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January 25, 2023

Judge Peeples
Sitting in Assignment
190th District Court, Harris County Texas
delivered via email and e-service

RE: CAUSE NO.: 2023-00964, MEALER V. HIDALGO
CONTESTANT MEALER'S OBJECTION TO SUA SPONTE CONSOLIDATION

Dear Judge Peeples:

At our last master docket call hearing, mention was made of consolidating this case, and the 16 other cases in which I represent Contestants with other election contest cases filed by other attorneys with different legal theories, arguments, discovery needs, and individual burdens. The Court indicated it was inclined to consolidate these matters, and asked for the parties to indicate their support or opposition in a brief letter to the Court by today, January 25, 2023. Contestant herein objects to *sua sponte* consolidation, and because the Texas Rules of Civil Procedure prevent a party from indicating in letter that they wish the Court to take an action, a formal brief will follow to urge the Court not to adopt consolidation. This memo serves only as a notice to the Court of the Contestant's position.

The facts and circumstances in this matter do not warrant consolidation. There is no parity of parties: each case involves a separate set of Contestees and independent fact scenarios and independent burdens with strict standing rules that would have prevented the cases from being brought together or against the same or joint Contestees. For this reason, the risks of consolidation outweigh any potential

benefits and consequently this Court should find that consolidation of the cases across all Contestants/Contestees is inappropriate.

First, and primarily, it is *impossible* to have parity of parties in an election contest. Other than the fact that all the election contests at issue here are brought under same chapter of the election code, the 20+ actions some defense counsel seek to consolidate are completely unrelated. Each case involves a different Contestant (Plaintiff) and a different Contestee (Defendant). They share no parity of parties, nor can they due to the unique standing issues for election matters. The Election Code states that the proper Defendant in an election contest is the Contestee, or the winning candidate[1] (not the County, City, or Elections Department), and confers no standing upon other candidates to sue anyone over the outcome of their election other than their opponents. Moreover, the principles of standing under common law in Texas also fail to confer such standing upon candidates. Despite a statuary directive authorizing relief, courts in an election matter must consider their jurisdiction to proceed, and the standing of the petition is an element of their jurisdiction.[2] "The standing requirement stems from two limitations on subject matter jurisdiction: the separation of powers doctrine and, in Texas, the open courts provision."[3] To have standing in an election matter, the petitioner must allege some injury which is distinct from that which is sustained by the public at large.[4] Voting in a primary or a general election is insufficient to bestow standing.[5] And, consequently, the individual candidates only have standing to sue those candidates opposite them in the same race, or on the same ballot.[6] A petitioner's status as a citizen or a voter is insufficient to confer upon them standing to challenge the eligibility for a candidate in an election under Section 273.081 of

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[1] Tex. Elec. Code § 232.003

[2] *In re Baker*, 404 S.W.3d 575, 577 (2010) (citing *Tex. Ass'n of Business v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993).

[3] *Id.* at 578 (citing *Tex. Ass'n of Business,* 852 S.W.2d at 443.

[4] *Id.* (citing *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001); *Blum v. Lanier*, 997 S.W.2d 259, 261 (Tex. 1999); *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984).

[5] *Id.* citing *Brown*, 53 S.W.3d at 302; *Clifton v. Walters*, 308 S.W.3d 94, 98-99 (Tex.App.—Ft. Worth 2010, no pet. h).

[6] For example, *Brimer v. Maxwell*, 265 S.W.3d 926, 928 (Tex.App.—Dallas 2008, no pet.), *In re Jones*, 978 S.W.2d 648,651 (Tex.App.—Amarillo (1998)) (orig. proceeding [mand. denied]), and *Lemons v. Wylie*, 563 S.W.2d 882, 883 (Tex.Civ.App.-Amarillo (1978) no writ) all establish that a candidate for election to an office has standing to challenge the eligibility of another candidate for the same office because their interest is of a particularized nature.

the Texas Election Code.[7] Ultimately, "Article III of the United States Constitution requires a party who invokes the court's authority to 'show that he personally has suffered some actual or treated injury as a result of the putatively illegal conduct of the defendant' and that the injury 'fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."[8] This makes it impossible for any Contestant here to have standing as against the Contestee in another matter, and visa versa. Therefore they cannot by law share parties or burdens. Allowing Counsel for another Contestee to comment on the veracity of Contestants arguments or discovery requests would be adding words to the standing statute which is a legislative function, not a judicial one, and amount to improper interventions.

