IN THE SUPREME COURT OF TEXAS

NO. 06-0040

IN RE THE HONORABLE ROBERT FRANCIS, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued January 24, 2006

JUSTICE BRISTER delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE MEDINA and JUSTICE GREEN joined.

JUSTICE WAINWRIGHT filed a dissenting opinion, in which JUSTICE O'NEILL and JUSTICE JOHNSON joined.

JUSTICE WILLETT did not participate in the decision.

With the arrival of the biennial primary season, we must address once again whether the Texas Election Code requires minor defects in a candidate's papers to be addressed by eliminating the error or the candidate.[1] In this case, a candidate for the Texas Court of Criminal Appeals filed a 225-page petition signed by hundreds of eligible voters, more than enough to have his name placed on the Republican primary ballot. But due to a clerical error, several pages did not state that he was running for "Place 8" on that Court. The Republican Party of Texas listed him as a candidate, but his name was removed by a Travis County district judge upon challenge by another Republican candidate.

Candidates have a duty to file applications for office that comply with the Texas Election Code. But the ballot is not restricted to those who never make a mistake. To the contrary, the

[1] *See In re Bell*, 91 S.W.3d 784 (Tex. 2002); *In re Gamble*, 71 S.W.3d 313 (Tex. 2002).

Election Code anticipates that candidates will occasionally err and specifically requires party officials to assist them so that no candidate is excluded from the ballot unnecessarily. When a defect could have easily been cured had party officials properly performed their statutory role, nothing in the Code requires exclusion as a mandatory remedy. We hold that the trial court erred in concluding that it does.

I

Candidates for statewide judicial office in Texas must file an application accompanied by a petition with signatures of at least 50 eligible voters from each of the State's 14 appellate districts.[2] The following statement must appear at the top of each page of the petition:

> I know that the purpose of this petition is to entitle (insert candidate's name) to have his or her name placed on the ballot for the office of (insert office title, including any place number or other distinguishing number) for the (insert political party's name) primary election. I understand that by signing this petition I become ineligible to vote in a primary election or participate in a convention of another party, including a party not holding a primary election, during the voting year in which this primary election is held.[3]

On December 29, 2005 — four days before the January 2nd filing deadline[4] — Relator Robert Francis, currently Judge of the Dallas County Criminal District Court No. 3, filed his application and an accompanying petition as a candidate for the Texas Court of Criminal Appeals. His application and 198 pages of his petition noted that he sought election to Place 8 on that Court. An additional 27 pages of his petition listed the same court, but omitted the place number. Because

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[2] *See* TEX. ELEC. CODE § 172.021(g); *cf.* TEX. ELEC. CODE § 181 *et. seq.* (providing separate procedures for political parties making nominations by convention).

[3] *Id.* § 172.027 (underlining in original).

[4] *See id.* § 172.023(a).

he had obtained far more signatures than the statutory minimum, 15 of the defective pages were superfluous. But 12 of the errant pages were concentrated in one appellate district, leaving 95 of his 122 signatures from that district on pages without a place number.

Republican and Democratic candidates for statewide judicial office must file their applications and petitions with the "state chair" of the party in whose primary they choose to run.[5] After filing, state law provides that the state chair "shall review" an application and accompanying petition to determine whether they comply with statutory requirements "as to form, content, and procedure."[6] Further, that review "shall be completed as soon as practicable,"[7] or "not later than the

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[5] *Id.* § 172.022(a)(1).

[6] *Id.* § 141.032(a), (c). The full text of this section reads:

> § 141.032. REVIEW OF APPLICATION; NOTICE TO CANDIDATE.
> (a) On the filing of an application for a place on the ballot, the authority with whom the application is filed shall review the application to determine whether it complies with the requirements as to form, content, and procedure that it must satisfy for the candidate's name to be placed on the ballot.
> (b) Except as provided by Subsection (c), the review shall be completed not later than the fifth day after the date the application is received by the authority.
> (c) If an application is accompanied by a petition, the petition is considered part of the application, and the review shall be completed as soon as practicable after the date the application is received by the authority. However, the petition is not considered part of the application for purposes of determining compliance with the requirements applicable to each document, and a deficiency in the requirements for one document may not be remedied by the contents of the other document.
> (d) A determination under this section that an application complies with the applicable requirements does not preclude a subsequent determination that the application does not comply, subject to Section 141.034.
> (e) If an application does not comply with the applicable requirements, the authority shall reject the application and immediately deliver to the candidate written notice of the reason for the rejection.
> (f) This section does not apply to a determination of a candidate's eligibility.

