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Survey of Recent Mandamus Decisions of the Texas Supreme Court

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SURVEY OF RECENT MANDAMUS DECISIONS OF THE TEXAS SUPREME COURT

*Honorable Douglas S. Lang**

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I. INTRODUCTION

Mandamus relief is appropriate when a petitioner demonstrates a clear abuse of discretion and has no adequate remedy by appeal.¹ However, mandamus is an “extraordinary” remedy and not a matter of right.² Although the Texas Supreme Court’s mandamus opinions during the past year drew on previously recognized applications, mandamus relief in the supreme court remains very much dependent on the particular circumstances of each case.

This Article analyzes, summarizes, and categorizes the fourteen supreme court mandamus opinions³ delivered during the Survey period of December 1, 2019, through November 30, 2020. A particular focus of the Article will be upon the mandamus element of lack of an adequate appellate remedy. The Texas Supreme Court’s opinions occasionally omit discussion of that element. Therefore, analysis of the inclusion or omission of discussion of that element will provide guidance to practitioners.

II. MANDAMUS FUNDAMENTALS

The Texas Supreme Court’s jurisdiction over writs of mandamus stems

1. *In re Mobile Mini, Inc.*, 596 S.W.3d 781, 783–84 (Tex. 2020) (orig. proceeding) (per curiam).

2. “Mandamus . . . is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court. Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles.” *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding) (quoting *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding)).

3. See generally *Town of Shady Shores v. Swanson*, 590 S.W.3d 544 (Tex. 2019) (orig. proceeding); *In re Murrin Bros. 1885, Ltd.*, 603 S.W.3d 53 (Tex. 2019) (orig. proceeding); *In re Turner*, 591 S.W.3d 121 (Tex. 2019) (orig. proceeding); *In re Mobile Mini, Inc.*, 596 S.W.3d at 783; *In re C.J.C.*, 603 S.W.3d 804, 808 (Tex. 2020) (orig. proceeding); *In re Abbott*, 601 S.W.3d 802 (Tex. 2020) (orig. proceeding) (per curiam); *In re Lester*, 602 S.W.3d 469 (Tex. 2020) (orig. proceeding); *In re Green Party of Tex.*, No. 20-0708, 2020 WL 5580156 (Tex. Sept. 18, 2020) (orig. proceeding) (per curiam); *In re Panchakarla*, 602 S.W.3d 536 (Tex. 2020) (orig. proceeding) (per curiam); *In re Fox River Real Est. Holdings, Inc.*, 596 S.W.3d 759 (Tex. 2020) (orig. proceeding); *In re Hotze (Hotze I)*, No. 20-0430, 2020 WL 4046034 (Tex. July 17, 2020) (orig. proceeding); *In re Hotze (Hotze II)*, No. 20-0739, 2020 WL 5919726 (Tex. Oct. 7, 2020) (orig. proceeding); *In re Tex. House Republican Caucus PAC*, No. 20-0663, 2020 WL 5351318 (Tex. Sept. 5, 2020) (orig. proceeding) (per curiam); *In re Republican Party of Tex.*, 605 S.W.3d 47 (Tex. 2020) (orig. proceeding) (per curiam).

from the Texas constitution.⁴ Specifically, § 3 of article V states, in part, (1) “under such regulations as may be prescribed by law,” the supreme court and its justices “may issue the writs of mandamus . . . and such other writs, as may be necessary to enforce its jurisdiction,” and (2) the Texas “Legislature may confer original jurisdiction on the [Texas] Supreme Court to issue writs of . . . mandamus in such cases as may be specified, except as against the Governor of the State.”⁵

Consistent with those constitutional grants of authority, § 22.002(a) of the Texas Government Code provides that the supreme court or a justice of that court

may issue . . . all writs of . . . mandamus agreeable to the principles of law regulating those writs, against a statutory county court judge, a statutory probate court judge, a district judge, a court of appeals or a justice of a court of appeals, or any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals.⁶

Further, the Texas Government Code § 22.002 states that “[t]he supreme court or, in vacation, a justice of the supreme court may issue a writ of mandamus to compel a statutory county court judge, a statutory probate court judge, or a district judge to proceed to trial and judgment in a case,” and

[o]nly the supreme court has the authority to issue a writ of mandamus . . . against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform.⁷

Additionally, a number of Texas statutes and rules provide for mandamus proceedings in certain courts as to specifically identified matters.⁸

4. See TEX. CONST. art. V, §§ 1, 3, 6.

5. *Id.* § 3(a). Also, § 6 of article V provides, in part, that the intermediate appellate courts of Texas “shall have appellate jurisdiction co-extensive with the limits of their respective districts” and “such other jurisdiction, original and appellate, as may be prescribed by law.” *Id.* § 6(a).

6. TEX. GOV'T CODE ANN. § 22.002(a).

7. *Id.* § 22.002(b)–(c). The mandamus jurisdiction of the Texas courts of appeals is less broad than that of the Texas Supreme Court. Specifically, pursuant to Texas Government Code § 22.221: (1) each of the fourteen courts of appeals or a justice thereof “may issue a writ of mandamus and all other writs necessary to enforce the jurisdiction of the court,” and (2) “each court of appeals . . . may issue . . . writs of mandamus . . . against a judge of a district, statutory county, statutory probate county, or county court in the court of appeals district” and certain magistrates and associate judges. *Id.* § 22.221 (a)–(b).

8. See, e.g., *In re Lester*, 602 S.W.3d at 472 (citing the Tim Cole Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001–.154). The remedy of mandamus at the Texas Supreme Court is provided to compel performance of the ministerial duty of the Comptroller of Public Accounts. See *In re Smith*, 333 S.W.3d 582, 585 (Tex. 2011) (orig. proceeding). *In re Occidental Chem. Corp.*, 561 S.W.3d 146, 153–54 (Tex. 2018) (orig. proceeding) (concluding that the statute gives the Texas Supreme Court original jurisdiction to hear and determine certain suits involving imposition of ad valorem taxes by multiple taxing units on same property confers original mandamus jurisdiction in supreme court); *City of Hous. v. Hous. Mun. Emps. Pension Sys.*, 549 S.W.3d 566, 582–84 (Tex. 2018) (affirming denial of city's plea to jurisdiction where suit for mandamus was proper proceeding to compel dis-

Texas Rule of Appellate Procedure 52 provides procedural requirements for mandamus proceedings in both the supreme court and the courts of appeals.⁹ “If the supreme court and [a] court of appeals have concurrent [mandamus] jurisdiction, the petition must be presented first to the court of appeals unless there is a compelling reason not to do so,” which must be stated in the petition.¹⁰ Further, failure to comply with the additional requirements of Rule 52 may result in denial of relief.¹¹

III. MANDAMUS STATISTICS

Statistics for the Texas Supreme Court’s six most recent fiscal years show that dispositions, year to year, have been close to or in excess of the petitions filed.¹² Further, the rate at which the petitions have been granted in that period, in the range from 3.3% to 7.5%, demonstrates that mandamus is indeed an “extraordinary” remedy.¹³

closure of information pursuant to Texas Public Information Act and other nondiscretionary governmental action required by law); *In re Nestle USA, Inc.*, 387 S.W.3d 610, 617 (Tex. 2012) (orig. proceeding) (concluding that the statutory language allowed for Texas Supreme Court mandamus review of constitutionality of franchise tax statute); TEX. R. APP. P. 24.4(a) (providing that a party may seek Texas Supreme Court mandamus review of a court of appeals’ ruling on a motion challenging trial court’s determination of amount of security required to supersede judgment); TEX. ELEC. CODE ANN. § 273.061 (“The [Texas] Supreme Court or a court of appeals may issue writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing duty is a public officer.”).

9. See TEX. R. APP. P. 52. The party seeking relief in a mandamus proceeding is the relator and the person against whom relief is sought is the respondent. *Id.* at 52.2. “A person whose interest would be directly affected by the relief sought is a real party in interest and a party to the case.” *Id.*

10. See TEX. R. APP. P. 52.3(e); see also *In re Abbott*, 601 S.W.3d 802, 807 (Tex. 2020) (orig. proceeding) (per curiam); *State v. Naylor*, 466 S.W.3d 783, 793–94 (Tex. 2015) (orig. proceeding) (“[A] party may not circumvent the court of appeals simply by arguing futility.”); *Chambers-Liberty Counties Navigation Dist. v. State*, 575 S.W.3d 339, 356 (Tex. 2019) (orig. proceeding) (“Texas Rule of Appellate Procedure 52.3(e) provides that if a mandamus petition is filed in the Supreme Court without first being presented to the court of appeals, the petition must state the compelling reason why the petition was not first presented to the court of appeals.”); cf. *In re Abbott*, 601 S.W.3d at 807 n.1 (noting that without citing Texas Rule of Appellate Procedure 52.3(e), the Texas Supreme Court said, “[b]ecause this is a matter of state-wide importance requiring immediate attention, the relators’ decision to bypass the court of appeals is warranted. See *Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001) (orig. proceeding).”).

11. See, e.g., *In re Charboneau*, No. 05-18-00551-CV, 2018 WL 2276226, at *1 (Tex. App.—Dallas May 18, 2018, orig. proceeding [mand. denied]) (mem. op.); *In re Phillips*, No. 05-18-00543-CV, 2018 WL 2213888, at *1 (Tex. App.—Dallas May 15, 2018, orig. proceeding [mand. denied]) (mem. op.); *In re Wade*, No. 05-17-00046-CV, 2017 WL 462364, at *1 (Tex. App.—Dallas Feb. 2, 2017, orig. proceeding) (mem. op.).

12. See TEX. JUDICIAL BRANCH, TEXAS SUPREME COURT ANNUAL STATISTICAL REPORT SUPPLEMENT, <https://www.txcourts.gov/statistics/annual-statistical-reports> [<https://perma.cc/R2ER-UH4S>].

