

STEVE SMITH,	§	IN THE DISTRICT COURT
	§	
Petitioner-Contestant,	§	
	§	
v.	§	OF TRAVIS COUNTY, TEXAS
	§	
DON WILLETT,	§	
	§	
Respondent-Contestee.	§	250th JUDICIAL DISTRICT

**ORIGINAL PETITION INITIATING ELECTION CONTEST,
 REQUEST FOR DISCLOSURE, REQUEST FOR PRODUCTION,
 MOTION TO MODIFY STANDARD DISCOVERY PROCEDURES,
 MOTION FOR 10-DAY CONTINUANCE OF TRIAL,
 MOTION TO INSPECT ELECTION RECORDS OF REPUBLICAN PARTY OF TEXAS,
 MOTION TO INSPECT ELECTION RECORDS OF TARRANT COUNTY,
 MOTION TO INSPECT ELECTION RECORDS OF GREGG COUNTY,
 REQUEST FOR EXPEDITED HEARING ON PENDING MOTIONS, AND
 REQUEST FOR INJUNCTIVE RELIEF REGARDING DUE PROCESS CLAIM**

Petitioner-contestant Steve Smith, initiating an election contest under the Texas Election Code and asserting a related due process claim under the Texas Constitution against respondent-contestee Don Willett, respectfully shows:

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 Travis 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), Smith 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, Smith delivered a copy of this original petition to the Texas Secretary of State on or before the filing deadline.

4. In the Republican Party of Texas primary election held March 7, 2006, Steve Smith and Don Willett sought their party's nomination for the office of Justice of the Texas Supreme Court, Place 2.

5. The final canvass of the March 7th Republican primary election issued by the Republican Party of Texas on March 22, 2006 states that Willett received more votes than Smith and therefore Willett is currently the party's nominee for the relevant office in the November 2006 general election.

6. Smith asserts that the outcome of the contested election, as shown by the final canvass, is not the true outcome. See Section 221.003(a), Election Code.

7. Smith 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 Willett and/or that persons officially involved in the administration of the contested election failed to count legal votes for Smith and/or engaged in other fraud and/or illegal conduct and/or made mistakes.

8. The final canvass does not include legal votes cast for

Smith in at least seven counties. Republican primaries were conducted in the following counties but the votes cast in those counties were not included in the final canvass: Armstrong, Cass, Childress, Dimmit, Kent, Limestone, and Lynn. In the aggregate, Smith prevailed over Willett in those seven counties.

9. The final canvass includes illegal votes for Willett in Winkler County and does not include legal votes for Smith in Winkler County. The final canvass includes 273 votes (100%) for Willett and zero votes (0%) for Smith from Winkler County. In contrast, Smith received 74% of the vote from Winkler County in the 2002 Republican primary for Texas Supreme Court and he received 65% of the vote from Winkler County in the 2004 Republican primary for Texas Supreme Court. Obviously, whether due to mistake or fraud, the vote totals reported for Winkler County in the contested election are incorrect.

10. The final canvass includes illegal votes for Willett in Galveston County. The final canvass includes 2,461 votes (51%) for Willett and 2,406 votes (49%) for Smith from Galveston County. In contrast, Smith received 55% of the vote from Galveston County in the 2004 Republican primary for Texas Supreme Court (and outperformed his statewide result by 8%). In its report filed with the Republican Party of Texas, the Galveston County Republican Executive Committee affirmatively refused to certify the votes cast in Galveston County, stating: "The Executive Committee refused to

certify the results at this time due to some remaining discrepancies in vote totals." The uncertified vote totals reported from Galveston County should not have been included in the final canvass.

11. The final canvass includes illegal votes for Willett in Tarrant County and does not include legal votes for Smith in Tarrant County. According to the final canvass, Smith would have a majority of the votes cast statewide in the contested election if Tarrant County were excluded (similarly, Smith would prevail statewide if Smith and Willet split the vote in Tarrant County). The final canvass includes 20,907 votes (62%) for Willett and 12,985 votes (38%) for Smith from Tarrant County. In contrast, Smith received 53% of the vote from Tarrant County in the 2004 Republican primary for Texas Supreme Court (and outperformed his statewide result by 6%). And unlike 2004, Smith received the endorsement of the Fort Worth Star-Telegram in 2006. In addition, the substantial problems experienced by Tarrant County in counting the votes in the contested election have been widely reported. Finally, in violation of the Election Code, the report filed with the Republican Party of Texas by the Tarrant County Republican Executive Committee was not certified as correct by the local canvassing authority. Based on the foregoing, Smith has a good faith belief that, whether due to mistake or fraud, the vote totals reported for Tarrant County in the contested election are incor-

rect.

