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Christopher B. Norris

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NOTE: TEXAS V. HODGES

*Christopher B. Norris**

IN *Texas v. Hodges*,¹ the Texas Supreme Court used sound legal reasoning to interpret the State's election code, but the peculiar facts of the case led to an unsettling result. A twenty-year incumbent judge who ran unopposed in the Democratic Party primary was declared ineligible for the general election because he voted for his Sunday school teacher in the Republican Party primary. While the outcome seems heavy-handed at first glance, in reality, the supreme court correctly applied the prevailing constitutional standard in reversing the district court's ruling that section 162.015(a)(2) of the Texas Election Code was unconstitutional. In reaching its decision, the supreme court disregarded a reasonable alternative construction of the statute that would have allowed the judge to remain on the bench.

In March of 2001, Judge David L. Hodges ran unopposed in the Democratic Party primary for his sixth term as judge of McLennan County Court at Law No. 1.² Following his victory, Judge Hodges was certified by the McLennan County Democratic Party Chair, John Cullar, as the Party's nominee for the general election in November of 2002.³ Since there were no Republican or independent challengers for Judge Hodges' seat, he was seemingly guaranteed reelection.⁴ As a result, Judge Hodges decided to vote in the Republican Primary for Jim Meyer, his friend and Sunday school teacher, who was running in a contested race for district judge. Upon learning of Judge Hodges' vote in the Republican Primary, Cullar contacted Judge Hodges to inform him that section 162.015(a)(2) of the Texas Election Code required Cullar to declare Judge Hodges ineligible as the Democratic Party's candidate for the November general election. Section 162.015 states:

- (a) A person who voted at a primary election or who was a candidate for nomination in a primary is ineligible for a place on the ballot for the succeeding general election for state and county officers as:
- (1) an independent candidate for an office for which a candidate was nominated in the primary; or

* Christopher B. Norris will receive his J.D. from SMU Dedman School of Law in May of 2004. He would like to thank his wife, Dawn, for her inspiration, patience and love.

1. *Texas v. Hodges*, 92 S.W.3d 489 (Tex. 2002).

2. *Id.* at 492.

3. Brief of Appellee David L. Hodges at 3, *Texas v. Hodges*, 92 S.W.3d 489 (Tex. 2002) (No. 02-0518).

4. *Id.*

(2) *the nominee of a political party other than the party holding the primary in which the person voted or was a candidate.*

(b) A person who was a candidate for nomination in a primary election is ineligible for a place on the list of write-in candidates for the succeeding general election for state and county officers as a write-in candidate for the office sought by that candidate in the primary.⁵

Judge Hodges attempted to preempt Cullar's declaration of ineligibility by seeking a declaratory judgment from the trial court that section 162.015(a)(2) did not require or authorize Cullar to declare Judge Hodges ineligible and an injunction preventing Cullar from declaring him ineligible.⁶ On May 20, 2002, the trial court denied Judge Hodges' request for a temporary injunction, rejecting his argument that section 162.015(a)(2) was ambiguous and should be construed in a manner that made it inapplicable to his situation.⁷ Four days later, Cullar issued a Notice of Administrative Declaration of Ineligibility, which declared Judges Hodges ineligible for a place on the 2002 general election ballot as the Democratic nominee.⁸ Subsequently, Judge Hodges amended his petition to challenge the constitutionality of section 162.015(a)(2) as written and as applied to him.⁹ The State of Texas joined the fray at this point to defend the constitutionality of section 162.015.¹⁰

After a bench trial, the district court held that: (1) section 162.015 was unconstitutional as applied to Judge Hodges "under the specific and unique facts of the case,"¹¹ (2) Cullar's Notice of Administrative Ineligibility was void, (3) the Democratic Party and Cullar were permanently enjoined from declaring Judge Hodges ineligible for the general election and from nominating any other candidate to the ballot, and (4) Judge Hodges was the Democratic Party's duly elected nominee.¹² The State of Texas, Cullar, and the McLennan County Democratic Party filed a direct appeal to the Texas Supreme Court under the court's direct appeal jurisdiction over constitutional questions.¹³ The Texas Supreme Court recog-

5. TEX. ELEC. CODE ANN. § 162.015 (Vernon 2002) (emphasis added).

6. *Hodges*, 92 S.W.3d at 493.

