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Supreme Court of Texas.
In re The Honorable Brent GAMBLE, Relator.
No. 02-0104.

February 11, 2002.

Appearances:
Stephen G. Tipps, Baker & Botts, Houston, TX, for relator.
Juan A. Magallanes, Magallanes Hinojosa & Mancias, Brownsville,
TX, for respondent.

Before:

Chief Justice Thomas R. Phillips, Justices Priscilla R. Owen,
Harriet O'Neill, Wallace B. Jefferson, Xavier Rodriguez, Nathan L.
Hecht, Deborah Hankinson, James A. Baker, and Craig Enoch.

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SPEAKER: Oyez, oyez, oyez. The Honorable, the Supreme Court of
Texas. All persons having business with the Honorable, the Supreme
Court of Texas are acknowledge to draw near and give their attention
for the Court is now sitting. God save the State of Texas and this
Honorable Court.
JUDGE: Thank you. Please be seated.
The Court [inaudible] has one letter on the total submission
docket In Re the Honorable Brent Gamble, an original mandamus
procedure. The Court has allotted 20 minutes for each side to proceed
oral argument and the late part you may consider that Court have time
for rebuttal by adivising the Marshal of the Court. The clerk is making
a recording of these proceedings, and you may purchase a tape of these
proceedings from [inaudible]. The Court is ready to hear argument from
petitioner for the relator.
SPEAKER: May it please the Court. Mr. Tipps will read an argument
for the relator. Relator has reserved five minutes for rebuttal.

ORAL ARGUMENT OF STEPHEN G. TIPPS ON BEHALF OF THE PETITIONER

MR. TIPPS: May it please the Court.
The primary issue in this case is whether there are any
consequences that flow from a party chair's breached of her duty to
review append this application and notify him of any defects. The Court
of Appeals recognized that such duty existed, recognized that in this
case the duty had been breached but nevertheless held that the election

code provided no consequences for this particular breached of statutory duty.

JUDGE: Mr. Tipps, the statute that you say is that if the chair had determined by the stand of statutory. If the chair had determined that the petition application met the requisites to be put on the ballot but then later determined that it did not and therefore the name did not belong on the ballot, the statute says that that's -- that the chairman is not bound by the first determination that it met the conditions.

Here, you argued that it was simply a mistake and therefore there ought to be some sanction for it. But it seems that the statute clearly contemplates this kind of mistake and has no cut-off for when that mistake could be corrected. Meaning, they could tell you in time, they could research in time, tell you in time, you're there, but the statute seems to be very absolute that that's not binding on the minute, some point in the future they could determine you don't belong there.

MR. TIPPS: I think the statute does at least two things, the part of the statute that the Court is referring to clearly preserves the opportunity for challenges to applications to be identified after the fact. But the statute also imposes a duty on the party chair to conduct a prompt review either within five days or within a reasonable time period and further imposes a duty to notify the candidate if that review shows a defect. So I think there are two different things that the statute does. And in this case, the evidence was that the party chair failed to discharge that second duty to review and notify. So I don't think those two provisions are really in conflict.

JUDGE: What is the defect from the phase of the application?

MR. TIPPS: The defect in the application which is -- which includes the petition. Petition can't cure the effects in the application, but the petition and the application are one. And the defect is that the candidate has applied for one court and his petitions say that his running for a different court, and that was in fact the defect that the party chair identified and that was the defect of which she notified Judge Gamble on January 3rd.

JUDGE: Well, the statute does say that the petition is not considered part of the application for purposes of determining compliance with the requirements applicable to each document.

MR. TIPPS: Which is the provision of the statute that was added by the legislature after this case, which prevented the party chair in this case from determining that the problem with the application was cured by the petition. But it's the very fact that one says one court and the other says the other court that was the defect that resulted initially in Judge Gamble's being removed from the ballot.

JUDGE: When Judge Gamble conceives that his application did not comply with Section 031 --

MR. TIPPS: With Section --

JUDGE: 031 --141031 which --

MR. TIPPS: Yes, he applied for the wrong -- if [inaudible] mistaken, he applied for the wrong court.

JUDGE: And your petition to the court for injunctive relief relies on Section V of 141032 five-day period, and that's the basis upon which you got your injunction, is that correct?

MR. TIPPS: I have to look back to the petition. The statute, of course, contains a file --

JUDGE: You said because Gamble presents the application on December 19, 2001 should have not been a problem, Section 141032 without a section of the election code provides a procedure for

identifying erros within five days of the date the candidate presents the application which is part B. That is the only allegation I could find [inaudible] you relied on trial court. However, on page five of your mandamus, you said the review shall be completed as soon as practical [inaudible] the application received with the subsection C. Is there a problem that you rely on one section to get an injunction and rely on another one to get further relief here?

MR. TIPPS: Well, I don't think so. I think those two need to be read together. The five-day requirement relates to problems with the application, and then the statute later on says that if there are petitions involved, the Court has a reason --

JUDGE: My point is if you can only use V to look at an application and you can only use C to look at a case with application and petition, was there ground in the trial court for injunction relief?

MR. TIPPS: Well, I think there were, because I think if the statute is properly read, the five-day period probably applies to this particular kind of problem. The period is extended if there are petitions, I would suggest, because it may take longer to review petitions. But the problem here is with the [inaudible] --

JUDGE: [inaudible] is the rationale, but does it make any difference on this case because you are arguing one ground on the trial court and a different one here?

