Supreme Court of Texas

No. 21-0893

In re Steven Hotze, M.D., Hon. Sid Miller, Gerry Monroe, Randolph Price, Alan Hartman, Alan Vera, and Gregory Blume
Relators

On Petition for Writ of Mandamus

JUSTICE DEVINE dissenting to the denial of petition for writ of mandamus.

"[T]he [Texas] Election Code does not authorize an early-voting clerk to send an application to vote by mail to a voter who has not requested one."[1] Notwithstanding this clear and unequivocal articulation of the law, the Harris County Elections Administrator, Isabel Longoria, mass-mailed unsolicited vote-by-mail applications to registered voters in advance of Harris County's November 2021 municipal elections.[2] Longoria knowingly undertook this *ultra vires*

[1] *State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020).

[2] Longoria recently resigned after Harris County's March 2022 primary election returns were plagued by irregularities, including mail-in-ballot counting discrepancies. According to media reports, Longoria's resignation is effective July 1, 2022, but even if she were to vacate her office before the disposition of the mandamus petition, that would not moot the proceeding because relators have sued her in her official capacity. *See* TEX. R. APP. P.

action, but after the relators sought a writ of mandamus compelling her compliance with the law,[3] she promised not to repeat the unlawful conduct before the conclusion of the November 2021 election.

In this mandamus proceeding, Relators principally seek a writ compelling Longoria to cease unlawful dissemination of ballot applications. They also ask the Court to order her to undertake specific actions to countermand or ameliorate the effects of the improper mailing on the November 2021 election. In response, Longoria does not maintain that her actions were lawful. Instead, she seeks to avoid any consequences for this contumacious conduct on the basis that (1) the relators lack standing to seek an order compelling her compliance with the law; (2) mandamus relief was rendered moot by her sworn assurance that she would not send any other unsolicited ballot applications before completion of the November 2021 election; (3) completion of the November 2021 municipal election mooted any complaints about the unsolicited mailings; and (4) once unsolicited ballot applications had been mailed and the election process was fully underway, it was "logistically impossible" and prejudicial to grant some of the ameliorative remedies the relators have requested.

7.2(a) ("When a public officer is a party in an official capacity to an appeal or original proceeding, and if that person ceases to hold office before the appeal or original proceeding is finally disposed of, the public officer's successor is automatically substituted as a party if appropriate.").

[3] *See* TEX. ELEC. CODE § 273.061 ("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 . . . regardless of whether the person responsible for performing the duty is a public officer.").

I would grant mandamus relief because (1) our opinion in *State v. Hollins* is controlling;[4] (2) Longoria's standing and mootness arguments lack merit; and (3) the repeated pattern of noncompliance with the law by Harris County's election officials affects local, state, and national elections. The integrity of the election process—both in fact and in appearance—is critical to ensuring public confidence in the results of an election.[5] Refusal to follow the rules erodes trust in our democracy and foments unrest. Because the Court's action is necessary to enforce the Legislature's comprehensive election scheme, I respectfully dissent to the denial of the petition for writ of mandamus.

Given the nature of the relief requested, only one relator with standing is required.[6] Standing requires "a concrete injury" to the relator and "a real controversy between the parties that will be resolved by the court."[7] To satisfy the standing requirement, the relators must show an "injury in fact" that is (1) "concrete and particularized" and "actual or imminent"; (2) "fairly traceable" to Longoria's actions; and (3) "likely" to be "redressed by a favorable decision."[8] Citizens generally

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[4] 620 S.W.3d 400 (Tex. 2020).

[5] *See Tex. Indep. Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996) ("[T]here must be substantial regulation of elections to ensure fairness, honesty, and order.").

[6] *See Andrade v. NAACP of Austin*, 345 S.W.3d 1, 6 (Tex. 2011) (holding that only one plaintiff need establish standing because the voters sought only declaratory and injunctive relief).

[7] *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 154 (Tex. 2012).

[8] *Id.* at 154-55 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

lack standing to bring a lawsuit "'simply to insist that the government and its officials adhere to the requirements of law.'"[9] But at the time the mandamus petition was filed, at least one of the relators was a candidate for elected office on the November 2021 ballot and thus had standing to seek enforcement of the election laws.[10]

"The candidate's injury-in-fact should be self-evident" because "[c]andidates for office spend money, devote time, and otherwise injuriously rely on provisions of the Election Code in organizing, funding, and running their campaigns."[11] "The candidate who pours money and sweat into a campaign, who spends time away from [his] job and family to traverse the campaign trail, and who puts [his] name on a ballot has an undeniably different—and more particularized—interest in the lawfulness of the election as compared to the interests of [the general public.]"[12] And so long as "the threatened injury is real,

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[9] *Andrade*, 345 S.W.3d at 7 (quoting CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.10 (3d ed. 2008)).

