

No. 04-18-00309-CV

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FILED IN  
4th COURT OF APPEALS  
SAN ANTONIO, TEXAS  
8/15/2018 4:57:49 PM  
KEITH E. HOTTLE  
CLERK

**IN THE COURT OF APPEALS  
FOR THE FOURTH JUDICIAL DISTRICT  
SAN ANTONIO, TEXAS**

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LETICIA GARZA GALVAN AND MARTIE GARCIA VELA,  
APPELLANTS,  
V.  
ELOY VERA AND BALDEMAR GARZA,  
APPELLEES

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*ON APPEAL FROM THE 229TH JUDICIAL DISTRICT COURT  
OF STARR COUNTY, TEXAS; No. DC-18-186  
HONORABLE JOEL JOHNSON, JUDGE PRESIDING*

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**Appellants' Emergency Opposed Motion for Expedited Oral  
Argument/Decision and Motion for Order Expediting Schedule for  
New Election**

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TO THE HONORABLE COURT OF APPEALS:

This Court has set oral argument for August 29. However, if oral argument remains set for that date, it may become impossible for relief to be granted for Appellants with respect to the 2018 primaries at issue, at least in the absence of extreme measures dictated in the Court's order to shorten the statutory notice period applicable to a new election. Appellants hereby respectfully request that the Court expedite the schedule for decision in this case, as discussed below. Appellants

further request, in the event that the Court holds for Appellants and orders new elections, that the Court order an expedited schedule for such elections.

### **I. Request to Expedite Decision of the Court of Appeals**

First, Appellants respectfully request that the Court expedite the current schedule for decision in this matter by moving oral argument to an earlier date or, if that is not possible, expediting decision to an earlier date even without oral argument. In the event that this Court were to rule for Appellants, there is still sufficient time to conduct the new election(s) that would be required, but the window for such action is closing quickly. Appellants herein describe the various pre-election requirements that would be applicable to new elections, and outline how new elections in the contested races could be facilitated by an order of this Court in Appellants' favor. Expediting the decision timetable by a week, or even a few days, would afford valuable flexibility to ensure that such elections could be completed so as not to interfere with the general election timetable.

Section 232.041 of the Election Code provides that “[i]n an election contest in which the contested election is declared void, the court shall include in its judgment an order directing the appropriate authority to order a new election.”<sup>1</sup> “As soon as practicable after the judgment becomes final, the district court shall set the date for the new election.... In the case of a primary election, the court shall direct

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<sup>1</sup> Appellants have requested that this Court reverse the judgment below and render judgment that the elections were void, prohibit motions for rehearing, and order new elections in both races with abbreviated schedules. Appellants' br. at 59.

the appropriate officers of the political party to hold the election on the date set.”  
Tex. Elec. Code § 231.007(a).

If this Court exercises its authority to prohibit motions for rehearing, *see id.* § 232.014(e), as Appellants have requested, then there will be no avenue for further review, because “[t]he decision of the court of appeals [in an accelerated appeal of a primary contest] is not reviewable by the supreme court by certified question or any other method.” *Id.* § 232.014(f). This Court’s decision will be final immediately upon issuance. The district court will immediately have the authority to set the date for the new election and order the appropriate Democratic Party official(s) to conduct it. *Id.* § 231.007(a).<sup>2</sup> The district court may also shorten the period for early voting by personal appearance, and set the date on which such voting shall begin, so long as it begins not later than the 10th day before election day. *Id.* § 231.007(c). The district court may also shorten the normal period between election day and the date of the official canvass. *Id.* § 231.007(f).

Once the court’s order sets out these dates, the election notice must be posted 21 days before the election on the relevant county’s bulletin board. *See* Tex. Elec. Code § 4.003(b) (notice for general and special elections); *id.* § 172.1112 (stating that notice of a primary election shall be posted in the manner prescribed by § 4.003(b) for general and special elections).

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<sup>2</sup> Here, this would be the Starr County Democratic Party chair with respect to both elections, and additionally the Democratic Party chairs in Duval and Jim Hogg counties with respect to conducting the new election for the 229th District Judge race.

Appellants suggest and request the following schedule. If this Court issues its decision by August 24, and if the decision orders new elections and prohibits motions for rehearing, then special District Judge Joel Johnson could immediately issue his order setting the new election and the relevant deadlines. The parties and/or the Court could communicate with Judge Johnson in the interim to advise him of the situation and ensure that he is awaiting the Court's ruling when it is released, so that he is prepared to act immediately to the extent necessary.

The following is a potential schedule to illustrate:

- Wednesday, Aug. 29 – court-ordered deadline for relevant county clerk(s) to post election notice (21 days prior to election day, unless notice period shortened by court order).
- Saturday, Sept. 8 – court-ordered first day of early voting by personal appearance (11 days prior to election day);
- Wednesday, Sept. 19 – court-ordered Election Day
- Thursday, Sept. 20 – court-ordered deadline for canvass to be completed

While tight, this schedule would incorporate the full 21-day period for notice by posting on the county bulletin board, and allow the canvass to be completed so that any mail ballots required to be sent to military or overseas voters who have requested them by a federal postcard application (FCPA) can be placed in the mail by the September 22 deadline. This process can be facilitated further, to the extent necessary, by additional specific orders of the district court, which “retains jurisdiction of the contest until the new election is completed and may make any

orders the court considers necessary to ensure its proper conduct.” Tex. Elec. Code § 231.007(g).<sup>3</sup>

