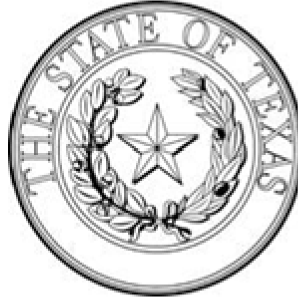
Petition for Writ of Mandamus Dismissed and Opinion filed June 23, 2020.



In The

Fourteenth Court of Appeals

NO. 14-20-00310-CV

IN RE STEVE KHERKHER, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS

OPINION

On April 20, 2020, relator Steve Kherkher filed a petition for writ of mandamus. *See* Tex. Elec. Code Ann. § 273.061. Kherkher requests that this court compel Lillie Schechter, Chair, Harris County Democratic Party, to declare Brittanye Lashay Morris ineligible to be on the November 3, 2020 general election ballot for the 333rd District Court in Harris County. Kherkher asserts that sworn public records conclusively establish that Morris does not meet the constitutional residency requirements. Morris filed an amended motion to dismiss Kherkher's petition for lack of standing. We grant the amended motion to dismiss and dismiss the petition.

BACKGROUND

Morris won the Democratic nomination for the position of judge of the 333rd District Court in Harris County in the March 3, 2020 primary election. On March 18, 2020, approximately two weeks after the primary election, Kherkher filed a challenge to the eligibility of Morris with Schechter. Kherkher asserted that he provided Schechter with public records, which established that Morris did not meet the residency requirements because she had lived in Fort Bend County for part of the two years before the upcoming November 3, 2020 general election. *See* Tex. Const. Art 5, § 7 (requiring, in relevant part, that district judge reside "in the district in which he was elected for two (2) years next preceding his election").

On March 21, 2020, Schechter advised Morris that she had received public records, including a residence homestead application for property in Fort Bend County, that appeared to establish conclusively that Morris had not resided within Harris County continuously for the two years next preceding November 3, 2020. Schechter stated that she was inclined to declare Morris ineligible to be a candidate for judge of the 333rd District Court on the November 3, 2020 general election ballot. However, Schechter afforded Morris an opportunity to demonstrate that Morris had been a resident of Harris County continuously from November 3, 2018, and had not been a resident of Fort Bend County at any time from November 3, 2018, to the date of the notification. Schechter gave Morris until March 27, 2020, to respond.

Morris responded that a homestead application does not conclusively establish a candidate's residence at the property subject to the exemption and, therefore, Schechter had not been presented with any public records that conclusively showed that Morris resided anywhere other than Harris County for the previous two years as

stated in Morris's application. Morris did not provide any documents to Schechter. On March 31, 2020, Schechter informed Morris that she concluded that the homestead application conclusively established that Morris failed to meet the residency requirements and declared Morris ineligible for the position of judge of the 333rd District Court.

Morris submitted documents to Schechter on April 7, 2020. The next day, Schechter advised Morris that the documents contained the type of information Schechter requested from Morris in the March 18, 2020 correspondence. On April 8, 2020, Schechter announced that,"[b]ased on those documents, which were not previously available to me, I am now able to consider [Morris] eligible to be on the ballot."

In this mandamus proceeding, Kherkher contends that Schechter had a ministerial duty to declare Morris ineligible for judge of the 333rd District Court when she was presented with public records establishing that Morris had not met the residency requirements for that office. Kherkher, therefore, asks this court to compel Schechter to declare Morris ineligible to be a candidate for judge of the 333rd District Court.

In response, Morris filed a motion and amended motion to dismiss for lack of jurisdiction in this court, asserting that relator does not have standing to challenge her eligibility to be a candidate for judge of the 333rd District Court. Because the amended motion to dismiss is dispositive, we address it first and do not reach the merits of the petition.

MOTION TO DISMISS

Standing is a constitutional prerequisite to maintaining suit. *Jefferson Cty. v. Jefferson Cty. Constables Ass'n*, 546 S.W.3d 661, 666 (Tex. 2018). Standing

consists of some interest peculiar to the person individually and not as a member of the general public. *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984). In other words, standing requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court. *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 154 (Tex. 2012). The claimant must be personally injured rather than the public at large. *Id.* at 155. "After all, our Constitution opens the courthouse doors only to those who have or are suffering an injury." *Id.* Standing to sue may be predicated on either statutory or common law authority. *Aubrey v. Aubrey*, 523 S.W.3d 299, 311 (Tex. App.—Dallas 2017, no pet.); *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 850 (Tex. App.—Fort Worth 2005, no pet.).

