

CAUSE NO. CV17,952

GREG CAPERS	§	
Contestant,	§	IN THE DISTRICT COURT
	§	
v.	§	
	§	<u>411TH</u> JUDICIAL DISTRICT
SAM HOUSTON	§	
Contestee.	§	
	§	
	§	SAN JACINTO COUNTY, TEXAS

CONTESTANT’S ORIGINAL PETITION ASSERTING AN ELECTION CONTEST¹

Contestant Greg Capers, who was and is a Republican candidate for re-election as the incumbent Sheriff of San Jacinto County, hereby files this Original Petition asserting an Election Contest. As is required by the Texas Election Code, Contestant names opposing candidate Sam Houston as the Contestee.

**I.
EXPEDITED DISCOVERY-CONTROL PLAN**

1. Section 231.002 of the Texas Election Code provides that the Texas Rules of Civil Procedure apply to this Election Contest. Because Contestant’s Election Contest concerns a Republican Primary Election, Section 232.012 of the Texas Election Code imposes expedited timeframes for resolving said Contest.

¹ Notice is hereby provided to the San Jacinto County District Clerk that the Clerk must provide notice of this Election Contest to the Presiding Officer of the Final Canvassing Authority. That individual is Vicky Shelly, Elections Administrator/Voter Registrar for San Jacinto County, Texas. Her address is 51 E. Pine Ave., Rm A-1, Coldspring, Texas, 77331.

Accordingly, Contestant intends to conduct expedited discovery as permitted under the Texas Election Code and as permitted by the Texas Rules of Civil Procedure and asks that the Court enter an order setting forth a suitable discovery control plan. For example, many of the key election records are in the actual and/or constructive possession of the Election Administrator for San Jacinto County, or the County itself. Because these governmental actors are non-parties, Contestant will need the Court's assistance to obtain such information by way of shortened Court-ordered deadlines to respond to subpoenas for documents and testimony.

2. The common law also dictates that time is of the essence in this Election Contest, and [t]here are compelling state interests to promptly resolve the disputed issues in order to put into office the duly elected candidate." *Goodman v. Wise*, 620 S.W.2d 857, 860 (Tex. Civ. App. — Corpus Christi 1981, writ ref d n.r.e.); *see also Wendover v. Tobin*, 261 S.W. 434, 438 (Tex. Civ. App. — San Antonio 1924) ("public welfare . . . demand[s] a swift and expeditious disposal" of election contests). The need for swift and expeditious disposal of this Contest is paramount. The reason for this need for speed is simple, as both of the candidates, the Republican Party of San Jacinto County, the Statewide Republican Party of Texas, the Texas Secretary of State, as well as the general public, each need to know: (i) whether the reported outcome of the Republican Primary Election for San Jacinto County Sheriff can be determined by the Court to be the true outcome,

and, if so, whether the true winner is the Contestant or the Contestee; (ii) and, if the Court cannot determine whether the reported outcome is the true outcome, whether a new election should be ordered for this contested race. Clearly, as stated above in the rules, common law, and statutory law, the public policy of this State is to resolve this Election Contest as rapidly as possible. Unless and until this Honorable Court reviews all the evidence and determines that the true outcome can or cannot be determined, both the candidates and the public will be in limbo. It is therefore crucial to determine the merits of this Election Contest as soon as possible. Contestant Capers and his undersigned counsel stand ready to assist the Court and the Contestee to move as expeditiously as possible.

3. Pursuant to Texas Rule of Civil Procedure 47(c)(2), Contestant seeks all the remedies provided by the Texas Election Code for an election contest, including being seated as the actual winner. Alternatively, Contestant seeks a new election. No monetary damages or attorneys' fees are sought, as neither are permitted under the Texas Election Code as a remedy.

II. PARTIES

4. Contestant Greg Capers is the current Sheriff of San Jacinto County and has been so since he was first elected in 2014. Seeking a fourth term, Contestant Capers ran for the Republican Party Primary Election nomination for

the office of Sheriff in the Republican Primary which was held on March 5, 2024. Contestant is a resident and registered voter in San Jacinto County.