Moreover, the Court can provide more breathing room in the schedule by expediting decision to an earlier date, shortening the 21-day statutory notice period, or both. For example, even if a decision were still released on August 24 as suggested above, modestly shortening the period for notice on the county bulletin boards from 21 to 19 days would allow Election Day to be Monday, September 17, providing a full four weekdays thereafter for completion of the canvass and to allow printing of whatever number of ballots must be mailed by Saturday, September 22.<sup>4</sup> The Court’s authority to adjust statutory deadlines to protect the electoral process is well-established, as recognized recently by the Texas Supreme Court in *In re Palomo*, 366 S.W.3d 193, 194 (Tex. 2012).<sup>5</sup> Further, the Court could issue its

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<sup>3</sup> For example, the district court could set the deadline by which the County chair must conduct the drawing to determine the order of names on the ballot. See Tex. Elec. Code § 172.082.

<sup>4</sup> Tex. Sec’y of State, November 6, 2018 Election Law Calendar, <https://www.sos.state.tx.us/elections/forms/November-6-2018-Calendar.pdf>.

<sup>5</sup> The Court in *In re Palomo* ordered a candidate’s name be placed on the ballot in a primary election, despite the fact that the deadline for certifying candidates’ names set by the United States District Court in redistricting litigation had passed, stating:

Sanchez argues that this Court cannot act after that deadline. But we have often ordered candidates placed on the ballot after statutory deadlines to protect the electoral process. *E.g.*, *Bird v. Rothstein*, 930 S.W.2d 586, 587 (Tex.1996); *Davis v. Taylor*, 930 S.W.2d 581, 584 (Tex.1996); *LaRouche v. Hannah*, 822 S.W.2d 632, 634 (Tex.1992); *Painter v. Shaner*, 667 S.W.2d 123, 124 (Tex.1984). Nothing in the federal court’s order setting dates for conducting this year’s delayed primary elections suggests that the deadlines should be treated any differently than the statutory deadlines they replace.

*In re Palomo*, 366 S.W.3d at 194 n.7 (emphasis added). Moreover, adjusting the notice deadline for a court-ordered new primary election would not delay the general election, but would facilitate the general election while protecting the rights of the candidates involved here, and the voters to vote in a free and fair election, to protect the electoral process. See, *e.g.*, *Triantaphyllis v. Gamble*,

decision by order with an opinion to follow later. *See id.* at 194 (“We issued our order without opinion so as not to delay printing of the ballots.”).

## **II. Regardless of the election timetable, this dispute will not be mooted.**

As demonstrated above, there is sufficient time remaining to conduct a new election in one or both contested races if this Court rules for Appellants, and Appellants respectfully request that the decision be expedited so as to afford maximum flexibility. However, even if this Court’s decision were delayed to the point that it became impossible to order a new election for these Appellants with regard to the 2018 primaries, the court would retain jurisdiction to decide the important issues presented here under the exception for disputes capable of repetition yet evading review. Appellants did not want to delay the filing of this motion, requesting their primary relief sought (expediting the schedule for decision to prevent mootness), but will amend it as soon as possible to more fully address this exception.

### **Prayer**

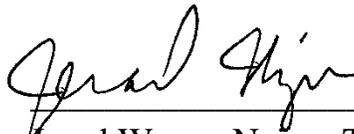
Appellants respectfully request that the Court expedite its decisional process in this matter in order to preserve the ability to provide for a new election in the 2018 primaries affected here. Further, in the event the Court rules for one or both of the appellants, Appellants request that the Court’s order dictate a schedule for the new

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93 S.W.3d 398, 405 (Tex. App.—Houston 14th Dist.] 2002, pet. denied) (recognizing that “the right to vote for a candidate of one’s choice has been described as ‘the essence of a democratic society’”) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

election(s) so as to facilitate a timely election. Lastly, and only in the event that it becomes impossible to provide for new elections for the 2018 primaries at issue, Appellants maintain that this Court retains jurisdiction over this dispute and will elaborate in a subsequent filing.

Respectfully submitted,

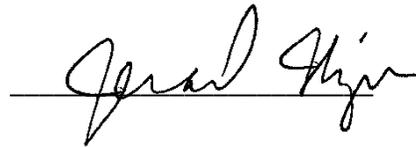


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### CERTIFICATE OF CONFERENCE

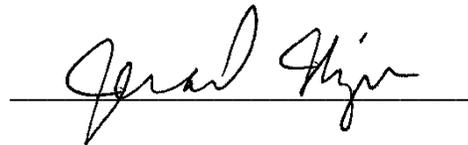
I hereby certify that I have conferred today with counsel for Appellees, Mr. Carlos Escobar, by email. I explained that I would be asking for expedited consideration of this appeal, with or without oral argument, and that I would suggest August 24 as a target for an expedited decision. He advised that Appellees are opposed to this motion. Mr. Escobar did not provide a reason for the opposition, nor did he claim any scheduling conflicts. His response simply said Appellees are opposed.

A handwritten signature in black ink, reading "Jerald Hijo", is written over a horizontal line.

### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document, along with any accompanying exhibits, has been served by eService on the following counsel of record on August 15, 2018.

Carlos Omar Escobar  
Escobar Law Firm, PLLC  
2415 North 10<sup>th</sup> St., McAllen, TX 78501  
*Counsel for Eloy Vera and Baldemar Garza*

A handwritten signature in black ink, reading "Jerald Hijo", is written over a horizontal line.