filed in connection with an election, we conclude the petition requirements of election code chapter 277 apply to repeal petitions under local government code chapter 174 to the extent they do not conflict with requirements contained in chapter 174.[48]

B. Application of City Charter Requirements

[23] The City also contends the provisions in the Sherman City Charter governing initiative and referendum petitions do not apply to a petition seeking the repeal of collective bargaining rights under chapter 174 of the local government code. We have already concluded chapter 277 of the election code applies to elections under chapter 174 of the local government code to the extent there is no conflict between them. Section 277.004 of the election code specifically makes effective "any requirements for the validity or verification of petition signatures in addition to those provided [by chapter 277 of the election code] that are prescribed by a home-rule city charter provision," if the charter provision was in effect September 1, 1985.[49]

The City does not dispute that it is a home-rule city and that its charter provisions relating to petition requirements were in effect on September 1, 1985. Instead, the City asserts that a repeal election under chapter 174 of the local government code is not an "initiative" or "referendum" as those terms are defined by the city charter.

The Sherman City Charter defines the power of initiative as "the power [of the electors] to propose any ordinance except an ordinance appropriating money, or authorizing the levy of taxes, and to adopt or reject same at the polls."[50] The charter defines the power of referendum as "the power of the electors to approve or reject at the polls any ordinance passed by the [city] council, or submitted by the council to a vote of the electors."[51] According to the City, these charter provisions only apply to the enactment and repeal of ordinances and, in an election held under chapter 174 of the local government code, no ordinance was before the voters.

[24] A municipal government acts through the passage of ordinances, which are municipal bylaws passed by the governing body of the municipality for the regulation, management, and control of its affairs and those of its citizens.[52] Therefore, for a city to hold an election, the city ***915** council must pass an ordinance calling for the election. Here, the petition forms called for repeal of collective bargaining provisions pursuant to section 174.053 of the local government code. Section 174.053 provides that the governing body shall order an election when presented with a petition signed by the requisite number of qualified voters (*i.e.,* electors) of the political subdivision.[53] Therefore, a petition to hold an election under section 174.053(a) is essentially what the city charter defines as an initiative petition a petition by electors requesting the city council pass an ordinance calling for an election on whether to repeal collective bargaining rights.[54] Accordingly, we conclude that under section 277.004 of the election code, the provisions of the city charter relating to initiative petitions apply to the repeal petition process to the extent they do not conflict with the provisions of chapter 174 of the local government code. We overrule the City's fourth point of error.

FACIAL DEFECTS IN REPEAL PETITION FORMS

We now turn to the City's fifth, sixth, and seventh points of error, in which it asserts the trial court erred in determining certain defects in the petition forms rendered them invalid to confer authority on the City to call the election.

A. Compliance with Statutory and Charter Requirements

1. Supplementing Petition/Sufficiency of Petition

Section 277.0023(a) of the election code provides a petition may not be supplemented, modified, or amended on or after the date it is received by the authority with whom it is required to be filed unless expressly authorized by law.[55] This provision does not conflict with any requirements contained in chapter 174 of the local government code. Thus, it applies to the repeal election at issue here.

[25] The trial court found none of the petition forms filed contained the requisite number of signatures to provide the City with authority to call the repeal election. The trial court also found no set of valid petition forms filed on any single calendar day contained a sufficient number of valid

signatures. The trial court concluded as a matter of law that, by allowing the thirty-seven petition forms to be submitted on different days and at different times, the City allowed supplementation of the "petition" in violation of section 277.0023(a) of the election code.

In its seventh point of error, the City asserts the trial court erred in determining the multiple petition "pages" did not constitute a single petition. We will treat the City's contention as a challenge to the legal and factual sufficiency of the evidence supporting the trial court's findings of fact as well as a challenge to the trial court's conclusion of law that the City violated the election code by allowing supplementation of the petition.

