

SUPREME COURT OF TEXAS

In re Steven Hotze, M.D., Hon. Allen West, Republican Party of Texas, Hon. Sid Miller, Hon. Mark Henry, Hon. Charles Perry, Hon. Pat Fallon, Hon. Bill Zedler, Hon. Cecil Bell, Jr., Hon. Steve Toth, Hon. Dan Flynn, Hon. Matt Rinaldi, Hon. Rick Green, Hon. Molly White, Harris County Republican Party/Hon. Keith Nielsen, Hon. Bryan Slaton, Hon. Robin Armstrong, M.D., Jim Graham, Hon. Cathie Adams, Hon. Joann Fleming, Julie McCarty, Sharon Hemphill, and Al Hartman

No. 20-0739 · No. No. 20-0739 · Decided October 7, 2020

SUMMARY

Justice Devine dissented from the Texas Supreme Court's order denying a petition for writ of mandamus and motion for stay concerning the Governor's proclamation suspending certain Election Code provisions. The dissent argues that the mandamus petition was timely and that the Secretary of State had statutory duties subject to mandamus review, including duties implicated by the allegedly unconstitutional proclamation.

CASE DETAILS

COURT	Supreme Court of Texas
WRITING FOR THE COURT	John P. Devine
JURISDICTION	Texas
DECIDED	October 7, 2020
DOCKET	No. 20-0739
DISPOSITION	writ_denied
PROCEDURAL POSTURE	Relators petitioned the Supreme Court of Texas for a writ of mandamus and moved for a stay, seeking to compel the Secretary of State to comply with specified Texas Election Code provisions and to challenge the Governor's proclamation suspending statutory early-voting requirements. The court denied the petition and motion for stay, treating the mandamus proceeding as untimely; Justice Devine dissented.

PRECEDENTIAL VALUE	dissenting opinion; no independent majority precedential value
PARTIES	Steven Hotze, M.D., Hon. Allen West, Republican Party of Texas, Hon. Sid Miller, Hon. Mark Henry, Hon. Charles Perry, Hon. Pat Fallon, Hon. Bill Zedler, Hon. Cecil Bell, Jr., Hon. Steve Toth, Hon. Dan Flynn, Hon. Matt Rinaldi, Hon. Rick Green, Hon. Molly White, Harris County Republican Party, Hon. Keith Nielsen, Hon. Bryan Slaton, Hon. Robin Armstrong, M.D., Jim Graham, Hon. Cathie Adams, Hon. Joann Fleming, Julie McCarty, Sharon Hemphill, Al Hartman v. Secretary of State of Texas

TOPICS

election law

election administration

appellate procedure

remedies

constitutional law

PRACTICE AREAS

election law

constitutional law

appellate procedure

remedies

QUESTIONS PRESENTED

1. Whether the Supreme Court of Texas should exercise mandamus authority to compel the Secretary of State to perform statutory duties under the Election Code.
2. Whether the Secretary of State's implementation of the Governor's proclamation constituted an abuse of discretion or otherwise implicated a ministerial duty subject to mandamus.
3. Whether the mandamus petition was untimely in light of the importance of the electoral interests at stake.
4. Whether relators, including ballot candidates and a county judge subject to the proclamation, had standing to seek mandamus relief.

KEY QUOTATIONS

“In such a situation, as here, where our state, local, and national elections are at issue and the Court is ‘properly called on,’ the Court should exercise its mandamus authority over officials empowered to carry out our election laws.”

“mandamus may issue to compel public officials to perform ministerial acts, as well as ‘to correct a clear abuse of discretion of a public official.’”

“The Proclamation was a mandate to those in his chain of command—including the Secretary—to carry out its directives.”

FACTUAL BACKGROUND

On July 27, 2020, the Governor issued a proclamation purporting to suspend Texas Election Code sections 85.001(a) and 86.006(a-1) under the Disaster Relief Act. The proclamation directed the Secretary of State to take

notice of the changes, and the Secretary subsequently provided additional guidance to local election officials. Relators contended that the proclamation and the Secretary’s actions violated statutory requirements governing the timing and manner of early voting and were potentially unconstitutional.

PROCEDURAL HISTORY

Relators sought mandamus relief directly in the Supreme Court of Texas against the Secretary of State. The majority denied the petition and motion for stay on timeliness grounds without reaching standing or the merits. Justice Devine would have considered the petition and granted relief.

DISPOSITION

writ_denied

CASES CITED

- In re Salon a La Mode, No. 20-0340, 2020 WL 2125844 (Tex. May 5, 2020)
- In re Palomo, 366 S.W.3d 193, 194 n.7 (Tex. 2012) (per curiam)
- Bird v. Rothstein, 930 S.W.2d 586, 587–588 (Tex. 1996)
- Davis v. Taylor, 930 S.W.2d 581, 584 (Tex. 1996)
- LaRouche v. Hannah, 822 S.W.2d 632, 634 (Tex. 1992)
- Painter v. Shaner, 667 S.W.2d 123, 124 (Tex. 1984)
- In re Williams, 470 S.W.3d 819, 821 (Tex. 2015)
- Anderson v. City of Seven Points, 806 S.W.2d 791, 793 (Tex. 1991)
- In re Hotze, No. 20-0430, 2020 WL 4046034, at *1–2 (Tex. July 17, 2020) (Devine, J., concurring)
- In re Republican Party of Texas, 605 S.W.3d 47, 51 n.7 (Tex. 2020) (Devine, J., dissenting)

OPINION

PER CURIAM.