Morris asserts that only a candidate for the 333rd District Court would have standing to challenge her eligibility and therefore, Kherkher, as a voter, does not have standing. It is well-established that a voter having no special interest cannot bring suit seeking the removal of an ineligible candidate from the ballot. *Allen v. Fisher*, 9 S.W.2d 731, 732 (Tex. 1928); *Clifton v. Walters*, 308 S.W.3d 94, 98–99 (Tex. App.—Fort Worth 2010, pet. denied); *Brimer v. Maxwell*, 265 S.W.3d 926, 928 (Tex. App.—Dallas 2008, no pet.); *Lemons v. Wylie*, 563 S.W.2d 882, 883 (Tex. App.—Amarillo 1978, no writ). A candidate for the same office has an interest in not being opposed by an ineligible candidate that is separate and apart from the interest of the general public and, therefore, has standing. *Risner v. Harris Cty. Republican Party*, 444 S.W.3d 327, 337 (Tex. App.—Houston [1st Dist.] 2014, no pet.) *In re Jones*, 978 S.W.2d 648 (Tex. App.—Amarillo, orig. proceeding [mand. denied]); *Lemons*, 563 S.W.2d at 883; *Adkins v. Rawls*, 182 S.W.2d 509, 512 (Tex. App.—Waco 1994, no writ). But even a primary opponent, after the primary election, has no greater standing than any other voter to challenge a nominee in the

general election. *See Allen*, 9 S.W.2d at 732. Kherker argues that this caselaw does not apply to him for two reasons.

I. Statutory Standing

Kherkher first asserts that he has statutory standing to challenge Morris's eligibility based on two statutory provisions: Sections 273.061 and 145.003 of the Election Code. *See* Tex. Elec. Code Ann. §§ 145.003, 273.061.

"[T]he judge-made criteria regarding standing do not apply when the Texas Legislature has conferred standing through a statute." *In re Sullivan*, 157 S.W.3d 911, 915 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding [mand. denied]); *see also Zaatari v. City of Austin*, No. 03-17-00812-CV, — S.W.3d —, 2019 WL 6336186 (Tex. App.—Austin Nov. 27, 2019, no pet. h.) (stating that common-law standards are not dispositive if Legislature has conferred standing by statute). "In statutory standing cases, . . . the analysis is a straight statutory construction of the relevant statute to determine upon whom the Texas Legislature conferred standing and whether the claimant in question falls in that category." *Sullivan*, 157 S.W.3d at 915; *see also Nephrology Leaders & Assocs. v. Am. Renal Assocs., LLC*, 573 S.W.3d 912, 916 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (stating that courts must determine whether plaintiff has established that he has been injured or wronged within parameters of statutory language); *Everett*, 178 S.W.3d at 851 (stating that "[w]hen standing has been statutorily conferred, the statute itself serves as the proper framework for a standing analysis").

Statutory construction is a question of law. *Sunstate Equip. Co., LLC v. Hegar*, No. 17-0444, — S.W.3d —, 2020 WL 1660036, at *2 (Tex. Apr. 3, 2020). When construing a statute, our primary objective is to give effect to the Legislature's intent. *In re D.S.*, No. 18-0908, — S.W.3d —, 2020 WL 2363408, at *5 (Tex. May

8, 2020). A statute's unambiguous language controls. *City of Richardson v. Oncor Elec. Delivery Co.*, 539 S.W.3d 252, 261 (Tex. 2018). "In construing a statute, we assume the Legislature chose statutory language with care, included each chosen word for a purpose, and purposefully omitted all other words." *In re D.S.*, 2020 WL 2363408, at *5. "When interpreting the Legislature's words, . . . we must never 'rewrite the statute under the guise of interpreting it.'" *Colo. Cty. v. Staff*, 510 S.W.3d 435, 444 (Tex. 2017) (quoting *In re Ford Motor Co.*, 442 S.W.3d 265, 284 (Tex. 2014)); *see also KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 183 (Tex. 2019) (explaining that a court must enforce statute as written and refrain from rewriting text chosen by lawmakers); *Ferreira v. Butler*, 575 S.W.3d 331, 337 (Tex. 2019) (explaining that changing the meaning of a statute by adding words is a legislative, not judicial, function).