5. Contestee Sam Houston, who was the challenger and current San Jacinto Precinct 3 Constable, ran for the same seat and in the same primary and was the only primary opponent of Contestant. **Service may be effectuated upon this Contestee by serving him at 6301 FM 9455, Cleveland, Texas, 77328.** Because this is an accelerated election contest under state law, **the District Clerk's office is required** under Section 232.012(c) of the Texas Election Code, **to specify in its citation of service upon Contestee that the Contestee is commanded to answer the Contestant's petition no later than 10 a.m. of the fifth day after the date of service of citation on the Contestee. In addition, state law requires the citation to direct the officer receiving the citation to return it unserved if it is not served within ten (10) days after the date of its issuance.** Because no Democratic candidates sought the Democratic nomination for this office, the winner of the March 5, 2024, Republican Primary Election is set to be elected as Sheriff in November of 2024.

III. JURISDICTION AND VENUE

6. Jurisdiction over this Election Contest is vested in a District Court pursuant to Section 231.001 of the Texas Election Code. This Court has subject matter jurisdiction over this matter by virtue of the relief sought herein. Both the

Contestant and the Contestee are residents of San Jacinto County. This election contest is timely brought, pursuant to Section 232.008(c) and Section 1.012, respectively.

7. Venue of this Election Contest is both proper and mandatory in San Jacinto County, pursuant to Section 232.006(c) of the Texas Election Code. However, pursuant to Section 231.004 of the Texas Election Code, all San Jacinto County Judges are disqualified from presiding over this Election Contest. **Accordingly, this Election Contest must be transferred to the Presiding Judge of this Administrative Judicial Region, so that another non-disqualified Judge may be assigned as a Special Judge to preside in this matter.**

IV. SUMMARY OF THE CASE

8. The purported outcome of this specific election, as reported in the final canvass, shows Contestant Capers with 2,887 votes and Contestee Houston with 2,994 votes. Thus, the reported margin of purported defeat of one hundred and seven (107) votes is a mere 1.82% (percent) of the cast vote total of 5,881 votes in this specific race for Sheriff. Contestant asserts that this purported 107 vote margin, as reported by the final canvass, is not the true outcome of the race for Sheriff of San Jacinto County. More specifically, Contestant asserts that at least one hundred and seven (107) voters (and likely a significantly much higher amount than this number), cast their ballots in this particular race and those cast votes were

improperly counted². As will be proven at trial, none of these voters were legally entitled to vote in this particular race for a variety of reasons, including, but not limited to, the fact that they failed to register in time to be entitled to vote in the March 5, 2024 Republican Primary (e.g., the statutory deadline was February 5, 2024) and/or they were not a resident of San Jacinto County at the time they cast their ballot in that Primary (e.g., only voters who reside in San Jacinto County have a legal right to vote for county offices like Sheriff). Accordingly, none of these votes were eligible to be counted. Since the number of ballots cast which were illegally counted exceeds the purported one hundred and seven (107) vote margin of difference between these two candidates, the Court hearing this Election Contest is required to determine whether the true outcome can be determined. Indeed, as the evidence will demonstrate at trial, this Court will ultimately determine that Contestant Capers—rather than Contestee Houston—is the true winner, such that the Contestant must be declared the Republican nominee for Sheriff of San Jacinto County. In the alternative, if the Court finds that it is impossible to determine the true outcome of this particular race, then Contestant Capers asserts that the Court must declare the purported election outcome to be void and require that a new

² To protect the privacy of the identity of these voters, Contestant will not print their names or addresses in this public filing. Contestant asserts that these specific voters were either registered to vote after the statutory deadline had already passed (e.g., after February 5, 2024) and/or were improperly registered to vote because said voters were not residents of San Jacinto County.

election be ordered and conducted in the manner set forth in the Texas Election Code.

V.
THE FACTS AND THE LAW OF THIS CASE

9. San Jacinto early in-person voting for the Republican Primary began on Tuesday, February 20, 2024, and ended on Friday, March 1, 2024. Election Day voting took place on Tuesday, March 5, 2024. As will be proven at trial, the purported outcome of the contest for Sheriff of San Jacinto County is not the true outcome, because: (i) votes were cast and counted which were ineligible to be counted (e.g., illegal votes); (ii) eligible votes (e.g., legal votes) were cast but not counted; and (iii) one or more election officers or other persons officially involved in the administration of the election: (a) prevented eligible voters from voting; (b) failed to count legal votes; and/or (c) engaged in other fraud and/or illegal conduct and/or made a mistake.