13. See *id.*; *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding).

Texas Supreme Court Mandamus Statistics: Past Five Fiscal Years

FISCAL YEAR	2020	2019	2018	2017	2016	2015
New petitions	225	209	209	187	188	220
Total dispositions	219	214	217	181	194	225
Petitions denied	74.9% (164)	80.8%	76.5%	79%	79.9%	72%
Petitions granted	5.5% (12)	3.3%	6.9%	6.6%	6.7%	7.5%

IV. SUBJECT MATTER CATEGORIES OF RECENT TEXAS SUPREME COURT MANDAMUS CASES

A. THE OPEN MEETINGS ACT CLAIMS AND WAIVER OF GOVERNMENTAL IMMUNITY

The case of *Town of Shady Shores v. Swanson*¹⁴ clarifies, among other things, the apparent conflict between a city's governmental immunity and claims brought "by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation" of the Open Meetings Act.¹⁵ *Town of Shady Shores* involved a suit by the former city secretary of Shady Shores, for, among other things, wrongful termination of her employment, reinstatement, and back wages. She also sought a declaratory judgment pursuant to the Uniform Declaratory Judgments Act (UDJA)¹⁶ that she was terminated after a city council meeting that was conducted in violation of the Open Meetings Act. The town asserted in its plea to the jurisdiction and in its motions for summary judgment, among other things, that it retains immunity from suit because the Open Meetings Act does not waive governmental immunity with respect to declaratory judgment claims under the UDJA.¹⁷ However, before directing remand to the Second Fort Worth Court of Appeals for review of certain pleading issues, the Texas Supreme Court concluded that the Open Meetings Act "waives the Town's immunity from a suit 'by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation' of the Act."¹⁸

14. 590 S.W.3d 544, 556 (Tex. 2019) (orig. proceeding).

15. *Id.* at 556 (citing TEX. GOV'T CODE ANN. § 551.142(a)).

16. TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001–37.011.

17. *Town of Shady Shores*, 590 S.W.3d at 555–56.

18. *Id.* at 556; *see also* TEX. GOV'T CODE § 551.142(a) ("An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body.").

B. REVIEW OF DENIAL OF MOTION TO DISQUALIFY AND DENIAL OF TEXAS RULES OF CIVIL PROCEDURE 12 MOTION

The Texas Supreme Court decided *In re Murrin Brothers 1885, Ltd.*,¹⁹ a case over control of Fort Worth's Billy Bob's Texas (BBT)—often referred to as the world's largest honky-tonk and rodeo. In that case, the supreme court denied a petition for writ of mandamus filed by the Murrin Group that sought reversal of the Second Fort Worth Court of Appeals' refusal to disqualify the law firm of Kelly Hart & Hallman LLP from representing some of the owners and, nominally, the LLC.²⁰

The genuine legal news is the supreme court's clarification of Texas law regarding alleged conflicts of interest of law firms in derivative lawsuits. The specific issue the supreme court addressed was whether a law firm is automatically disqualified in a derivative suit when representing both the LLC as a nominal defendant and some of the LLC's owners.²¹

The supreme court addressed three points. First, the supreme court observed that companies in derivative actions “are simultaneously ‘plaintiffs’ and ‘defendants,’ depending on how you look at it.”²² Second, in the logical course of its analysis, the supreme court stated the obvious dilemma: if the company is deemed both plaintiff and defendant, “no lawyer could ever represent it in derivative litigation because to do so would automatically place the lawyer on both sides of the case. Obviously, that is not the rule.”²³ Second, having dispensed with the controversy of the label that could be placed on the LLC as a party, the supreme court focused on the baseline practical problem of conflicts. The supreme court instructed, “[T]he proper inquiry is to look to whether the substance of the challenged representation requires the lawyer to take conflicting positions or to take a position that risks harming one of his clients.”²⁴

Third, and preliminary to stating its conclusion, the supreme court reflected upon the different stances taken by courts across the country about the alleged risks of harm to adverse parties in derivative actions.²⁵ Some jurisdictions claim that representation of both the entity and some of its owners is “categorically impermissible.”²⁶ Others, including the U.S. District Court for the District of Delaware, reason, “[T]he interests of the company and its controlling officers or directors are often aligned, and separate counsel is not necessary unless a divergence of those interests arises.”²⁷

19. 603 S.W.3d 53, 53 (Tex. 2019) (orig. proceeding).

20. *Id.* at 62.

21. *Id.* at 58.

22. *Id.*

23. *Id.*

24. *Id.* (citing *Nat'l Med. Enters. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996) (orig. proceeding)).

25. *Id.*

26. *Id.* at 57–58.

27. *Id.* at 59 (citing *Respler ex rel. Magnum Hunter Res. Corp. v. Evans*, 17 F. Supp. 3d 418, 421 (D. Del. 2014)).

However, neither of the above stated views of the law were expressly adopted by the supreme court. Rather, the supreme court said, “We announce no categorical rule governing dual representation in derivative litigation.”²⁸

Yet, even though the supreme court declined to “announce” a categorical rule, it can be fairly said that the supreme court did, in fact, forge a rule. That is because in the final stage of its analysis, the supreme court stated that a conclusion respecting disqualification “requires consideration of the true extent of their adversity under the circumstances” pursuant to Texas Disciplinary Rules of Professional Conduct Rule 1.06(a): “A lawyer shall not represent opposing parties to the same litigation.”²⁹ The supreme court’s decision on this point appears to be very similar to the Delaware court’s rule.

Finally, using its stated measure, the supreme court concluded there was no disqualifying conflict and explained:

Stripped of the conceptual and procedural baggage of its “derivative” claims, this case is about who controls the management of BBT . . . Either the Hickman Group is right, in which case its interests and BBT’s are truly aligned, or the Murrin Group is right, in which case BBT is aligned with it instead.³⁰

Finding no abuse of discretion in the trial court’s denial of the motion to disqualify, mandamus relief was denied.³¹

Before concluding, the supreme court addressed the Murrin Group’s contention that the trial court erred in denying their Texas Rules of Civil Procedure Rule 12 Motion (Rule 12 Motion) to show authority.³² The Murrin Group claimed that their opponents had no authority to choose legal counsel to represent the LLC based upon the language of the governing documents.³³ Not surprising was the fact that the real parties in interest interpreted the documents differently.

Relators argued they were harmed in three ways.³⁴ First, they were harmed by the denial of their contractual rights to choose counsel. Second, at trial, the jury would be confused by counsel representing both the LLC and their adversaries. Third, the LLC was funding the opposition’s legal fees. The supreme court dispensed with those alleged harms by concluding these issues can be addressed by the trial court.³⁵ The supreme court concluded, “Under these circumstances, the relators have not estab-

28. *Id.*

29. *Id.*; see also TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.06 cmt. 6 (defining the term “directly adverse”).

30. *In re Murrin Brothers 1885, Ltd.*, 603 S.W.3d at 60.

31. *Id.* at 61.

32. *Id.*; see TEX. R. CIV. P. 12 (“A party in a suit or proceeding pending in a court of this state may, by sworn written motion stating that he believes the suit or proceeding is being prosecuted or defended without authority, cause the attorney to be cited to appear before the court and show his authority to act.”).

33. *In re Murrin Brothers 1885, Ltd.*, 603 S.W.3d at 61.

34. *See id.*

35. *Id.* at 61–62.

lished the lack of an adequate remedy if mandamus relief is not granted. Accordingly, mandamus relief as to the Rule 12 motion is denied.”³⁶ The element of “abuse of discretion” was not addressed by the supreme court as to the Rule 12 Motion.³⁷

The supreme court prefaced its final remarks about the denial of the petition for writ of mandamus with a bit of historical color. It expressed comfort that dispute resolution has advanced to court trials and away from the days of the Wild West when the means of settling a “family feud over a dance hall and saloon in the Fort Worth Stockyards” might have been by a gun battle of six-shooters.³⁸ Finally, the supreme court observed that the denial of mandamus relief allows this dispute to proceed toward a more peaceful alternative where the parties are represented by their chosen lawyers.³⁹

C. HEALTHCARE CASE DISCOVERY OF NON-PARTY PHYSICIAN

In the case of *In re Turner*,⁴⁰ the Texas Supreme Court considered the limits on discovery under the Texas Medical Liability Act (TMLA).⁴¹ Generally, in a healthcare liability claim case, no discovery is permitted until the claimant serves an expert report on the physician or provider against whom the claim is asserted, in accordance with the TMLA.⁴² In this case, the claimant sued one healthcare provider and served an expert report meeting the TMLA’s requirements on that provider. However, the claimant sought to depose another physician who was not a named party to the suit regarding the same underlying incident. When the non-party physician was served with a subpoena duces tecum, he objected, claiming this process was no more than pre-suit discovery, which is prohibited under the TMLA.⁴³ The Fifth Dallas Court of Appeals agreed in part with the physician holding such an expert report must be served on the non-party deponent before the discovery proceeds and granted mandamus relief.⁴⁴ The supreme court disagreed with the court of appeals and conditionally granted mandamus relief.⁴⁵ In so doing, the supreme court recited the general rules of discovery and commented that:

[A] party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action . . . We see nothing in the [TMLA] indicating that the Legislature intended to deprive a claimant of legitimate, and possibly crucial, discovery of information in aid of a health care liability claim for which

36. *Id.* at 62.

37. *See id.*

38. *Id.*

39. *Id.*

40. 591 S.W.3d 121, 121 (Tex. 2019) (orig. proceeding).

41. TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001–.050.

42. *In re Turner*, 591 S.W.3d at 122.

43. *Id.* at 123; *see In re Jordan*, 249 S.W.3d 416, 419–20, 424 (Tex. 2008) (orig. proceeding); TEX. CIV. PRAC. & REM. CODE § 74.351(s).

44. *In re Turner*, 591 S.W.3d at 124.