MR. TIPPS: Well, I don't think it does because the argument that we are making here is that Judge Gamble properly availed himself of rights he has under 273.081 by seeking the injunction --

JUDGE: But your basis for the injunction is that they violated a mandatory deed, but you use one ground in the trial court as a violation and another ground here as a violation, and should we have a problem with that.

MR. TIPPS: Well, I don't think so because I believe that this Court properly should take cognizance of the fact that Judge Gamble exercised the statutory right in obtaining an injunction.

JUDGE: I understand that, but there is no basis for -- where are we? We have not construed the best I could tell what part C means assume practicable.

MR. TIPPS: I think that's -- I'm not aware of the construction.

JUDGE: And there is a case against Escobar that says the reason that you have injunctive relief is that you can do that on a time period that still gives the election official all the opportunity to go from the record process. So it must mean -- although we haven't said it that you can take that action after the deadline, although some cases say once the deadline comes, you're toast. But don't you have to have a proper ground to get you injunction for you candidate to rely on for there would be violation potential [inaudible].

MR. TIPPS: Well, and I think we have a proper ground.

JUDGE: Which was?

MR. TIPPS: Which was that --

JUDGE: That to be your Section C.

MR. TIPPS: If we alleged Section B, then, that was the ground that we have.

JUDGE: But doesn't apply to your case because you have an application and petition.

MR. TIPPS: But I think if you read the two together, when the problem is with the application part of the total package --

JUDGE: But would you agree that either way because you have a petition and an application, your client is not eligible for either court because you can't use one to support the other. So as you go back

and forth, you end up with no court that you can run for.

MR. TIPPS: I think as of January the 3rd when the party chair made the decision that he would not be included on the ballot --

JUDGE: For either court.

MR. TIPPS: For either court, that was a decision that the party chair was obligated to make under the circumstances, but it was a decision that resulted in Judge Gamble's having a right to seek injunctive relief, which he did because the harm had been caused by a violation of the statutory duty. And once he obtained injunctive relief from a proper court and that injunctive relief ordered the county chair to accept his correct application and place him on the ballot, he then was a fully qualified candidate because he had filed, he obtained a judicial remedy, and he had done what the judicial remedy entitled him to do, and that is to file a correct application.

JUDGE: Mr. Tipps, it seems to me -- I mean, you phrased the question as being whether or not there is a consequence as a result of the party official not fulfilling their statutory obligation. But it seems to me the other question has to be answered is whether or not if there is such a failure, whether or not there can be remedy after 6:00 p.m. on January 2nd.

MR. TIPPS: Yes. And the Court of -- the Court of Appeals implied that there could not be, because the Court of Appeals took the position that there was no consequence; but in fact, there is.

JUDGE: But the code prohibits -- does not allow for deficiencies and applications to be corrected after January 2nd. There's a mandatory requirement on the part of the candidate that he or she fulfill all statutory requirements before January 2nd at 6:00 p.m. And as a result of that, the Court of Appeals determine that the code did not permit applications to be amended after that date, and that seems to be an accurate statement of the law. So it seems to -- my question to you then is, if you are correct that there was a statutory violation, is there any remedy under the law given the mandatory language of the election code?

MR. TIPPS: Yes, the remedy afforded by the legislature is that the candidate who is harmed by a statutory violation is entitled under 273081 to seek an appropriate -- to seek appropriate injunctive relief, the legislature determined that it should be up to the trial judge to decide whether or not there is a consequence by weighing all the facts and applying the appropriate principles of equity.

JUDGE: One of the purposes of the legislature has indicated with its very rigid -- stringent requirements in the election code is to prevent fraud. What is to prevent fraud if we were to allow a remedy under these some sort of circumstance? I want to go in and amend my application to run for a different spot after the filing day. And in this particular instance we have inconsistencies in the documents, the application says that the judge is running for one bench, the petition say he is running for another. Does he get to pick or choose which one of these that he wants to do? Aren't we going against legislative intent to allow remedy under these circumstances?

MR. TIPPS: No.

JUDGE: Why not?

MR. TIPPS: Of course there's no evidence of fraud here. But more importantly, the legislature entrusted that decision to the trial courts. If there were facts in this case that suggested that Judge Gamble had been engaged in some kind of [inaudible] trying to [inaudible] two different ventures --

JUDGE: Why don't you just see which bench look like he would have

an opponent?

MR. TIPPS: Or whatever. If his motives had been up anything other than what they were, there's a very good chance that the trial judge would not have afforded him the relief that he sought, but the legislature has made a policy decision by enacting 273.801 that whether or not there are consequences for a particular statutory violation are to be determined by the trial judge, and that's what the trial judge did here.

JUDGE: But if the -- if the election officer is not bound by the determination of the application and the petition is probably filled out and filed and is free to later on determine that they have not been in the candidate's [inaudible] from the ballot, can the court, the trial court under, quote, appropriate injunctive relief redecide that the party ought to be allowed to make the corrections now necessary and get back on the ballot when the filing period is over with?

MR. TIPPS: Well, again, I think there are two different issues because the issue here was the party did not review the application in a [inaudible] fashion. It was then discovered after the filing deadline, Judge Gamble was removed from the ballot, Judge Gamble sought injunctive relief and the Court ordered the party to take into action and the party complied with that Court order. The situation the juror referring back to, I think, is one in which the party chair discovers after the fact that the -- an earlier determination of compliance was wrong. And then he is under a duty to correct it. And if he acts an error in that regard, then the candidate has appropriate alternatives would either mandamus or injunction.