[7] *Id.* § 141.032(c).

fifth day" if the application does not include a petition.[8] If the documents do not comply with the statutory requirements, the state chair "shall reject the application and immediately deliver to the candidate written notice of the reason for the rejection."[9]

In this case, Francis personally delivered his application and petition to the office of the Chair of the Republican Party of Texas. The State Chair's appointee assured Francis that the Party would review the documents before the January 2nd filing deadline. On December 30, the Party completed its review and notified Francis that his filings were in order and his name would be posted as a candidate by the end of the day – which it was.

Three days later, and thirty minutes before the filing deadline, an attorney for another candidate notified Party officials about the omission of "Place 8" from several pages of Francis's petition. On Friday, January 6, 2006, the Party Chair rejected this challenge and certified Francis as a candidate.[10]

On Monday, January 9, Travis County District Judge John Dietz reversed that ruling, signing a temporary injunction that ordered the Republican Party to "decertify" Francis and enjoined the Party from listing him as a candidate. On January 11, Francis filed an interlocutory appeal, and the next day, Francis also filed an emergency petition for writ of mandamus in the court of appeals. On January 13, the court of appeals denied Francis's petition for writ of mandamus. That same day, Francis filed this emergency petition for writ of mandamus, asking this Court to order the trial court to vacate its temporary injunction, and to order the Republican Party Chair to put Francis's name on

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[8] *Id.* § 141.032(b).

[9] *Id.* § 141.032(e).

[10] *See id.* § 172.028.

the primary ballot. The interlocutory appeal of the temporary injunction remains pending in the court of appeals.

This Court may review a temporary injunction from a petition for writ of mandamus when an expedited appeal would be inadequate; if, for example, the appeal could not be completed before the issue became moot.[11] In addition, Section 273.061 of the Texas Election Code gives the Court jurisdiction to issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election.[12] In a mandamus action, this Court reviews the trial court's actions to determine whether it clearly abused its discretion.[13] A trial court has no discretion to determine what the law is.[14]

II

There is no disagreement about the material facts.

First, the record establishes that Francis's application and petition complied in all respects

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[11] *See Republican Party of Texas v. Dietz*, 940 S.W.2d 86 (Tex. 1997) (party entitled to challenge trial court's temporary injunction by mandamus in Supreme Court); *Sears v. Bayoud*, 786 S.W.2d 248 (1990) (Supreme Court mandamus review available for election mandamus based on its "statewide application," "urgency of time constraints," and potential for the case to become moot without immediate attention); *see also In re Newton*, 146 S.W.3d 648, 652-53 (Tex. 2004) (holding that mandamus was available because a temporary restraining order is generally not appealable, and the impending election would have concluded before any appeal from the trial court's ruling was possible); *In re Texas Natural Res. Conservation Comm'n*, 85 S.W.3d 201, 207 (Tex. 2002) (holding that "mandamus is available to remedy a temporary restraining order that violates Rule 680's time limitations").

[12] TEX. ELEC. CODE § 273.061; *Sears*, 786 S.W.2d at 249. *See also Sterling v. Ferguson*, 53 S.W.2d 753, 758 (noting that mandamus cannot issue to compel election officials to take action while still under the constraints of an existing injunction).

[13] *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004).

[14] *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

with all statutory requirements, except that 27 pages of his 225-page petition lacked one requirement — the designation of a place number.

Second, the State Chair's appointee testified that she reviewed Francis's petition, but failed to discover the occasional omission of "Place 8." Significantly, there are three seats on the Court of Criminal Appeals up for election this year.

Third, Francis proved that, had his petition been rejected for this defect on December 30th rather than approved, he could have cured it before the filing deadline. Within 24 hours after service of his opponent's temporary injunction pleadings, Francis filed new petitions in the trial court that included the place designation, signed by most of the same voters who signed the original defective ones.

Based on this undisputed evidence, the trial court concluded that any omission of the statutory requirements for a petition rendered all signatures on that page invalid, that such errors could not be cured even if the State Chair had approved the petitions, and that Francis could not be certified as a candidate. We agree with the first legal conclusion, but disagree with the others.

