

CHAPTER 11:

EXTRAORDINARY AND EQUITABLE RELIEF

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I. INTRODUCTION

Requests for extraordinary writs (mandamus, prohibition, and quo warranto), equitable relief (various types of injunction), or declaratory judgments¹ are not uncommon in election-related litigation. When issued, writs of mandamus² compel officials to perform their legally required duties, writs of prohibition constrain and overturn the unauthorized exercise of judicial or quasi-judicial authority, quo warranto ousts usurpers from office, injunctions either compel or prohibit action, and declaratory judgments announce the rights, duties, and obligations of the parties.

Extraordinary writs, which originated in common law, are now frequently either authorized or limited by state statutes. Before receiving an extraordinary writ, requestors must usually demonstrate that no adequate, alternative form of relief is available and that they acted with utmost diligence lest they become vulnerable to laches.³ Extraordinary writs may offer plaintiffs an opportunity to challenge election officials' decisions in the absence of an administrative or judicial appeals process. Equitable relief is generally available when no adequate remedy at law exists. The most common equitable relief granted in election lawsuits is usually some form of injunction.

This chapter discusses the use of extraordinary and equitable relief in election-related lawsuits.

¹ Declaratory judgments are procedural devices and are not a form of relief. They are included in this chapter because plaintiffs sometimes erroneously request declaratory judgments rather than writs of mandamus or instead of filing an election contest.

² In practice, the "writ of" portion is frequently omitted when referring to the extraordinary writs. In addition, some states have statutory replacements for writs of mandamus, thus references to writs of mandamus or mandamus in this manual are intended to include the statutory equivalents, to the extent applicable.

³ State *ex rel.* Newell v. Tuscarawas County Bd. of Elections, 757 N.E.2d 1135, 1138 (Ohio 2001) (Douglas, J., dissenting) (per curiam).

II. EXTRAORDINARY WRITS

A. WRITS OF MANDAMUS

Mandamus is a discretionary writ that usually issues to compel a government official or government agency—such as election officials or the board of elections or its equivalents—to perform a legally required, ministerial public duty.⁴ Mandamus does not establish legal rights or duties; it only enforces the performance of preexisting public duties.⁵ For example, mandamus can compel a member of the state legislature to open and publish election returns,⁶ and it can compel an election official to register a voter or grant ballot access to a candidate or ballot measure.⁷

All states permit writs of mandamus⁸ or a statutory equivalent, although some states permit only the state supreme court to issue the writ while other states permit their lower courts to do so. To qualify for a writ of mandamus, the plaintiff⁹ must demonstrate the following:

- a clear legal right for the denied or withheld act at the time the suit was instituted,¹⁰
- the defendant's clear legal duty¹¹ to act as requested, coupled with failure to do so, and
- mandamus is the only available adequate remedy.

The majority view holds that a plaintiff's eligibility for mandamus relief is not conditioned on her first demanding that the defendant act because the legally-imposed duty operates as a continuing demand on the defendant's conduct.¹² The minority view requires plaintiffs to demand that the defendant act—and the defendant must usually refuse to act, either by his

⁴ Although less common, mandamus can also be used to compel an inferior court to act. See *In re Willbourn*, 590 So.2d 1381, 1386 (Miss. 1991) (ordering the lower court to dissolve a temporary restraining order that was preventing the election board from certifying a winner and, thus, holding up any opportunity for an election contest).

⁵ CHESTER JAMES ANTINEAU, *THE PRACTICE OF EXTRAORDINARY REMEDIES: HABEAS CORPUS AND THE OTHER COMMON LAW WRITS* 292 (1987); *State ex rel. Willke v. Taft*, 107 Ohio St. 3d 1 (2005) (noting courts cannot create the legal duties subject to mandamus action; they must be pre-existing).

⁶ ANTINEAU, *supra* note 5, at 312.

⁷ *Id.* at 313. Mandamus is unavailable where the official acted within his authorized discretion, exercised was not faulty. See *State ex rel. Vickers v. Summit County Council*, 97 Ohio St. 3d 204 (2002) (per curiam) (noting mandamus would not have been available even absent laches because the municipal council had no clear legal duty to submit every charter amendment proposal to the voters).

⁸ ANTINEAU, *supra* note 5, at 291.