JUDGE: What if this has been the other way around that the mistake that had been on petition were now beyond the filing date, the party chairman discovers a mistake, is there a time under the statute go back and get the petition -- redo the petition process? Is that a fair reading of the statute?

MR. TIPPS: Well, again, the statute gives the candidate who's harmed by breach of duty an opportunity to go to court and seek whatever injunctive relief he or she can [inaudible] the judge is appropriately. And I can't predict what the judge would decide to do on those particular facts.

JUDGE: Where does the judge of the trial court did the authority to reopen the petition, sign the process as far as the deadline is --

MR. TIPPS: Well, assuming hypothetically that that's what a -- the hypothetical judge did in your hypothetical. The authority to do that would be the Court's general equitable authority. Because the legislature, in enacting 273081, trusted the trial court's acting pursuant to their equitable authority to make the right the decision and the Court of Appeals in this case effectively [inaudible] the role the legislature had given to the trial judge when it decided on its own that there were no circumstances under which any -- any equitable relief would be appropriate on these facts. And I suggest that that's inconsistent with the statutory scheme that the legislature has established.

JUDGE: Mr. Tipps, you don't disagree that Judge Gamble also had a duty on the election code to make certain that his application and petitions [inaudible] proper order?

MR. TIPPS: No, I do not.

JUDGE: And you assume that the duties listed in Section 141.032 granted Judge Gamble.

MR. TIPPS: Certain of the duties do -- certain of the duties granted to the party of chair.

JUDGE: Well, no, sir, I'm sorry. In terms of whose the duty is ought to -- I mean, they're taking a position that the party chair owed the duty to him to make certain his application was correct.

MR. TIPPS: Yes, and that was what Escobar said and that's what [inaudible] with.

JUDGE: Is it another -- the reading of the statute that this is a duty that runs to the integrity of the election process in order to make certain that only qualified people are on the ballot, those who'd met all the statutory requirements, and that may be the reason why the legislature has not pay consequence in vis-a-vis the candidate as opposed to a consequence vis-a-vis the integrity of the election process?

MR. TIPPS: I don't disagree with that there may be another purpose of the statute. But I do disagree that the legislature has not provided consequence. I --

JUDGE: The consequence is if you don't comply, you're off. Then they require to remove the candidate from the ballot which would tend to mean that 141.032 to the extent there is a duty -- that duty is really owed integrity of the election process as opposed to making sure that the individual candidate has done what they are supposed to do so that they could have a second bite at the apple.

MR. TIPPS: Well, I --

JUDGE: That's kind of long question and I apologize, but do you see what I mean?

MR. TIPPS: I do, but I think both purposes -- I think both purposes of the statute and I would refer the Court both to Escobar and also to the Fort Worth Court of Appeals recent decision in Dukhata, which I'll give the Court the cite in a minute. But that Court also affirms that one purpose of 142 -- 1410.32 is to provide a safeguard for the candidate to allow the candidate an opportunity to cure. And I think that's in the purpose -- statutory purpose.

JUDGE: But the absence of any kind of consequence vis-a-vis the party representative would indicate perhaps on the part of the legislature an intent if there's a failure to make sure that the duty does randomly check the process and would explain why there's [inaudible] consequence that would -- in order to benefit the candidate.

MR. TIPPS: But I disagree with your assumption that the election code does not provide a consequence, because I think the election code does say that there can be a consequence if the trial judge with whom the injunction papers were filed decides that there should be a consequence.

JUDGE: So what's the ending point of that injunction power? We get to February 25th, and I get to open and redo petitions at that point in time; meaning, it seems to me if you read the injunction power of that broadly, it's very open-ended on the part of the trial judge being able to interfere with the election process.

MR. TIPPS: Well, first of all, the -- any injunction granted is subject to appellant review and Mr. Triantaphyllis intervened in the timely fashion here, he could have had this injunction or sanction injunction --

JUDGE: Well, I'd like to ask you about that as to what the grounds [inaudible] he had an adequate remedy, but you nonsuited.

MR. TIPPS: The nonsuited, eight or nine days after -

JUDGE: But it was true, the record show that this case was set for hearing on the merits on the 18th of January.

MR. TIPPS: Yes. And the nonsuit was filed right before that

hearing after a -- more than a week had elapsed, during which time Mr. Triantaphyllis had not taken any action to intervention and under circumstances in which there really was nothing to be resolved at the temporary injunction hearing because Judge Gamble had obtained the relief, all the relief he needed --

JUDGE: I understand. And now, the Court of Appeals noted in the footnote, I think maybe would some surprise the TRO is suppose to maintain the status quo but your client got all the relief they asked for, in fact a permanent injunction -- temporary restraining order here.

MR. TIPPS: Which is not unheard of in the law when you have a situation in which the only way to prevent the irreparable injury that would otherwise occur is to ask for mandatory injunction, which is what they ask for and what they got because the deadline that they were offering under that point was --

JUDGE: Was that an argument they made that the group relate relief that the trial court granted as a TRO was -- went too far? What else have a hearing set for the mayor if you can get everything you asked for in an ex parte hearing based on affidavit?

MR. TIPPS: Well, I don't know why Judge Ryder set the matter for temporary injunction --

JUDGE: That's certainly part of the law.

MR. TIPPS: Yes.

JUDGE: I mean, you wouldn't have anything if he hadn't set for a hearing, isn't that right?