45. *See In re Jordan*, 249 S.W.3d at 127.

a statutorily compliant expert report has been served.⁴⁶

However, in granting mandamus relief, the supreme court sent the case back to the trial court for management of the process and directed that:

[I]n conducting Dr. Sandate's deposition and seeking relief from the trial court regarding disagreements over the propriety of specific questions, the parties are governed by the parameters set forth in this opinion. With respect to the subpoena duces tecum, the parties may present argument to the trial court as to the permissible scope of document production in light of those same parameters.⁴⁷

In rendering its decision, the supreme court did not directly address the "adequacy of the appellate" remedy. It merely stated the general rule that mandamus will be allowed only when "the relator shows that the trial court abused its discretion and that no adequate appellate remedy exists."⁴⁸

D. VENUE IN LIMITED PARTNER'S SUIT TO REMOVE GENERAL PARTNER

The case of *In re Fox River Real Estate Holdings, Inc.*⁴⁹ involved two mandatory venue provisions that, at first blush, appear to be in conflict. The underlying suit arose from allegations of wrongful disposition of a limited partnership's assets. A group of limited partners sued the owner of the general partner and the general partner claiming they fraudulently misappropriated valuable groundwater leases and other assets, breached the limited partnership agreement, and violated fiduciary duties owed to the partnership. The limited partners sought actual damages in excess of \$1 million, exemplary damages, attorney's fees and expenses, and declaratory, injunctive, and other equitable relief.⁵⁰

The venue conflict arose because one statute, § 15.020 of the Texas Civil Practice and Remedies Code, permits parties in a "major transaction" to contractually agree to venue for related disputes.⁵¹ The other, § 65.023(a) of the Texas Civil Practice and Remedies Code, "mandates venue in a defendant's county of domicile for cases purely or primarily seeking injunctive relief."⁵²

Suit was filed in Washington County, which was the domicile of the defendants. However, the trial court granted defendants' motion to transfer venue to Harris County based on the venue-selection clause in the partnership agreement. The limited partners sought mandamus to compel venue in Washington County, but the Fourteenth Houston Court of Ap-

46. *In re Turner*, 591 S.W.3d at 126 (citation omitted).

47. *Id.* at 127.

48. *Id.* at 124.

49. 596 S.W.3d 759, 759 (Tex. 2020) (orig. proceeding).

50. *Id.* at 761.

51. *Id.*; TEX. CIV. PRAC. & REM. CODE § 15.020.

52. TEX. CIV. PRAC. & REM. CODE § 65.023(a).

peals denied relief.⁵³

The Texas Supreme Court observed that § 15.020 is a venue provision that controls only over other mandatory venue provisions in Title 2 of the Texas Civil Practice and Remedies Code.⁵⁴ However, it does not control over a venue statute outside of Title 2.⁵⁵ Accordingly, the supreme court considered whether § 65.023(a), found in Title 3, was applicable.⁵⁶

First, the supreme court identified the language of § 65.023(a) upon which its decision should be based: “[A] writ of injunction against a party who is a resident of this state shall be tried in a district or county court in the county in which the party is domiciled.”⁵⁷ Then, the supreme court observed that § 65.023(a) is “operative only when a plaintiff’s pleadings in the underlying suit establish the relief sought is ‘purely or primarily injunctive.’”⁵⁸ The supreme court emphasized, “In this context, ‘primary’ necessarily means first in order of rank or importance.”⁵⁹ Finally, it reviewed the litany of claims and relief sought,⁶⁰ employing what it called a “commonsense examination of the substance of . . . [the] claims for relief,”⁶¹ and concluding the limited partners’ “requests for injunctive relief are not the dominant purpose or central focus of the lawsuit.”⁶² Adequacy of any remedy by appeal was not addressed since that is not a prerequisite to mandamus relief in mandatory venue cases.⁶³

E. TIMELY DESIGNATION OF RESPONSIBLE THIRD PARTY

In *In re Mobile Mini, Inc.*, Mobile Mini sought mandamus relief to compel “the trial court to grant its timely filed motion to designate a responsible third party in a construction worker’s personal-injury suit.”⁶⁴ The motion was filed after the statute of limitations expired on the worker’s claims against the third party. However, Mobile Mini contended:

[T]he trial court was obligated to grant it because (1) the motion was filed more than sixty days before a trial setting, (2) the responsible third party was timely disclosed in response to the worker’s discov-

53. *In re Fox River Real Est. Holdings, Inc.*, 596 S.W.3d at 762.

54. *Id.* at 764.

55. *Id.*; see TEX. CIV. PRAC. & REM. CODE ANN. § 15.020(d) (“This section does not apply to an action if . . . (3) venue is established under a statute of this state other than this title.”).

56. *In re Fox River Real Est. Holdings, Inc.*, 596 S.W.3d at 765–66.

57. *Id.* at 765 n.35 (citing TEX. CIV. PRAC. & REM. CODE § 65.023(a)); see *In re Cont’l Airlines, Inc.*, 988 S.W.2d 733, 736 (Tex. 1998) (orig. proceeding) (“The statute placing venue for injunction suits in the county of the defendant’s domicile is mandatory.”).

58. *In re Fox River Real Est. Holdings, Inc.*, 596 S.W.3d at 765.

59. *Id.*

60. *Id.* (“The crux of this dispute is whether Fox River ‘primarily’ seeks injunctive relief despite pleading for significant damages, attorney’s fees, declaratory relief, and other equitable relief, including a constructive trust.”).

61. *Id.*

62. *Id.*

63. *Id.* at 763 n.18.

64. *In re Mobile Mini, Inc.*, 596 S.W.3d 781, 783 (Tex. 2020) (orig. proceeding) (per curiam) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 33.004).

ery requests, and (3) the worker did not challenge the sufficiency of the factual allegations concerning the third party's alleged responsibility.⁶⁵

The plaintiff sued Mobile Mini and other defendants nineteen days before the statute of limitations expired on his tort claims. Mobile Mini was served at that time with discovery requests in addition to the original petition.⁶⁶ It timely filed its answer to the suit and responses to the discovery requests. The discovery responses included the identification of the third party whom Mobile Mini would later move to designate as a responsible third party. However, the statute of limitations on the tort claim had run by that time.⁶⁷

When Mobile Mini moved to designate the responsible third party, the plaintiff opposed the motion on the ground that, according to Texas Civil Practice & Remedy Code § 33.004(d), the third party could not be a responsible party once the limitations period had expired.⁶⁸ Further, plaintiff contended that even though Mobile Mini served its discovery responses timely, the statute of limitations had run by that time, it could no longer sue the third party, and Mobile Mini could have served its responses before the statute of limitations ran. The trial court agreed with the plaintiff and the Thirteenth Corpus Christi–Edinburg Court of Appeals denied mandamus relief.⁶⁹

The Texas Supreme Court agreed with Mobile Mini that, on this record, § 33.004(d) did not prohibit designation of the third party. That is because Mobile Mini timely filed its discovery responses.⁷⁰ It had no obligation to count the days left before the limitations period ran and file the responses within that time.⁷¹ The supreme court reasoned:

[T]he circumstances presented here do not invoke the gamesmanship concerns section 33.004(d) operates to prevent. Mobile Mini identified Nolana as a responsible third party in its initial response to Covarrubias's initial request for disclosures and that response was timely under the Texas Rules of Civil Procedure. Because Covarrubias waited almost two years to sue Mobile Mini, the response deadline for the disclosures fell after limitations expired. Mobile Mini did not engage in any dilatory or stall tactics to game the system, but instead filed the discovery response when it was due, and Covarrubias does not contend the response was inadequate. Mobile Mini's failure to disclose Nolana's identity before limitations expired was

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(d) (“A defendant may not designate a person as a responsible third party with respect to a claimant's cause of action after the applicable limitations period on the cause of action has expired with respect to the responsible third party if the defendant has failed to comply with its obligations, if any, to timely disclose that the person may be designated as a responsible third party under the Texas Rules of Civil Procedure.”).

69. *In re Mobile Mini, Inc.*, 596 S.W.3d at 783–84.

70. *See id.* at 784.

71. *See id.*

the natural consequence of Covarubbias's decision to wait to file suit until limitations were nearing terminus.⁷²

The supreme court made clear that Mobile Mini met its burden to secure mandamus relief by stating, "Mobile Mini is entitled to mandamus relief because the trial court abused its discretion in denying Mobile Mini's motion and Mobile Mini lacks an adequate appellate remedy."⁷³

F. TRIAL COURT'S PLENARY POWER TO VACATE AN ORDER
GRANTING A MOTION TO DISMISS—TEXAS CITIZENS
PARTICIPATION ACT

The issue in the case of *In re Panchakarla*⁷⁴ was whether the "Texas Citizens Participation Act (TCPA) prohibits a trial court from exercising its plenary power to vacate an order granting a motion to dismiss."⁷⁵ Central to the resolution of this dispute is the TCPA's deadline for ruling on a motion to dismiss. Section 27.005(a) of the Texas Civil Practice and Remedy Code requires the trial court to rule on a TCPA dismissal motion "not later than the 30th day following the date the hearing on the motion concludes."⁷⁶ If the trial court does not issue a timely ruling, § 27.008(a) of the Texas Civil Practice and Remedy Code provides "the motion is considered to have been denied by operation of law and the moving party may appeal."⁷⁷ An interlocutory appeal is also authorized from the trial court's timely denial of a dismissal motion.⁷⁸ An interlocutory appeal from denial of a TCPA motion automatically stays all trial court proceedings.⁷⁹ However, should the trial court grant the motion to dismiss, an appeal may be taken as with any final judgment.⁸⁰

The Fifth Dallas Court of Appeals "held that the trial court had no power to vacate its own order [granting the motion to dismiss] after the

72. *Id.* at 785.

73. *Id.* at 783–84.

74. 602 S.W.3d 536, 536 (Tex. 2020) (orig. proceeding) (per curiam).

75. *Id.* at 538.

76. TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(a) ("The court must rule on a motion under Section 27.003 not later than the 30th day following the date the hearing on the motion concludes.").

77. *Id.* § 27.008(a) ("If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.").

78. *Id.* § 51.014(a)(12) ("(a) A person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that: . . . (12) denies a motion to dismiss filed under Section 27.003 . . .").

79. *Id.* § 51.014(b).