[10] *In re Hotze*, 627 S.W.3d 642, 650 n.1 (Tex. 2020) (Devine, J., dissenting) (concluding that candidates on the ballot had standing to pursue relief from a gubernatorial proclamation suspending statutory provisions governing the 2020 general election); *see Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020) ("As a candidate for elected office, the President's alleged injury is one that '"affect[s] [him] in a personal and individual way'." (quoting *Lujan*, 504 U.S. at 561)); *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020) ("An inaccurate vote tally is a concrete and particularized injury to candidates."); *see also Hotze v. Hudspeth*, 16 F.4th 1121, 1125-27 (5th Cir. 2021) (Oldham, J., dissenting) (citing *Lujan*, *Trump*, and *Carson*).

[11] *Hotze*, 16 F.4th at 1125 (Oldham, J., dissenting) (addressing the issue of candidate standing which the majority had declined to consider based on inadequate briefing).

[12] *Id.* at 1126.

immediate, and direct," "the injury required for standing need not be actualized."[13]

Adherence to the Election Code's requirements pertaining to distribution of ballots directly and tangibly benefits candidates differently from ordinary citizens. While all citizens have an interest in the outcome of an election and all citizens have an interest in governmental compliance with the law, the injury suffered by a candidate due to unlawful government action during an ongoing election is distinct from the undifferentiated injury the public experiences. Unauthorized distribution of ballots presents a real, immediate, and direct threat to the individual candidates whose names appear on those ballots, regardless of whether the injury actually materializes.[14] The remaining prongs of the standing inquiry are similarly satisfied because the injury is clearly traceable to Longoria's unlawful actions and is obviously redressable by an order to cease and desist unsolicited mailings. Longoria's standing challenge therefore fails.[15]

Her mootness challenge fares no better. Any decision that would constitute an advisory opinion is outside the jurisdiction the Texas

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[13] *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

[14] Candidates have standing to challenge governmental actions that prevent access to the ballot, and to my mind the issue here implicates the other side of that coin. Ballot access means little if a candidate's standing to challenge wrongful administration of an election begins and ends with listing the candidate's name on the ballot.

[15] Because at least one of the relators has standing, it is unnecessary to determine whether any of the other relators also meet the standing test.

Constitution confers on the courts.[16] For that reason, the mootness doctrine requires dismissal of a case when a live controversy ceases to exist between the parties.[17] Here, however, neither the completion of the November 2021 election nor Longoria's voluntary cessation of wrongful conduct moots the mandamus petition.

While the November 2021 election has concluded and retrospective relief is not available with regard to that election, the controversy is not moot because the "capable of repetition, yet evading review" exception to the mootness doctrine applies.[18] The controversy would evade review because the early voting ballot-distribution process and the related election cycle are inherently too short to fully litigate any challenges prior to the election's conclusion. The controversy is capable of repetition because it could reasonably be expected to arise between the parties in the future.

Longoria admits that, once applications are improperly distributed and the election is in progress, there are few, if any, viable remedies to correct what is a clear violation of the law. Without prospective relief, election officials like Longoria would be free to engage in the same conduct over and over again, knowing that any litigation

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[16] *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016).

[17] *Id.*

[18] *See Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006) ("Controversy surrounding election laws . . . is one of the paradigmatic circumstances in which the Supreme Court has found that full litigation can never be completed before the precise controversy (a particular election) has run its course." (citations omitted)).

could not be completed before the election has been concluded and the damage has been done. This issue is capable of repetition not only as to the same candidate-relator, who failed to secure a victory in the November 2021 election, but also to one who is similarly situated.[19]

With regard to Longoria's promise not to send additional unsolicited ballot applications, we explained in *Matthews v. Kountze Independent School District* that

> [a] defendant's cessation of challenged conduct does not, in itself, deprive a court of the power to hear or determine claims for prospective relief. If it did, defendants could control the jurisdiction of courts with protestations of repentance and reform, while remaining free to return to their old ways. This would obviously defeat the public interest in having the legality of the challenged conduct settled.[20]

Such actions would support dismissal of a pending matter on mootness grounds only when it is "absolutely clear" that the challenged conduct "cannot reasonably be expected to recur."[21] Longoria's affidavit stating that "[m]y office is not planning to and will not send any unsolicited application to vote by mail between today and the November 2, 2021