A

We agree that the omission of any statutorily required information on a petition renders signatures on that petition invalid.[15] Section 172.027 of the Election Code says that a candidate's

[15] We have strictly enforced mandatory statutory requirements for political candidacy in the past. *See, e.g., Wallace v. Howell*, 707 S.W.2d 876, 877 (Tex. 1986) (disqualifying candidate who filed application for two judicial positions and conditioned withdrawal from one on qualification for the other); *Painter v. Shaner*, 667 S.W.2d 123, 125 (Tex. 1984) (noting "statutory mandates" should be "strictly construed"); *Brown v. Walker*, 377 S.W.2d 630, 632 (Tex. 1964) (disqualifying candidate who mailed application by regular mail because applications sent before, but received after, the deadline must be sent via certified or registered mail); *Canady v. Democratic Executive Comm. of Travis County*, 381 S.W.2d 321, 324 (Tex. 1964) (disqualifying candidate who listed his legal address as one outside the relevant precinct); *Burroughs v. Lyles*, 181 S.W.2d 570, 573 (Tex. 1944).

place number "must appear at the top of each page of a petition." Section 141.063(a)(4) says that a signature on a petition is invalid unless "each statement that is required by this code . . . appears, at the time of signing, on the page on which the signature is entered." As the Code requires a place number on each page, and declares invalid any signatures on pages without it, the trial court correctly concluded that all but 27 signatures from the district involved in this challenge are invalid.

B

We disagree, however, that invalid signatures cannot be cured. The Election Code never explicitly says what happens when a state chair erroneously approves a petition containing invalid signatures, but discovers the error later. As with other statutes, "the consequence of noncompliance is not necessarily punishment."[16]

In primary elections, statewide judicial candidates are certified for the ballot by the party's state chair.[17] Section 172.028(c) provides that a candidate's name "may not be certified" by the party chair if the candidate has filed for more than one office,[18] or if a candidate withdraws, dies, or is "declared ineligible."[19] But the Code never says that a candidate *must* be declared ineligible when petition signatures are invalid. To the contrary, while party chairs should reject such a petition,[20] if it is erroneously accepted, it cannot be challenged once early voting begins.[21]

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[16] *Hines v. Hash*, 843 S.W.2d 464, 469 (Tex. 1993).

[17] TEX. ELEC. CODE § 172.028(a).

[18] *Id.* § 141.033.

[19] *Id.* § 172.057.

[20] *Id.* § 141.032(e).

[21] *Id.* § 141.034(a).

This is not the only statute that says something "must" be done, but does not say what happens if it is not. This Court has considered several such statutes,[22] as has the United States Supreme Court.[23] In *Hines v. Hash*, for example, we addressed the pre-suit notice requirement in the Texas Deceptive Trade Practices Act, which was added to the statute in 1977, and from which the statutory penalty (loss of treble damages) was removed two years later.[24] We held the pre-suit notice requirement was "clearly mandatory, but that feature alone does not determine the consequences for failure to comply with it."[25] Instead, we stated that when a statute is silent as to a penalty, we must look to the statute's purpose for guidance.[26] As the purpose of the DTPA's notice provision was to "discourage litigation and encourage settlements,"[27] that purpose was served not by tossing noncomplying consumers out of court, but by abating the suit to allow settlement

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[22] *See e.g., Hubenak v. San Jacinto Gas Transmission Co.,* 141 S.W.3d 172, 184 (Tex. 2004) (determining consequences of condemning authority's failure to negotiate land price as statutorily mandated); *Lubbock County v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 584 (Tex. 2002) (determining that consequences of following mandatory procedure is abatement until procedure is followed); *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 494 (Tex. 2001) ("When a statute is silent about the consequences of noncompliance, we look to the statute's purpose to determine the proper consequences.") (quoting *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999) and determining consequence of failure to submit claim to arbitration within statutory period); *State v. $435,000*, 842 S.W.2d 642, 644 (Tex. 1992) (per curiam) (holding that dismissal is not a consequence of State's mandatory duty to hold forfeiture hearing within the prescribed time); *Schepps v. Presbyterian Hosp. of Dallas*, 652 S.W.2d 934, 938 (Tex. 1983) (determining that the purpose of the mandatory notice requirement was better served by abating cause of action to allow intended negotiations rather than terminating plaintiff's substantive rights).