A. Section 273.061

The first section Kherkher relies on in asserting statutory standing is section 273.061, which provides the following:

> The supreme court or a court of appeals may 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.

Tex. Elec. Code Ann. § 273.061.

Kherkher asserts that he has standing because compelling Schechter to declare Morris ineligible is an action "in connection with the holding of an election." *See id.* Kherkher posits that this court, in *In re Hotze*, left open, at a minimum, the question of what statutory standing section 273.061 confers on individuals who seek to compel the performance of a ministerial duty concerning an election. *See* No. 14-

08-00421-CV, 2008 WL 4380228 (Tex. App.—Houston [14th Dist.] July 10, 2008, orig. proceeding) (mem. op.).

In *Hotze*, the voters passed a proposition, which related to limits on all combined city revenues. *Id.* at *1. The relator brought a mandamus proceeding, complaining that, although the proposition had been certified and added to the city's charter, the mayor, city controller, and the city council had not obtained verification from the city's outside accountants that the spending and revenue limits were in compliance for the two previous fiscal years. *Id.* We addressed whether the relator had standing under section 273.061. *Id.*

We set forth the common-law standard for standing:

> To have standing, a party must demonstrate that he "possesses an interest in a conflict distinct from that of the general public, such that the defendant's actions have caused the plaintiff some particular injury."

Id. (quoting *Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001)). The relator asserted that he had an interest in the same way as signers of an initiative petition have an interest in an election contest from that of the general public. *Id.* (citing *Blum v. Lanier*, 997 S.W.2d 259, 262 (Tex. 1999); *Glass v. Smith*, 244 Tex. 645, 648 (Tex. 1951)). Analyzing the relief the relator sought, we determined that the implementation and enforcement of the proposition went beyond the election process and, therefore, seeking to compel the respondents to perform their duties was not "in connection with the holding of an election." *Id.* at *3 (quoting Tex. Elec. Code Ann. § 273.061). Based on this, we held that the relator did not have standing under section 273.061. *Id.*

In *Hotze*, we still required the relator to show that he had an interest distinct from that of the general public such that he suffered some particular injury. *See id.* at *1 (quoting *Williams*, 52 S.W.3d at 178).

In *Andrade v. NAACP of Austin*, the Texas Supreme Court addressed whether Section 273.08 of the Election Code conferred standing on voters who alleged that the Secretary of State's certification of a paperless direct recording electronic voting machine known as "eslate" deprived them of their statutory right to a recount. *See* 345 S.W.3d 1, 17 (Tex. 2011). Section 273.081 provides that "[a] person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring." Tex. Elec. Code Ann. § 273.081. The court held that section 273.081 "does not create standing—it merely authorizes injunctive relief." *Andrade*, 345 S.W.3d at 17. Statutes such as section 273.081, "which permit 'persons aggrieved,' 'persons adversely affected,' [or] 'any party in interest,' to sue, still require that the plaintiff show how he has been injured or damaged other than as a member of the general public." *Id.* (quoting *Scott v. Bd. of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966)). In *Andrade*, the voters made no showing that the Secretary of State's certification of the "eslate" machine harmed them other than as members of the general public. *Id.*

If the language found in section 273.081—"[a] person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code"—does not confer standing without a showing of harm other than as a member of the general public, then there is no reason to conclude that section 273.061 would create individual standing without the claimant showing a particularized injury beyond that of the general public. When the Legislature intends to confer standing by statute, it has shown that it is capable of unambiguously creating standing. *See*,

e.g., Grossman v. Wolfe, 250, 257 (Tex. App.—Austin 2019, pet. denied) (holding that Texas Antiquities Code, which provides "[a] citizen of the State of Texas may bring an action . . . for restraining orders and injunctive relief to restrain and enjoin violations or threatened violations" of Code, conferred standing on city resident) (quoting Tex. Nat. Res. Code Ann. § 191.173(a))); *Burks v. Yarbrough*, 157 S.W.3d 876, 880 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (holding that Open Meetings Act, which provides that an "interested person . . . 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" broadly conferred standing) (quoting Tex. Gov't Code Ann. § 551.142(a))). We conclude that section 273.061 does not confer standing on Kherkher to challenge Morris's eligibility.