7. *Id.*

8. Brief of Appellee David L. Hodges at 4, *Hodges* (No. 02-0518).

9. Judge Hodges petition did not specify which provision or which constitution (Texas or United States) section 162.015 violated as applied to him. Additionally, the trial court failed to cite the particular constitutional provision that had been violated. As the supreme court notes, Judge Hodges' trial brief claimed an impermissible burden on his right to vote and a violation of his substantive due process rights. *Hodges*, 92 S.W.3d at 493.

10. *Id.*

11. Brief of Appellee David L. Hodges at 4, *Hodges* (No. 02-0518). The text of the judgment reads in part: "The court does not find, determine, or declare that section 162.015 of the Texas Election Code is unconstitutional as applied to any candidates, fact situations, or circumstances other than the specific finding and declaration set forth herein that section 162.015 is unconstitutional as applied to Plaintiff, David L. Hodges, under the specific and unique facts and circumstances existing in this case as established by the evidence herein." *Id.*

12. Brief of Appellant the State of Texas at 2, *Texas v. Hodges*, 92 S.W.3d 489 (Tex. 2002) (No. 02-0518).

13. "An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the

nized two issues on appeal: (1) whether section 162.015 could be reasonably construed to permit Judge Hodges to appear as the Democratic candidate in the general election (an issue reasserted by Judge Hodges on appeal as an alternative basis for affirming the trial court's decision)¹⁴ and (2) whether section 162.015 was unconstitutional under the Texas or the United States Constitution.¹⁵

The Texas Supreme Court reversed the district court's finding that section 162.015 was unconstitutional by correctly applying the balancing test articulated by the U.S. Supreme Court in *Anderson v. Celebrezze*.¹⁶ The *Anderson* test provides an analytical structure for determining the constitutionality of an election regulation by weighing the "character and magnitude" of the constitutional injury against the "precise interests" offered by the State as justification for the regulation.¹⁷ A regulation that "severely" restricts the First and Fourteenth Amendment rights of a party must be "narrowly drawn" to advance a "compelling" state interest.¹⁸ On the other hand, a "reasonable nondiscriminatory restriction" need only be justified by the advancement of the State's "important regulatory interests."¹⁹

Judge Hodges asserted that his fundamental right to vote had been infringed upon by section 162.015(a)(2),²⁰ while the appellants argued that, in fact, Judge Hodges' right to be a candidate was restricted.²¹ The supreme court correctly recognized that, although the statute created serious consequences for Judge Hodges in deciding for whom he would vote, he was still permitted to vote in the primary of his choice.²² Although Judge Hodges' fundamental right to vote was impacted by the election code, the effect was "limited to a single election cycle and a specific voting act—crossover voting."²³ Judge Hodges' right to be a candidate was clearly restricted, but "candidacy is not a fundamental right" protected by the First or Fourteenth Amendment.²⁴ Because the supreme court determined that section 162.015 did not place a severe restriction on Judge Hodges' fundamental right to vote, it held that strict scrutiny was not appropriate in this case.²⁵

constitutionality of a statute of this state." TEX. GOV'T CODE ANN. § 22.001(c) (Vernon 2001).

14. *Hodges*, 92 S.W.3d at 493.

15. *Id.* at 492.

16. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

17. *Burdick v. Takushi*, 504 U.S. 428 (1992) (applying the *Anderson* test to Hawaii's ban on write-in candidates).

18. *Hodges*, 92 S.W.3d at 496 (citing *Burdick*, 504 U.S. at 434).

19. *Id.*

20. Brief of Appellee David L. Hodges at 12, *Hodges* (No. 02-0518).

21. Brief of Appellant the State of Texas at 9, *Hodges* (No. 02-0518).

22. *Hodges*, 92 S.W.3d at 498.

23. *Id.*

24. *Id.* (citing *Benham v. Driegert*, 853 F. Supp. 951 (N.D. Tex. 1994), *aff'd*, 38 F.3d 569 (5th Cir. 1994)).