[23] *See Brock v. Pierce County*, 476 U.S. 253, 259-62 (1986).

[24] *See Hines*, 843 S.W.2d at 466-67.

[25] *Id*. at 467.

[26] *Id.* at 468.

[27] *Id*. at 468 (quoting *Jim Walter Homes, Inc. v. Valencia*, 690 S.W.2d 239, 242 (Tex. 1985)).

negotiations to occur.[28]

We think the same analysis requires the same type of abatement here. Four years ago, we stated in *In re Gamble* that the primary purposes of the Election Code provisions at issue here were to (1) ensure that candidates are properly qualified and (2) provide a safety net for their errors:

> While section 141.032 is indisputably designed to assure that candidates are properly qualified to be nominated as a party's candidate for the general election, that is not the only reason for the provision. This section also serves as a safety net for candidates who file their applications early in the filing period, assuring that individuals willing to commit to public service will receive the assistance of party officials in complying with the myriad and technical requirements for becoming a party candidate. There would be no purpose to the duty to notify the prospective candidate of defects in his or her application if the intent was not to allow an opportunity to cure those defects, particularly if the defects can be corrected before the filing deadline.[29]

As we noted in *Gamble*, it is hard to see why the Election Code requires this review procedure unless the purpose is to avoid disqualifying candidates for clerical errors. Similarly, it is hard to see why the statute requires review "as soon as practicable" and that notice of defects be given "immediately" unless the Legislature intended to give candidates who file early an opportunity to remedy defects while there is still time. These statutory purposes are defeated if a party chair fails to conduct any review, fails to discover defects apparent on the face of the filing documents, or fails to notify candidates of defects observed while there is still time to correct them. A limited opportunity to cure would remedy such statutory omissions.

Abatement and cure would also advance the purposes of the Election Code by encouraging candidates to use it as a tool rather than a trap. Candidates would be encouraged to file early so that

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[28] *Id*. at 469.

[29] 71 S.W.3d at 318.

they can benefit from the state chair's review, and ensure that they will not be excluded for technicalities. Opponents would no longer be able to win elections by default by pointing out defects only after it is too late to correct them. Nor would abatement "penalize" those who strive to file perfect papers; they will share the same benefits when they fall short, and at worst will only be required to win election on their own merits. The result should be a system in which there are fewer technical errors and fewer elections decided by default — a result truly consistent with the Code.

Further, it would be inconsistent with the purposes of the Code if some candidates but not others get an opportunity to cure defects. If a party chair happens to discover a defect in one petition but overlooks the same defect in another, an element of chance is introduced into the primary process. The review procedure itself indicates that the Legislature did not intend to create such a whimsical form of democracy.

As we noted in *Gamble*, candidates must bear ultimate responsibility for filing a proper application and petition.[30] But the Election Code expressly requires that party chairs assist candidates with "the myriad and technical requirements" governing those documents.[31] The party chair's duty is not conditioned on whether candidates comply with theirs; on the contrary, the party chair's duty only makes a difference when a candidate's efforts have fallen short. These procedures are simply inconsistent with holding that the Legislature intended to punish candidates for clerical errors by excluding them from the ballot.

Accordingly, as we did with the DTPA, we hold that when a challenge is made based on facial defects a party chair overlooked and approved when they could have been cured, the trial court

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[30] *Id*. at 317-18.

[31] *Id*.

must abate the challenge and allow the candidate that opportunity. Candidates should have the same opportunity to cure as a proper review before the filing deadline would have allowed them.[32] Consistent with the purposes of the Election Code and *Gamble*, facial defects should exclude a candidate from the ballot only when a proper review by the party chair would have led to the same result.

C

For many reasons, an abatement and opportunity to cure not only complies best with the purposes of the Election Code, but is also the fairest remedy, and the one most likely to cause the least harm. First, access to the ballot lies at the very heart of a constitutional republic. "The Constitution requires that access to the electorate be real, not 'merely theoretical.'"[33] As we have noted many times in recent years, provisions that restrict the right to hold office must be strictly construed against ineligibility.[34] Construing the Election Code's silence in favor of an opportunity to cure avoids potential constitutional problems that might be implicated if access to the ballot was unnecessarily restricted.