MR. TIPPS: That's true. That's true. And if Mr. Triantaphyllis had intervened in a timely fashion and made the arguments that he made in his -- would be intervention --

JUDGE: [inaudible] generous when he calls no case to be pending. Another question is, what happened to that TRO if you had not executed on it on the same day you got it? It would have disappeared [inaudible], wouldn't it?

MR. TIPPS: Well, the TRO might have but by that time, a corrected application had been filed and accepted pursuant to the court.

JUDGE: I understand.

MR. TIPPS: So I --

JUDGE: Would it be a fair statement to say that the entire sequence of this adversary process was worked out in advance on behalf of your client?

MR. TIPPS: I'm sure they had a plan how far -- I would doubt that it worked out in advance to the point of not being able to know whether or not Mr. Triantaphyllis would decide to intervene and --

JUDGE: Well, by now [inaudible] pretty well took care of that [inaudible], didn't it?

MR. TIPPS: Yes, but the nonsuit was filed more than a week after the TRO. And under these --

JUDGE: But there's no deadline for somebody to intervene.

MR. TIPPS: No, but there are deadlines that are operating with regard to the election process. And I think under those circumstances, it was not inappropriate for the nonsuit to have been taken at a time than it was.

JUDGE: [inaudible] just two quick questions. Who informed the primary director about the problem with the application? I couldn't tell from the --

MR. TIPPS: I can't tell either. The affidavit says that she was informed, I do not know who -- I do not know and the record doesn't reflect who informed her.

JUDGE: And then just understanding your construction of the statute and the duty of the director to inform the parties or another side of the parties' problem with the application, how far does it go? I mean, what if there -- what if there are mistakes in the petition, the address isn't listed and hundred of them or the telephone number or, you know, other things that are requisites in the petition, isn't that directive responsibility to sort through each and every, you know, signature and precinct number and everything to make sure it's correct?

MR. TIPPS: Well, the statute imposes a duty to review. In this case, the evidence was -- no review was conducted. If --

JUDGE: I'm just trying to figure out how far there will be if it has --

MR. TIPPS: -- if the candidate believes that the duty to review was breached then the candidate has the right to seek injunctive relief and tell his or her story to the district judge and try to persuade the district judge that the statutory violation was such that he's entitled -- it was such that certain temporary injunctive relief is appropriate. And I don't know if I can answer the question beyond that.

JUDGE: Any other questions?

Thank you, Counsel. The Court is going to hear the argument in response.

SPEAKER: May it please the Court. Mr. Juan Magallanes to represent argument for the respondent.

ORAL ARGUMENT OF JUAN A. MAGALLANES ON BEHALF OF THE RESPONDENT

MR. MAGALLANES: May it please the Court. Good morning. My name is Juan Magallanes and I [inaudible] represent the real party of interest here [inaudible]Triantaphyllis, I put myself [inaudible].

Listening to relator's contention that -- or as -- or characterization of the party official's conduct in this case, we disagree with that characterization. He -- in fact, before he left the podium, he again reiterated the characterization of the conduct in saying that the Republican Party officials of Harris County failed to do their duty.

If the Court will look at the affidavit of Kathy Hagler, the individual responsible before reviewing this petition, it is -- well, reflect that in that affidavit, Ms. Hagler unequivocally states that she did her job, she did review the petition, she did review the application that was filed with her by Judge Gamble. But at the time that she initially reviewed that application, she missed Judge Gamble's error subsequently that she's allowed to do under the provisions of the election code to a second review is as part -- at the time of the second review, it's the time when she actually caught his error, that he in fact had filed an application for a 190th and a petition stated that he was going through a 270th. So we would disagree with the characterization that relator puts on the job that Ms. Hagler did in this situation.

JUDGE: Assuming that the statute is not clear that a trial court could not take the facts of this case determine that the designation in the office was just a mistake and conform the application to the petitions for the 270th. Why shouldn't the Court be permitted to enter that as a remedy to the party official's failure to find the error in time to make it -- get it corrected before the filing period?

MR. MAGALLANES: Well, if the Court were to allow such correction, we would submit to do that with open the electoral process to uncertainty. It would frustrate to no end the object to be obtained, that is to inform what position they are running for.

JUDGE: How would he do that because with the petition requirement, you can't run but to one court, and that's all he's got petitions for, that He was trying to be sneaky about it, there's no way to be sneaky.

MR. MAGALLANES: I'm sorry, your Honor. I missed --

JUDGE: How could it frustrate the process -- how could it inject fraud or uncertainty into the process when the only court he could run for is the one he has petitions for?

MR. MAGALLANES: Well, because at that point, I believe that if you are allowed to, I guess, deviate from the mandatory requirements of the statute, then you have -- in effect free for all, if --

JUDGE: I'm trying to understand what free for all would result because he can only file for one court, that's the one he got petitions for. He couldn't -- he can't use those petitions for anything else.

MR. MAGALLANES: That is correct, your Honor. But in this case, if, for example, his petition enumerated one court and his application in another and then at the last minute he changes his mind, he would have to probably -- I mean, he would have to, of course, go through to get another petition to comply with his application.

JUDGE: Right.

MR. MAGALLANES: But the process, as the way it stands right now in the election code and the case filed in effect of the state, basically says that when you file, you file an application -- a petition which denominates exactly what court you're running for. We submitted the reason for that is the legislature wanted to avoid confusion, uncertainty.