Uncontroverted evidence in the record shows thirty-seven separate petition forms were submitted to the city clerk between January 23, 1995 and February 8, 1995 on different dates and at different times. Each petition form admitted into evidence by stipulation of the parties contains a date stamp showing the date and time of filing. A comparison of the petition forms shows they were filed on different days and at different times.[56]

Nevertheless, the City contends the thirty-seven petition forms constituted a single petition. In support of its argument, the City relies heavily on Friend's allegedly "uncontradicted" testimony that she gathered all of the petition forms in a single folder and, only when the last petition form was filed, did she accept all of the ***916** forms as one petition. However, Friend's intent to treat the multiple petition forms as a single document is irrelevant in determining whether the petition forms constituted a single petition. Further, the trial court, as the fact finder, was not bound by Friend's testimony. The date stamps appearing on the petition forms indicate the forms were filed at various dates and times, and they clearly contradict Friend's testimony. Lastly, the petition forms themselves identify several different committees of electors "who as a committee of the petitioners, shall be regarded as responsible for the circulation and filing of the petition ... " according to the city charter. We conclude the trial court's finding of fact that thirty-seven separate petition forms were filed is supported by legally and factually sufficient evidence.

The City also contends the trial court erred in concluding as a matter of law that the repeal petitions were supplemented in violation of election code section 277.0023, which prohibits supplementation of petitions. We have already determined that election code chapter 277 applies to the petition process in this election. By treating petition forms filed on different days and at different times as one petition, the City allowed supplementation of the petition in violation of section 277.0023. Accordingly, we conclude the trial court correctly concluded the petition was improperly supplemented in violation of section 277.0023 of the election code. We overrule the City's seventh point of error.

2. Language of the Petition

[26] The city charter provides that initiative petition papers shall contain the full text of the proposed ordinance.[57] This provision does not conflict with any provision in chapter 174 of the local government code and thus is not preempted by that chapter.

The trial court found the petition forms did not contain the full text of the ordinance to be voted upon as required by the city charter. The trial court concluded the city clerk was without authority to certify the petition because the City failed to comply with the charter requirement.

In its fifth point of error, the City argues the trial court erred in determining the petition did not contain all of the language required by law. Specifically, the City contends the city charter provision requiring that the full text of the proposed ordinance be set out in the petition is inapplicable because this petition is not an initiative petition. According to the City, at most, the repeal petition is a referendum petition, and the city charter does not require referendum petitions to contain the full text of ordinances to be repealed.

The repeal petition forms contained the following language:

REFERENDUM PETITION

> A PETITION SEEKING THE REPEAL OF COLLECTIVE BARGAINING RIGHTS FOR SHERMAN POLICEMEN AND FIREFIGHTERS, PURSUANT TO SECTION 174.053 OF THE TEXAS LOCAL GOVERNMENT CODE.
>
> The undersigned registered voters of the City of Sherman, Texas by the signature of their names, seek the repeal of collective bargaining rights for Sherman Policemen and Firefighters, pursuant to

Section 174.053 of the Texas Local Government Code.

The petition forms do not contain the full text of the ordinance ordering the election and thus on their face do not comply with the charter requirement. We have already concluded the petition required under section 174.053 of the local government code is in the nature of an initiative petition as that term is defined in the city charter.[58] Contrary to the City's assertions, the title "Referendum Petition" is not determinative of the nature or effect of the petition.[59] Accordingly, we again ***917** reject the City's argument. Additionally, uncontradicted trial testimony showed the City used the same procedures for all election petitions. Thus, the City admittedly disregarded its own established petition procedures and now attempts to claim those procedures were not required by law. We conclude the trial court did not err in applying to the repeal petitions the Sherman City Charter requirement that initiative petitions must contain the full text of the proposed ordinance. Further, the trial court did not err in concluding the repeal petition did not contain all of the language required by the Sherman City Charter. We overrule the City's fifth point of error.[60]

3. Committee of Electors

The Sherman City Charter requires that every petition shall contain the names and addresses of "five (5) electors who, as a committee of the petitioners, shall be regarded as responsible for the circulation and filing of the petition."[61] This provision does not conflict with any of the requirements of chapter 174 of the local government code and thus applies to the election at issue here.