10. For example, approximately 255 voters who voted in this election did not register to vote on or before February 5, 2024, which was the last day to register to vote during the March 5, 2024, Republican Primary. In addition, approximately 218 voters cast a ballot in the Republican Primary, even though they did not reside in San Jacinto County. Moreover, approximately 30 felons cast a ballot in the election as well. Despite the fact all 503 voters were ineligible to cast a ballot, these voters were nevertheless permitted to vote, and their cast ballots

were improperly counted. To the extent these voters can be located and subpoenaed to testify, Contestant asserts that it is likely that they cast their illegal ballots in favor of the Contestee. Under Section 231.009 of the Texas Election Code, these voters may be compelled to reveal for whom they voted, and, to the extent they voted for Contestee, each such illegal vote shall be subtract from the vote totals in the final canvass.

11. To the extent these voters' testimony cannot be obtained and/or can be obtained but is not credible and trustworthy, however, the caselaw demonstrates that this Court may decide to order a new election without even trying to determine how a particular voter voted. Instead, the Court may take all such unascertained illegal voting into account when it determines whether the true outcome can or cannot be determined. In *Green v. Reyes*, 836 S.W.2d 203 (Tex. App.-Houston [14th Dist.] 1992, no writ), the 14th Court of Appeals in Houston affirmed a trial court's decision to grant a new election. One of the conclusions of law by the trier of fact in that case, which was affirmed by the 14th Court, stated the following:

“[t]he Court may reach this result ‘without attempting to determine how individual voters voted’ so long as ‘the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election.’ Texas Election Code § 221.009(b).”

Id. at 207. That same appellate court also upheld the following conclusions of law:

“Section 221.009(b) must be interpreted and applied in a manner that makes sense. It clearly must mean that an election tribunal in its discretion may order a new election when, as here, the number of

illegal votes exceeded the official margin of victory without either requiring testimony from each illegal voter, or proof by the Contestant that collecting such testimony represented a physical impossibility. The statute must envision the circumstance in which the magnitude of the illegal voting along with some evidence of the tendencies of the illegal voting warrant the relief of a new election without the laborious, lengthy, and expensive process of a single trial judge trying to call a close election weeks or months afterwards by the testimony of hundreds of voters with uncertain memories.”

“Plainly worded statutes must be read in their common sense. Section 221.009(b) must mean that in some reasonable circumstances the presumption of correctness of the official outcome no longer prevents relief in the form of a new election.”

“Section 221.011 requires the court to deduct illegal votes from the candidates receiving them, but when it "cannot ascertain how the [illegal] voters voted, the tribunal shall consider those votes in making its judgment." The law assumes that in some cases, as here, some illegal votes will remain in doubt after all the evidence is concluded in an election contest, and further mandates that the court take those illegal but unknown votes into account.”

“When the court, with some degree of certainty, can determine the outcome of the election based upon the evidence presented by the parties, section 212.012(a) requires it to do so. Failing this, the court's only alternative is defined by § 221.012(b), which requires the voiding of the election. Whatever may be the case when Contestant fails to sustain its burden of proof concerning the number of illegal voters, or proves a number of illegal voters less than the margin in the official returns for the election, once a Contestant has satisfied its burden of proving the number of illegal voters necessary to trigger the powers of the court under § 221.009(b), § 221.012(b) cannot be read to require a Contestant to prove the unavailability or lack of memory on the part of each and every voter whose vote might make a difference in order for the court to declare a new election. Such a burden would make some election contests logistically impossible.”

“An application of sections 221.009 and 221.012 in this fashion carefully balances two competing public policies which clash when

illegal voting exceeds the margin of "victory" by some magnitude: the policy of promptly determining election results versus the policy of maintaining public confidence in the integrity of an election process that is free from taint."

Green v. Reyes, 836 S.W.2d 203, 207 (Tex. App.-Houston [14th Dist.] 1992, no writ).

12. Texas case law is replete with court decisions declaring that a trial court may properly determine whether an election is or is not void, without ever resorting to any investigation whatsoever as to which candidate for whom a particular voter's illegal vote was cast. And, while it is true that an intellectual distinction may be made between whether a voter cast an illegal ballot in this contested election, as opposed to whether a voter cast an illegal ballot specifically for either Contestant Capers or Contestee Houston, the public policy rationale for not requiring the effort to gather this evidence is virtually the same in either scenario. Indeed, a trial court in Hidalgo County on January 27, 2022, expressly extended this reasoning to relieve a contestant from having to establish that an illegal voter cast a ballot in the contest election. *Leal v. Pena*, No. 2020-DCL-06433, which was affirmed by the Corpus Christi Court of Appeals on April 27, 2023. *Pena v. Leal*, 13-22-00204-CV (PFR pending) ("it was not necessary to engage into the inquiry as to whether those illegal ballots were actually cast in the subject election"). Accordingly, for all these reasons, this Court has the power to find that it is neither possible nor practical for Contestant to prove that any

illegal ballots which were cast in the March 5, 2024, Republican Primary were, in fact, cast in this specific contested race.