⁹ Local practice rules might require petitions for mandamus be brought in state's name in relation to the plaintiff, *id.* at 292. Citizens and taxpayers may have standing to request mandamus to compel elections to be called as required and for performance of ministerial election-related duties, *id.* at 403, and citizens who signed petitions have standing to seek mandamus to compel the acceptance of the petition, *id.* at 320-22.

¹⁰ *Id.* at 296. Mandamus does not enforce uncertain, abstract, doubtful, or prospective claims. Mandamus is only available to compel future duties when clear that the defendant does not intend to perform it or when the future duty is continuous from a current duty he is not performing.

¹¹ The defendant's legal duty can arise from statutory or common law and must be something the defendant is capable of performing.

¹² ANTINEAU, *supra* note 5, at 297.

words or conduct—before seeking mandamus relief.¹³ The defendant’s anticipated refusal substitutes for actual refusal only when it is clear that the plaintiff’s demand would have been vain or useless.¹⁴

Virtually all legally required election duties have been subjected to a writ of mandamus at one time or another. Courts have issued writs of mandamus to compel government bodies or officials¹⁵ to:

- hold legally required public elections, including recall or initiative elections,
- accept legally conforming ballot measures or nominating petitions,
- add wrongfully omitted candidates’ names to the ballot,
- accept filing fees necessary to secure ballot access,
- restore wrongfully deleted names to a petition,
- conduct elections in conformity with local law,
- recognize qualified voters’ right to vote when wrongfully-denied,
- compel the provision of wrongfully-denied absentee ballots,
- disqualify void election returns,
- canvass the vote, and
- announce the election results and issue the election certificates.¹⁶

Mandamus will not:

- compel performance of discretionary activities unless in its absence the discretion would be exercised in a shocking, discriminatory, or unjust manner,¹⁷
- compel strict compliance with the law in disregard of its plain intent and spirit,¹⁸ nor
- issue when the controversy is moot.¹⁹

Courts may not issue mandamus that is actually a request for declaratory or injunctive relief in disguise.²⁰ Mandamus compels action, it does not prohibit it.²¹ Mandamus does not issue if an adequate alternative remedy exists²² or if such a remedy once existed but was lost because of

¹³ *Id.* at 298.

¹⁴ *Id.* at 297.

¹⁵ Necessary parties to mandamus actions are those government bodies or individuals with a clear, legal duty to perform the requested action.

¹⁶ ANTINEAU, *supra* note 5, at 320-22 (listing many cases).

¹⁷ *Walsh v. Boyle*, 166 N.Y.S. 681, 685 (N.Y. App. Div. 1917) (finding ballot order placement was left to officials’ discretion in absence of showing of discrimination that “shock[s] the conscience” or violates “all rights, decency and fair play”).

¹⁸ ANTINEAU, *supra* note 5, at 302.

¹⁹ *Id.* at 304.

²⁰ *State ex rel. Mackey v. Blackwell*, 106 Ohio St. 3d 261 (2005) (per curiam) (holding the mandamus claim fails for want of jurisdiction at both appeals and state supreme court levels because, based on the relator’s request that the court “prevent” and “prohibit[]” certain actions and declare that other actions violated a state statute, the realtors were actually seeking prohibitory injunctions and a declaratory judgment) *and* *State ex rel. Essig v. Blackwell*, 103 Ohio St. 3d 481 (2004).

²¹ See *Mackey*, 106 Ohio St. 3d.at 261 (per curiam) (noting the court must examine the petition to see if it seeks to compel or prohibit official action)(citation omitted)

²² ANTINEAU, *supra* note 5, at 294. See *Mackey*, 106 Ohio St. 3d.at 261 (finding mandamus not a substitute for a statutory election contest).

the plaintiff's unexcused delay.²³ Therefore, its availability may be limited or foreclosed when state statutes provide administrative review or expedited appeals from official actions.²⁴ To bar mandamus, the alternative remedy must be equally and fully sufficient and offer the speedy, adequate and specific remedy mandamus would provide.²⁵ Thus, a speedy and adequate injunction can bar mandamus,²⁶ but a mandatory injunction that fails to offer a complete remedy usually cannot.²⁷ Declaratory judgments are rarely adequate alternatives.²⁸ Adequate administrative remedies also bar mandamus,²⁹ but obviously futile, incomplete, or historically arbitrarily-applied administrative remedies do not.³⁰ In at least one case, the availability of a federal civil rights lawsuit under § 1983 barred mandamus.³¹