[27] The trial court concluded the city clerk was without authority to certify the petition because there existed no committee of five electors and the petition forms failed to identify a single committee of five electors as required by the Sherman City Charter.

In its sixth point of error, the City argues the trial court erred in concluding the failure of the petition to identify a single committee of five electors deprived the city clerk of the authority to certify the petition as a valid basis for the repeal election. Specifically, the City contends that, because the committee list is not part of the certification process as set out in the city charter, the existence of multiple committees does not affect the validity of the signatures on the petition. The City does not dispute the fact that the petition forms contain more than one committee of five electors. Instead, the City asserts this defect should not affect the validity of the signatures because the committee of electors is not considered in certifying a petition. To certify a petition, the city charter requires the city clerk to check for a signed circulator affidavit and determine if the requisite number of qualified electors signed the petition.[62] However, that the committee of electors is not considered during the certification process does not change the fact that the petitions wholly failed to comply with this requirement, a fact obvious from the face of the petition forms. Accordingly, we conclude the trial court did not err in concluding the petition failed to comply with the charter requirements. We overrule the City's sixth point of error.

B. Effect of Non-compliance with Statutory and City Charter Requirements

Having concluded the City did not comply with statutory and city charter requirements, we next examine the effect of the City's noncompliance.

In its third point of error, the City contends the trial court erred in treating the petition requirements as mandatory rather than directory. In its second point of error, the City contends the trial court erred in failing to give sufficient deference to the will of the voters by focusing on the mechanics ***918** of the petition process. We will address these points of error together.

[28] [29] We have already concluded that the provisions of chapter 277 of the Texas Election Code and provisions of the Sherman City Charter apply to the petitions prepared in this repeal election to the extent they do not conflict with chapter 174 of the Texas Local Government Code. The applicable statutes and the city charter set forth the petition requirements in mandatory language. For example, section 277.0023 of the election code unequivocally states "a petition *may not* be supplemented, modified, or amended on or after the date it is received by the authority with whom it is required to be filed...."[63] Section four of the city charter provides "[i]nitiative petition papers *shall contain* the full text of the proposed ordinance" and on each petition "there *shall appear* ... the names and addresses of five (5) electors."[64] When interpreting statutes, we are directed to give words their ordinary meaning.[65]

Despite the plain language of the applicable provisions of law and the city charter, the City argues the mechanics of the petition process are largely irrelevant after the election has taken place; therefore, we should treat the petition requirements as directory only. According to the City, when election requirements are directory, substantial

compliance with the law is all that is required.[66]

[30] Courts are to construe the provisions that relate to voters as directory whereas the provisions which relate to what is required of candidates are mandatory.[67] The rationale for the differing rules is that the right to vote is fundamental while the right to hold office is in the nature of a privilege.[68] Most of the cases in this area address whether laws proscribing the conduct of the election at the polls are mandatory or directory.[69] However, in the instant case, the provisions at issue do not relate to the mechanics of voting or the right of an individual citizen to cast a ballot; rather, these provisions set out the requirements for properly calling an election.[70] As such, these provisions are more analogous to requirements for candidates to get on the ballot, which repeatedly have been held mandatory and therefore require strict compliance.[71] Accordingly, we conclude the trial court properly treated the petition requirements of chapter 277 of the election code and the city charter as mandatory.

[31] Moreover, even accepting the City's argument that the provisions of chapter 174 of the local government code, chapter 277 of the election code, and the city charter are directory only, the record shows the City did not substantially comply with the applicable petition requirements. "Substantial compliance" does not mean literal and exact compliance with every provision of a statute. If the statutory ***919** mandate is followed sufficiently to reasonably carry out the intent and purpose of the statute, substantial compliance will be deemed to have occurred.[72] However, the record shows the City completely failed to comply with several of the petition requirements, and these deficiencies were apparent on the face of the petitions. No single petition form contained a sufficient number of signatures to vest the city council with the authority to call the May 6 repeal election. Likewise, none of the petition forms contained the full language of the proposed ordinance to be voted upon, and the forms contained different committees of five electors.