13. In addition, Contestant may also seek to prove that a certain number of illegal votes occurred where it was impossible to even identify the specific voter. Section 221.012(b) of the Texas Election Code comes into play where there were illegal votes cast which upon reasonable inquiry at an election contest cannot be attributed to either the Contestant or Contestee. See TEX. ELEC. CODE ANN. § 221.012(a)(b)(Vernon 1986); see also *Medrano v. Gleinser*, 769 S.W.2d 687, 688 (Tex. App. — Corpus Christi 1989, no writ). This Court may void the election results and order that a new election be held where there is a sufficient number of illegal votes which cannot be attributed to either candidate, namely, where the number of illegal unascertainable votes is greater than or equal to the margin of victory. TEX. ELEC. CODE ANN. § 221.012(b)(Vernon 1986); see also *Medrano*, 769 S.W.2d at 688.

14. Contestant would also point out that the Texas Election Code does not require a trial court to rely solely on "illegal votes" in attempting to ascertain the true outcome of an election. As is evident from section 221.003, the outcome of an election can be muddled not just by the counting of illegal votes or the failure to count legal votes, but also by mistakes made by election officers. TEX. ELEC. CODE ANN. § 221.003(a)(2)(C) (Vernon 2003); see *Alvarez*, 844 S.W.2d at 242.

A contestant may allege and prove that "irregularities rendered impossible a determination of the majority of the voters' true will." *Guerra v. Garza*, 865 S.W.2d 573, 576 (Tex. App. — Corpus Christi 1993, writ dismissed, w.o.j.). "The election code does not provide any guidance as to how a trial court should weigh a "mistake" by an election clerk. But given the importance of recording the true will of the voters, we believe that if a sufficient number of voters are rendered potentially ineligible by mistakes made during the recording process to account for the entire margin of victory, the trial court is within its discretion to declare the election void because it is impossible to determine the true outcome of the election." *Gonzalez v. Villarreal*, 251 S.W.3d 763, 782 (Tex. App. —Corpus Christi-Edinburg 2008), pet. dismissed, w.o.j.

15. For the above-referenced categories of complaint, the Court is empowered to find that Contestant need not prove that these voters voted in the Sheriff's race. To the contrary, all that is required is to show that these things occurred, so that the Court may take them into account when determining whether the true outcome of the election may be ascertained. Support for this proposition can be found in *Gonzalez v. Villarreal*, 251 S.W.3d 763, 782 (Tex. App. —Corpus Christi-Edinburg 2008, pet. dismissed, w.o.j.), as follows:

"In reality, election contests are not so cut and dry. The election code, however, recognizes that it may be impracticable or even impossible to determine for whom an illegal vote was cast. The election code does not require such an inquiry. Rather, the code provides that "if the

tribunal finds that illegal votes were cast but cannot ascertain how the voters voted, the tribunal shall consider those votes in making its judgment." Id. § 221.011(b) (Vernon 2003). Although section 221.011 does not dictate exactly how those illegal votes should be considered, section 221.009 provides the answer: "[i]f the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election, the tribunal may declare the election void without attempting to determine how individual voters voted." Id. § 221.009(b) (Vernon 2003). In other words, if a trial court determines that illegal votes were cast and that the number of illegal votes equals or is greater than the margin of victory, the trial court can then declare the election void without ever inquiring as to the candidate for whom those illegal votes were cast. See, e.g., Slusher, 896 S.W.2d at 240; Alvarez, 844 S.W.2d at 242 (holding that the election code permits a trial court to determine whether the number of illegal votes cast exceeded contestee's margin of victory without determining for which candidate illegal votes were cast); Kelley v. Scott, 733 S.W.2d 312, 314 (Tex. App.-El Paso 1987, writ dismissed) (judgment declared void because one illegal vote was cast, which equaled the number of votes to change the outcome of the election, regardless of the candidate for whom the illegal voter casts her vote)."