Second, Contestant objects because the law and facts of the matter are not the same, contrary to what some counsel for Contestees have stated. Contestant bases her case on the same law that underscores Article II VRA cases as it regards the disenfranchisement of voters served by a polling location, and what happens if insufficient mitigation is available.

Additionally and more importantly the legal theory presented by Contestant ***is wholly incompatible with, and mutually exclusive to,*** the legal theory promoted by the Contestants represented by Mr. Woodfill and Taylor. The Contestants they represent will be arguing that it is both possible and proper to deduce the number of individuals who have been disenfranchised by counting those individual witnesses attest to. Instead, Contestant Mealer and those who share her legal theory (17 in total), will be arguing that such evidence is improper and inappropriate, and unreliable. Rather, quantitative modeling must be used to demonstrate within acceptable margins of error, the number of people who were more likely than not, disenfranchised by a polling closure. And beyond the fact that litigating these two theories require different evidence, it must be obvious that they are mutually exclusive theories, the side-by-side litigation of which would be extremely prejudicial to all Contestants.

Additionally, the discovery tracks will be separate. Contestant Mealer has asked for only that information necessary to quantitatively model with accuracy the number of people disenfranchised. For example, she only needs to verify the number of mail in ballots that were requested and returned and counted, so as to verify what opportunity, if any, a disenfranchised voter might have had to avail

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[7] *In Re Jones*, 978 S.W.2d 648 at 651 (Tex.App.—Amarillo 1998, orig. proceeding [mand. denied] (citing *Allen v. Fisher,* 9 S.W.2d 731, 732 (1928)).

[8] *In re Baker*, 404 S.W.3d at 580 (citing *Valley Forge Christian College v. Ams United for Separation of Church & State, Inc.,* 454 U.S. 464, 472 (1982) (citing *Gladstone Relators v. Village of Bellwood,* 441 U.S. 91, 99 (1979) and *Simon v. E. Ky. Welfare Rights Org.* 426 U.S. 26, 38 (1976).

themselves of voting by mail, as is consistent with VRA case law and the legal theory proposed by Contestant. She has no interest in validating the individual mail in ballots or proving ballot fraud. Similarly, she requested Provisional rosters and tally sheets to be able to prove their contention that provisional ballots were not provided to those voters affected by the poll closures. She has no interest in proving up the merits of individual qualifications of provisional ballots or otherwise investigating the decisions of the various ballot board entities. She requests the Central Count plan and chain of custody documents solely to verify and track individuals who may have had a say or could have witnessed the events surrounding the poll closures, and because the Audit Report issued by the SOS has noted that some of the MBB produced by Harris County did not have their paperwork in order, and therefore SOS could not show where the MBBs originated from. Similarly, Contestant cannot include in her quantitative modeling ballots that perhaps do not, did not, or should not count after a reconciliation. This approach is entirely separate and apart from that taken in the other cases. And involving the lawyers for those Contestees in Discovery discussions would not only be inefficient, but prejudicial to the Contestant Mealer since they don't share legal theories, or arguments.

Although "the use of the permissive word 'may' [in the Rule] imports the exercise of discretion in such matters[,]…the court is not vested with unlimited discretion, and is required to exercise a sound and legal discretion within limits by the circumstances of the particular case. The express purpose of the rule is to further convenience and avoid prejudice, and thus promote the ends of justice. When all of the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby, there is no room for the exercise of discretion."[9] Allowing Contestees to have input in matters they are not the Defendants in, and could not intervene in, can only serve to expand and extend the litigation process, and disadvantage the Contestant. There is no allegation that any of the Contestees acted in concert, or indeed even that they are responsible for the issues which give rise to the underlying nature of the claims each Contestee makes. Nor does it need to. There is certainly no allegation by this Contestant that the Contestees acted in concert.

Ultimately, these are cases which involve 20+ different Contestees, but each case involves entirely independent fact scenarios and each has their own unique burden. Each Contestant seeks their own unique relief: a new election *for them*,

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[9] In re Gulf, supra, quoting *Womack v. Berry*, 291 S.W.2d 677, 683 (1956). *See also Dal-Briar Corp. v. Baskette*, 833 S.W.2d 612, 615 (1992).

not for everyone involved. For these reasons, the Contestants do not believe Consolidation is warranted.

As a final note, if the Court wishes to move forward sua sponte and consolidate these cases with those contests filed by other attorneys, or the Contestees wish to consolidate, the Contestant insists that for preservation of error, that Contestee file a motion, and that Contestant be given an opportunity to respond for the preservation of error, and that any hearing held on that matter include on the parties to the Motion.

Sincerely,

/s/ Elizabeth Alvarez

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