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SUPREME COURT OF TEXAS
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No. 20-0847

IN THE SUPREME COURT OF TEXAS

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS; RUTH HUGHS IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,

Petitioners,

v.

THE ANTI-DEFAMATION LEAGUE AUSTIN, SOUTHWEST, AND TEXOMA REGIONS; COMMON CAUSE TEXAS; ROBERT KNETSCH,

Respondents.

On Petition for Writ of Mandamus
to the Third Court of Appeals, Austin

REAL PARTIES IN INTEREST RESPONSE IN OPPOSITION TO RELATORS' PETITION FOR WRIT OF MANDAMUS

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2. Whether it was legal error for the Third Court of Appeals to issue the mandate with its judgment, when Texas Rule of Appellate Procedure 18.6 provides that an appellate court "may issue the mandate with its judgment" in an accelerated appeal like the one at issue here?

TO THE HONORABLE SUPREME COURT OF TEXAS:

Relators' petition for a writ of mandamus, seeking an order that the Third Court of Appeals recall its mandate in *Abbott v. Anti-Defamation League Austin, Southwest, and Texoma Regions*, No. 03-20-00498-CV, should be denied. First, the petition is moot. The same day it was filed, this Court stayed the judgment and mandate that are the subject of the petition. Second, the petition fails on the merits. The crux of Relators' argument is that it was legal error for the Court of Appeals to issue the mandate with its judgment. But Texas Rule of Appellate Procedure 18.6 specifically provides that in an accelerated appeal like the one at issue here, an appellate court "may issue the mandate with its judgment." Because there was no legal error, mandamus is unavailable.

STATEMENT OF FACTS

I. Background Facts

On March 13, 2020, Governor Abbott issued a disaster proclamation certifying that the COVID-19 pandemic posed an imminent threat of disaster under TEX. GOV'T CODE § 418.014. MR.0001-0003. On July 27, 2020, Governor Abbott issued an executive order extending the early voting period in light of the COVID-19 pandemic. In the same order, Governor Abbott suspended the restriction in Section 86.006 of the Texas Election Code that only allows in-person delivery of mail-in ballots on Election Day. MR.0012-0015. On September 30, 2020, the State of Texas represented to this Court that the definition of early voting clerk's office in

the Texas Election Code includes satellite clerks' offices, and that whether to offer multiple mail-in ballot drop-off locations is within the purview and authority of early voting clerks. Real Parties in Interest App. A at 5.

The following day, on October 1, 2020, the Governor issued a new Proclamation concerning Section 86.006. The October 1 Proclamation prohibited county election officials from operating more than one early voting drop-off location in each county prior to the Election Day. MR.0016-0021. Governor Abbott claimed his suspension of the clerks' authority to designate multiple ballot drop-off locations under Section 86.006 was necessary to "add ballot security protocols." MR.0017. Governor Abbott also claimed to have authority to issue the Proclamation to "control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area" under Texas Government Code § 418.018(c). MR.0019.

II. Procedural History

Real Parties in Interest filed their original petition and application for temporary injunctive relief on October 5, 2020, seeking to enjoin Governor Abbott's limitation on the operation of more than one mail-in ballot drop-off location in each county prior to Election Day. MR.0084-0111.

On October 13, 2020, the trial court held an evidentiary hearing. The trial court heard testimony from ten live witnesses, nine of which were presented by the

Real Parties in Interest. *See generally* MR.183-478. These witnesses included representatives from Real Parties in Interest ADL and Common Cause Texas, Real Party in Interest Robert Knetsch, and two additional voters injured by the Governor's October 1 Proclamation. These witnesses also included experts on travel behavior, election security, infectious disease, and emergency powers of the executive. In addition, the Director of Elections, Brian Keith Ingram, testified on behalf of Governor Abbott and Secretary Hughs and was cross-examined by Real Parties in Interest.

On October 15, 2020, the trial court issued its order. MR.0487-0488. The Order denied Relators' pleas to the jurisdiction and granted the Application for Temporary Injunction filed by the Real Parties in Interest. The trial court enjoined Relators from implementing or enforcing the following paragraph of the October 1, 2020 Proclamation:

> "(1) the voter delivers the marked mail ballot at a single early voting clerk's office location that is publicly designated by the early voting clerk for the return of marked mail ballots under Section 88.006(a-1) and this suspension,"

MR.0488.