Even though requests for mandamus are actions at law, their availability is nonetheless subject to the equitable doctrines of unclean hands and laches.³² Moreover, mandamus cannot be used to compel actions that are unlawful, nugatory, fruitless, or contravene public policy. A writ of mandamus is also generally considered inappropriate if its issuance would cause confusion, embarrassment, disorder, or unnecessary hardship to the defendant public agency,³³ or would not promote substantial justice.³⁴

Although mandamus is a discretionary writ, courts may not arbitrarily or capriciously refuse to issue it. Nonetheless, a court's decision to grant or deny a writ of mandamus can be appealed only for abuse of discretion, prejudicial error of law, or failure to make a legal finding.³⁵ Courts can issue writs of mandamus in either an alternative or preemptory form. Alternative writs of mandamus order the recipient to take action or demonstrate why mandamus is inapplicable. Preemptory writs are final and absolute. In practice, courts commonly issue the alternative writ and reserve the preemptory form for instances when the alternative proves unavailing.

²³ ANTINEAU, *supra* note 5 at 299. *Anderson v. Ill. State Bd. of Elections*, 589 N.E.2d 907, 909 (Ill. App. Ct. 1992) (finding mandamus is appropriately denied when "proper and timely use" of statutory election remedies would have avoided resort to mandamus) (citation omitted).

²⁴ *In re Wilbourn*, 590 So.2d 1381, 1384-85 (Miss. 1991). *See also* *Gracey v. Grosse Pointe Farms Clerk*, 452 N.W.2d 471 (Mich. Ct. App. 1989) (holding, where administrative processes exist, mandamus may be limited to an order for the administrative remedies to proceed or to accelerate the process).

²⁵ Antineau, *supra* note 5, at 298-99.

²⁶ *Id.* at 299.

²⁷ *Id.* at 300.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *See State ex rel. Mackey v. Blackwell*, 106 Ohio St. 3d 261 (2005) (per curiam) (noting the adequacy of §1983 for federal civil rights violations, but not for state claims, because it can provide declaratory, injunctive and monetary relief).

³² When mandamus relief is not completely barred because of the election's proximity, the nearness may nonetheless alter the relief. *See Zaremborg v. Super. Ct.*, 8 Cal. Rptr. 3d 723, 730 (Ct. App. 2004) (issuing mandamus to a lower court to set aside its orders prohibiting a ballot measure from appearing on the ballot, but due to the nearness to the election, the ballot measure had to be placed on the ballot at a later election as there was insufficient time to add it to the originally contemplated election).

³³ ANTINEAU, *supra* note 5, at 300-301, 303.

³⁴ *Anderson v. Ill. State Bd. of Elections*, 589 N.E.2d 907, 909 (Ill. App. Ct. 1992).

³⁵ ANTINEAU, *supra* note 5, at 420.

B. WRITS OF PROHIBITION

Courts issue writs of prohibition when a judicial or quasi-judicial body has acted in a manner that exceeds its jurisdiction.³⁶ Writs of prohibition target judicial acts involving fraud, corruption, abuse of discretion, or actions that clearly disregard applicable statutory provisions. Elections boards act quasi-judicially when they:

- hold hearings to determine candidate qualifications,³⁷
- notice and/or call elections,
- grant ballot access to ballot measures, or
- remove candidates from the ballot.³⁸

Under the common law, every court of general jurisdiction could issue writs of prohibition. Today, state statutes may specify which courts may issue it.

