

NO. _____

NATHAN MACIAS,

Contestant - Petitioner

v.

DOUG MILLER

Contestee - Respondent

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IN THE DISTRICT COURT

_____ JUDICIAL DISTRICT

COMAL COUNTY, TEXAS

**ORIGINAL PETITION INITIATING ELECTION CONTEST,
REQUEST FOR DISCLOSURE, REQUEST FOR PRODUCTION, MOTION TO
MODIFY STANDARD DISCOVERY PROCEDURES,
MOTION TO INSPECT ELECTION RECORDS OF REPUBLICAN PARTY OF TEXAS,
MOTION TO INSPECT ELECTION RECORDS OF BANDERA, COMAL, KENDALL
AND GILLESPIE COUNTIES, REQUEST FOR EXPEDITED HEARING
ON PENDING MOTIONS**

Petitioner-contestant Representative Macias, initiating an election contest under the Texas Election Code against respondent-contestee Doug Miller, respectfully shows as follows:

ELECTION CONTEST

1. This original petition initiating an election contest is filed pursuant to Section 232.002 of the Election Code.

2. Under Section 232.009(a) of the Election Code, the Comal County District Clerk must "promptly deliver written notice of the filing to the presiding officer of the final canvassing authority for the contested election." As required by Section 232.009(d), Representative Macias provides the following name and address of the person to whom that notice must be delivered: Tina J. Benkiser, Chairman, Republican Party of Texas, 900 Congress Avenue, Suite 300, Austin, Texas 78701.

3. As required by Section 232.008(d) of the Election Code, Representative Macias delivered a copy of this original petition to the Texas Secretary of State on or before the filing deadline.

4. The Respondent-Contestee may be notified as follows: Mr. Doug Miller, 865 Fredericksburg, New Braunfels, Texas 78130; (830) 625-3000.

5. In the Republican Party of Texas primary election held March 4, 2008, Representative Nathan Macias and Doug Miller sought their party's nomination for the office of State Representative for District 73. The final canvass of the March 4th Republican primary election issued by the Republican Party of Texas on March 19, 2008, states that Miller received 29 more votes than Representative Macias, out of almost 29,324 votes cast (which is a margin of less than 0.1%), and therefore, Miller is currently the party's nominee for the relevant office in the November 2008 general election. Representative Macias requested a recount which was conducted from March 24 to March 26, 2008, the final canvass of the results of the recount has not yet occurred.

6. Representative Macias asserts that the outcome of the contested election, as shown by the last canvass, is not the true outcome of the election. *See* § 221.003(a), Election Code.

7. Representative Macias generally contends that "illegal votes" (as defined by Section 221.003(b) of the Election Code: "'illegal vote' means a vote that is not legally countable") were counted for Miller and/or that persons officially involved in the administration of the contested election failed to count legal votes for Representative Macias and/or engaged in other fraud and/or illegal conduct and/or made mistakes in conducting the election or in counting the ballots.

8. Additionally, Representative Macias alleges the final canvass does not include legal votes cast for Representative Macias in Bandera, Comal, Gillespie and Kendall counties. Republican primaries were conducted in Bandera, Comal, Gillespie and Kendall counties, but legal votes for Representative Macias in those counties were not included in the final canvass. In the aggregate, Representative Macias actually prevailed over Miller in those 4 counties.

9. The final canvass includes illegal votes for Miller in Bandera, Comal, Gillespie and Kendall counties. The final canvass also failed to include legal votes for Representative Macias in Bandera, Comal, Gillespie and Kendall counties. Obviously, whether due to mistake or fraud, the vote totals reported for Bandera, Comal, Gillespie and Kendall counties in the contested primary election are incorrect.

ILLEGAL VOTES WERE INCLUDED IN THE
VOTE TOTALS OF THE MARCH 4, 2008 PRIMARY ELECTION

10. Pursuant to Representative Macias' request, the Texas Secretary of State provided the Macias campaign with an official list of all registered voters who voted in the Republican and Democratic Primaries of March 4, 2008. When the two lists, Republican and Democratic voters who voted in both primaries were compared, the results were very disturbing. Just as in Harris County, where the County Clerk reported there were 1,147 voters who voted in both the Republican and the Democratic primaries of 2008, using the same method used by the Harris County Clerk, we compared the list provided to us by the Texas Secretary of State and discovered there are ***Two Hundred Fifty Three (253) voters*** with unique voter ID numbers (VUIDs) who appear to have illegally voted in both the Republican and the Democratic primaries in District 73. Voting in both the Republican and Democratic primaries is strictly prohibited by the Texas Election Code § 162.013. In light of this comparison of official records from the Texas Secretary of State's office, it is abundantly clear that void and illegal (i.e., "double") votes are currently included in the results of the District 73 election.