[32] Substantial compliance with an election requirement cannot exist when there has been a complete lack of compliance and the purpose of the requirement has not been fulfilled. In this case, the defects were substantial and were apparent on the face of the petitions.[73] Thus, the petitions were insufficient to confer authority on the City to call the May 6 repeal election. We conclude the trial court correctly found the May 6 repeal election was void.[74] We overrule the City's second and third points of error.

In its fourteenth point of error, the City contends that the trial court erred in setting aside the results of the May 6, 1995 repeal election and in enjoining the City from giving effect to the results of that election. We have already determined the trial court did not err in concluding the repeal election was void. Accordingly, we overrule the City's fourteenth point of error.

ATTORNEY'S FEES

In its fifteenth point of error, the City contends the trial court erroneously awarded attorney's fees under the declaratory judgments act. The City's sole contention under this point is that, because suit could only be brought as an election contest and could not be maintained as a declaratory judgment action, there is no statutory basis for the trial court's award of attorney's fees. We have already held this suit could be maintained as a declaratory judgment action. Under the declaratory judgments act, the trial court may, in its discretion, award costs and reasonable attorney's fees "as are equitable and just."[75] Accordingly, we conclude the trial court did not err in awarding attorney's fees to the police and firefighters. We overrule the City's fifteenth point of error.

Because we have concluded the trial court correctly held the May 6 repeal election was void because the City was without authority to order the election, we need not address the City's remaining points of error eight through twelve challenging the trial court's findings on the validity of the circulator's affidavits. We also need not address the City's thirteenth point of error challenging the trial court's determination that police and firefighters have a protectable due process right in maintaining the collective bargaining system.[76]

We affirm the trial court's judgment.

All Citations

996 S.W.2d 904

Footnotes

1 Justice Ron Chapman was a member of the panel at the time this case was argued and submitted for decision. Justice Chapman

retired from the Court on December 31, 1998. Therefore, he did not participate in the issuance of this opinion.

2 *See* Tex. Local Gov't Code Ann. § 174.001–.253 (Vernon 1999).

3 *Id.* § 174.023.

4 *See id.* § 174.053(a).

5 Although Friend gave contradictory testimony at trial, the trial court specifically found that her testimony was not credible.

6 *Bland Indep. Sch. Dist. v. Blue,* 989 S.W.2d 441, 445 (Tex.App.—Dallas 1999, pet filed); *State v. Benavides,* 772 S.W.2d 271, 273 (Tex.App.—Corpus Christi 1989, writ denied).

7 *Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440, 446 (Tex.1993); *Bland Indep. Sch. Dist.,* 989 S.W.2d at 446.

8 *Bland Indep. Sch. Dist.,* 989 S.W.2d at 446; *Liberty Mut. Ins. Co. v. Sharp,* 874 S.W.2d 736, 739 (Tex.App.—Austin 1994, writ denied).

9 *See Bland Indep. Sch. Dist.,* 989 S.W.2d at 446; *Sharp,* 874 S.W.2d at 739.

10 *See Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 928 (Tex.1998), *cert. denied,* 526 U.S. 1144, 119 S.Ct. 2018, 143 L.Ed.2d 1030 (1999); *Bland Indep. Sch. Dist.,* 989 S.W.2d at 446.

11 *See Texas Parks & Wildlife Dep't v. Garrett Place, Inc.,* 972 S.W.2d 140, 142–43 (Tex.App.—Dallas 1998, no pet.).

12 *Texas Ass'n of Bus.,* 852 S.W.2d at 446.

13 *Moore v. Barr,* 718 S.W.2d 925, 926 (Tex.App.—Houston [14th Dist.] 1986, no writ); *Crittenden v. Cox,* 513 S.W.2d 241, 245 (Tex.Civ.App.—Eastland 1974, no writ).

14 *See* Tex. Elec.Code Ann. § 221.002(a) (Vernon 1986).

15 Tex. Elec.Code Ann. § 221.003(a),(c) (Vernon 1986).

16 *See id.* § 233.006(a),(b).