Because prohibition stops only excessive judicial or quasi-judicial authority, it is unavailable to stop officials from performing their statutorily-mandated ministerial duties. Thus, a court can issue a writ of prohibition when a lower court exceeds its jurisdiction by ordering a recount not required by statute,³⁹ but cannot issue it to prevent the Secretary of State from receiving, tabulating and certifying election returns and results as constitutionally mandated.⁴⁰

Before a court issues a writ of prohibition, the petitioner must commonly demonstrate the following:

- the targeted inferior judicial or quasi-judicial tribunal exercised unauthorized power,
- the petitioner would be injured if the writ is denied,⁴¹ and
- no adequate alternate remedy exists.⁴²

Petitioners may also be required to exhaust all available administrative remedies before seeking prohibition.⁴³ Although petitioners are commonly required to first object to the court or body exceeding its jurisdiction before seeking a writ of prohibition, this requirement is frequently

³⁶ State *ex rel.* Travers v. McBride, 607 S.W.2d 851, 854 (Mo. Ct. App. 1980) (applicability of prohibition to lower courts); ANTINEAU, *supra* note 5, at 479 (applicability of prohibition to administrative bodies). Prohibition is generally unavailable when public officials act non-judicially, ANTINEAU, *supra* note 5, at 498.

³⁷ See Campaign to Elect Larry Carver Sheriff v. Campaign to Elect Anthony Stankiewicz Sheriff, 101 Ohio St. 3d 256 (2004).

³⁸ ANTINEAU, *supra* note 5, at 498, § 3.32.

³⁹ State *ex rel.* Travers v. McBride, 607 S.W.2d 851, 854 (Mo. Ct. App. 1980).

⁴⁰ *In re Wilbourn*, 590 So.2d 1381, 1385 (Miss. 1991) (citing Barnes v. Ladner, 131 So.2d 458 (Miss. 1961)).

⁴¹ State *ex rel.* Newell v. Tuscarawas County Bd. of Elections, 757 N.E.2d 1135, 1138 (Ohio 2001) (Douglas, J., dissenting) (*per curiam*); see ANTINEAU, *supra* note 5, at 502. The hardship may need to be extraordinary and amount to a great and irreparable injury if the writ is denied.

⁴² *Newell*, 757 N.E.2d at 1138.

⁴³ ANTINEAU, *supra* note 5, at 501 (failure to exhaust administrative remedies can lead to the request's dismissal as premature).

waived in interests of society or justice.⁴⁴ In addition, the petitioner must act in good faith and with clean hands.⁴⁵

Writs of prohibition are available both before and after the election, although untimely requests may be barred by laches. Before the election, writs of prohibition have been used to stop inferior courts from impermissibly counting the names on a recall petition and to prevent election boards from placing legally ineligible candidates' names on the ballot.⁴⁶

After the election, prohibition has restrained election boards from allowing others to view the ballots, and halted election contest proceedings when the lower court lacked jurisdiction or the contest was untimely filed.⁴⁷ If an otherwise mooted issue is of public importance, a court may issue a writ of prohibition to provide future guidance to election officers.⁴⁸

Courts usually deny requests for writs of prohibition when an adequate legal remedy or another extraordinary writ is available.⁴⁹ Before an alternate remedy can displace prohibition it usually must be equally prompt, convenient, and effective. Courts also deny requests for a writ of prohibition when issuing it would be useless or against public policy;⁵⁰ when the requestor's interest is unclear, too remote, or inconsequential; or if the requestor has no legal right that is directly affected by the act the writ would target.⁵¹

C. QUO WARRANTO

Quo warranto actions are common law actions, now frequently codified in statute, that challenge the winning office holder's right to the elective office⁵² because of her purported failure to meet the necessary qualifications. Quo warranto actions differ from—and serve different purposes than—election contests.⁵³ Election contests vindicate personal rights and are

⁴⁴ *Id.* at 500 (noting that the writ commonly issues despite the petitioner's failure to object below when the question relates to public offices).

⁴⁵ *Id.* at 501. Petitioners may also need to demonstrate their status as persons "beneficially interested" in the defendant tribunal remaining within its jurisdiction, *id.* at 536.

⁴⁶ *Id.* at 499. As long as the targeted election has not yet been held, prohibition can also prevent the ballot measures or candidates' names from being placed on the ballot even if a protest hearing has been completed. See *State ex rel. Hill Communities, Inc. v. Clermont County Bd. of Elections*, 746 N.E.2d 1115, 1118 (Ohio 2001) (per curiam).

⁴⁷ ANTINEAU, *supra* note 5, at 499.

⁴⁸ *Id.* at 501.

⁴⁹ *Id.* at 499.

⁵⁰ *Id.* at 501.