12. The final canvass includes illegal votes for Willett in Gregg County and does not include legal votes for Smith in Gregg County. According to the final canvass, the votes cast in Gregg County in the contested election account for approximately one-half of Willett's statewide margin of victory. The final canvass includes 4,758 (70%) for Willett and 2,084 votes (30%) for Smith from Gregg County. In contrast, Smith received 43% of the vote from Gregg County in the 2004 Republican primary for Texas Supreme Court (and underperformed his statewide result by only 4%). Based on the foregoing, Smith has a good faith belief that, whether due to mistake or fraud, the vote totals reported for Gregg County in the contested election are incorrect.

13. Smith reserves the right to timely amend this original petition if additional evidence concerning the counting of votes, fraud, illegal conduct, or mistakes related to the contested election is discovered.

DISCOVERY REQUESTS

14. Pursuant to Texas Rule of Civil Procedure 194, Smith requests that Willett, within nine days of the service of this document, disclose and serve by hand-delivery the information and material described in Rule 194.2.

15. Pursuant to Texas Rule of Civil Procedure 196, Smith requests that Willett 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.

16. Smith requests that Willett produce the documents described in paragraph 15 at the following date, time, and place: nine days after the service of this document; 10:00 a.m.; business office of Willett's attorney in charge.

MOTION TO MODIFY STANDARD DISCOVERY PROCEDURES

17. Pursuant to Texas Rule of Civil Procedure 191.1, Smith requests that the Court sign an order shortening the time allowed for Willett to comply with the discovery requests set forth above.

18. Smith further requests that the Court sign an order requiring that Willett's response to the request for disclosure be hand-delivered.

19. 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 FOR 10-DAY CONTINUANCE OF TRIAL

20. Under Section 232.012 of the Election Code, accelerated procedures apply to the trial of this primary election contest.

21. Section 232.012(b)-(e) of the Election Code provides:

(b) When the contestant's petition is filed, the district clerk shall immediately notify the district judge of the filing.

(c) A contestee must file an answer to the contestant's petition not later than 10 a.m. of the fifth day after the date of service of citation on the contestee. The citation issued for the contestee must command the contestee to answer by the specified deadline and must direct the officer receiving the citation to return it unserved if it is not served within 10 days after the date of issuance.

(d) After the clerk receives the officer's return showing service of citation, the clerk shall promptly notify the district judge of that fact. The judge shall set the contest for trial for a date not later than the fifth day after the date by which the contestee must answer.

(e) The district judge may not grant a continuance in the trial except: (1) one time for a period not exceeding 10 days for good cause supported by the affidavit of a party; or (2) with the consent of the parties.

(emphasis added).

22. Pursuant to Section 232.012(e) of the Election Code, Smith requests that the Court sign an order granting him a 10-day continuance of the trial.

23. Smith needs the requested 10-day period (and more) to inspect election records held by the Republican Party of Texas,

Tarrant County and Gregg County, review the disclosures and documents provided by Willett in response to Smith's discovery requests, prepare and serve numerous trial subpoenas, and to otherwise properly prepare for the trial. The foregoing reasons constitute good cause for the requested relief.

24. This motion for continuance is supported by the affidavit of Smith attached to this document as Exhibit A.

MOTION TO INSPECT ELECTION RECORDS OF REPUBLICAN PARTY OF TEXAS

25. Smith requests that the Court sign an order allowing Smith 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 22, 2006, 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 22, 2006 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; and

(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.

MOTION TO INSPECT ELECTION RECORDS OF TARRANT COUNTY

26. Smith desires to perform a partial pretrial audit of the election records (including "secured" items) in the possession, custody, or control of the Tarrant County Elections Administrator which relate to the contested election.