JUDGE: And I'm trying to understand what confusion and uncertainty results if you just change the application. Because if you change the petition, I could see the confusion because you would be taking advantage of the [inaudible] understanding -- misunderstanding or whatever it was at the time they signed the petition --

MR. MAGALLANES: Yes, your Honor.

JUDGE: Go back and say, well, yes, you signed the petition for one court but now we're going to administratively change it for another court. Presumably, the [inaudible] would be confused about that. But here, I don't see the confusion.

MR. MAGALLANES: Well, if I understand, the question is why -- what would be the harm in allowing them to go back and amend --

JUDGE: Well, you just said there was confusion and I'm trying to understand what confusion there could be.

MR. MAGALLANES: Well, the confusion is to what exactly what statutory provisions is any given candidates suppose to follow. I mean, if you allow him to do this, then it certainly opens it up for well, you know -- it doesn't -- the election code doesn't mean what it says. If it says it's mandatory, it doesn't mean -- if it says "must," it doesn't mean "must."

JUDGE: What has the application had said 470th District Court at the time that there is no 470th District Court, in all the petition it said 270.

MR. MAGALLANES: That, your Honor, would be a clerical error.

JUDGE: Why is this -- so that could be corrected?

MR. MAGALLANES: No, I'm not saying that. But I would say -- I would categorize that more closely to a clerical error than what Judge Gamble attempts to, categorize this as a clerical error. He -- if you

look at the petition, there are two places that you denominate [inaudible]. But if more importance, I would submit, is the affirmation of that application because the -- in fact, it tells you one more time when before you sign in front of a notary public affirming under oath that all the information provided above is true and correct, now that implies that the candidate has read, has reviewed it, and under an official of the State of Texas has sworn under oath that in fact that information is correct.

JUDGE: But what it says that 470th have affirmation and there is no 470? He admit it to be in the 270th.

MR. MAGALLANES: Your Honor, at that point, I will assume that maybe we would be looking at a different situation on a different construction. But in this case, it didn't say that.

JUDGE: But how could -- do you think the petition -- do you think the candidate could correct that mistake?

MR. MAGALLANES: I don't know how to answer that. I don't know if he would be able to in the light of what case would be at that point or what statutory construction is given to the election code by this Court, by the Court of Appeals, I wouldn't be able answer that, it will be speculating. All I know is that at this point what we are confronted with is two different designations in his process for filing on the ballot.

In addition to that, Judge Gamble attempts to and has in the Court of Appeals to shift the responsibility totally to the party chairman, yet he avoids the responsibility that he has. Again, if you look at the conduct, he had someone else fill out his application. He was presented with that application by that person he entrusted to correctly fill out his application. That application has two places for [inaudible] what position he wanted to. He swears under oath that that is correct and then he files it.

Now, the case law is clear that he has not filed his application according to the mandatory provisions of the election code and he attempts to shift that responsibility by saying that there are no consequences to a party chairman who fails to see his error upon initial review of the application but catches it subsequently. Well, in all the cases that we have seen that might be correct, the [inaudible] case, the Gibson case, and other cases where the chair did not notice that a person left something blank. But in all those cases, this Court as well as the Court of Appeals throughout the state have consistently gravitated back to the position that, and the question is, who's primary responsibility is to make sure that that application is correctly filed? It doesn't say the state party chair or the local party officials. It says unequivocally it's the candidate's position.

JUDGE: The statute says that the application and the petition have to be read separately and that one could not be used to resolve the deficiency in the other. So I suppose that means there are missing information in one but it's in the other document; you can't put them together to provide that missing information. But suppose this Court crafted a rule that say is that in a race that's on a ballot that requires signatures of voters that the petition controls over the application. So you walk in and you file your petition, it can't be used to fill in the deficiencies in the application. But assuming the application is correct in all other respects, the petition controls what office you filed for.

So your petition says, "I'm going to 270th and it must be attached to the application for the application be accepted." And they run in and they file their application and fills out all the pertinent

information that shows I'm going for the 190th, why wouldn't a rule that says the only office they are running for, the 270th, it works against the candidate, the candidate [inaudible] free to pick whatever they want and it works in favor of the process? The voters said they wanted this candidate that running for that office, get that candidate in the office and anybody else campaigning out there if they are aware of what's going on or aware the petitions are being collected for the 270, why isn't that rule under the statute as it written avoid confusion on the statute have a rule that can be easily applied from the beginning and the end and not do violence to the nature of -- the mandatory nature of the statute? Why -- isn't that a good rule?

MR. MAGALLANES: Well, Court certainly can craft a rule -- such a rule, your Honor. But if it were to do that, then it have to deal with the provision says take standalone principle that you take the application [inaudible] and you take the petition [inaudible] that, you know, one defect will not -- one document will not -- you can't use one document to cure the defect of another and vice versa. Then you're gonna file --

JUDGE: But there's no defect -- there's no defect in the documents here. He -- I mean, everything is filled out. We are not blind in any information application is, the application [inaudible]. But this application has to be accompanied by a petition. And because the information -- there's a conflict between the documents, we could have a rule that says tough, you're running for the 190th but you don't have the petitions necessary -- or craft a rule that says you're bound. You can only run for the 270.

MR. MAGALLANES: I believe you could if that's what the Court [inaudible] that would determine the result in this case. However, again, I would go back to the [inaudible] right now, the pertinent election code provisions that provide that the process of applying for position in a ballot in [inaudible] and require mandatorily that you do it in such a way where the petition and the application both denominate what petition sought and they -- they cannot have a conflict. And if they do have a conflict, you have incorrectly filed, you have a defective application.