The trial court further found that the Proclamation's limit to a single drop-off location "would likely needlessly and unreasonably increase risks of exposure to COVID-19 infections, and needlessly and unreasonably substantially burden

potential voters' constitutionally protected rights to vote, as a consequence of increased travel and delays, among other things." MR.0488.

Relators immediately appealed. MR.0481-0486. On October 23, the Third Court of Appeals affirmed the trial court's ruling in a unanimous opinion, and directed the clerk to issue the mandate. MR.0544. Relators immediately filed an emergency petition for review and the instant petition for mandamus. This Court granted expedited review and temporarily stayed the mandate and judgment.

STANDARD OF REVIEW

"Mandamus is an extraordinary proceeding, encompassing an extraordinary remedy." *Deloitte & Touche, LLP v. Fourteenth Court of Appeals*, 951 S.W.2d 394, 396 (Tex. 1997). It is, therefore, "granted only in very narrow and extraordinary circumstances." *Polaris Inv. Mgmt. Corp. v. Abascal*, 892 S.W.2d 860, 861 (Tex. 1995). The writ is available only if a court "has committed a clear abuse of discretion," which means that "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law." *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (internal quotation marks and footnotes omitted). Furthermore, the writ "will not issue to resolve disputes that may be addressed by other remedies." *In re City of Lubbock*, 254 S.W.3d 547, 548 (Tex. App. 2008).

ARGUMENT

Relators fall far short of the high bar required to establish entitlement to a writ of mandamus. Their petition should be denied.

First, the petition is moot, because the same day that Relators filed the instant petition, this Court stayed the mandate and judgment that are the subject of the petition. Relators have, therefore, effectively obtained the relief they are seeking here. *See In re Watts Regulator Co.*, No. 01-16-00728-CV, 2016 WL 6087690, at *1 (Tex. App.—Houston [1st Dist.] Oct. 18, 2016, orig. proceeding) ("Because Watts's mandamus petition…requests stay relief that has been granted, we dismiss this original proceeding as moot."). Furthermore, this Court's stay order vitiated Relators' claim that they have no adequate remedy at law to prevent the district court's injunction from going into effect. Because Relators have already obtained the relief they seek in this original action, mandamus relief is unavailable. *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) ("Mandamus relief is only available when a party has no adequate remedy at law.").

Second, even if this Court were to reach the merits of the petition, it should be denied. The sole basis for Relators' petition is their erroneous claim that it was legal error for the Third Court of Appeals to issue the mandate with its judgment. Relators' appeal, however, was an accelerated appeal, MR.0481, and Texas Rule of Appellate Procedure 18.6 provides that, in an accelerated appeal, the appellate court

"may issue the mandate with its judgment." TEX. R. APP. P. 18.6. The law is clear, and the Court of Appeals applied it correctly. Consequently, there was no abuse of discretion, and mandamus must be denied. *See In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d at 382.

It is irrelevant, as Relators claim, that the Court of Appeals issued the mandate prior to the expiration of the ten-day period provided by Rule 18.1. Rule 18.1 is a default, general rule, but Rule 18.6 applies when, as here, there is an accelerated appeal. It is a "fundamental rule" of statutory construction that "the specific [rule] controls over the general [rule]." *Smith v. Adair*, 96 S.W.3d 700, 704 (Tex. App.—Texarkana 2003, pet. denied). At bottom, Relators' interpretation would read Rule 18.6 out of the Texas Rules of Appellate Procedure, and must be rejected.

Relators' claim that the Court of Appeals cannot abrogate the State's right to supersede without bond improperly conflates the Court of Appeals' authority to issue temporary relief under Rule 29.3 and its authority to resolve the merits of an appeal properly before it. The Court of Appeals did not issue an order pursuant to Rule 29.3 that reinstated or had the effect of reinstating the trial court's temporary injunction. Instead, the Court of Appeals affirmed the district court's injunction following a review of the merits, and issued its mandate, returning the matter to the district court. This is made plain by the fact that the Court of Appeals denied the

Real Parties in Interest's motion for emergency relief as moot because of its affirmance of the trial court's temporary injunction.