11. Due to the constitutional principles of secrecy of the ballot and the constitutional right against self-incrimination held by each of the alleged "double voters," it is impossible to ever identify and remove the illegally casts ballots which are included in the results of the District 73 primary election. And because the number of illegally casts ballots far exceeds the miniscule difference between the contestants in this election, it will be impossible to ever know to a legal certainty who actually received a majority of the legal votes. Therefore, the only possible legal and equitable remedy which can accurately determine who the majority of Republicans chose as their nominee in House District 73 is by the Court ordering a new election in the district.

ILLEGAL MAIL IN ABSENTEE BALLOTS WERE INCLUDED IN

THE VOTE TOTALS OF THE PRIMARY ELECTION

12. Illegal voters were not the only problem with the results of this primary election. The Comal County original election results and the recount totals included forty-four (44) illegal mail in early vote ballots that were not signed by the Comal County clerk, who serves as the election judge for mail in early voting. The lack of the County Clerk's signature on these 44 mail in early vote ballots makes them illegal votes according to the Election Code. "The presiding judge's signature ***shall*** be placed on the back of each ballot to be used at the polling place." Tex. Elec. Code Ann. § 62.008(a) (emphasis added); furthermore, "...an unsigned

ballot may not be made available for selection by the voters.” Tex. Elec. Code § 62.008(c).¹ In the case of mail in ballots it is particularly important to be able to identify and verify that the ballots voted are, in fact, the same ballots that were issued at the courthouse since a mail in ballot when it is cast is not at the polling place, and it has been outside the polling place for an extended period of time during which no election official can attest to the integrity of the mail in ballot. Therefore, in the case of a mail in ballot it is more important that it is not counted if it does not contain the signature of the election judge.

ILLEGAL PROVISIONAL AND EMERGENCY BALLOTS WERE INCLUDED
IN THE VOTE TOTALS OF THE PRIMARY ELECTION

13. On behalf of Representative Macias, we also have objections to three (3) illegal provisional ballots that were included in the Comal County recount. All three (3) of these illegal provisional ballots had carrier envelopes that lacked any indication that they were actually approved by the Ballot Board Judge, because they lack his signature, initials or any other identifier; therefore, counting these three (3) provisional ballots was a direct violation of the Texas Administrative Code Rule § 81.172 (i)(5). Additionally, one (1) of the three (3) illegal provisional ballots also lacked the signature of the election judge and was not properly marked as a “provisional” ballot. Texas Administrative Code § 81.174(a) (1) provides that, “the Election Judge shall . . . write or stamp ‘provisional’ on the back of the ballot.” Tex. Admin. Code 81.174(a)(1). As we have stated above, any ballot that lacks the signature of the election judge should already not be counted, and this provisional ballot lacked both key indicators designed to insure ballot integrity. Because the three (3) provisional ballots lacked several different indicators intended to ensure their integrity, they are illegal ballots and should not be included in any vote totals.

14. Illegal Emergency ballots were also improperly counted in Gillespie County, where we objected to the inclusion of three (3) unsigned emergency ballots in Precinct 4. As we have stated above, unsigned ballots should never be counted and in this case there is the added question of as to the integrity of the ballots which lack the normal indices of authenticity that come with regular ballots.

¹ “The clerk has the same duties and authority with respect to early voting as a presiding election judge...” § 83.001 (c) Tex. Elec. Code and “The county clerk is the early voting clerk for the county in ... a primary election...” § 83.002 (2) Tex. Elec. Code.

