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Via Electronic Filing

Blake Hawthorne, Clerk
Supreme Court of Texas

Re: No. 20-0889, *In re Mackowiak, et al.*

Dear Mr. Hawthorne:

Last night, the Court invited the Solicitor General to file a brief expressing the views of the State in the above case.¹ At the time of this filing, Respondents had not yet submitted any responsive briefing. As a result, the State is able to evaluate this case based solely on the mandamus petition. If the facts as alleged in the petition are true, the view of the State is that the Court should conditionally grant the petition for a writ of mandamus.

I. THE TEXAS ELECTION CODE REQUIRES LOCAL ELECTION OFFICIALS TO ALLOW POLL WATCHERS TO OBSERVE ALL RELEVANT ACTIVITIES.

Poll watchers are a critical safeguard for ensuring election integrity. This Court recognized their importance when it upheld a gubernatorial proclamation ensuring that election sites could “be properly staffed by poll watchers.” *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, No. 20-0846, 2020 WL 6295076, at *7 (Tex. Oct. 27, 2020) (per curiam). “The measure plausibly promote[d] uniformity of elections and increase[d] confidence in electoral integrity.” *Id.* Poll watchers “decrease[] the opportunity for fraud.” *Id.* And when misconduct does occur, poll watchers can report it. *See, e.g.*, Tex. Elec. Code § 33.058(b).

But poll watchers are also valuable even when nothing nefarious is afoot. Their presence allows courts to dispel doubts about election integrity. *See, e.g., Reyes v. City*

¹ No fee has been paid or will be paid for the preparation of this brief.

of Laredo, 794 S.W.2d 846, 848 (Tex. App.—San Antonio 1990, no writ) (“At every stage of this election, from the original count to the recount, to the court-ordered recount following remand, poll watchers and/or representatives of the parties have been present to prevent precisely the sort of occurrence which appellant now speculates must have occurred.”); *Wooley v. Sterrett*, 387 S.W.2d 734, 742 (Tex. Civ. App.—Dallas 1965, no writ) (relying on the testimony of a poll watcher).

For poll watchers to serve these important purposes, they must be able to “observe any activity conducted at the location at which the watcher is serving.” Tex. Elec. Code § 33.056(a). If poll watchers cannot observe what is happening, they cannot deter fraud, report misconduct, or vouch for the integrity of the process.

Relators allege that Respondents have “sequestered” poll watchers “behind a locked door in a ‘media room’ separate and apart from the Central Counting Station where they [cannot] observe” certain counting activities. Pet’n at 3. One declarant swears that poll watchers do “not have sufficient access to verify the integrity of the process.” Pet’n Ex. B at 4. That is a very serious charge, and Relators have supported it with sworn declarations. *See* Pet’n Exs. A–C.²

Such sequestration violates the Election Code. “A watcher is entitled to sit or stand near enough . . . to verify that the ballots are read correctly” and that votes “are tallied correctly.” Tex. Elec. Code § 33.056(b). Local election officials have a duty not to “knowingly prevent[] a watcher from observing an activity the watcher is entitled to observe.” *Id.* § 33.061(a).

The statute contains only one exception, but it does not apply here: “A watcher may not be present at the voting station when a voter is preparing the voter’s ballot or is being assisted by a person of the voter’s choice.” *Id.* § 33.057(b). That exception is irrelevant to the observation of vote counting (as opposed to vote casting), and the express inclusion of that one exception prevents the Court from inferring any other exceptions. *See United Servs. Auto. Ass’n v. Brite*, 215 S.W.3d 400, 403 (Tex. 2007) (“[A]lthough the statute excludes several items when determining the amount in controversy, front pay is not among them.”); *Harris County v. Crooker*, 248 S.W. 652, 655 (Tex. 1923) (“The rule *expressio unius est exclusio alterius* is a sound one, frequently applied in the construction of statutes.”).

² As noted above, the briefing schedule in this case required the State to file this brief before Respondents had submitted a response to the petition and the facts it alleges.

For these reasons, local election officials cannot prevent poll watchers from observing any relevant activity at the Travis County Central Counting Station or any other site at which poll watchers are entitled to observe. Travis County’s alleged practice of sequestering poll watchers in a separate room that prevents watchers from observing relevant activity, *see* Pet’n Exs. A–C, if true, would violate the Texas Election Code.