Now, if the court sees fit to redetermine that in fact that is not a defective application because of the [inaudible] reason that you just stated, your Honor, that the public would still get what they wanted in fact because they signed a petition saying "I know you're running for this Court and what have you. But I would submit that that would entail ignoring the statutory language, the mandatory statutory language that we have that virtually Judge Gamble has complied with it before. He knows what's it about. All the candidates are charged with a certain responsibility because it's them -- they are the ones running for a position, they are the candidates and why? I think the Honors have properly been placed on their shoulders that they complete the application process from one end to the other because that is the law in this state. And now if the Court seems deemed to craft such a rule, so be it.

JUDGE: May I ask you a question about the injunctive relief section. That indicates that there's any timeframe that a party whose being harmed by the violation of the code has to file the injunction and of course the relator filed it after deadline, do you agree or disagree that as long as you can meet the other deadlines that a person has injunctive relief even after the deadline has passed for filing?

MR. MAGALLANES: I agree that that is the remedy of the person who has injunctive relief. Yes, your Honor, I do. However, as the Court

knows, we are in the position that in this particular case before this Court. The temporary restraining order was secured, was ex parte without hearing. It was in fact granted the same day it was filed. And the temporary restraining order as employed in this particular case altered the status quo, which the temporary restraining order is not supposed to do, it supposed to maintain the status quo until you have a some kind of viable adversarial hearing so that the court would be more informed about what are the facts and disputes of this case and are able to issue an appropriate relief that is in consonant with the fact that is presented to it.

And -- but secondly, it also provide a full and complete relief to Judge Gamble in this case. And we have submitted and its stated in our briefs that was totally inappropriate, it was a temporary restraining order --

JUDGE: But the Court [inaudible] didn't really rely on the injunction ordered to grant relief that went another way.

MR. MAGALLANES: Because as the Court knows that under the election code that we are entitled to. When the case was nonsuited, we have no case to go into. So there was another avenue that would challenge the form of content of the petition under the code, and it provides that you can be challenged all up until that day before that day of the start of practical [inaudible].

JUDGE: But wasn't your challenge in the Court of Appeals based upon an allegations that the election officials in charge of that ballot process violated a mandatory duty by placing Judge Gamble on the ballot?

MR. MAGALLANES: That is correct, your Honor, and we --

JUDGE: When his application that was [inaudible] ballot was not properly complete.

MR. MAGALLANES: That is correct. That was our position. Because as the Court knows, there simply is no a statutory provision for allowing a new application basically because Judge Gamble didn't go and correct his application he had filed, he filed a new application.

JUDGE: Is there any legislative history on why there's injunctive relief? It seems there's some theory involved in allowing an injunction to after the fact to correct the wrong and they used it for that purpose in this case.

MR. MAGALLANES: There is the legislative history that I am aware of, your Honor. The purpose of that is -- is probably the reason why we later resorted to that because the election code -- we don't disagree the election code provided that [inaudible]. But it's the method and manner with which it was employed in this case that we take issue with. In addition to that, it runs other Court's prior question is that we felt that the chairman of the Republican Party it is our position to active correctly throughout the process up and until they were properly restrained by a temporary restraining order requiring them --

JUDGE: So it's your view then regardless of what happened in the injunction hearing, there was no violation of an election code by the Republican election officials upon which to base an injunction?

MR. MAGALLANES: That is correct.

I believe that in this particular case, the relator also asked this Court to consider this case in the light of the Belle case, the recent decision by this Honorable Court. We would submit that this is not the Belle case, the situation is not the same. And [inaudible] case, I was struck by one particular provision that this Court in making a decision or in analyzing, but I have heard in that case said and that was that he was called upon [inaudible] the signatures were

valid or not. And the court says, "For a place on the ballot, Belle
needs a 250 valid signatures on his petition. And then the court goes
on and says, "...assuming he satisfies all other election code
requirements." Well, that struck here because that assumption, as the
Court ruled and submit has not been met here. He did not meet all the
other requirements of the election code.

In addition to Belle, the Court went through great pains I believe
in reading it to point out that the section of the election code that
governed this particular problem, the mandatory language of that
section had been removed and therefore the court in applying the
[inaudible] Construction Act arrived that is on [inaudible] just a
reasonable result [inaudible] to be attained in that case because it
found that all the other information contained in the doctrine's filed:
Number one, that the information that was submitted did not help in
finding out whether the voters were in fact residence of the voting
area. And the number two, that some of the information that could
verify in fact whether they lived in the geographical area where they
are going to vote for this particular candidate could be verified
through other information provided in the application. Well, we don't
have that situation here. Right here, this Court is confronted with
mandatory language and in fact the [inaudible] Construction Act defines
-- must which is employed as -- as Judge Gamble's responsibility. He
must do this. He must do that.

As the court knows, the [inaudible] construction defines must as a
condition precedent to anything. And in this particular case, it speaks
for itself. Before you are allowed to do this, you must do this. And in
fact, what we have here in this Court is that, the fact Judge Gamble
failed to fulfill that condition proceeding to justify his place on the
ballot.

JUDGE: Any other questions?
Thank you, Counsel.
MR. MAGALLANES: Thank you, your Honor.