THE BALLOT BOX FROM PRECINCT 5 IN GILLESPIE COUNTY
CONTAINS ILLEGAL BALLOTS THAT WERE COUNTED

15. Aside from illegal ballots counted in the ballot Box of Precinct 4 of Gillespie County, there were far more numerous and disturbing irregularities with the Box of Precinct 5, particularly with the last voter sign in sheet that was used in Precinct 5 of Gillespie County. This irregularity is of far greater significance because of numerous other irregularities present in the handling and in the contents of Box 5. For instance, the extremely late arrival of the box from Precinct 5 at the central counting station was one of the first indicators of problems on election night. At the recount, we confirmed that Box 5 did not even arrive at the central counting station until 10:43 PM, almost 4 hours after the polls had closed. Not only was Box 5 the last ballot box to have arrived at the courthouse, and it would also be the last Box to be counted in the entire four (4) counties that comprise District 73. Box 5 was not counted until all the other in District 73 had already been completed, so that that the results without Box 5 were known before Box 5 was counted. While Box 5 was being counted, Representative Macias was leading district wide, but after the count of Box 5 was completed Representative Macias was behind by 38 votes. Other anomalies also existed in Precinct 5 of Gillespie County, for instance, Precinct 5 had the highest level of increase in Republican voter turnout of any precinct in the county compared to 2006, which was more than a 140% increase in voter turnout for that precinct. Additionally, twice as many emergency paper ballots were used in Box 5 as any other box in Gillespie County. The irregularities with Box 5 continued to occur after the counting commenced when it was discovered that candidate Doug Miller's in-laws were among the members of the counting team and no Macias representatives were included.

16. However, by far the most serious irregularity with respect to the election records of Gillespie County Box 5 involved the last voter sign-in sheet, which is called a "combination form." The defect evident on the face of this combination form is particularly damaging to all of the results from Box 5, especially when viewed in combination with the suspicious circumstances of the transportation and counting of Box 5, as well as the high proportion of emergency ballots cast there. The last voter sign-in sheet (or combination form) that was used in Precinct 5 of Gillespie was not attested to by the precinct election judge. This form has an attestation (i.e., an affidavit) in the lower left hand corner which is phrased "sworn to and subscribed before me this ____ day of _____ 20__." This date line is followed by a

signature line for the presiding election judge. Strangely, the date is filled in on the attestation, but there is no signature whatsoever by the election judge, and thus there is no verification of the 23 signatures of the voters who attempted to vote. Every other sign in sheet or combination form from Precinct 5 was properly signed the precinct judge, and this particular sheet was on the bottom of the stack of combination forms produced at the recount. The signature of the precinct judge on this form is absolutely essential to authenticate the signatures and other information which appears on the combination form. Without the attestation of the election judge every signature on this combination form is invalid as are the ballots that were cast in reliance upon the signatures. The failure of the presiding judge to sign the combination form invalidates all the signatures on the form. Based upon the numerous and serious irregularities that occurred with respect to Box 5 as well as the lack of proper attestation of the combination form, all of the results of Box 5 must be invalidated, and the true results of this election are unknowable. Therefore, the only viable remedy would be a new election.

17. Because the final canvass of the District 73 Republican primary unquestionably includes illegal votes for Miller in Bandera, Comal, Kendall and Gillespie Counties and does not include legal votes for Representative Macias, he has formed a good faith belief that, whether due to accident, mistake or fraud, the vote totals reported for Bandera, Comal, Kendall and Gillespie counties in this contested election are incorrect.

18. Representative Macias reserves the right to timely amend this original petition if additional evidence concerning the counting of illegal votes, fraud, illegal conduct, and/or mistakes related to the contested election are discovered.

DISCOVERY REQUESTS TO DOUG MILLER

19. Pursuant to Texas Rule of Civil Procedure 194, Representative Macias requests that Miller, within nine days of the service of this document, disclose and serve by hand-delivery the information and material described in Rule 194.2 of the Texas Rules of Civil Procedure.

20. Pursuant to Texas Rule of Civil Procedure 196, Representative Macias requests that Miller produce for inspection and copying:

- (a) all documents that establish or otherwise support the claim that the outcome of the contested election, as shown by the final canvass, is the true outcome;

(b) all documents that establish or otherwise support the claim that the outcome of the contested election, as shown by the final canvass, is not the true outcome; and

(c) all documents that discuss, concern, or otherwise relate to whether the outcome of the contested election, as shown by the final canvass, is or is not the true outcome.

21. Representative Macias requests that Miller produce the documents described in paragraphs 19 and 20 at the following date, time, and place: nine days after the service of this document; 10:00 a.m. at the business office of Miller's attorney in charge.

MOTION TO MODIFY STANDARD DISCOVERY PROCEDURES

22. Pursuant to Texas Rule of Civil Procedure 191.1, Representative Macias requests that the Court sign an order shortening the time allowed for Miller to comply with the discovery requests set forth above.

23. Representative Macias further requests that the Court sign an order requiring that Miller's response to the request for disclosure be hand-delivered.

24. The foregoing modifications to standard discovery procedures are necessary because of the accelerated procedures that apply to this primary election contest. For example, the trial would be over before the disclosures and documents were due if the standard discovery deadlines remain applicable. The foregoing reasons constitute good cause for the requested relief.