⁵¹ *Id.* at 536.

⁵² *White v. Miller*, 219 S.E.2d 123, 124 (Ga. 1975). When state contest statutes do not permit election contests based on the candidate's lack of qualifications, or when laches would prevent this type of lawsuit because the qualification problems were known or discoverable before the election, quo warranto may nonetheless be available to protect the public from an unqualified or ineligible office holder. A state may also recognize quo warranto challenges to incorporation elections. See *Donaghey v. Att'y Gen.*, 584 P.2d 557, 558 n.1 (Ariz. 1978) (en banc).

⁵³ *Miller*, 219 S.E.2d at 124.

brought by or on behalf of unsuccessful candidates⁵⁴ who claim they are the true winner or that the true winner is unascertainable.⁵⁵ Quo warranto, on the other hand, protects the public from an unqualified office holder and is brought by or on behalf of the public.⁵⁶ Because it is meant to protect the public, statutory authority that grants a legislative body exclusive authority to determine election contests for its seats does not preclude citizens from filing quo warranto actions.⁵⁷

Quo warranto may be the exclusive statutory means of challenging the office holder's entitlement to office.⁵⁸ Because a quo warranto action seeks to oust the usurper from office, it is only brought after the purported winner takes office. Losing an election is insufficient by itself to sustain a quo warranto action. Either the losing candidate must plead and prove his own rightful title to the office,⁵⁹ or he must be able to bring the quo warranto action in his capacity as an interested citizen and taxpayer.⁶⁰ Quo warranto actions are not barred by failure to bring a timely pre-election challenge to the candidate's qualifications as long as legitimate grounds exist to believe that the office holder remains unqualified to hold office.⁶¹ Successful quo warranto actions oust the office holder and leave the office either vacant or vested in the person in whose name the suit was brought.

As an extraordinary writ, quo warranto actions require the unavailability of an adequate alternative remedy. In some instances, quo warranto actions have been possible when state statutes did not support an election contest under the circumstances that tainted the election. For example, although a jammed voting machine that stopped counting votes cast for one city council candidate after the first thirty-nine was not a sufficient irregularity to call a new election, it did support a quo warranto action brought by the state attorney general in which the certified winner was found to not be the true winner.⁶² A quo warranto action brought by the attorney general was used to challenge a tied mayoral election in which irregularities, including malfunctioning voting equipment, occurred.⁶³ Quo warranto was also used to dislodge a judicial appointee when the judicial office remained on the ballot and another candidate won the election.⁶⁴

⁵⁴ *Id.*

⁵⁵ See *supra* Chapter 9: Election Contests.

⁵⁶ *Miller*, 219 S.E.2d at 124. Although a losing candidate or a voter may be able to bring a quo warranto action, they are frequently brought by the state attorney general in relation to the individual who claims a right to the office, or in the state's name, *id.* at 124. If the attorney general fails to bring a quo warranto action when a private citizen brings him undisputed facts that demonstrate as a matter of law that an office is being usurped, the private citizen can seek a writ of mandamus to compel the attorney general to pursue the claim. See *Donaghey*, 584 P.2d at 558.

⁵⁷ See *Donaghey*, 584 P.2d 557.

⁵⁸ *Reid v. Dalton*, 100 P.3d 349, 353-54 (Wa. Ct. App. 2004).

⁵⁹ *Id.* at 354.

⁶⁰ *Miller*, 219 S.E.2d at 124-25; *Noble v. Meagher*, 686 S.W.2d 458, 462 (Ky. 1985) (Stephens, C.J., dissenting); *but see Nelson v. Sneed*, 83 S.W. 786 (Tenn. 1904) (contestant cannot also claim citizen quo warranto rights because different legal rights are at stake).

⁶¹ *Noble*, 686 S.W.2d at 462.

⁶² *People v. Delgado*, 791 N.Y.S.2d 177 (N.Y. App. Div. 2005).

⁶³ *Flood v. Schopfer*, 799 N.Y.S.2d 232 (N.Y. App. Div. 2005).

⁶⁴ *Leedom v. Thomas*, 373 A.2d 1329 (Pa. 1977).