For these reasons, the question presented here is not analogous to the question of whether a Court of Appeals may issue a temporary order reinstating a district court's temporary injunction, while an appeal is pending before it, pursuant to its inherent authority under TRAP 29.3. Real Parties in Interest recognize that that question is currently before this Court in another matter. *See In re Texas Education* Agency, No. 20-0404. No matter the Court's resolution of that question, it should reject Relators' far more radical position that a Court of Appeals may not issue the mandate with a judgment in an accelerated appeal as Rule 18.6 of the Texas Rules of Civil Procedure expressly provides.

Finally, the implications of Relators' position here are extraordinary. Following an evidentiary hearing, a Texas district court enjoined the Governor's October 1 Proclamation because it "would likely needlessly and unreasonably increase risks of exposure to COVID-19 infections, and needlessly and unreasonably substantially burden potential voters' constitutionally protected rights to vote." MR.0488. The Third Court of Appeals unanimously affirmed the injunction and, recognizing that Election Day is imminent, issued the mandate with the Court of

Appeals' judgment.[1] Nevertheless, Relators assert the *right* to avoid the injunctive relief that two separate courts have found Plaintiffs are entitled to by simply running out the clock until this case is mooted by the passage of the election.

This Court should reject this dangerous assertion, which would effectively render the judiciary—a coequal branch of government—a bystander in the review of executive action and election law. If accepted, it will encourage the imposition of new voting rules at the eleventh hour—when they are most disruptive to voters and election administrators—because they are effectively insulated from judicial review. If there were any doubt that this is what Relators contend, it is confirmed by their statement that the Legislature is empowered to "limit judicial review of executive actions." Pet. at 9 (quoting *Morath v. Sterling City ISD*, 499 S.W.3d 407, 412 (Tex. 2016) (plurality op.)). This is wrong. The judiciary is fully empowered to review and decide whether the Governor of Texas exceeded his emergency powers by issuing an order that has no relationship to the emergency and that violates Texas voters' constitutional rights.

[1] Relators' assertion that the Court of Appeals issued the mandate "without providing any reasoning for doing so" is false. Pet. ix. The Court of Appeals stated that it was issuing the mandate with the judgment "*[b]ecause the general election is eleven days from today*." MR.0544 (emphasis added).

PRAYER

For the foregoing reasons, Relators' petition for mandamus should be dismissed as moot or denied on the merits.

Dated: October 26, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 26, 2020, a true and correct copy of the foregoing document was served on all counsel of record using the Court's electronic case filing system.

/s/ Lindsey B. Cohan

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 1,837 words. All text appears in 14-point typeface, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Lindsey B. Cohan

TAB A:
September 30, 2020
Texas Solicitor General
Submission

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September 30, 2020

Via Electronic Filing

Blake Hawthorne, Clerk
Supreme Court of Texas

Re: No. 20-0751, *In re Hotze, et al.*

Dear Mr. Hawthorne:

On September 28, 2020, the Court invited the Solicitor General to file a brief expressing the views of the State on three questions presented in this mandamus petition.[1]

The view of the State is that the mandamus petition should be denied or dismissed for lack of jurisdiction. Each of Relators' claims fails on the merits. *See infra* I. But the Court should not reach the merits because Relators lack standing and, independently, are not entitled to mandamus relief. *See infra* II. Viewing those matters through the mandamus standard, Relators have not shown an entitlement to the relief they seek.

I. Respondent's alleged actions are lawful.

In the State's view, each of the three questions the Court presented to the State should be answered in the negative.

A. The Court first asks whether, "in light of the Governor's July 27, 2020 proclamation, . . . allowing early voting to begin on October 13, 2020, violates Texas Election Code section 85.001(a)." The Governor's Proclamation "suspend[ed] Section 85.001(a) of the Texas Election Code to the extent necessary to require that . . . early voting by personal appearance shall begin on Tuesday, October 13, 2020." The Governor has authority to suspend this statute, and his Proclamation to that

[1] No fee has been paid or will be paid for the preparation of this brief.

effect has "the force and effect of law" under the Texas Disaster Act of 1975. Tex. Gov't Code § 418.012.