How to Deal With the Undervote.

16. According to the official canvass, there was an undervote of 140 votes in the race for Sheriff. As stated previously, the total cast vote for all voters who voted in the Republican Primary was 6,021 votes. Thus, the undervote, when expressed as a percentage, is 2.33% (percent). This means that for every 1000 voters who voted in the March 5, 2024, Republican Primary, 24 of those 1000 voters (23.3 rounded up to 24) did not cast a ballot in the race for Sheriff, while 976 did so.

17. The reported margin of purported defeat in the Sheriff's race was 107 votes. Thus, to ensure that the undervote of 2.33% (percent) is considered, Contestant alleges that the margin necessary to demonstrate a material impact on the Sheriff's race is 132 votes (131.9 rounded up). Contestant's view of how to deal with the undervote is supported by a similar conclusion of law by a trial court in Cameron County which was entered on January 27, 2022. In the case of *Leal v. Pena*, No. 2020-DCL-06433, the trial court found the following:

"41. The Court is mindful that overturning an election is not to be taken lightly. To this end the Court has considered using an approximate "under vote ratio" of 6,000/40,000. The evidence shows 15% of voters in this election "under voted" in the school board election. By using this ratio an 8 vote margin of victory requires approximately ten (10) illegally cast votes to equate to in order to invalidate the election results. The Court has found 24 illegally cast votes. This number is more than twice the calculated "over vote" cushion favoring the Contestee."

The trial court's judgment, including the above-quoted conclusion of law, was affirmed by the Corpus Christi Court of Appeals. *Pena v. Leal*, 13-22-00204-CV (PFR pending).

The Right To Vote Is A Fundamental Constitutional Right Which Must Be Protected.

18. "The right to vote is fundamental, as it preserves all other rights." *Andrade*, 345 S.W.3d at 12 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)); see also Tex. Const. art. I, § 3 (providing equal rights). Courts have zealously protected the right to vote. See *Reynolds v. Sims*,

377 U.S. 533, 555, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."); *Stewart v. Blackwell*, 444 F.3d 843, 862 (6th Cir. 2006) ("Few rights have been so extensively and vigorously protected as the right to vote. Its fundamental nature and the vigilance of its defense, both from the courts, Congress, and through the constitutional amendment process, stem from the recognition that our democratic structure and the preservation of our rights depends to a great extent on the franchise."); see also *United States v. Mosley*, 238 U.S. 383, 386, 35 S. Ct. 904, 59 L. Ed. 1355 (1915) ("We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."); *Avery v. Midland County*, 406 S.W.2d 422, 425 (Tex. 1966) ("Petitioner as a voter in the county has a justiciable interest in matters affecting the equality of his voting and political rights."); *Thomas Paine*, *Dissertation on the Principles of Government*, 1795 ("The right of voting . . . is the primary right by which all other rights are protected.").

The Constitutional Right To Vote Is Denied When A Reported Outcome Is Not The True Outcome Of An Election.

19. "No one who has imbibed anything of the spirit and genius of our free government will ever question the peerless value and sacred inviolability of the elective franchise. It will be guarded with sleepless vigilance by all who appreciate the blessings of free institutions." *Arberry v. Beavers*, 6 Tex. 457, 470 (1851). Because the sacred right to vote is fundamental to a democratic society, this Court has a solemn obligation to ensure that the purported outcome of the San Jacinto County Sheriff's race, as reported by San Jacinto County in its final canvass, is the true outcome. This duty does not and cannot derive from a political perspective. Indeed, the political victor will almost always support the status quo, while the reportedly defeated candidate very well may not, especially when the reported margin of victory is narrow and close. But the Court's job here is to render a judgment that is based purely on the facts and the law, and must be made *in spite of, not because of*, the political ramifications it may generate. Thus, for the parties and the public to have confidence in its system of democratic elections, and after hearing all of the evidence in this case, it is the Court's considered judgment that that the reported outcome of the Sheriff's race is wrong, then it must decide whether Contestant Capers is the actual winner, or, in the alternative, if the Court cannot determine the true outcome, then it must declare the contested election outcome to be void, and then order a new election for this specific contested race.