MOTION TO INSPECT ELECTION RECORDS OF REPUBLICAN PARTY OF TEXAS

25. Representative Macias requests that the Court sign an order allowing Representative Macias and/or his attorneys of record to review the following election records and other documents in the possession, custody, or control of the Republican Party of Texas:

(a) the final canvass issued March 19 or 31, 2008, and all supporting and related documents;

(b) any amended "final canvass," and all supporting and related documents;

(c) any local canvasses that were reported after the final canvass issued March 19 or 31, 2008 was completed, and all supporting and related documents;

(d) all documents that establish or otherwise support the claim that the outcome of the contested election, as shown by the final canvass, is the true outcome;

(e) all documents that establish or otherwise support the claim that the outcome of the contested election, as shown by the final canvass, is not the true outcome;

- (f) all documents that discuss, concern, or otherwise relate to whether the outcome of the contested election, as shown by the final canvass, is or is not the true outcome;
- (g) A copy of the full Report of the Credentials Committee of the 2006 State Convention;
- (h) Copies of all challenges to the credentials of Gillespie County Republican Chair, Pauline Cusack and the Gillespie County Delegation submitted to the State Officials Committee, the Temporary Committee on Credentials and/or the Credentials Committee pursuant to Rule 27 of the Rules of the RPT for the 2006 State Convention; and
- (i) Copies of all witness statements, affidavits, letters, notes, or other documents submitted in support of the challenges to the credentials of Gillespie County Republican Chair, Pauline Cusack and/or the delegation of Gillespie County submitted to the State Officials Committee, the Temporary Committee on Credentials and/or the Credentials Committee pursuant to Rule 27 of the Rules of the RPT for the 2006 State Convention.

MOTION TO INSPECT ELECTION RECORDS OF
BANDERA, COMAL, KENDALL AND GILLESPIE COUNTIES

26. Representative Macias desires to perform a partial pretrial audit of the election records (including "secured" items) in the possession, custody, or control of the Elections Administrators and/or the County Clerks for Bandera, Comal, Kendall, and Gillespie Counties which relate to the contested election.

27. Representative Macias desires access to all election records related to absentee voting and votes counted at the central counting station.

28. Representative Macias further desires access to all election records related to the early voting by personal appearance and the election day polling places.

29. Texas Election Code § 221.008 provides: A tribunal hearing an election contest may cause secured ballot boxes, voting machines, or other equipment used in the election to be unsecured to determine the correct vote count or any other fact that the tribunal considers pertinent to a fair and just disposition of the contest.

30. Representative Macias requests that the Court sign an order allowing Representative Macias, his attorneys, and/or his designated expert(s) to access, under the direct supervision of the County Clerks or Elections Administrators of Bandera, Comal, Kendall and/or Gillespie Counties and/or their agent(s), the foregoing election records.

31. Representative Macias further requests that the Court sign an order allowing Representative Macias, his attorneys, and/or his designated expert(s) to review the following election records and other documents in the possession, custody, or control of the County Clerks or Elections Administrators of Bandera, Comal, Kendall and/or Gillespie Counties and/or their agent(s):

- (a) the final local canvass, and all supporting and related documents;
- (b) any amended "final local canvass," and all supporting and related documents;
- (c) all documents that establish or otherwise support the claim that the vote totals of the contested elections in Bandera, Comal, Kendall and/or Gillespie Counties, as shown by the final local canvass, are correct;
- (d) all documents that establish or otherwise support the claim that the vote totals of the contested elections in Bandera, Comal, Kendall and/or Gillespie Counties County, as shown by the final local canvass, are not correct; and
- (e) all documents that discuss, concern, or otherwise relate to whether the vote totals of the contested elections in Bandera, Comal, Kendall and/or Gillespie Counties as shown by the final local canvass, are or are not correct.

REQUEST FOR EXPEDITED HEARING ON PENDING MOTIONS

32. An expedited hearing on the foregoing motions is necessary because of the accelerated procedures that apply to this primary election contest.

33. **Representative Macias requests that the Court set a hearing on the motions contained in this document at the earliest possible time.**

CONDITIONS PRECEDENT

34. All conditions precedent have been performed or have occurred.

REQUEST FOR RELIEF

35. Based on the foregoing, Representative Macias requests that the Court ascertain the true outcome of the contested election and declare the outcome or, in the alternative, that the Court declare the contested election is void and order a new election.

36. Representative Macias also seeks costs of suit, attorneys' fees and all other relief, in law and in equity, to which he may be entitled.

Respectfully submitted,

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CONTESTANT – PETITIONER DEMANDS TRIAL BY JURY