80. *Id.* ("An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4) or in a suit brought under the Family Code, stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3), (5), (8), or (12) also stays all other proceedings in the trial court pending resolution of that appeal."); see also *In re Panchakarla*, 602 S.W.3d at 538 (explaining that under the TCPA "if granting the motion does not resolve the entire controversy, the order is interlocutory and unappealable unless made final by severance").

statutory deadline for ruling on the motion had expired.”⁸¹ The Texas Supreme Court disagreed with the court of appeals and it conditionally granted mandamus.⁸²

The supreme court reasoned that “trial courts retain plenary power over their judgments until they are final.”⁸³ The only constraint the supreme court found in the TCPA was that interlocutory orders denying a TCPA motion to dismiss are immediately appealable and when perfected, an appeal stays all trial court proceedings until the appeal is concluded.⁸⁴ However, the supreme court observed the statute is silent as to the trial court’s authority to reconsider “either a timely issued ruling granting a TCPA motion to dismiss or a timely order denying such a motion when no interlocutory appeal is pending.”⁸⁵

The supreme court concluded that, even though nothing in the statute prohibits a trial court from vacating its own orders when they have plenary power to do so, the effect of the trial court vacating the dismissal order in this instance provides the basis for an interlocutory appeal.⁸⁶ The supreme court summarized,

Here, once the trial court vacated its February 22 order, as it had authority to do, no ruling on the dismissal motion was in place. Accordingly, the motion to dismiss was either overruled by operation of law for want of a timely ruling . . . or denied by the trial court in a new trial. In this procedural posture, we need not consider whether the trial court’s order granting a new trial restarted the trial clock and permitted a new hearing and ruling on the dismissal motion, because even if it did not, the same result ensues. Whether the trial court properly denied the defendants’ TCPA motion or whether it was overruled by operation of law on vacatur of the prior order, the defendants can seek relief by interlocutory appeal as the Legislature contemplated.⁸⁷

The supreme court determined that the trial court did not abuse its discretion. Accordingly, mandamus was conditionally granted as to the decision of the court of appeals.⁸⁸

G. MINISTERIAL DUTY TO PAY WRONGFUL IMPRISONMENT COMPENSATION—TIM COLE ACT

A somewhat novel original proceeding mandamus case, *In re Lester*,⁸⁹ addressed compensation for a wrongfully convicted person under the Tim

81. *In re Panchakarla*, 602 S.W.3d at 538 (citing *In re Hartley*, 599 S.W.3d 574, 577 (Tex. App.—Dallas 2019, orig. proceeding) (mem. op.), *mand. granted*, *In re Panchakarla*, 602 S.W.3d 536 (Tex. 2020) (orig. proceeding) (per curiam)).

82. *Id.*

83. *See id.* at 539; TEX. R. CIV. P. 306a; TEX. R. APP. P. 26.1.

84. *In re Panchakarla*, 602 S.W.3d at 540.

85. *Id.*

86. *Id.* at 541.

87. *Id.* (citations omitted).

88. *Id.*

89. 602 S.W.3d 469, 469 (Tex. 2020) (orig. proceeding).

Cole Act.⁹⁰ The Texas Supreme Court described the case as “an egregious case of the criminal-justice system gone wrong.”⁹¹ The only question in the case was whether relator Colton Lester was entitled to wrongful-imprisonment compensation under the Tim Cole Act.⁹²

In 2014, seventeen-year-old Lester attempted to sexually proposition a minor by text message. Lester was charged with attempted online solicitation of a minor under § 33.021(b) of the Texas Penal Code, a third-degree felony, even though the Texas Court of Criminal Appeals had already declared the statute unconstitutional. Unaware that his prosecution was illegal, Lester pleaded guilty to the charge and received a five-year deferred adjudication sentence.⁹³ Later, Lester’s probation was revoked, he was sentenced to three years in prison, and ultimately served two years in prison before obtaining relief by writ of habeas corpus. After his release, Lester applied for compensation under the Tim Cole Act, which was denied twice.⁹⁴

According to the plain language of the Texas Civil Practice and Remedies Code, the Texas Comptroller of Public Accounts has a purely ministerial duty to determine eligibility for Tim Cole Act compensation.⁹⁵ However, if compensation is denied, a challenge to that denial may be brought exclusively before the supreme court by an action for mandamus.⁹⁶

The supreme court concluded the Comptroller had a ministerial duty to declare Lester entitled to compensation “because the conduct for which he was imprisoned was not a crime at any time during his criminal proceedings.”⁹⁷ Accordingly, the supreme court conditionally granted Lester’s petition for writ of mandamus.⁹⁸ Because the Comptroller’s duty was ministerial, it was unnecessary for the supreme court to evaluate whether there was an adequate remedy by appeal.⁹⁹

90. *Id.* at 471; *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001–103.154.

91. *In re Lester*, 602 S.W.3d at 471.

92. *Id.* at 471 n.1 (“The Tim Cole Act is codified in Chapter 103 of the Texas Civil Practice & Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE §§ 103.001–.154. The chapter is titled ‘Compensation to Persons Wrongfully Imprisoned,’ but since 2009, the statute has been known as the Tim Cole Act. *See* Act of May 27, 2009, 81st Leg., R.S., ch. 180, § 1, 2009 TEX. GEN. LAWS 523 (‘This Act shall be known as the Tim Cole Act.’). Tim Cole died of an asthma attack in 1999 while incarcerated for aggravated sexual assault. DNA evidence later cleared Cole of the charges, and in 2010, Cole received the State’s first posthumous pardon. *See In re Smith*, 333 S.W.3d 582, 583 n.1 (Tex. 2011).”).

93. *Id.* at 471.

94. *Id.*

95. TEX. CIV. PRAC. & REM. CODE §§ 103.051(b)(1), (b-1).

96. *Id.* § 103.051(d)–(e); *see* TEX. GOV’T CODE ANN. § 22.002(c) (providing that only the Texas Supreme Court has authority to issue writs of mandamus against executive officers of the state); *In re Smith*, 333 S.W.3d at 585.

97. *In re Lester*, 602 S.W.3d at 471.

98. *Id.*

99. *Id.* at 475. In performing its designated functions, the supreme court may issue writs of mandamus or grant other relief as necessary to compel officials to perform nondiscretionary acts when the law so requires. TEX. GOV’T CODE § 22.002(c); *see also In re Phillips*, 496 S.W.3d 769, 770–71 (Tex. 2016) (orig. proceeding) (explaining that mandamus is available to compel performance of ministerial duty of Texas Comptroller).

H. FAMILY LAW TRIAL COURT AWARDED VISITATION RIGHTS TO UNRELATED NON-PARENT

*In re C.J.C.*¹⁰⁰ is a case of first impression in family law respecting whether “[t]he presumption that the best interest of the child is served by awarding custody to [a] parent” applies in a custody modification proceeding.¹⁰¹ In its analysis, the supreme court referred to *In re V.L.K.* and noted that “the Legislature codified the presumption in Chapter 153 of the Family Code, which governs only original custody determinations.”¹⁰² In that regard, the supreme court observed that Texas Family Code § 156.101(a) provides that any person who seeks to modify an existing custody order must show (1) changed circumstances, and (2) that modification would be a positive improvement for the child.¹⁰³ Chapter 156 of the Texas Family Code does not provide for a parental presumption in modification suits.¹⁰⁴

The supreme court concluded that the presumption found in Texas Family Code § 153.131(a) must also be applied in modification of custody matters in light of the direction by the United States Supreme Court in *Troxel v. Granville*.¹⁰⁵ In that case, the Supreme Court declared unconstitutional a trial court’s order requiring a fit parent to permit visitation with her children’s grandparents.¹⁰⁶

In re C.J.C., the trial court award allowed the natural mother’s boyfriend, with whom she and the child lived until her untimely death, to have visitation and overnight possession rights.¹⁰⁷ However, the award was made over the objection of the child’s natural father and possessory conservator. The natural father had not married the child’s mother, was estranged from the mother at the time of her death, and was not alleged to be nor found to be unfit.¹⁰⁸

The particular ruling reviewed by the supreme court was the following statement from the record, “The court has determined what is in [the child’s] best interest, and you, [the natural father] are to make this as agreeable as you can . . . force yourself to do.”¹⁰⁹ The supreme court concluded the statutes applicable to the trial court’s decision reflected “exactly the opposite” of a parental presumption.¹¹⁰ Further, the su-

100. 603 S.W.3d 804, 807 (Tex. 2020) (orig. proceeding).

101. *Id.* at 807 n.4 (citing *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000) (orig. proceeding)).

102. *In re V.L.K.*, 24 S.W.3d at 341; TEX. FAM. CODE ANN. § 153.131(a) (“[U]nless the court finds that the appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child’s physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.”).

103. *In re C.J.C.*, 603 S.W.3d at 813.

104. *Id.* at 810–11 (citing *In re V.L.K.*, 24 S.W.3d at 343).

105. *Id.* at 807–08.

106. *Troxel v. Granville*, 530 U.S. 57, 61, 72 (2000).

107. *In re C.J.C.*, 603 S.W.3d at 810.

108. *Id.*

109. *Id.* at 815.

110. *Id.*

preme court concluded the trial court improperly placed on a fit parent “the burden of *disproving* that visitation would be in the best interest of [his child].”¹¹¹

The supreme court conditionally granted mandamus relief concluding that “previously [we] have granted relief to require a trial court to vacate orders erroneously permitting nonparents access to a child over a fit parent’s objection.”¹¹² Further, the court said, “[W]e conclude that a court must apply the presumption that a fit parent—not the court—determines the best interest of the child in any proceeding in which a nonparent seeks conservatorship or access over the objection of a child’s fit parent.”¹¹³

I. GOVERNOR’S EXECUTIVE ORDERS

In the case of *In re Abbott*,¹¹⁴ Governor Greg Abbott and the Texas Attorney General sought a somewhat unusual mandamus review of a trial court’s temporary restraining order that blocked Governor Abbott’s Executive Order GA-13 (GA-13). That executive order suspended, during the current COVID-19 pandemic, application of certain statutes authorizing trial judges to release jail inmates with violent histories.¹¹⁵ The plaintiffs in the trial court included sixteen Texas trial judges and certain public interest organizations and lawyer associations. They alleged GA-13 was unconstitutional and exceeded the governor’s statutory emergency powers because the order improperly interfered with judicial authority to make individualized bail decisions. In the trial court, the plaintiffs requested and were granted a temporary restraining order that blocked enforcement of GA-13 as it specifically applied to judges. None of the plaintiffs were eligible as an inmate who could not obtain release because of GA-13, and the plaintiffs did not identify any such person by name.¹¹⁶

In rendering conditional mandamus relief, the Texas Supreme Court addressed the jurisdictional standing of the judges.¹¹⁷ The supreme court noted that the “judicial plaintiffs have not alleged the personal, legally

111. *Id.* at 816.