17 *See Mesquite Indep. Sch. Dist. v. Gross,* 123 Tex. 49, 57, 67 S.W.2d 242, 246 (1934); *Sawyer v. Board of Regents,* 393 S.W.2d 391, 396 (Tex.Civ.App.—Amarillo 1965, no writ).

18 *See City of Kingsville v. International Ass'n of Firefighters, Local Union No. 2390,* 568 S.W.2d 397, 400 (Tex.Civ.App.—Corpus Christi 1978, no writ).

19 *See Sawyer,* 393 S.W.2d at 396.

20 *See West End Rural High Sch. Dist. v. Columbus Consol. Sch. Dist.,* 148 Tex. 153, 158, 221 S.W.2d 777, 780 (1949) (citing *Cary v. Simpson,* 239 Ky. 381, 39 S.W.2d 668, 670 (1931)).

21 *See City of Kingsville,* 568 S.W.2d at 399; *see also City of Honey Springs v. Templeton,* 194 S.W.2d 620, 623 (Tex.Civ.App.—Dallas 1946, writ ref'd n.r.e.).

22 Tex. Civ. Prac. & Rem.Code Ann. § 37.003(a) (Vernon 1997).

23 *Id.* § 37.002(b).

24 *Id.* § 37.004(a).

25 *See* Tex. Elec.Code Ann. § 221.003 (Vernon 1986) (tribunal determines whether outcome of election is not true outcome due to fraud or illegal conduct in administration of election); *see also City of Kingsville,* 568 S.W.2d at 400.

26 *Commissioners' Court v. Rayburn,* 264 S.W.2d 552, 555 (Tex.Civ.App.—Beaumont 1954, no writ) (statutory authority to hold election can be determined by declaratory judgment action).

27 *See* Tex. Civ. Prac. & Rem.Code Ann. § 37.004 (Vernon 1997); *Rayburn,* 264 S.W.2d at 555 (application of declaratory judgment act to construe statutes proper).

28 *See City of Kingsville,* 568 S.W.2d at 399.

29 *See* Tex. Elec.Code Ann. § 233.006(a),(b) (Vernon 1986).

30 *Gregory v. Sunbelt Sav., F.S.B.,* 835 S.W.2d 155, 158 (Tex.App.—Dallas 1992, writ denied).

31 *Baker v. Baker,* 719 S.W.2d 672, 674 (Tex.App.—Fort Worth 1986, no writ).

32 *Federal Deposit Ins. Corp. v. F & A Equip. Leasing,* 854 S.W.2d 681, 684 (Tex.App.—Dallas 1993, no writ).

33 *Stafford v. Stafford,* 726 S.W.2d 14, 16 (Tex.1987).

34 *Id.*

35 *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex.1986).

36 *Sears, Roebuck & Co. v. Nichols,* 819 S.W.2d 900, 903 (Tex.App.—Houston [14th Dist.] 1991, writ denied).

37 *Dallas Morning News v. Board of Trustees,* 861 S.W.2d 532, 536 (Tex.App.—Dallas 1993, writ denied).

38 *Waggoner v. Morrow,* 932 S.W.2d 627, 631 (Tex.App.—Houston [14th Dist.] 1996, no writ).

39 *See* Tex. Local Gov't Code Ann. § 174.005 (Vernon 1999).

40 *Id.* § 174.005.

41 *See id.* § 174.053(a).

42 *See id.* § 174.053.

43 Tex. Elec.Code Ann. § 277.001 (Vernon Supp.1999).

44 *See id.* § 277.002.

45 *See id.* § 277.0022.

46 *See id.* § 277.0023.

47 *See id.* §§ 277.0024 & 277.003.

48 *See* Tex. Local Gov't Code Ann. § 174.005 (Vernon 1999) (chapter preempts only *contrary* law); *see also* Op. Tex. Sec'y State No. JH–4 (1993) (signatures on petition for election under Fire and Police Employee Relations Act must comport with requirements of section 277.002(a) of election code).

49 Tex. Elec.Code Ann. § 277.004 (Vernon Supp.1999).

50 Sherman City Charter art. IX, § 1.

51 *Id.* art. IX, § 2.