To ignore the clear and convincing evidence in this case that illegal votes were counted, legal votes were discarded, eligible voters were prevented from voting, and election officials engaged in fraud or illegality or made mistakes, would be tantamount to accepting the old adage of “it’s good enough for government work.” The Texas Election Code mandates this result, and it is not within the sound discretion of this Court to turn a blind eye to these transgressions, as to do so would not protect, but would denigrate, the constitutional right to vote.

The Trial Court’s Duty in an Election Contest.

20. The Texas Election Code mandates that an election tribunal “**shall** declare the election outcome if it can ascertain the true outcome of the election.” *Tex. Elec. Code §221.009(a)*(emphasis added). Conversely, if the Court cannot ascertain the true outcome of the election, it “**shall** declare the election void” and order a new election. *Tex. Elec. Code §221.009(b)*(emphasis added); *Green v. Reyes*, 836 S.W.2d 203, 212 (Tex. App.-Houston [14th Dist.] 1992, no writ).

21. Contestant Capers must prove by clear and convincing evidence that, with respect to each voter whose vote is challenged, one or more violations of the Texas Election Code occurred and that these violations materially affected the outcome of the election. *Woods v. Legg*, 363 S.W3d 710 (Tex. App.-Houston [1st Dist.] 2011, no pet.).

22. The Texas Civil Practices and Remedies Code defines "clear and convincing" as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Tex. Civ. Prac. & Rem. Code, Section 41.001(2)*.

23. The focus of this Court's inquiry then, as dictated by the Texas Election Code, is to first attempt to determine the true outcome of the election, if possible. If the true outcome can be ascertained, then this Court has no discretion but to declare that the reported outcome is, indeed, the true outcome. Conversely, Section 221.012(b) of the Texas Election Code mandates that an election tribunal "shall declare the election void if it cannot ascertain the true outcome of the election."

24. Section 221.003 of the Texas Election Code sets forth the general parameters of an election contest:

Sec. 221.003. SCOPE OF INQUIRY.

(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.

TEX. ELEC. CODE ANN. § 221.003(a) (Vernon 2003).

25. The appellate standard of review applicable to this Court's judgment is whether the record shows that the trial court abused its discretion. *Guerra v. Garza*, 865 S.W.2d 573, 576 (Tex. App. — Corpus Christi 1993, writ dismissed w.o.j.); *Reese v. Duncan*, 80 S.W.3d 650, 655 (Tex. App.-Dallas 2002, pet. denied)

Voter Eligibility.

26. To be eligible to vote in an election, a person "must be a qualified voter on the day the person offers to vote; be a resident of the territory covered by the election; and satisfy all other requirements for voting prescribed by law." *Slusher v. Streater*, 896 S.W.2d 239, 247 (Tex. App. — Houston [1st Dist.] 1995, no writ)(citing TEX. ELEC. CODE ANN. § 11.001 (Vernon 1986)).

27. The Texas Election Code defines a "qualified voter" as "one who is 18 years of age or older; is a United States citizen; has not been determined mentally incompetent; has not been finally convicted of a felony, except under certain circumstances; is a resident of this state; and is a registered voter." *Id.* (citing TEX. ELEC. CODE ANN. § 11.002 (Vernon 1986)).

§ 221.003(a)(1)'s Reference to Illegal Voting

28. An "illegal vote" is one that "is not legally countable." TEX. ELEC. CODE ANN. § 221.003(b) (Vernon 2003). For example, a vote cast in a precinct by a person who does not reside in the county of the election is an illegal vote that

cannot be counted. Alvarez v. Espinoza, 844 S.W.2d 238, 247 (Tex. App.-San Antonio 1992, writ dismiss'd w.o.j.).

**VI.
CAUSE OF ACTION ASSERTING AN ELECTION CONTEST**

29. Contestant incorporates all previous paragraphs of this Petition by this reference. Based upon the facts and law developed herein, Contestant asserts that the tribunal hearing this Election Contest must find that the outcome of the contested election, as shown by the final canvass, is not the true outcome because, among other things, at least one hundred and seven (107) illegal votes³ were cast and counted in this specific race for Sheriff of San Jacinto County.

30. Because it is not possible to determine the true outcome of this election, the tribunal must declare the election result to be void and order that a new election must be held in the manner prescribed by the Texas Election Code.

31. Section 221 of the Texas Election Code sets forth the general parameters of an election contest:

Sec. 221.003. SCOPE OF INQUIRY. (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

³ Under the Texas Election Code, an "illegal vote" means a vote that is not legally countable.