IN THE SUPREME COURT OF TEXAS ===== NO. 20-0739
===== IN RE STEVEN HOTZE, M.D., HON. ALLEN WEST, REPUBLICAN
PARTY OF TEXAS, HON. SID MILLER, HON. MARK HENRY, HON. CHARLES PERRY,
HON. PAT FALLON, HON. BILL ZEDLER, HON. CECIL BELL, JR., HON. STEVE TOTH,
HON. DAN FLYNN, HON. MATT RINALDI, HON. RICK GREEN, HON. MOLLY WHITE,
HARRIS COUNTY REPUBLICAN PARTY/HON.

KEITH NIELSEN, HON. BRYAN SLATON, HON. ROBIN ARMSTRONG, M.D., JIM
GRAHAM, HON. CATHIE ADAMS, HON. JOANN FLEMMING, JULIE MCCARTY,
SHARON HEMPHILL, AND AL HARTMAN, RELATORS
===== ON
PETITION FOR WRIT OF MANDAMUS

JUSTICE DEVINE dissenting from the Court’s order denying the petition for writ of mandamus and motion for stay.

Today the Court does a disservice to the citizens of the State of Texas and the Texas Constitution. Relators 1 ask the Court to exercise its mandamus power granted by the Election Code to compel the Secretary of State—the chief election officer—to comply with the Election Code’s specific provisions.

In such a situation, as here, where our state, local, and national elections are at issue and the Court is “properly called on,” *In re Salon a La Mode*, No. 20-0340, 2020 WL 2125844 (Tex. May 5, 2020) (Blacklock, J., concurring), the Court should exercise its mandamus authority over officials empowered to carry out our election laws. I disagree with the Court’s decision to dismiss this mandamus as untimely.

We have often acted even “after statutory deadlines to protect the electoral process.” *In re Palomo*, 366 S.W.3d 193, 194 n.7 (Tex. 2012) (per curiam) (citing *Bird v. Rothstein*, 930 S.W.2d 586, 587 (Tex. 1996)); 1 Because the Court concludes that Relators’ suit is untimely, it does not reach the issue of standing. I would conclude Relators, who include candidates on the ballot and a county judge subject to the proclamation, have standing to pursue relief.

Davis v. Taylor, 930 S.W.2d 581, 584 (Tex. 1996); *LaRouche v. Hannah*, 822 S.W.2d 632, 634 (Tex. 1992); *Painter v. Shaner*, 667 S.W.2d 123, 124 (Tex. 1984)). And in *Bird v. Rothstein*, we declined to hold that laches or any similar doctrine barred relief against the Secretary of State given the important interests at stake. 930 S.W.2d at 588. I believe the interests at stake here are of similar importance and worthy of our consideration.

Respondent argues, however, that the Election Code imposes no duty on the Secretary that would implicate our mandamus authority. In essence, she argues that the Secretary’s title is simply that, a title, to which no consequent duties attach. Without a ministerial task, it is argued that the Secretary cannot be held responsible for carrying out unconstitutional proclamations.

But this argument defies common sense. Texas law has consistently stated that “mandamus may issue to compel public officials to perform ministerial acts, as well as ‘to correct a clear abuse of discretion of a public official.’” *In re Williams*, 470 S.W.3d 819, 821 (Tex. 2015) (emphasis added) (citing *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex.

1991). On July 27, 2020, Governor Abbott issued a proclamation suspending Texas Election Code sections 85.001(a) and 86.006(a-1) pursuant to his asserted authority under the Disaster Relief Act. 2 See TEX. GOV’T CODE §§ 418.001–.261.

The Governor called on the Secretary to “take notice” of the changes “immediately.” The Governor of the State of Tex., Proclamation No. 41-3752, 45 Tex. Reg. 5449, 5456–5457 (2020). The Proclamation was a mandate to those in his chain of command—including the Secretary—to carry out its directives. Not only that, the Governor was clear that the decision was made “in consultation with the Texas Secretary of State” because of their belief that “strict compliance” with sections 85.001(a) and 86.006(a-1) would not be feasible.

Id. 2 Today we miss a second chance to consider the constitutionality of chapter 418. I have previously voiced my concern on chapter 418 as an unconstitutional delegation of legislative power in contravention of the Texas Constitution article 1 section 28. See *In re Hotze*, No. 20-0430, 2020 WL 4046034, at *1–2 (Tex. July 17, 2020) (Devine, J., concurring). Relators argue that after the proclamation was sent out, the Secretary provided “additional guidance” to local officials.

As a result, the Secretary endorsed the Governor’s actions in contravention of her duties 3 to carry out the Election Code’s clear provisions on the timing and manner of early voting. These actions go beyond acting as a mere intermediary and make the Secretary complicit in the alleged constitutional and statutory violations.

Because the Secretary continues to act pursuant to a potentially unconstitutional proclamation, her conduct is subject to this Court’s authority to mandamus public officials who engage in abuses of discretion. I accordingly would grant the relief requested by Relators.

Because the Court does not, I respectfully dissent.

John P. Devine Justice OPINION

DELIVERED: October 7, 2020 3 Respondent once again attempts to cabin the meaning of “duty” within the scope of this Court’s mandamus authority. See *In re Republican Party of Texas*, 605 S.W.3d 47, 51 n.7 (Tex. 2020) (Devine, J., dissenting).

That argument is misplaced because Relators here seek to compel the Secretary to act in accordance with her statutory duty as chief election officer. And that duty is prescribed and limited by statute. Although the Governor may have expanded that duty by proclamation, that puts the cart before the horse. It assumes that the Governor’s proclamation is constitutional.

If it is unconstitutional, which Relators call on this Court to address today, then the Secretary is acting in contravention of those duties prescribed by statute.