25. *Id.*

The supreme court next analyzed section 162.015 under the second half of the *Anderson* test: (1) whether the State's interests were sufficiently important to justify that restriction, and (2) whether the restriction on Judge Hodges' right to vote was a "reasonable non-discriminatory restriction."²⁶ In determining that the State's interests were sufficiently important, the supreme court was swayed by a laundry list of justifications offered by the appellants.²⁷ Judge Hodges contends these justifications apply more directly to the "sore loser" laws²⁸ that surround the provision disputed in this case.²⁹ In response, the supreme court failed to make clear how "voter confusion" or the "destabilizing and disorganizing effects of interparty raiding and intraparty feuding" could be caused by a candidate of one party, with no opponent in the primary election, voting in the primary of another party.³⁰ Such an act has no effect on the candidate's own race and an indirect effect, at best, on any other part of the electoral process. Despite this tentative connection, finding an "important regulatory interest" was a low burden easily met by the supreme court's focus on the State's interests in protecting the political parties' associational rights and in maintaining the integrity and stability of the political process.³¹

The supreme court concluded its constitutional discussion by deciding that section 162.015(a)(2) was a reasonable non-discriminatory method of advancing the State's important interest of maintaining the integrity and stability of the political process.³² The crux of this decision rested on the issue of reasonableness, not discrimination, and the supreme court looked to Judge Hodges' arguments regarding narrow tailoring to make its decision.³³ Judge Hodges suggested that the statute could have been written to either: (1) make the declaration of ineligibility permissive instead of mandatory or (2) provide that a candidate in his situation had forfeited his or her nomination, but could still be nominated by their political party as their own replacement.³⁴ Ultimately, the supreme court decided that

26. *Id.* at 496.

27. "(1) [R]egulating the election process, (2) preventing voter confusion, (3) preventing the destabilizing and disorganizing effects of interparty raiding and intraparty feuding, (4) maintaining the order and integrity of primary election processes, (5) protecting party purity, and (6) protecting the right of political parties not to associate with another party's members." *Id.* at 499 (citing *Nat'l Comm. of the U.S. Taxpayers Party v. Garza*, 924 F. Supp. 71, 73 (Tex. 1996) and *Storer v. Brown*, 415 U.S. 724 (1974) (accepting California's offered explanation of a law that made independent candidates ineligible for the general election if they voted in the preceding primary)).

28. The "sore loser" provisions prevent a candidate in the primary who loses from getting a "second bite at the apple." Specifically, the statute prevents a candidate who loses the nomination of a particular party in the primary from becoming an independent candidate in the general election (section 162.015(a)(1)), a nominee of another party in the general election (section 162.015(a)(2)), or a write-in candidate in the general election (section 162.015(b)).

29. *Hodges*, 92 S.W.3d at 499.

30. *Id.*

31. *Id.* at 500.

32. *Id.* at 502.

33. *Id.* at 500.

34. *Id.* at 500-01.

Judge Hodges' suggestions did not cure all of the ills the statute was meant to address.³⁵ The supreme court felt that forcing a party to "fight amongst themselves" over whether to disqualify or renominate a "disloyal party member" would cause, rather than prevent, destabilization and confusion.³⁶ Additionally, Judge Hodges' suggestions failed to protect the right of the Republican Party to prevent disruption of its candidate selection process through interparty raiding.³⁷ Again, the low standard created by the *Anderson* test and the supreme court's dismissal of Judge Hodges' assertion that these justifications apply more directly to the "sore loser" provisions of section 162.015 inevitably led to the conclusion that the regulation was constitutional.

Unlike the constitutionality question, however, the supreme court's rejection of Judge Hodges' statutory construction argument was not unavoidable. Judge Hodges argued that: (1) section 162.015(a)(2) was ambiguous because it is subject to more than one reasonable interpretation;³⁸ (2) one of those reasonable interpretations did not make him ineligible for the general election;³⁹ and (3) because election statutes are strictly construed against ineligibility,⁴⁰ the supreme court should have reached the conclusion that section 162.015(a)(2) did not require him to be declared ineligible for the general election. Specifically, Judge Hodges offered the following as a reasonable interpretation of section 162.015(a)(2):

[A] person who voted at a primary is ineligible for a place on the ballot for the succeeding general election for state and county officers as the nominee of any party other than either (1) the party in which that person voted in the primary election, or (2) the party in which that person was a candidate and successfully earned a place on the general election ballot by being the successful candidate.⁴¹