B. Section 145.003

Kherkher also claims that he has statutory standing to challenge Morris's eligibility under section 145.003 of the Election Code because he presented the public record to Schechter. *See* Tex. Elec. Code Ann. § 145.003. Under section 145.003(f), "[a] candidate may be declared ineligible only if: (1) the information on the candidate's application for a place on the ballot indicates that the candidate is ineligible for the office; or (2) facts indicating that the candidate is ineligible are conclusively established by another public record." *Id.* § 145.003(f). Section 145.003(g) provides that "[w]hen presented with an application for a place on the ballot or another public record containing information pertinent to a candidate's eligibility, the appropriate authority shall promptly review the record." *Id.* § 145.003(g). "If the authority determines that the record establishes ineligibility as provided in Subsection (f), the authority shall declare the candidate ineligible." *Id.*

Nothing in the plain language of section 145.003 refers to standing. Kherkher's desire to enforce the Election Code does not confer standing on him to maintain his challenge to Morris's eligibility. *See In re Baker*, 404 S.W.3d 575, 579 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding) (holding that interest in having party chairman follow Election Code was not different from that of other member of public at large, "all of whom may be safely presumed to favor general enforcement of the laws" and thus did not confer standing to challenge eligibility of candidate to be on ballot).

II. Constitutional Standing

Kherkher also asserts that he has constitutional standing because he contributed campaign funds to both the Democratic Party and "the constitutionally eligible candidate in the contest for the 333rd Harris County District Court at a maximum level." According to Kherkher, his Democratic Party contributions are being used, in part, to fund "Get-Out-The-Vote" campaigns and "Joint Judicial" campaigns that will include Morris. Kherkher states that he cannot obtain a refund of contributed funds, which will be spent on an ineligible candidate.

The court in *Baker* was presented with the question of whether the relator had standing to challenge eligibility of a Republican primary candidate on the basis that he was a contributor to a Democratic primary candidate for the same court. 404 S.W.3d at 579. The court, however, determined that it was not necessary to reach that issue. *Id.* at 580. Even if the court assumed that financial contributions were sufficient to provide standing, the relator's alleged injury was still contingent upon the purportedly ineligible Republican candidate winning the primary and the Democratic candidate supported by the relator winning the primary. *Id.* However, even though it was not necessary for the court to reach the financial-contribution

issue, it concluded that the considerations that give opposing candidates standing to challenge each other's ballot eligibility do not necessarily establish that a candidate's financial contributors may also claim an injury distinct from that sustained by the public at large. *Id.* at 582. Kherkher has cited no authority supporting his position that financial contributions provide him with an injury distinct from that of the general public to confer standing to challenge Morris's eligibility to be on the ballot for the general election. We decline to so hold.

Kherkher further claims that he has constitutional standing because he voted in the Democratic primary and intends to vote in the general election on November 3, 2020, but he will not have the opportunity to vote for an eligible candidate for the 333rd District Court unless this court grants him relief. As Morris argued in her motion to dismiss, the mere fact that Kherkher is a voter is not sufficient to confer standing to challenge Morris's eligibility under well-settled Texas law. *See Allen*, 9 S.W.2d at 732; *Clifton*, 308 S.W.3d at 98–99; *Brimer*, 265 S.W.3d at 928; *Lemons*, 563 S.W.2d at 883. Kherkher can also write in the name of an eligible democratic candidate. Therefore, Kherkher does not have standing based on his status as a voter to maintain his challenge to Morris's eligibility as a candidate for judge of the 333rd District Court.

CONCLUSION

We conclude that Kherkher does not have standing to challenge Morris's eligibility to appear on the ballot for the general election on November 3, 2020, as a candidate for the 333rd District Court. Morris's amended motion to dismiss is granted and Kherkher's petition for writ of mandamus is dismissed for lack of jurisdiction.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Christopher, Wise, and Zimmerer.