REBUTTAL ARGUMENT OF STEPHEN G. TIPPS ON BEHALF OF THE PETITIONER

JUDGE: Following up on Judge [inaudible] question, Judge Gamble
[inaudible] and had wrong court on [inaudible] appellate court, would
you be here making this argument?
MR. TIPPS: I'd rather doubt it. I don't think under those
circumstances that it would have been very likely that he couldn't have
gotten any kind of injunctive relief
JUDGE: But there, again, the trial judge would have just as much -
- you had just as much right under the statute to go to the trial
court.
MR. TIPPS: If the statute means what it says that a person harmed
by an electoral code violation is entitled to injunctive relief if
appropriate to think is a fair reading --
JUDGE: So no matter how massive the candidate's mistake -- no
matter how tiny or how massive the party has an obligation to file it,
and if they don't, you can't go to a district judge and hope for the
best?
MR. TIPPS: And ask and make your case. And whether or not you get
the relief, whether or not you can show that the relief that you're
asking for is appropriate is when the defendant on the facts.

JUDGE: Will it be an abuse [inaudible] court on the -- in his application [inaudible] Supreme Court. Would you be here making this argument?

MR. TIPPS: I'd rather doubt it. I don't think under those circumstances that it would have been very likely that he could have gotten any kind of injunctive relief --

JUDGE: But there, again, the trial judge would have just as much -- had just as much right under the statute to go to the trial court.

MR. TIPPS: If the statute means what it says that a person harmed by an electoral code violation is entitled to injunctive relief, if appropriate to think is a fair reading --

JUDGE: So no matter how massive the candidate's mistake, no matter how tiny or how massive the party has an obligation to file it, and if they don't, you can't go to a district judge and hope for the best --

MR. TIPPS: And ask to make your case. And whether or not you get the relief, whether or not you can show that the relief that you're asking for is appropriate is when the defendant on the facts.

JUDGE: Will it be an abuse of discretion for the trial judge to change the petitions?

MR. TIPPS: It might well be, because the significance of the legislative scheme is that the decision is entrusted to the trial judge in the first instance and he makes his decision, or she makes her decision, and then there's a right of appeal. And the Court of Appeals reviews that decision under the appropriate standard of review.

JUDGE: If I were fashioning the rules that trial courts did use as a guideline, the evidence in this case is Judge Gamble comes in and says, "Opps, I made a mistake. I really intended to swear that I was going to 270th. Then by mistake, I swore that I was going to 190th. And my proof is my petitions that were all signed by the 270th. And you said the trial court did not abuse its discretion based on that proof.

Suppose that Judge Gamble -- the rule is that the petitions control over the application, that the guiding principles are when you got an application must be filed and must be accompanied by petitions for this particular office and the party comes to you and says, "I made a mistake the trial court makes its decision based on the petitions they control." That establishes that what you should [inaudible]. Suppose that the judge walks in the courtroom, the one who's found his office, and said -- and rejected it because the petitions don't match up with the application, the petition's for the 270th, application 190th. Suppose the judge walks in and the evidence is judge here's my petitions for the 190th, my mistake was attaching the wrong petitions and I want to run for 190th. It seems to me that you could be making the same argument today, that injunctive relief would be appropriate to allow the candidate to substitute the petition for the correct court number in lieu of the petitions that have the wrong court number under exactly the same testimony, it was a mistake. I intended to file the 190th petitions for the 190th application and it was just a clerical error of my assistant grabbed the wrong [inaudible] of petitions and attached it.

MR. TIPPS: That's a complicated claim that the candidate could be making.

JUDGE: Well, have we not -- have been campaigns for candidates that have started out for one office in the side [inaudible]. I believe [inaudible] for another one so they set those aside and the other petition --

MR. TIPPS: There have indeed, but my point simply is that the more complicated the candidate's explanation the less likely the candidate

is going to be, persuade the judge to grant injunctive relief. On the facts of this case --the situation is about as uncomplicated as it could get.

JUDGE: Well, it does, it does entail the judge [inaudible] swearing the statement [inaudible].

MR. TIPPS: This case.

JUDGE: Right. The petition in [inaudible] is hypothetical. The petitions are not notarized by the judge.

MR. TIPPS: And Judge Gamble is certainly not proud of the fact that he swore to a false statement, but I mean, mistakes were made and a mistake was made here. And we went to court. We got the right to correct the incorrect.

JUDGE: Mr. Tipps, what if the Court position had been left blank in the application, what would be the consequence then? I mean, if you -- if then allowed petition to fill in the court number, wouldn't you be violating subsection C of 141.032 by allowing a deficiency [inaudible] one document to remedy about the contents of the other document?

MR. TIPPS: I'm not suggesting that you should cure the application by looking to the petition. I'm not suggesting that in this case, the Republican Party didn't do exactly what it is statutorily obligated to do. All I'm saying is that 141.032 provides a safeguard to protect candidates against their own mistakes, and 273.081 allows them to go to court and try to persuade a judge that the appellee are such that they ought to be able to make the correction.

JUDGE: But the remedy you're seeking would be violative of subsection C, wouldn't it?

MR. TIPPS: I don't believe so. I read that provision to relate to the duty of the party chair either to accept or reject the application, and I think it means that the party chair cannot fix it himself. But the party chair has to do what the party chair did here and say I can't do what was authorized [inaudible] because the legislature said I can't, I have to reject it. But I don't think that means that the Court weighing the equities looking not only at the petitions but also at the extrinsic evidence was prohibited from doing what in fact -

JUDGE: So you're saying the Court could cure the deficiency of one document by another document.