112. *Id.* at 811. The supreme court cites to the following cases to support its proposition that mandamus relief is appropriate in this context:

In re Derzapf, 219 S.W.3d 327, 334–35 (Tex. 2007) (orig. proceeding) (per curiam) (citing *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (per curiam) (noting parties’ agreement that mandamus relief is appropriate if the trial court’s temporary orders granting possession of a child to a nonparent were a clear abuse of discretion)); *see Little v. Daggett*, 858 S.W.2d 368, 369 (Tex. 1993) (per curiam) (granting mandamus relief to vacate trial court’s temporary orders granting visitation in a suit to establish paternity); *Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991) (per curiam) (holding that mandamus was an appropriate remedy because “the trial court’s issuance of temporary orders [was] not subject to interlocutory appeal . . .”).

Id. at 811 n.27.

113. *In re C.J.C.*, 603 S.W.3d at 817.

114. 601 S.W.3d 802, 802 (Tex. 2020) (orig. proceeding) (per curiam).

115. *Id.* at 805.

116. *Id.*

117. *See id.*

cognizable injury required for standing.”¹¹⁸ Rather, “the judicial plaintiffs sued to correct an alleged trespass by the executive branch on powers assigned to the judiciary.”¹¹⁹ The supreme court concluded that the judges did not have standing, but commented that other citizens may have standing, specifically stating:

That does not mean the issues raised in this lawsuit are unimportant or cannot be litigated. If a defendant in a bail hearing contends the executive order is unconstitutional and the suspended statutes should continue to provide the rule of decision, the judge has a duty to rule on that issue, and the losing side can challenge that ruling.¹²⁰

Finally, the supreme court determined that mandamus was the proper remedy “[b]ecause temporary restraining orders are not appealable, the Governor and Attorney General have no remedy by appeal.”¹²¹

J. ELECTION LAW ISSUES

It is no surprise that in 2020, an election year, the Texas Supreme Court was presented with an array of election related issues. Five mandamus opinions were released in the period from mid-July up to a few days before the November 3 general election. Two of those petitions were dismissed for want of jurisdiction, two were denied, and one was granted.¹²² The subjects included whether: (1) candidates had complied with statutory requirements to have their names placed on the ballot; (2) the Governor’s executive orders could suspend Texas Election Code provisions for the general election; and (3) the City of Houston could be stopped from terminating its contract for use of its convention center by the Republican Party of Texas for the Party’s 2020 State Convention.

1. In re Republican Party of Texas

This case¹²³ concerns when the City of Houston and Houston First Corporation (the owner and the operator, respectively, of the George R. Brown Convention Center) terminated their contract with the Republican Party of Texas (the Party) for the use of the Convention Center to conduct the Party’s 2020 State Convention on July 8, 2020.¹²⁴ The Convention Center was to be used by the Party for the period of July 13–18.

118. *Id.* at 809.

119. *Id.*

120. *Id.*

121. *Id.* at 813 (citing *In re Office of Attorney Gen.*, 257 S.W.3d 695, 698 (Tex. 2008) (per curiam)).

122. See *In re Republican Party of Tex.*, 605 S.W.3d 47, 48 (Tex. 2020) (orig. proceeding) (per curiam); *In re Tex. Republican Caucus PAC*, No. 20-0663, 2020 WL 5351318 (Tex. Sept. 5, 2020) (orig. proceeding) (per curiam); *In re Hotze (Hotze I)*, No. 20-0430, 2020 WL 4046034 (Tex. July 17, 2020) (orig. proceeding); *In re Green Party of Tex.*, No. 20-0708, 2020 WL 5580156 (Tex. Sept. 18, 2020) (orig. proceeding) (per curiam); *In re Hotze (Hotze II)*, No. 20-0739, 2020 WL 5919726 (Tex. Oct. 7, 2020) (orig. proceeding).

123. *In re Republican Party of Tex.*, 605 S.W.3d at 48 (orig. proceeding) (per curiam) (dismissing the petition for lack of jurisdiction).

124. *Id.* at 47.

The City and Houston First claimed they could terminate the contract based upon the COVID-19 pandemic pursuant to the contract's force-majeure clause. That clause provided, in part, that notice of termination was required to be communicated "as soon as practicable, but no later than [seven] calendar days after the occurrence of the cause relied upon."¹²⁵

On Friday, July 10, the Party petitioned the Texas Supreme Court for mandamus relief directing the City of Houston and Houston First Corporation "to perform their obligations in connection with the [Republican Party's] Convention, including performance of their contractual obligations, and performance of all legal obligations to ensure the free exercise of association and assembly."¹²⁶ The Party contended, *inter alia*, that the notice of termination was unfounded and motivated by the mayor's political views that were in opposition to those of the Party. The supreme court requested for the City and Houston First to respond by the close of business on Saturday, July 11, and, also, asked that the Solicitor General tender his views.¹²⁷

In its petition, the Party claimed § 273.061 of the Texas Election Code gives the supreme 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 or a political party convention, regardless of whether the person responsible for performing the duty is a public officer."¹²⁸ However, the supreme court concluded it did not have jurisdiction to address the petition.

The supreme court reasoned the obligation of Houston First claimed by the Party is not a "duty imposed by law" referred to in § 273.061 of the Texas Election Code.¹²⁹ Such duties are "limited to [those] imposed by a constitution, statute, city charter, or city ordinance."¹³⁰ The Party did not assert that Houston First owed it any such duty. Rather, "[t]he Party argue[d] it ha[d] constitutional rights to hold a convention and engage in electoral activities, and that [was] unquestionably true."¹³¹ The supreme court addressed that contention by observing, "[T]hose rights do not allow [the Party] to simply commandeer use of the Center."¹³² The supreme court closed its majority *per curiam* opinion by commenting it could not entertain the petition even though the Party made "troubling factual allegations."¹³³

Justice Devine dissented,¹³⁴ stating that the supreme court clearly had jurisdiction over the case because "an essential purpose of the Election

125. *Id.* at 51 (Devine, J., dissenting).

126. *Id.* at 48.

127. *Id.*

128. *Id.*; TEX. ELEC. CODE ANN. § 273.061 (emphasis added).

129. *In re Republican Party of Tex.*, 605 S.W.3d at 48.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 48–54.

Code’s grant of mandamus jurisdiction . . . is to ensure the smooth functioning of the electoral process against last-minute threats to the integrity of that process.”¹³⁵ Further, Justice Devine observed “[t]he practical reality is that running an election and associated political conventions involves a host of legal obligations imposed upon many private and public parties by the constitution, statutes, and contracts.”¹³⁶ Having lashed together the contractual rights of the Party with its legal obligations in the political process, Justice Devine opined the contract between the Party and Houston First was a “duty imposed by law in connection with the holding of an election or a political party convention.”¹³⁷ Accordingly, Justice Devine concluded that the supreme court had jurisdiction to compel the performance of the contract by issuance of a writ of mandamus pursuant to Texas Election Code § 273.061.¹³⁸

2. In re Texas House Republican Caucus PAC

In this case,¹³⁹ several Republican Party candidates and organizations filed a petition for writ of mandamus to prevent forty-four Libertarian Party candidates from appearing on the 2020 general election ballot.¹⁴⁰ The claim was that those candidates did not qualify for placement on the ballot since they failed to pay the filing fee required by § 141.041 of the Texas Election Code. The Republicans conceded the statutory deadline to have the Libertarians removed from the ballot using a declaration of ineligibility passed on August 21, before their petition was filed.¹⁴¹ They claimed a later deadline applied to their petition, which they described as a challenge to the Libertarians’ ballot applications governed by the deadline in § 141.034 of the Texas Election Code.¹⁴²

The Texas Supreme Court denied the petition because “the Libertarian Party nominates candidates by convention rather than primary election [and] its candidates’ applications are governed by [C]hapter 181 of the Election Code, not by [C]hapter 141’s procedures.”¹⁴³ Further, the relief sought challenges “‘an application for a place on the ballot’ under [C]hapter 141, but Libertarian Party candidates do not file such applications. Instead, they file ‘an application for nomination by convention’ under [C]hapter 181, which is a statutorily separate type of application governed by a separate set of statutes.”¹⁴⁴ So, having no basis for its prayer for mandamus, the petition of the Caucus was dismissed.¹⁴⁵

135. *Id.*

136. *Id.*

137. *Id.* at 49–50.

138. *Id.* at 51.

139. *In re Tex. House Republican Caucus PAC*, No. 20-0663, 2020 WL 5351318, at *1 (Tex. Sept. 5, 2020) (orig. proceeding) (per curiam).

140. *Id.*

141. *Id.*; see TEX. ELEC. CODE ANN. § 145.035.

142. *In re Tex. House Republican Caucus PAC*, 2020 WL 5351318, at *5.

143. *Id.* at *1.

144. *Id.* at *1–2.

145. *Id.* at *2.

3. In re Hotze (Hotze I)

Here,¹⁴⁶ without comment, the Texas Supreme Court dismissed the petition. However, Justice Devine explained in his concurrence the dilemma of the supreme court, in this way:

The challenged orders in this case, which temporarily suspend the right of nonessential business owners to make a living, were issued by the Governor under Chapter 418 of the Texas Government Code. Relators here challenge these orders on multiple grounds. They do so through an original mandamus petition, naming the Governor as the real party in interest. I doubt, however, that this is the proper vehicle to make such a challenge.¹⁴⁷

As pointed out by Justice Devine, the immovable obstacle to this petition was the Texas constitution, which provides that “the Legislature ‘may confer original jurisdiction on the supreme court to issue writs . . . of mandamus in such cases as may be specified, *except as against the Governor of the State.*’”¹⁴⁸ The Texas Government Code § 22.002(a) provides the same exception.¹⁴⁹ Nevertheless, while he acknowledges the petition must be dismissed for want of jurisdiction, Justice Devine said he “share[s] Relators’ concerns” about improper delegation of authority to the governor.¹⁵⁰

Further, Justice Devine did not agree with the state’s argument that the Governor’s powers to issue emergency orders under the Texas Disaster Act of 1975 is a constitutional delegation of powers.¹⁵¹ He made clear his view that the supreme court had decided long ago that Texas constitution article I, § 28¹⁵² “does not permit the Legislature to ‘delegate to a municipal corporation *or to anyone else*, authority to suspend a statute law of the State.’”¹⁵³ No path to reconcile this quandary was suggested by the concurrence.