II. THE COURT HAS JURISDICTION.

This Court “may issue a writ 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. At least one Relator has established an injury traceable to the Respondents and redressable by the relief sought. *See Heckman v. Williamson County*, 369 S.W.3d 137, 153 n.64 (Tex. 2012) (noting that “the court need not analyze the standing of more than one plaintiff—so long as that plaintiff has standing to pursue as much or more relief than any of the other plaintiffs”—because “if that plaintiff prevails on the merits, the same prospective relief would issue regardless of the standing of the other plaintiffs”).

A. First, at least one Relator has suffered an injury in fact. That injury stems from the “election watcher’s purpose” “to act as the candidate’s ‘eyes and ears.’” *Bickham v. Dallas County*, No. 05-20-00560-CV, 2020 WL 6253325, at *6 (Tex. App.—Dallas Oct. 23, 2020, no pet. hist.); *see also* Tex. Elec. Code §§ 33.002–32.003 (permitting Relators here to appoint poll watchers). It follows that when poll watchers are prevented from observing relevant activities, those who appointed them are prevented from confirming that those activities are being conducted lawfully. “Although all citizens share a general interest in lawful government action,” *In re Hotze*, No. 20-0739, 2020 WL 5919726, at *4 (Tex. Oct. 7, 2020) (Blacklock, J., concurring), candidates like Relator Martin Harry have “a separate concrete interest” in winning their elections, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 (1992). Texas law provides poll watchers as a procedural protection against irregularities or unlawful conduct that could cost a candidate the election. Thus, Relators are “seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest.” *Id.* That is sufficient to show an injury in fact.

Bickham is not to the contrary. There, the Dallas Court of Appeals recently considered whether poll watchers had standing to challenge certain restrictions on their activities. Although that court concluded that the poll watchers themselves

lacked standing, its reasoning supports the conclusion that those who appoint poll watchers, like Relators, do have standing. “[A]ny injury-in-fact stemming from the alleged election code violations would not be suffered by [poll watchers] individually. Rather, the injury would be suffered by the candidate, political party, or proponents or opponents of a measure for whom they serve.” *Bickham*, 2020 WL 6253325, at *6. “If the watchers are prevented from being the candidate’s ‘eyes and ears,’ that particular harm is suffered by the candidate.” *Id.*; *see also id.* at *13 (Schenck, J., dissenting) (“Should a candidate wish to pursue any subsequent contest (or mount a defense) related to the count, the appointed watcher will be the only witness available.”).

B. Relators’ injury is traceable to Respondents and redressable by a writ of mandamus issued to Respondents. Respondent Nina Seaman is the Presiding Judge of the Travis County Central Counting Station. That gives her authority to manage the counting station, *see* Tex. Elec. Code § 127.005(c), and Relators say that she has used that authority to prevent poll watchers from observing relevant activities. *See* Pet’n Ex. B at 2 (declaring that, when poll watchers “asked that [they] be allowed in the tabulation room, according to the law,” “Nina Seaman, the Presiding Election Judge[,] refused”); *see also* Pet’n Ex. E at 4 (“DeBeauvoir did not deny corralling the poll watchers in her building’s media room.”).

By seeking relief against the local election officials responsible for the injuries they allege, Relators have established traceability and redressability. They have therefore avoided the pitfalls that precluded relief in other cases. *See, e.g., In re Hotze*, 2020 WL 5919726, at *4 (Blacklock, J., concurring) (explaining that a challenged proclamation was not traceable to the Secretary of State or redressable by relief against her).

C. Although Election Day has come and gone, this case is not moot because ballot counting is ongoing. According to Relators, “the central counting station is continuing to operate for the purpose of tabulating late-received and overseas mail ballots and provisional ballots.” Pet’n at 4. For that reason, issuing a writ of mandamus would still partially redress Relators’ injury. *Cf. In re Miller*, No. 05-02-00221-CV, 2002 WL 370386, at *1 (Tex. App.—Dallas Feb. 25, 2002, orig. proc.) (dismissing a petition for a writ of mandamus regarding the “evicti[on] [of] a poll watcher from a polling place” because the election was already over “and relator ha[d] been declared the winner”).

* * *

If the facts as alleged in the mandamus petition are true, Relators have shown that Respondents are preventing poll watchers from observing at least some activities at the Travis County Central Counting Station. That violates the Election Code. Consistent with section 273.061 of the Texas Election Code, it would be appropriate to conditionally grant mandamus relief.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On November 8, 2020, this document was served electronically on Eric C. Opiela, lead counsel for Relators, at eopiela@ericopiela.com; and on David A. Escamilla, lead counsel for Respondents, at David.Escamilla@traviscountytexas.gov.

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CERTIFICATE OF COMPLIANCE

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/s/ Kyle D. Hawkins
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