In other words, Judge Hodges contended that the statute could reasonably be read to make him eligible as the nominee for the Democratic Party, the party whose primary he was a candidate in, or the Republican Party, the party whose primary he voted in, but not a third party, such as the Libertarian, Green, or Socialist Parties.⁴² The supreme court recognized this inclusive, rather than preclusive, interpretation of the statute was a possible reading of section 162.015(a)(2), but not a reasonable one because it "conflicts with the Election Code's overall structure and the limiting language of the statute itself."⁴³ However, the supreme court's narrow legal analysis of the issue too easily accepts that the voter restric-

35. *Id.* at 501.

36. *Id.*

37. *Id.*

38. *Id.* at 494.

39. *Id.*

40. *Id.* at 494-95; *see also* *Wentworth v. Meyer*, 839 S.W.2d 766 (Tex. 1992); *Brown v. Meyer*, 787 S.W.2d 42 (Tex. 1990).

41. Brief of Appellee David L. Hodges at 44, *Hodges* (No. 02-0518).

42. *Id.* at 45.

43. *Hodges*, 92 S.W.3d at 495.

tion has precisely the same purpose as the “sore loser” laws and focuses on a semantic nuance that is no more plausible than Judge Hodges’ interpretation. The supreme court did not apply the law incorrectly, but it did reject a legally sound and reasonable construction of the law that would have favored the eligibility of Judge Hodges.

The supreme court argued that Judge Hodges’ interpretation would be antithetical to the “obvious and laudable purpose” of the statute: to preclude a candidate from having a “more than one bite at the apple.”⁴⁴ While this is clearly the purpose of the “sore loser” provisions,⁴⁵ it is not the purpose of the voting restriction. The supreme court, itself, went to great lengths in its constitutionality discussion to defend the voting restriction provision on the grounds that it protects the association rights of political parties and protects the stability and integrity of the political process.⁴⁶ In fact, the ambiguity of the regulation is best illustrated by this intermingling of purposes between the “sore loser” provisions and the voting restriction.

The supreme court also stated that the use of the phrase “*the party* holding the primary” instead of “a party” or “any party” demonstrated the legislature’s intent to restrict candidates to a single party during an election cycle.⁴⁷ This semantic inference is no more reasonable than Judge Hodges’ assertion that the drafters’ inclusion of the phrase “or was a candidate” at the end of section 162.015(a)(2) was meant in a disjunctive, rather than conjunctive, sense.⁴⁸ Accepting that inference would have allowed Judge Hodges to be the nominee of either the Republican Party or the Democratic Party in the general election. If the supreme court had recognized Judge Hodges’ assertion as reasonable, then it would have been required to strictly construe the statute in favor of eligibility.⁴⁹ Such a construction would have allowed the supreme court to accept Judge Hodges’ proposed interpretation of section 162.015(a)(2) and permitted him to be the duly elected nominee of the Democratic Party for the general election in November of 2002.

While the Texas Supreme Court’s reasoning was legally sound, its result was not inevitable. In analyzing an ambiguous provision of the Texas Election Code, the supreme court was faced with a choice to take a more conservative or a more common-sense approach to peculiar facts. It decided to focus on the purposes of the provisions surrounding section 162.015(a)(2), while failing to carefully identify its distinct purpose. In an attempt to protect the integrity of the political system, the supreme court admonished an act that had no effect on the integrity of Judge Hodges’ nomination or the electoral process. It focused on the ramifications of allowing a broader interpretation of the statute, rather than recognizing

44. *Id.*

45. *See supra* note 28.

46. *See supra* note 27.

47. *Hodges*, 92 S.W.3d at 496 (emphasis added).

48. Brief of Appellee David L. Hodges at 46, *Hodges* (No. 02-0518).

49. *See supra* note 39; *Hodges*, 92 S.W.3d at 495.

the ambiguity of the provision and its own duty to construe in favor of eligibility. In the end, the Texas Supreme Court chose a reasonable interpretation to reach a defensible legal conclusion, but not one it was required to make, and Judge Hodges' paid the price.

Essay