(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.

(b) In this title, "illegal vote" means a vote that is not legally countable.

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

32. Many courts interpret an election contest to mean any type of suit in which the validity of an election or any part of the elective process is made the subject matter of the litigation. *Roberts v. Brownsboro Indep. School Dist.*, 575 S.W.2d 371, 374 (Tex. Civ. App. - Tyler 1978, writ dismiss'd) (challenging an order calling a school bond election); *Kennedy v. Burnet Indep. School Dist.*, 474 S.W.2d 742, 746 (Tex. Civ. App. - Austin 1971, no writ) (contesting authority of county judge to call election involving consolidation of school districts); *Weinberg v. Molder*, 312 S.W.2d 393, 396 (Tex. Civ. App. - Waco 1958, writ refused n.r.e.) (challenging school bond election on grounds of misrepresentations by school district officials); *Turner v. Lewie*, 201 S.W.2d 86, 88 (Tex. Civ. App. - Fort Worth 1947, writ dismiss'd) (contesting notice of election to amend city charter).

33. These cases rely on language in *Dickson v. Strickland*, a 1924 Texas Supreme Court case in which it was contended that although the Constitution vested in the legislature exclusive authority to determine contested elections for

governor, that authority did not come into being until after the election. *114 Tex. 176, 265 S.W. 1012 (1924)*. In determining that the legislature's authority covered every part of the process of electing a governor, the court stated:

An election contest necessarily involves questions of both fact and law. It may be predicated upon a status or upon facts which existed before an election, upon what took place at the election, and perhaps in some instances upon a status or what took place after an election. The ineligibility of a candidate before an election, whether arising from lack of age, or from personal misconduct, or other infirmities, the manner of giving notice of the election, appointing election officers, their qualification, the creation of election districts, the preparation of the polls or polling places, the manner in which the ballots may have been prepared, and various other things which of necessity precede an election, are all well known subjects of election contests. A failure to observe any one or more of the many articles of title 49, Revised Statutes, applicable to general elections, may become the subject-matter of an election contest, and many of these provisions concern matters which must occur before the time of actual voting. In determining what a "contested election" is, we must bear in mind that an election in this state is not a single event, but a process, and that the entire process is subject to contest.

265 S.W. at 1018.

34. In *Cohen v. Clear Lake City Water Auth.*, the Houston Court of Appeals held that an election contest is meant to include any type of suit in which the validity of an election or any part of the elective process is made the subject matter of the litigation. *687 S.W.2d 406, 408* (Tex. App. -- Houston [14th Dist.] 1985, no writ). The court then determined that it had jurisdiction over matters occurring prior to election day, which may have affected the election. *Id.* Notwithstanding the fact that the provision in the Election Code which sets out the

scope of inquiry in an election contest has been revised since *Cohen, TEX. ELEC. CODE ANN. § 221.003* (Vernon 1986), it would be error to read the new provision as restricting a court's inquiry to matters occurring only on election day.

35. Accordingly, Contestant asserts that this Court has subject matter jurisdiction over this Election Contest and over all aspects plead above.

VII. CONCLUSION

36. For all the foregoing reasons, Contestant asks the Court to:
- (i) after a trial on the merits, sustain this Election Contest;
 - (ii) after subtracting all illegal votes that were cast and counted, and after adding all legal votes that were cast but not counted, and after consideration of all of the actions of all of the election officials which occurred before, during, and after the Republican Primary Election, declare that the true outcome of the election results in a determination that Contestant Capers is the actual true winner and is therefore the Republican Nominee; or, in the alternative, the true outcome of the election cannot be ascertained;
 - (iii) either enter a judgment declaring Contestant Capers is the winner; or, in the alternative, enter a judgment which voids the March 5, 2024, Republican Primary conducted in San Jacinto County, Texas, for the office of Sheriff for that County; and
 - (iv) award such other and further relief to which Contestant may show himself to be justly entitled.

PRAYER

WHEREFORE, Contestant Greg Capers prays that this Court: (i) find his Election Contest to be meritorious; (ii) find that the outcome of this contested election, as shown by the final canvass, is not the true outcome; or, in the alternative, (iii) find that the true outcome of this contested election cannot be determined and thus find that the contested election is void and order a new election in the manner prescribed by the Texas Election Code; and (iv) and for such other and further relief to which Contestant may show himself to be entitled.

Respectfully submitted,

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