Second, abatement ensures that the punishment fits the crime. When a petition does not contain all the required information, there is a potential for voter confusion or fraud. But certainly

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[32] Of course, such relief is constrained by the election schedule itself, as courts generally should not delay an election. *See id.* at 318.

[33] *Am. Party of Texas v. White*, 416 U.S. 767, 783 (1974).

[34] *E.g.*, *In re Carlisle*, ___ S.W.3d ___, ___, 49 Tex. Sup. Ct. J. 262, ____ (Tex. 2006) (per curiam); *State v. Hodges*, 92 S.W.3d 489, 494-95 (Tex. 2002); *Davis v. Taylor*, 930 S.W.2d 581, 583 (Tex. 1996); *Wentworth v. Meyer*, 839 S.W.2d 766, 767 (Tex. 1992); *Dawkins v. Meyer*, 825 S.W.2d 444, 448 (Tex. 1992); *Sears v. Bayoud*, 786 S.W.2d 248, 251 (Tex. 1990); *Brown v. Meyer*, 787 S.W.2d 42, 45 (Tex. 1990); *Hall v. Baum*, 452 S.W.2d 699, 702 (Tex. 1970), *appeal dismissed*, 397 U.S. 93 (1970); *Willis v. Potts*, 377 S.W.2d 622, 623 (Tex. 1964).

that is not always the case; sometimes voters know precisely what they are doing even if a clerical error might have misled someone else. Requiring that errors be cured separates the two cases — candidates who can get on the ballot without misleading voters will be able to cure, while those who must mislead voters to do so will not. Punishing every minor error as if it were a case of confusion or fraud not only punishes some candidates too much, but also frustrates the intentions of many voters who willingly signed their petitions.

Third, it places the duty of a party chair in its proper role. Party chairs are not required to be lawyers, nor are they required to be perfect. They have a very limited time to review thousands of papers during the window in which they must be filed. In such circumstances, they do not need the added burden that their own minor mistakes (when looking for the minor mistakes of others) might destroy a candidate's public career. Moreover, by allowing party chairs to focus on facial defects and call for correction before the filing deadline, the party chair is required neither to guess which defects render a petition invalid, nor what a court might do about them if they are challenged.

Fourth, this remedy advances the interests of those in whose name elections are conducted — the people. The public interest is best served when public offices are decided by fair and vigorous elections, not technicalities leading to default. Beginning every election cycle with lawsuits and publicity about efforts to toss candidates off and on the ballot sends an unfortunate message that elections are more about civic entertainment than civic duty.

Finally, we emphasize several limitations on today's holding. First, it concerns only facial defects that are apparent from the four corners of a candidate's filings; it does not reach forgery, fraud, or other non-accidental defects discoverable only by independent investigation. Second, it concerns only early filings that allow time for corrections after the state chair's review; no additional

time will be available for candidates who file at the last minute so that review cannot be completed before the filing deadline. Third, it does not allow political parties or candidates to ignore statutory deadlines; it allows candidates only the time that the Election Code was designed to give them. Fourth, it concerns only defective filings that have erroneously been approved; it does not change what the Election Code says party chairs should and must reject. Finally, it does not absolve candidates of the need for diligence and responsibility in their filings; party chairs must only notify them of defects, not do their work for them.

III

Applying these standards to the undisputed facts here, we hold that the trial court erred in concluding that the Election Code mandated the temporary injunction. While Francis's petition contained invalid signatures, he proved that he could have replaced them within 24 hours. Francis did not do so before the filing deadline only because the Party Chair (like he himself) inadvertently overlooked them. For the reasons above, we hold that the Election Code does not provide that he must be excluded from the ballot as a penalty.

When a candidate has been denied a place on the ballot due to official error, we have generally granted mandamus relief.[35] Accordingly, we conditionally grant the writ of mandamus and direct the trial court to vacate its order that Francis be excluded from the 2006 Republican Party primary ballot as a candidate for the Texas Court of Criminal Appeals, Place 8. The trial court is directed to abate the underlying proceeding to allow Francis to cure the defect. We are confident that the trial court will promptly comply, and our writ will issue only if it does not.

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[35] *See Davis v. Taylor*, 930 S.W.2d 581, 583 (Tex. 1996).

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Scott Brister
Justice

OPINION DELIVERED: January 27, 2006