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[19] *See id.* at 662 (observing that the Supreme Court "does not always focus on whether a particular plaintiff is likely to incur the same injury" and holding that, even if it were doubtful that the appellant would again attempt to engage in the regulated conduct, "this case is not moot, because other individuals certainly will be affected by the continuing existence of the [challenged statute]."); *cf. Henderson v. Ft. Worth Indep. Sch. Dist.*, 526 F.2d 286, 288 (5th Cir. 1976) ("It can be assumed that since appellant Henderson will not still qualify under the statute in April, 1976, school board officials will again deny him access to the ballot as a candidate.").

[20] 484 S.W.3d at 418 (citations omitted).

[21] *Id.*

election" is insufficient to meet this heavy burden.[22] Longoria has not given any assurances beyond the November 2021 election, but even if she had, that is a far cry from being "absolutely clear" that the conduct could not reasonably be expected to recur. It happened in 2020. It happened in 2021. Longoria makes no promises with respect to what the future will hold, but typically voluntary cessation will moot a case only when it would be impossible or difficult to reengage the conduct.[23]

Finally, relators have established a right to mandamus relief on the merits. *State v. Hollins* addresses the precise issue presented here: whether an election official has authority to send an application to vote by mail to a voter who has not requested one.[24] Because the Election Code does not expressly authorize unsolicited distribution of mail-in ballot applications, *Hollins* analyzed various statutory provisions to determine whether implied authority exists.[25] We held it does not.[26] While *Hollins* involved a mass mailing of unsolicited applications to Harris County voters *under* the age of 65 (most of whom would not be eligible to vote by mail),[27] Longoria's distribution efforts targeted Harris

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[22] *See id.* (the party asserting mootness based on voluntary cessation of the challenged conduct bears a "heavy burden").

[23] *Id.* at 419.

[24] 620 S.W.3d 400, 403, 410 (Tex. 2020).

[25] *Id.* at 403, 406.

[26] *Id.* at 403, 410.

[27] *Id.* at 403. The Harris County Clerk had also sent applications to vote by mail to every registered voter in Harris County 65 years of age or older, but the State did not challenge that mailing, so the issue of its legality was not presented to the Court. *Id.* at 404 & n.15.

County voters age 65 or older (who are categorically eligible to vote by mail).[28] Even so, this distinction is irrelevant under the analysis employed in *Hollins*, and Longoria offers no argument to the contrary. The Election Code provisions examined in *Hollins* do not distinguish among voter groups in any material or relevant way. Mandamus is therefore warranted because Longoria has a ministerial duty to comply with the law and clearly abused her discretion in distributing vote-by-mail ballot applications without an affirmative request from the voters.

Unlike the concurring justice, I am not convinced that mandamus relief is unwarranted—or that mootness is established—based on the newly enacted statute expressly prohibiting distribution of unsolicited vote-by-mail ballot applications by an election official.[29] In the last legislative session, the Legislature amended the Election Code by adding Section 276.016, which makes unauthorized distribution of ballot applications a state jail felony.[30] The statute's effective date was December 2, 2021.[31] The addition of Section 276.016 to the Election Code does not moot the controversy before the Court because it does not displace our opinion in *Hollins*, which squarely holds that an election official has no express or implied authority to distribute an unsolicited

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[28] *See* TEX. ELEC. CODE § 82.003 ("A qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day.").

[29] *Ante* at 1-3.

[30] TEX. ELEC. CODE § 276.016.

[31] Act of Aug. 31, 2021, 87th Leg., 2nd C.S., ch. 1, §§ 7.04, 10.4.

ballot application.[32] To the contrary, Section 276.016 supplements and affirms that holding, and we continue to have mandamus jurisdiction to enforce it.[33]

Longoria does not explain how Section 276.016's existence moots the controversy or the requested relief. Nor does she allege that the statute's existence makes it absolutely clear that the unlawful conduct would not recur in the future. To the contrary, Longoria, in her official capacity, is actively contesting the constitutionality of that statutory provision in federal court,[34] which prevents any mootness argument from carrying much weight.[35] Longoria's argument in the federal case indicates a desire and intent to continue the actions at issue here. While the enforceability of Section 276.016 remains subject to judicial determination in the federal courts, our jurisdiction to act—and the legal basis for doing so—is certain.