4. In re Green Party of Texas

In this case,¹⁵⁴ the Texas Supreme Court conditionally granted mandamus relief, setting aside the mandamus relief granted by the Third Austin Court of Appeals.¹⁵⁵ The controversy began on August 17, 2020, when certain Democratic candidates presented the Green Party co-chairs with

146. *In re Hotze (Hotze I)*, No. 20-0430, 2020 WL 4046034, at *1 (Tex. July 17, 2020) (orig. proceeding) (pet. dismissed for want of jurisdiction) (Devine, J., concurring).

147. *Id.* at *2.

148. *Id.*; TEX. CONST. art. V, § 3(a) (emphasis added).

149. TEX. GOV’T CODE ANN. § 22.002(a).

150. *Hotze I*, 2020 WL 4046034, at *3.

151. *Id.*

152. TEX. CONST. art. I, § 28 (“Sec. 28. Suspension of Laws. No power of suspending laws in this State shall be exercised except by the Legislature.”).

153. *Hotze I*, 2020 WL 4046034, at *5 (quoting *Brown Cracker & Candy Co. v. City of Dall.*, 137 S.W. 342, 343 (Tex. 1910)) (emphasis added).

154. *In re Green Party of Tex.*, No. 20-0708, 2020 WL 5580156, at *1 (Tex. Sept. 18, 2020) (orig. proceeding) (per curiam).

155. *Id.*

public records showing Green Party candidates, seeking the same positions as the Democratic candidates, had not paid their filing fees.

According to the Democratic candidates, because filing fees had not been paid, the Green Party chairs had a ministerial duty to declare those Green Party candidates ineligible.¹⁵⁶ The Green Party chairs refused to declare the candidates ineligible. The deadline for filing was on August 21, 2020.

On August 17, the same day as when the demand was made, the Democratic candidates in the court of appeals filed a petition for mandamus relief.¹⁵⁷ The court of appeals held that the Green Party candidates were ineligible to be candidates on the November ballot based on their failure to pay the filing fee. The court of appeals concluded that when the co-chairs were presented with the public record conclusively establishing this failure, they had a “statutory duty” under § 145.003 of the Texas Election Code to declare the Green Party candidates ineligible.¹⁵⁸ On August 19, that court of appeals conditionally granted relief and directed the co-chairs to declare the Green Party candidates ineligible to appear as the Green Party nominees and to take all steps within their authority to ensure that the candidates’ names did not appear on the ballot. Chief Justice Rose dissented, stating that “mandamus relief [was] not appropriate based on the record before [the court].”¹⁵⁹

Then, on September 11, the Green Party relators filed a petition for mandamus relief at the supreme court, requesting the mandamus relief granted by the court of appeals be “rescinded.”¹⁶⁰ The supreme court considered the statutory framework that directed what candidates must do in order to be placed on the ballot.¹⁶¹ Then, in a per curiam opinion, the supreme court observed, “A candidate’s name is to be omitted from the ballot if the candidate is declared ineligible on or before the seventy-fourth day before election day, which was August 21 this year.”¹⁶² However, the demand for removal of the Green Party candidates was made on August 17 and the court of appeals rendered its decision on August 19. The supreme court identified the flaw in the court of appeals’ decision as follows, “In the absence of recognizing a deadline for paying the filing fee or giving the candidates an opportunity to comply, the court of appeals erred in ordering the Green Party candidates removed from the ballot on August 19.”¹⁶³

Then, the supreme court moved on to grant affirmative relief.¹⁶⁴ It ex-

156. *Id.* at *1–2.

157. *Id.* at *1.

158. *Id.* at *2.

159. *Id.* at *3; *In re Davis*, 607 S.W.3d 862, 866 (Tex. App.—Austin 2020, orig. proceeding), *mand. granted*, *In re Green Party of Tex.*, No. 20-0708, 2020 WL 5580156 (Tex. Sept. 18, 2020) (orig. proceeding) (per curiam).

160. *In re Green Party of Tex.*, 2020 WL 5580156, at *1.

161. *Id.*

162. *Id.* at *9.

163. *Id.*

164. *Id.*

plained that the Green Party candidates could be placed on the ballot stating:

Because the August 21 deadline to remove a candidate from the ballot due to ineligibility has passed, removal from the ballot is no longer a remedy . . . [The] amici assert that this case is moot, arguing that it is too late to add or delete names from the ballot. However, the Secretary of State has indicated that changes to the ballot are not precluded by statute and relief is still possible.¹⁶⁵

The supreme court continued:

We recognize that changes to the ballot at this late point in the process will require extra time and resources to be expended by our local election officials. But a candidate's access to the ballot is an important value to our democracy . . . And an added expense is not a sufficient justification to deny these candidates that access.¹⁶⁶

The reasoning of this decision is worthy of further comment. First, the supreme court focused on the obvious, that the August 17 demand and refusal were premature since the deadline for filing was August 21.¹⁶⁷ The supreme court recognized that the court of appeals overlooked the fact that the candidates had plenty of time to pay the filing fees and incorrectly concluded the candidates were disqualified.¹⁶⁸ Therefore, the supreme court determined the chairs had no "ministerial duty" to disqualify the candidates at the time the demand was made.

Second, it was obvious by the time the petition was filed at the supreme court on September 11 (well after the August 21 deadline) that the issue was not simply whether the court of appeals ruled correctly. The broader issue was whether the status of the candidates should be restored. The supreme court recognized that the court of appeals did not provide the candidates with an opportunity to "cure."¹⁶⁹ However, in declaring the case was not moot and the candidates should be reinstated, the supreme court recalled its decision in *In re Francis*, where the opportunity to cure was determined to be required by the Constitution.¹⁷⁰ The supreme court then concluded that a candidate's "access to the ballot lies at the very heart of a constitutional republic."¹⁷¹

165. *Id.* at *9–10.

166. *Id.* (citations omitted).

167. *Id.* at *8.

168. *Id.*

169. *Id.* at *9.

170. *Id.* (citing *In re Francis*, 186 S.W.3d 534, 542 (Tex. 2006) (orig. proceeding)). However, early in its opinion in *In re Francis*, the Texas Supreme Court notably concluded,

The Constitution requires that access to the electorate be real, not "merely theoretical." As we have noted many times in recent years, provisions that restrict the right to hold office must be strictly construed against ineligibility. 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.

In re Francis, 186 S.W.3d at 542.

171. *In re Green Party of Tex.*, 2020 WL 5580156, at *10.

5. In re Hotze (Hotze II)

In this case,¹⁷² decided by the Texas Supreme Court in its opinion dated October 7, 2020, a petition for writ of mandamus sought relief from another one of the Governor's emergency orders issued pursuant to the Texas Disaster Act of 1975.¹⁷³ The petition filing followed on the heels of the dismissal of *Hotze I* by the supreme court's opinion delivered July 17, 2020.¹⁷⁴ Other named relators in this case included the Republican Party of Texas, voters, candidates, and current and former state officials.

The specific relief sought was to require the Texas Secretary of State to conduct the November 3 general election according to two statutory provisions that were suspended by the Governor's July 27 proclamation.¹⁷⁵ Relief was not requested against the Governor. Perhaps, that route was not taken because of the education the relators received from Justice Devine's concurrence in *Hotze I* about the impropriety of seeking mandamus against the Governor.¹⁷⁶

When the supreme court disposed of *Hotze II*, it did not outright dismiss for want of jurisdiction as it had in *Hotze I*. Rather, the majority denied mandamus relief because of the relators' "delay" in bringing the action.¹⁷⁷ The majority did not touch on the merits of the relators' claim that the Secretary of State should be compelled to ignore the Governor's proclamation. However, in denying mandamus relief, the supreme court identified facts that demonstrated relators' delay, including waiting to file the petition until September 23, ten weeks after the issuance of the proclamation, receipt of mail-in ballots in Harris County began on September 24, and had relators sought relief in lower courts where there could have been "a careful, thorough consideration of their arguments regarding the Act's scope and constitutionality."¹⁷⁸ The majority's conclusion that the relators' delay justified denial of relief was capped with this statement, "When the record fails to show that petitioners have acted diligently to protect their rights, relief by mandamus is not available."¹⁷⁹

A concurrence authored by Justice Blacklock and joined by Justice Busby agreed to the denial of the petition.¹⁸⁰ However, they made it clear that "delay" was not the lynchpin of the refusal to grant the petition. The

172. *In re Hotze (Hotze II)*, No. 20-0739, 2020 WL 5919726, *1 (Tex. Oct. 7, 2020) (orig. proceeding) (pet. denied).

173. *Id.*; see TEX. GOV'T CODE ANN. §§ 418.001–261.

174. See *Hotze I*, No. 20-0430, 2020 WL 4046034, *1–2 (Tex. July 17, 2020) (orig. proceeding). The named party in the style of the *Hotze I* case was Steven Hotze, M.D, also the named party in *Hotze II*. *Hotze II*, 2020 WL 5919726, at *1.

175. *Hotze II*, 2020 WL 5919726, at *1; TEX. ELEC. CODE ANN. §§ 85.001(a), 86.006(a-1).

176. *Hotze II*, 2020 WL 5919726, at *1–2; TEX. CONST. art. V, § 3(a) (The Texas constitution provides that the Legislature "may confer original jurisdiction on the Supreme Court to issue writs of . . . mandamus in such cases as may be specified, except as against the Governor of the State.").

177. *Hotze II*, 2020 WL 5919726, at *2.

178. *Id.*

179. *Id.* at *3.

180. *Id.*

concurrence described several possible grounds for dismissal of the petition for lack of standing.¹⁸¹

First, the concurrence considered that “[e]ven if the petitioners are injured by the Governor’s adjustment of these statutory rules pursuant to his emergency powers, that injury is not traceable to the Secretary of State, who neither conducts early voting nor receives hand-delivered mail-in ballots.”¹⁸² Second, “[b]ecause the Secretary does not implement the laws in question and does not control whether local officials do so, this Court ordering the Secretary to do or not do anything would not change local officials’ obligation to implement the law in accordance with the Governor’s proclamation.”¹⁸³ Third, the petition did not show the “challenged election activities will inflict a concrete and particularized injury-in-fact on any of the petitioners.”¹⁸⁴ The concurrence construed petitioners’ interest as being that they “want their government to comply with the law as they see it.”¹⁸⁵

The concurring justices then cited two additional bases. First, there is no legal basis for contending the Secretary of State can ignore the Governor’s proclamation even if ordered to do so by the supreme court.¹⁸⁶ This is because the Secretary’s title “chief election officer” is not “a delegation of authority to care for any breakdown in the election process.”¹⁸⁷ Sec-

181. *Id.* at *4.