III. EQUITABLE RELIEF: INJUNCTIONS

Courts issue mandatory injunctions to require the subject to act and prohibitory injunctions to prohibit the subject from acting. In either case, the injunction may be temporary or permanent. Temporary injunctions last a short time—a few hours to a few days—before they expire or must be renewed, and may be issued in an *ex parte* proceeding. Permanent injunctions last longer than temporary injunctions, but require full due process before they issue.

Plaintiffs seeking an injunction must demonstrate the likelihood they will succeed on the merits of the underlying case, plus the likelihood that they will experience irreparable harm if the injunction is not granted. Courts review requests for injunctions by balancing the hardships the parties would experience if the injunction is granted or denied.⁶⁵ In election cases, the courts may also consider the hardship voters would experience if the injunction is granted or denied.⁶⁶ Sometimes courts also consider whether issuing the injunction will advance public interests.⁶⁷

Courts generally refuse to issue injunctions that would prevent election officials from performing their statutorily required duties because doing so would violate the doctrine of non-judicial interference.⁶⁸ Courts may also refuse to enjoin an ongoing election.⁶⁹ When a court's decision to issue or deny an injunction is appealed, the reviewing court conducts a "limited and deferential" ⁷⁰ *de novo* review to determine if the lower court's actions constituted an abuse of discretion.⁷¹

IV. DECLARATORY JUDGMENTS

Declaratory judgments are not extraordinary writs. Rather, they are procedural devices⁷² that declare the validity or existence of statutory rights, legal status or legal relations between the parties, which the court has determined through statutory construction.⁷³

⁶⁵ *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc) (per curiam); *In re Wilbourn*, 590 So.2d 1381, 1384 (Miss. 1991), (identifying the ever-ticking twenty-day statute of limitations for an election contest as a problem if the certification of the election's results were enjoined without a winner being announced).

⁶⁶ *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d at 919 (noting voters' election preparations would be wasted if the election was enjoined).

⁶⁷ *Id.* at 918-19 (finding that interfering with an impending election to be extraordinary, but interfering with an election in progress because absentee ballots had already been mailed to be unprecedented, thus refusing to issue an injunction to stop the state from using previously decertified voting machines in a gubernatorial recall election)

⁶⁸ *In re Wilbourn*, 590 So.2d at 1385.

⁶⁹ *Sw. Voter Registration Educ. Project*, 344 F.3d at 919 (noting that enjoining the election would be tantamount to telling voters who have already voted that their vote does not count and they must vote again, but noting that fewer qualms existed in postponing an initiative election that was operating under an already accelerated schedule).

⁷⁰ *Id.* at 918.

⁷¹ Courts sometimes exceed their jurisdiction when they grant injunctions, such as when a court issued an injunction to move election contest proceedings from the statutorily-designated tribunal to itself. *In re Wilbourn*, 590 So.2d at 1385 (citing *Ex parte Wimberly*, 57 Miss. 437 (1879)).

The use of declaratory judgments is limited to existing and actual controversies.⁷⁴ They may be denied when, despite their captioning, they are an attempt to circumvent other restrictions, such as when a declaratory judgment lawsuit is an attempt to circumvent expired election contest statutes of limitations.⁷⁵ Courts may exercise their discretion to deny or defer a declaratory judgment request, especially when issuing it would violate the court's policy of not intervening in the exercise of legislators' or election officials' discretion.⁷⁶ Finally, although statutes of limitations do not exist for declaratory judgment requests, applicable statutes of limitations continue to operate on the underlying substantive claims.⁷⁷

⁷² DeHoff v. Att'y Gen., 564 S.W.2d 361, 363 (Tenn. 1978).

⁷³ Reid v. Dalton, 100 P.3d 349, 353 (Wa. Ct. App. 2004).

⁷⁴ Landwersiek v. Dunivan, 147 S.W.3d 141, 149 n.9 (Mo. Ct. App. 2004).

⁷⁵ Clark v. City of Trenton, 591 S.W.2d 257, 259 (Mo. Ct. App. 1979).

⁷⁶ *In re Wilbourn*, 590 So.2d 1381 (counting votes, canvassing returns, and declaring the result are functions given to the legislature and not the courts, meaning that judicial resolution of a disputed election is inappropriate until the results are certified and a contest action is filed).

⁷⁷ *DeHoff*, 564 S.W.2d at 363.