As justifications for denying mandamus relief, the concurring justice advances several other arguments that are unpersuasive or erroneous. Chiefly, the concurring justice suggests that the mandamus petition is singularly concerned with the November 2021 election.[36] Naturally, the mandamus petition focuses on the then-pending election

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[32] 620 S.W.3d 400, 403, 410 (Tex. 2020).

[33] *See* TEX. ELEC. CODE § 273.061. While Section 276.016 provides criminal penalties for noncompliance, nothing in the statute makes it the exclusive remedy or method for enforcing the election laws.

[34] *See Longoria v. Paxton*, __ F.Supp.3d __, 2022 WL 447573 (W.D. Tex. Feb. 11, 2022).

[35] *See Matthews*, 484 S.W.3d at 419.

[36] *Ante* at 2.

for which Longoria sent unsolicited ballot applications. But the prayer for relief was not so limited. To the contrary, the relators specifically requested a writ compelling Longoria to "immediately cease sending applications to vote by mail to any registered voter who has not sent in the initial request for an application to vote by mail." Because Longoria promised to defer sending unsolicited applications only until the conclusion of the November 2021 election, the relief requested here remains consequential.

The concurring justice also suggests that the case presents fact issues that are better suited for disposition in the trial court.[37] Not so. Longoria has never disputed sending unsolicited ballot applications notwithstanding our decision in *Hollins*; to the contrary, she admitted during a Senate hearing in August 2021 that she had sent and would continue to send unsolicited ballot applications, and the sworn affidavit attached to her response to the mandamus petition provides only a specific date range during which she would not engage in the prohibited conduct. That time period has since expired.

The concurring justice also seems particularly troubled that the relators did not file a reply to Longoria's response to the mandamus

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[37] *Ante* at 3 n1. Mandamus relief is particularly appropriate here where there is no dispute that the challenged conduct has occurred, the conduct is recurrent, the real party has expressed the inclination to repeat the conduct, and the criminal-penalty statute is currently under attack in federal court. Given these circumstances, pursuing what the concurrence refers to as "the advisable course" would lead to unnecessarily protracted litigation to secure time-sensitive relief that is otherwise straightforward and clearly warranted under *Hollins*. *See id.*

petition.[38] While a reply is always helpful, it is not mandatory,[39] and in other cases, the absence of a reply has not prevented this Court from setting a mandamus petition for oral argument and issuing a substantive disposition even when the failure to reply left defensive issues unaddressed.[40] Nor is the relators' failure to specifically address Longoria's mootness arguments fatal to their petition. It is certainly strongly advisable and preferable that parties weigh in on such potentially determinative issues, but if there is any doubt, it is not uncommon for this Court to request briefing directed to the matter. More importantly, however, the duty and obligation to determine our jurisdiction lies with us. Part and parcel of that inquiry is considering all issues that bear on our continuing jurisdiction to address the merits of a dispute. We should not deny relief based on the absence of jurisdiction if jurisdiction actually exists.

Because Harris County's election official has acted contrary to the law and this *ultra vires* action is capable of recurrence, I would grant mandamus relief prohibiting her from sending unsolicited ballot

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[38] *Id.* at 2-3. Relatedly, the concurrence asserts that the relators have shown "*no interest* in continuing to pursue this Court's review of a question the Legislature has already decisively addressed." *Id.* at 3. The relators have not withdrawn their mandamus petition, so I disagree with that assessment.

[39] *See* TEX. R. APP. P. 52.5 ("The relator may file a reply addressing any matter in the response. However, the court may consider and decide the case before a reply brief is filed."), 55.4 ("The petitioner may file a reply brief addressing any matter in the brief in response. However, the Court may consider and decide the case before a reply brief is filed.").

[40] *See, e.g.*, *In re Eagleridge*, ____ S.W.3d ____, 2022 WL 727015 (Tex. Mar. 11, 2022).

applications.[41] Though properly called on to exercise the mandamus power granted by the Election Code,[42] the Court declines to do so. I respectfully dissent.

John P. Devine
Justice

OPINION DELIVERED: March 11, 2022

[41] Other remedial measures the relators seek, such as ordering Longoria to refrain from processing any application to vote by mail received from an unsolicited application or notifying voters that the previously sent applications are invalid, would not be effective following the conclusion of the election and the request for those remedies is moot. However, a case "is not rendered moot simply because some of the issues become moot" while a proceeding is pending. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005). In any event, issuance of a writ compelling compliance with the Election Code should obviate the need to consider the viability of similar remedies, assuming Longoria complies with our writ.

[42] *See* TEX. ELEC. CODE § 273.061.