182. *Id.* One may question what definition of “standing” the Texas Supreme Court follows. The opinion in *Hotze II* was delivered on October 7, 2020. However, on June 19, 2020, the same court wrestled with the concept of standing in the case of *Pike v. Texas EMC Mgmt., LLC*, 610 S.W.3d 763, 773–74 (Tex. 2020). In *Pike*, the supreme court said,

Like jurisdiction, standing “is a word of many, too many, meanings.” Texas courts, having drawn upon the standing doctrine of our federal counterparts, sometimes apply the label “standing” to statutory or prudential considerations that “do not implicate subject-matter jurisdiction” but determine whether a plaintiff “falls within the class of [persons] . . . authorized to sue” or otherwise has “a valid . . . cause of action.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) (explaining why this use of the standing label can be “misleading”). Yet we have been clear in this century that the question whether a plaintiff has established his right “to go forward with [his] suit” or “satisfied the requisites of a particular statute” pertains “in reality to the right of the plaintiff to relief rather than to the [subject-matter] jurisdiction of the court to afford it.” *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76–77 (Tex. 2000). Thus, a plaintiff does not lack standing in its proper, jurisdictional sense “simply because he cannot prevail on the merits of his claim; he lacks standing [when] his claim of injury is too slight for a court to afford redress.” *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484–85 (Tex. 2018) (quoting *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 305 (Feb. 1, 2008)).

Id. (whether this is standing or simply a case where there is no merit since the Secretary has no powers to curb).

183. *Hotze II*, 2020 WL 5919726, at *4 (Blacklock, J., concurring).

184. *Id.* at *9.

185. *Id.* at *9–10. The concurring Justices also cited the United States Supreme Court for the proposition that “undifferentiated public interest in executive officers’ compliance with the law does not confer standing.” *Id.* at *10 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 577 (1992)).

186. *Id.* at *14.

187. *Id.* (quoting *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972) (orig. proceeding)).

ond, and finally, those justices conclude the petition actually asks for no more than an advisory opinion that would declare the Governor's proclamation invalid.¹⁸⁸

This case offers several points to ponder about the use of mandamus. First, one might consider that the majority decided to sidestep the merits by relying on the lapse of time or as Justice Devine refers to the holding in his dissent, "laches or any similar doctrine."¹⁸⁹ The adequacy of the remedy by appeal was not mentioned. One might assume that, in this case, a finding of "delay" dispensed with the necessity of addressing the traditional second element of mandamus.

Second, the majority equated delay with "lack of diligence" which, perhaps, may be a revived, if not new, consideration for any mandamus case. The support for the majority's "lack of diligence" premise is a 1993 Texas Supreme Court case, *Rivercenter Associates v. Rivera*.¹⁹⁰ There, the supreme court concluded a relator lacked diligence in seeking mandamus to compel a trial judge to enforce a contractual jury waiver.¹⁹¹ The supreme court in *Rivercenter* concluded that the plaintiff waited over four months after the filing of the defendants' jury demand before asserting any rights it may have had under the jury waiver provisions and the record did not reveal any justification for this delay.¹⁹²

Third, even though the *Hotze II* parties did not begin their efforts in a lower court, the supreme court addressed the elements of mandamus relief.¹⁹³ However, the supreme court did not cite *In re Prudential*. Since *In re Prudential* is the seminal case on mandamus, its absence is notable. Instead of *In re Prudential*, the supreme court cited *Walker v. Packer*,¹⁹⁴ the 1992 authority on mandamus, which *In re Prudential* clarified and refined.¹⁹⁵ Fourth, another interesting choice of authorities is evident in the

188. *Id.* "[O]ur separation of powers article, Tex. Const. art. II, § 1, prohibits courts from issuing advisory opinions that decide abstract questions of law without binding the parties." *Id.* (Blacklock, J., concurring) (quoting *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001)).

189. *Id.*

190. 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding).

191. *Id.*

192. *Id.*

193. See *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding).

194. *Hotze II*, 2020 WL 5919726, at *4 n.20 (citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)).

195. See *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 136–37. The Texas Supreme Court wrote, "[t]he operative word, 'adequate', has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts." *Id.* at 136. Then, the supreme court referred to *Walker v. Packer*. "Thus, we wrote in *Walker v. Packer* that 'an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ.' While this is certainly true, the word 'merely' carries heavy freight." *Id.* In contrast with the reference to *Walker*, the supreme court announced a "balance" should be used. *Id.* "An appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate." *Id.*

supreme court's reference to *Rivercenter*. *In re Prudential* cited *Rivercenter* for this proposition: "'Mandamus,' on the other hand, 'is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court. Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles.'"¹⁹⁶ These observations merely demonstrate the apparent "rock solid" *In re Prudential* case may not be immutable.

V. TEXAS SUPREME COURT'S APPROACH TO ADDRESSING ADEQUATE REMEDY

The chart below summarizes how the Texas Supreme Court has addressed the "lack of adequate appellate remedy" element in mandamus cases decided during the Survey period. The disparity in the supreme court's treatment of that critical element warrants a deeper look.

196. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 138.

Appellate Remedy Treatment	Opinion	Subject Matter of Case & Trial Court Action Addressed	Mandamus Disposition
Specific discussion of adequacy of party's appellate remedy	<i>In re Abbott</i> , 601 S.W.3d 802 (Tex. 2020) (orig. proceeding) (per curiam).	Trial judges obtained TRO that blocked Governor's emergency order suspending pre-trial release for violent criminals. Judges lack standing. No adequate remedy since TRO's are not appealable.	Granted
	<i>In re C.J.C.</i> , 603 S.W.3d 608 (Tex. 2020) (orig. proceeding).	Child custody case of first impression where unrelated, non-parent granted custody over objection of natural father. The father was not ruled unfit. There was no adequate remedy by appeal because of custody decision.	Granted
	<i>In re Mobile Mini, Inc.</i> , 596 S.W.3d 781 (Tex. 2020) (orig. proceeding) (per curiam).	Timely filed motion to designate responsible third party denied by trial court. An adequate appellate remedy is lacking because allowing a case to proceed to trial without a properly requested responsible-third-party designation would skew the proceedings, potentially affect the outcome of the litigation, and compromise the presentation of the relator's defense.	Granted

Appellate Remedy Treatment	Opinion	Subject Matter of Case & Trial Court Action Addressed	Mandamus Disposition
	<i>In re Turner</i> , 591 S.W.3d 121 (Tex. 2019) (orig. proceeding).	Court concluded Texas Civil Practice and Remedies Code § 74.001 (Texas Medical Liability Act) does not prohibit the deposition and accompanying document production of a non-party medical services provider where claimant has not served an expert report on the provider whose deposition is sought. SCOTX held the Act does not require an expert opinion in this situation and granted mandamus against the COA. The trial court did not abuse its discretion in allowing deposition without an expert report being issued. <i>In re Prudential</i> was expressly cited.	Granted
No statement as to adequacy of appellate remedy because of ministerial duty in statute	<i>In re Lester</i> , 602 S.W.3d 469 (Tex. 2020) (orig. proceeding).	Texas Comptroller of Public Accounts has a purely ministerial duty to determine eligibility for Tim Cole Act compensation (wrongfully convicted persons). Adequacy of remedy is not an issue.	Granted

Appellate Remedy Treatment	Opinion	Subject Matter of Case & Trial Court Action Addressed	Mandamus Disposition
No specific statement as to adequacy of appellate remedy-implied because of exigent circumstances of approaching election	<i>In re Green Party of Tex.</i> , No. 20-0708, 2020 WL 5580156 (Tex. 2020) (orig. proceeding) (per curiam).	Austin COA ordered Green Party chairs to disqualify candidates for failure to pay filing fees. SCOTX concluded COA erred and directed COA to vacate mandamus order.	Granted
Adequacy of appellate remedy not addressed	<i>In re Panchakarla</i> , 602 S.W.3d 536 (Tex. 2020) (orig. proceeding) (per curiam).	Texas Citizens Participation Act does not prohibit a trial court from exercising its plenary power to vacate an order granting a motion to dismiss. SCOTX granted mandamus reversing COA's mandamus relief. Adequacy of remedy issue cited, but not discussed.	Granted
Adequacy of appellate remedy not addressed because no abuse of discretion	<i>In re Fox River Real Estate Holdings, Inc.</i> , 596 S.W.3d 759 (Tex. 2020) (orig. proceeding).	Venue dispute over applicability of Texas Civil Practice and Remedies Code, § 15.020 as opposed to § 65.023(a). No abuse of discretion since code provisions are not in conflict. Section 65.023(a) is inapplicable.	Denied

Appellate Remedy Treatment	Opinion	Subject Matter of Case & Trial Court Action Addressed	Mandamus Disposition
	<i>In re Hotze</i> , No. 20-0739, 2020 WL 5919726 (Tex. 2020) (orig. proceeding) (<i>Hotze II</i>).	Republican Party of Texas, voters, candidates, and current and former state officials, sought mandamus relief to direct the Texas Secretary of State to conduct the November 3 general election according to existing statutory provisions and not in accordance with the Governor's order that suspended some of those statutes. Neither abuse of discretion nor the adequacy of the remedy by appeal were addressed.	Denied
	<i>In re Tex. House Republican Caucus PAC</i> , No. 20-0663, 2020 WL 5351318 (Tex. 2020) (orig. proceeding).	Republican Party candidates and organizations sought to prevent Libertarian Party candidates from appearing on the 2020 general-election ballot due to the Libertarians' failure to pay the filing fee. SCOTX determined Libertarians select candidates by convention not primary election so, Texas Election Code Chapter 141's procedures for challenging ballot applications do not apply.	Denied

Appellate Remedy Treatment	Opinion	Subject Matter of Case & Trial Court Action Addressed	Mandamus Disposition
Adequacy of appellate remedy discussed thoroughly, but no abuse of discretion.	<i>In re Murrin Bros.</i> 1885, <i>Ltd.</i> , 603 S.W.3d 53 (Tex. 2019) (orig. proceeding).	In case where trial court denied motion to disqualify counsel, SCOTX concluded none of these alleged harms satisfies the lack-of-adequate-remedy requirement. Those claims alleged by relator where that they have been denied contractual rights to veto litigation counsel, the jury will be confused and prejudiced against the involvement of opposing counsel, and payment of opposing counsel's legal bills by company are improper.	Denied
Adequacy of appellate remedy not discussed. Dismissal for want of jurisdiction.	<i>In re Hotze</i> , No. 20-0430, 2020 WL 4046034 (Tex. 2020) (orig. proceeding) (<i>Hotze I</i>).	The Governor was named as the real party in interest. Texas Government Code § 22.002 provides mandamus actions may be commenced "against . . . any officer of state government except the governor." Accordingly, the petition was dismissed. Justice Devine concurred in the dismissal and explained the above basis for the jurisdictional holding.	Dismissed for want of jurisdiction.