27. Smith desires access to all election records related to absentee voting and the central counting station.

28. Smith further desires access to all election records related to ten percent of the early voting by personal appearance and ten percent of the election day polling places.

29. Section 221.008 of the Texas Election Code 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. Smith requests that the Court sign an order allowing Smith, his attorneys, and/or his designated expert(s) to access, under the direct supervision of the Tarrant County Elections Administrator and/or her agent(s), the foregoing election records.

31. Smith further requests that the Court sign an order allowing Smith, 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 Tarrant County Elections Administrator:

(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 election in Tarrant County, 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 election in Tarrant 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 election in Tarrant County, as shown by the final local canvass, are or are not correct.

MOTION TO INSPECT ELECTION RECORDS OF GREGG COUNTY

32. Smith desires to perform a partial pretrial audit of the election records (including "secured" items) in the possession, custody, or control of the Gregg County Elections Administrator which relate to the contested election.

33. Smith desires access to all election records related to absentee voting and the central counting station.

34. Smith further desires access to all election records related to twenty percent of the early voting by personal appearance and twenty percent of the election day polling places.

35. Smith requests that the Court sign an order allowing Smith, his attorneys, and/or his designated expert(s) to access, under the direct supervision of the Gregg County Elections Administrator and/or her agent(s), the foregoing election records.

36. Smith further requests that the Court sign an order allowing Smith, 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 Gregg County Elections Administrator:

(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 election in Gregg County, 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 election in Gregg 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 election in Gregg

County, as shown by the final local canvass, are or are not correct.

REQUEST FOR EXPEDITED HEARING ON PENDING MOTIONS

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

38. Smith requests that the Court set a hearing on the motions contained in this document at the earliest possible time.

REQUEST FOR INJUNCTIVE RELIEF REGARDING DUE PROCESS CLAIM

39. The accelerated procedures required by the Election Code, as applied to this primary election contest, violate Article I, Sections 13 and 19 of the Texas Constitution.

40. The accelerated procedures are manifestly inadequate to allow discovery of mistakes or fraud affecting the true outcome of the contested election. Under the accelerated procedures, only the most open and obvious mistakes and/or fraud are discoverable.

41. Smith requests that the Court enjoin the application of any Election Code provision that, as applied to this primary election contest, violates the Texas Constitution.

CONDITIONS PRECEDENT

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

REQUEST FOR RELIEF

43. Based on the foregoing, Steve Smith requests that the Court ascertain the true outcome of the contested election and declare the outcome or, in the alternative, declare the contested election void and order a new election.

44. Smith also seeks costs of suit and all other relief, in law and in equity, to which he may be entitled.

Respectfully submitted,

SMITH & ROGERS, P.C.
710 West Avenue
Austin, Texas

/ S /

By: _____

Steven W. Smith
Texas Bar No. 18685873
P.O. Box 926
Austin, Texas 78767
512-496-7818 - Telephone
512-301-4097 - Facsimile

David A. Rogers
Texas Bar No. 24014089
P.O. Box 926
Austin, Texas 78767
512-923-6188 - Telephone
512-301-4097 - Facsimile

Attorneys for Steve Smith

EXHIBIT A

STATE OF TEXAS §
§
TRAVIS COUNTY §

**AFFIDAVIT OF STEVE SMITH IN SUPPORT OF
MOTION FOR 10-DAY CONTINUANCE OF TRIAL**

Before me, the undersigned notary, on this day personally appeared Steve Smith, a person whose identity is known to me. After I administered an oath to him, upon his oath he stated:

1. "My name is Steve Smith. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I have been licensed to practice law in Texas since 1987. I have been a practicing attorney since 1987. I served over two years on the Texas Supreme Court in 2002-2004 and am currently in private practice in Austin, Texas.

3. I need the requested 10-day period (and more) to inspect election records held by the Republican Party of Texas, Tarrant County and Gregg County, review the disclosures and documents provided by Willett in response to my discovery requests, prepare and serve numerous trial subpoenas, and to otherwise properly prepare for the trial.

4. In my opinion, the foregoing reasons constitute good cause for granting the requested 10-day continuance."

/ S /

Steve Smith

Sworn to and subscribed before me by Steve Smith on March 31, 2006.

/ S /

Notary Public in and for
the State of Texas

My commission expires: 12/23/07