MR. TIPPS: I'm saying under the injunction statute, the Court can hear the evidence in this case. Of course there was evidence beyond what the petitions said there was other extrinsic evidence. But I read that particular provision to limit the -- what the party chair can do in accepting and rejecting.

JUDGE: Mr. Tipps, the temporary restraining order that was issued by the trial court ordered the party to refrain from amending Judge Gamble's name from the ballot.

MR. TIPPS: Yes.

JUDGE: Is that right?

MR. TIPPS: A little bit.

JUDGE: Was -- in order for that relief to be granted, was it necessary for the trial court to also order as it did that he be allowed to amend his application?

MR. TIPPS: I --

JUDGE: [inaudible] without the second?

MR. TIPPS: I don't know. I mean, I know that they did vote --

JUDGE: Well, if the second is absolutely required that you got -- he's got to have an amended application on file; otherwise, the election code requirements have not been met. How can an order from a

trial court that a candidate be allowed to amend his application come within the remedy of section 273.081 of injunctive relief to stop the violation and in fact that an affirmative act in the [inaudible] of candidate be allowed his or her application?

MR. TIPPS: Because it's a remedy that the candidate is entitled to because of the harm caused by the party officials breached of her duty.

JUDGE: [inaudible] step [inaudible] from that, you have to step [inaudible] from that because what I'm looking for -- that was my original question, where can we find the authority that would allow a trial court to order or allow a candidate to amend an application?

MR. TIPPS: I think it flows from the general equitable powers of the trial court in that if the party --

JUDGE: General -- I'm sorry.

MR. TIPPS: -- if the party official had done her duty, the evidence here was that the application would have been corrected before. And so it's appropriate that the application -- that candidate be given a chance to correct the application later.

JUDGE: General equitable powers outside the statute?

MR. TIPPS: The general equitable powers possessed by these courts to which the legislature has said candidates may go to seek equitable relief.

JUDGE: Okay. So it's not within the confines of the statutory provision allows for injunction; it's within the trial court general equitable powers.

MR. TIPPS: Well, I think the statutory position allows for injunction --

JUDGE: Invokes the --

MR. TIPPS: Invokes the general equitable powers of the trial court.

JUDGE: In fact, you're not -- I mean, I don't have much more specific question. I don't find [inaudible] specifically in the statute that would allow this type of mandatory injunctive relief to be issued [inaudible] as part of the temporary restraining order.

MR. TIPPS: To which, all I can say is the statute authorizes appropriate injunctive relief and I argue in this case that injunctive relief was appropriate under the circumstances given the facts.

JUDGE: How can -- this is in a [inaudible] mandatory injunction ordering someone to do something affirmatively amend the application? How can mandatory injunctive relief be granted as part -- appropriate -- the appropriate injunctive relief in the context of the temporary restraining order that is designed to maintain its status quo? How is that appropriate relief --

MR. TIPPS: Because sometimes -- sometimes the only way to prevent the irreparable injury is to grant mandatory relief.

JUDGE: But a temporary restraining order is restricted to maintain status quo, isn't it?

MR. TIPPS: Suppose to be, but isn't always in -- Court sometimes acknowledge that extreme circumstances justify that kind of relief.

JUDGE: What was really extreme here, I mean, no ballots [inaudible]?

MR. TIPPS: That the extremity came from the fact that the county chair was under an obligation to report or certify the list by January the 12th, that was the immediate deadline against which -- under which the Court was working.

JUDGE: Certified by the secretary of state?

MR. TIPPS: Certified by the secretary of state and to the county chair or the county clerk.

JUDGE: Is that under a statue at the time --

MR. TIPPS: Yes.

JUDGE: -- it's been which --

MR. TIPPS: Yes, it's in the election code. I don't have it all on top of my head. It's a ten-day rule.

JUDGE: Any other questions?

MR. TIPPS: I would just like to give the Court a citation --

JUDGE: [inaudible] --

MR. TIPPS: I'm sorry.

JUDGE: [inaudible] --

MR. TIPPS: The Fort Worth decision in Dukhata was 2002, Westlaw 124489 and I simply also want to remind the Court that we have a pending -- an application for [inaudible] supported by the affidavit of [inaudible] Harris County Clerk's office that he intends to send out voter by mail ballots today. It indicated that he could wait until tomorrow and probably would, he hadn't heard from the Court, and the Court ultimately the early voting doesn't occur until February 23rd but --

JUDGE: But by sending -- now, tell me again, by sending out the ballot, you mean --

MR. TIPPS: We filed a motion for emergency relief supported by the affidavit of Tony Cervelo, who's the Harris County Elections Commissioner, in which he says that he intends to send out mail ballots this afternoon. There's some kind of a federal law that he believes that obligates him to send those out 30 days in advance to the election, 30 days would be tomorrow.

JUDGE: Judge Gamble was not on that?

JUDGE: I mean, he was not the --

MR. TIPPS: He's -- Judge Gamble is presently not on the ballot.

JUDGE: If he was on the ballot -- if he's on the primary ballot, he [inaudible].

MR. TIPPS: Yes. And we have made that argument on --

JUDGE: [inaudible] If he is not on the primary ballot, he could still be put on the general election ballot.

MR. TIPPS: Yes, and I would think if he's not on the mail ballot, he could still be put on the absentee ballot or the early voting ballot.

JUDGE: He only needs one vote.

MR. TIPPS: He does not need many votes. I think he and his wife could probably carry the day. Thank you

JUDGE: That concludes argument and the Marshal will adjourn the Court.

SPEAKER: Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas now stands adjourned.

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