Appellate Remedy Treatment	Opinion	Subject Matter of Case & Trial Court Action Addressed	Mandamus Disposition
	<i>In re Republican Party of Tex.</i> , 605 S.W.3d 47 (Tex. 2020) (orig. proceeding) (per curiam).	Party invokes § 273.061 of the Texas Election Code, to “issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer.” SCOTX found the dispute over use of the convention center for party convention to be a contractual matter. Justice Devine dissented.	Dismissed for want of jurisdiction.
No statement on adequacy of appellate remedy, but interpretation of remedy in statute	<i>Town of Shady Shores v. Swanson</i> , 590 S.W.3d 544 (Tex. 2019) (orig. proceeding).	Governmental Immunity waived in part by Open Meetings Act remedy to block violation by injunction or mandamus. Immunity issued decided and remanded for merits review.	No mandamus relief. Remanded for merits review.

As stated above, “Mandamus relief is appropriate when a petitioner demonstrates a clear abuse of discretion and has no adequate remedy by appeal.”¹⁹⁷ In the seminal case of *In re Prudential*, the Texas Supreme Court devised a subjective balancing test as to the “adequate remedy by appeal” element.¹⁹⁸ That is, the benefits of granting mandamus regarding “significant rulings in exceptional cases” are to be weighed against the detriments of interfering with trial court proceedings and adding to litigation’s burdens.¹⁹⁹

197. *In re Geomet Recycling LLC*, 578 S.W.3d 82, 91–92 (Tex. 2019) (orig. proceeding).

198. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d at 136.

199. *Id.*

A. CASES SPECIFICALLY ADDRESSING ADEQUACY OF REMEDY BY APPEAL

The element of the lack of an adequate remedy by appeal was addressed specifically in three cases during the Survey period. First, in the *In re Abbott* case, the Texas Supreme Court considered the “adequacy” element when it stopped the enforcement of a temporary restraining order.²⁰⁰ Second, in *In re C.J.C.*, a case of first impression, the Texas Supreme Court considered the “adequacy” element when it stopped the appointment of a non-relative as possessory conservator of a minor child, over the objection of the natural father.²⁰¹ Third, the Texas Supreme Court addressed the “adequacy” element in *In re Murrin Bros. 1885, Ltd.*, an attorney disqualification case where the court decided the appellate remedy was adequate.²⁰²

Although adequacy of the remedy by appeal was not addressed in *In re Panchakarla*,²⁰³ other than by a general citation to *In re Turner*,²⁰⁴ it is clear that the Texas Supreme Court was effecting a “mid-stream” correction in the trial process. In effect, without saying so, the supreme court at least impliedly addressed the inadequacy of the remedy by appeal as required by *In re Prudential*.

B. CASES NOT REFERRING TO ADEQUACY OF REMEDY OF APPEAL

The election cases, except for *Hotze II*,²⁰⁵ and the wrongful conviction case, *In re Lester*,²⁰⁶ do not consider the adequacy of the remedy by appeal because they address ministerial duties and the cases were not brought in trial courts.

The *Hotze II* case did not commence in a lower court, yet the Texas Supreme Court considered the requisites of mandamus in the context of what the supreme court referred to as the relators’ “delay” in pursuing mandamus at the supreme court.²⁰⁷ Further, instead of citing *In re Prudential*, the supreme court in *Hotze II* cited *Walker v. Packer*, a long-standing authority issued in 1992, which was clarified and refined by *In re Prudential*.²⁰⁸

200. *In re Abbott*, 601 S.W.3d 802, 813 (Tex. 2020) (orig. proceeding) (per curiam).

201. *In re C.J.C.*, 603 S.W.3d 804, 811 (Tex. 2020) (orig. proceeding).

202. *In re Murrin Bros. 1885, Ltd.*, 603 S.W.3d 53, 55–56, 61–62 (Tex. 2019) (orig. proceeding).

203. 602 S.W.3d 536, 539 (Tex. 2020) (orig. proceeding) (per curiam).

204. 591 S.W.3d 121, 124 (Tex. 2019) (orig. proceeding).

205. No. 20-0739, 2020 WL 5919726, at *2 (Tex. Oct. 7, 2020) (orig. proceeding).

206. 602 S.W.3d 469, 475 (Tex. 2020) (orig. proceeding).

207. *Hotze II*, 2020 WL 5919726, at *2 (Tex. 2020); see *In re Hotze (Hotze I)*, No. 20-0430, 2020 WL 4046034 (Tex. 2020) (orig. proceeding).

208. *Hotze II*, 2020 WL 5919726, at *3 n.201 (Tex. 2020) (citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)).

C. PRACTICAL QUESTIONS ABOUT THE SIGNIFICANCE OF *IN RE PRUDENTIAL*

The Texas Supreme Court's practice of citing mandamus authorities other than *In re Prudential* is not a new phenomenon.²⁰⁹ However, that practice creates some uncertainty about what authorities should be followed by the lower courts and counsel and the viability of the *In re Prudential* balancing test.²¹⁰

During the Survey period, only two of the mandamus opinions specifically cite the seminal case of *In re Prudential: In re Turner*²¹¹ and *In re C.J.C.*²¹² One might assume *In re Prudential* is cited in those cases because of its prominence. However, the Texas Supreme Court takes a different approach in the precedential cases of *In re Panchakarla*²¹³ and *In re Murrin Bros. 1885, Ltd.*²¹⁴ In those cases, the supreme court chose to cite as authority for mandamus relief, among other cases, *In re Turner*, a case that employs *In re Prudential* as its foundation authority.²¹⁵ Further, as noted above in the *Hotze II* case, the supreme court considered the requisites of mandamus in the context of what the supreme court referred to as the relators' "delay" in pursuing mandamus at the supreme court.²¹⁶ Once again, *In re Prudential* was not cited. Rather, the supreme court selected *Walker v. Packer*, a long-standing authority issued in 1992, which authority was clarified and refined by *In re Prudential*.²¹⁷ Finally, the uncertainty is enhanced by the supreme court's mandamus decisions that

209. For comments about the absence of citations to *In re Prudential* and the adequacy of a remedy by appeal in earlier mandamus opinions, see Honorable Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 6 SMU ANN. TEX. SURV. 387, 404–07 (2020), <https://scholar.smu.edu/smuatxs/vol6/iss1/15> [<https://perma.cc/M65H-AQ79>] [hereinafter Mandamus 2020]; Honorable Douglas S. Lang & Rachel A. Campbell, *Survey of Recent Mandamus Decisions of the Texas Supreme Court*, 5 SMU ANN. TEX. SURV. 407, 428 (2019), <https://scholar.smu.edu/smuatxs/vol5/iss1/16> [<https://perma.cc/ALV7-5TJX>] [hereinafter Mandamus 2019].

210. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding) (“An appellate remedy is ‘adequate’ when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.”).

211. 591 S.W.3d 121, 124 (Tex. 2019) (orig. proceeding) (holding that the limits of discovery of non-party health care provider in a health care liability claim are governed by Texas Medical Liability Act.).

212. 603 S.W.3d 804, 811 (Tex. 2020) (orig. proceeding) (noting the family law presumption).

213. 602 S.W.3d 536, 538–39 (Tex. 2020) (orig. proceeding) (per curiam) (holding that the trial court has plenary power to vacate a dismissal order in Texas Citizens Participation Act case, TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.005(a), .008(a)).

214. 603 S.W.3d 53, 57–59 (Tex. 2019) (orig. proceeding) (addressing dual representation by counsel in derivative litigation).

215. *In re Panchakarla*, 602 S.W.3d at 539; *In re Murrin Bros. 1885, Ltd.*, 603 S.W.3d at 56.

216. *In re Hotze (Hotze II)*, No. 20-0739, 2020 WL 5919726, at *2 (Tex. Oct. 7, 2020) (orig. proceeding).

217. *Id.* at *3 n.20 (citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)).

are silent regarding whether there is an adequate remedy by appeal.²¹⁸

In light of those issues, at least two practical questions arise: (1) does the Texas Supreme Court view *In re Prudential* as a diminished authority?, and (2) may intermediate appellate courts and practicing lawyers ignore the element of the adequacy of the remedy by appeal?

The logical answer is “no” to both questions. Until the supreme court overrules *In re Prudential* or modifies its holding in some way, lawyers should be careful to follow strictly that authority.²¹⁹ Otherwise, variance from that standard could be fatal to a mandamus petition.

VI. CONCLUSION

Mandamus is an indispensable tool for litigants where “mid-course” error correction is required and interlocutory appeal is not available. Despite the absence of discussion in Texas Supreme Court mandamus opinions of *In re Prudential*, its balancing test, and the issue of the adequacy of a remedy by appeal, those elements remain etched in the law. The burden of proof for the relator bringing a petition has not changed.

218. E.g., *In re Panchakarla*, 602 S.W.3d at 536–41; *In re Green Party of Tex.*, No. 20-0708, 2020 WL 5580156, at *1 (Tex. Sept. 18, 2020) (orig. proceeding) (per curiam). For articles that address *In re Prudential* and the adequacy of a remedy by appeal, see also Mandamus 2020, *supra* note 209; Mandamus 2019, *supra* note 209.

219. *Sw. Bell Tel. Co., L.P. v. Mitchell*, 276 S.W.3d 443, 447 (Tex. 2008) (discussing stare decisis and departure from a prior holdings).