52 *Dallas Power & Light Co. v. Carrington,* 245 S.W. 1046, 1048 (Tex.Civ.App.—Dallas 1922, writ dism'd); *see also Tharp v. Blake,* 171 S.W. 549, 551 (Tex.Civ.App.—El Paso 1914, no writ) (governing body of municipality speaks through its ordinances).

53 *See* Tex. Local Gov't Code Ann. § 174.053(a) (Vernon 1999).

54 Sherman City Charter art. IX, § 6.

55 *See* Tex. Elec.Code Ann. § 277.0023(a) (Vernon Supp.1999).

56 A few of the petitions do not have a time noted on them.

57 Sherman City Charter art. IX, § 4.

58 *See* Sherman City Charter art. IX, § 6.

59 *Cf. State Bar of Tex. v. Heard,* 603 S.W.2d 829, 833 (Tex.1980) (substance rather than title determines nature of pleading); *Messmer v. State Farm County Mut. Ins. Co. of Tex.,* 972 S.W.2d 774, 777 (Tex.App.—Corpus Christi 1998, no writ) (same).

60 Also under this point of error, the City challenges the trial court's finding that the repeal petitions did not contain the language required by section 174.053(b) of the local government code. *See* Tex. Local Gov't Code Ann. § 174.053(b) (Vernon 1999). However, in light of our conclusion that the petition forms did not contain the language required by the Sherman City Charter, our review of this contention is unnecessary. *See* Tex.R.App. P. 47.1.

61 Sherman City Charter art. IX, § 4.

62 *Id.* art. IX, § 5.

63 Tex. Elec.Code Ann. § 277.0023 (Vernon Supp.1999) (emphasis added).

64 Sherman City Charter art. IX, § 4 (emphasis added).

65 *See* Tex. Gov't Code Ann. § 312.002 (Vernon 1998).

66 *See Holt v. Trantham,* 575 S.W.2d 83, 86 (Tex.Civ.App.—Fort Worth 1978, writ ref'd n.r.e.).

67 *See Geiger v. DeBusk,* 534 S.W.2d 437, 439 (Tex.Civ.App.—Dallas 1976, no writ).

68 *McWaters v. Tucker,* 249 S.W.2d 80, 82 (Tex.Civ.App.—Galveston 1952, no writ).

69 *See, e.g., Setliff v. Gorrell,* 466 S.W.2d 74, 79 (Tex.Civ.App.—Amarillo 1971, no writ) (whether fact that polls opened at 8:00 a.m. rather than 7:00 a.m. invalidated election); *Wooley v. Sterrett,* 387 S.W.2d 734, 741–43 (Tex.Civ.App.—Dallas 1965, no writ) (whether various irregularities in conduct at polls invalidated election).

70 *See Countz v. Mitchell,* 120 Tex. 324, 332, 38 S.W.2d 770, 773 (1931) (right to hold election depends on authority conferred by law); *Williams v. Glover,* 259 S.W. 957, 960 (Tex.Civ.App.—Waco 1924, no writ) (same).

71 *Wallace v. Howell,* 707 S.W.2d 876, 877 (Tex.1986); *Bejarano v. Hunter,* 899 S.W.2d 346, 349 (Tex.App.—El Paso 1995, no writ).

72 *See Santos v. Guerra,* 570 S.W.2d 437, 440 (Tex.Civ.App.—San Antonio 1978, writ ref'd n.r.e.).

73 *See West End Rural High Sch. Dist.,* 221 S.W.2d at 780.

74 *See id.* at 779.

75 *See* Tex. Civ. Prac. & Rem.Code Ann. § 37.009 (Vernon 1997).

76 *See* Tex.R.App. P. 47.1.

History (2)

Direct History (2)

1. City of Sherman v. Hudman
996 S.W.2d 904 , Tex.App.-Dallas , June 25, 1999

Review Granted, Judgment Vacated, and Remanded by Agreement by

2. City of Sherman v. Hudman
2000 WL 36750990 , Tex. , Feb. 03, 2000