The Legislature expressly granted the Governor the authority to suspend "*any regulatory statute* prescribing the *procedures* for conduct of state business" when necessary to respond to a declared disaster. Tex. Gov't Code § 418.016(a) (emphases added); *see also* Att'y Gen. Op. KP-191 (2018) (concluding that Section 418.016(a) authorized a suspension of the Texas Election Code that yielded deadlines different than those provided by statute). Section 85.001(a) is a statute regulating the procedures for conducting an election, insofar as it specifies a beginning point for early voting. The Governor's Proclamation extends the time for early voting by suspending that beginning point effective October 13, 2020.

Relators are wrong to argue that the suspension power in section 418.016(a) is unconstitutional on its face and as employed in the Proclamation. *See* Pet. 20–24. As explained in Relators' parallel mandamus action against the Secretary of State, section 418.016(a)—and the Disaster Act as a whole—represents a proper delegation because the Governor's power is cabined by reasonable standards from the Legislature. *See* Attachment A at 14–16 (Resp. to Pet. for Writ of Mandamus, *In re Hotze*, No. 20-0739 (filed Sept. 28, 2020)).

Specifically, legislative powers can be delegated where "because of the nature of the subject of legislation [the Legislature] cannot practically and efficiently exercise such powers." *Hous. Auth. of City of Dallas v. Higginbotham*, 143 S.W.2d 79, 87 (Tex. 1940). "[A]s long as the Legislature establishes reasonable standards to guide the agency in exercising those powers," it may delegate legislative powers to another branch. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000). Moreover, the Legislature can delegate "the power to grant exceptions . . . of a fact-finding and administrative nature." *Williams v. State*, 176 S.W.2d 177, 185 (Tex. Crim. App. 1943) (holding that the Pink Bollworm Act did not violate Texas Constitution article I, section 28 by empowering the Governor and the Agriculture Commissioner to designate zones where growing cotton would not violate state law).

Under these principles, section 418.016(a) is a proper delegation during a state of disaster that requires quick and decisive action. In empowering the Governor to suspend regulatory statutes that would impede disaster-recovery efforts, the Legislature has not given him unlimited authority to suspend laws. Instead, the Legislature has restricted the suspension power to statutes whose "strict interpretation" would, according to the Governor's factual determination about the

effects of a rapidly unfolding disaster, "prevent, hinder, or delay necessary action in coping with a disaster." Tex. Gov't Code § 418.016(a). Further, the suspension power is temporally restricted by the 30-day expiration date for declared states of disaster, absent renewal, together with the Legislature's ability to "terminate a state of disaster at any time." *Id.* § 418.014(c). And the Disaster Act explicitly sets forth the purposes it serves. *Id.* §§ 418.002, 418.003, 418.004(1). These provisions help ensure that gubernatorial suspension power is not used in a manner inconsistent with legislative design. Operating within the confines of this delegated authority, the Proclamation properly suspends the statutory limit on the days for early voting in order to protect voters and poll workers during the COVID-19 disaster.

This conclusion is bolstered by the Legislature's awareness of past exercises of section 418.016(a). Indeed, use of this suspension power is nothing new, as Governors have exercised this delegated authority many times in responding to disasters. For example, during the 2017 Hurricane Harvey disaster, the Governor suspended numerous provisions of Texas law in order to alleviate hindrances to response efforts.[2] The suspension power has also been used to suspend provisions of the Texas Election Code in order to promptly call a special election.[3] Yet the Legislature did not repeal or amend the challenged provisions to further limit the Governor's authority to respond to the next crisis. A ruling in Relators' favor would contravene this clear authority from the Legislature and, importantly, undermine the State's ability to respond effectively to any existing or future disaster.

Relators here challenge the Legislature's grant of suspension authority to the Governor, but the Legislature has similarly delegated suspension power to this Court. *See* Tex. Gov't Code § 22.0035(b). The Court has repeatedly exercised that

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[2] *See, e.g.*, Proclamation (Oct. 16, 2017), *https://gov.texas.gov/news/post/governor-abbott-extends-suspension-of-rules-relating-to-vehicle-registratio*; Proclamation (Sept. 7, 2017), *https://gov.texas.gov/news/post/governor-abbott-extends-suspension-of-hotel-occupancy-tax-after-hurricane-h*; Proclamation (Aug. 29, 2017), *https://gov.texas.gov/news/post/governor-abbott-issues-a-proclamation-for-port-aransas-independent-school-d*; Proclamation (Aug. 25, 2017), *https://gov.texas.gov/news/post/governor-abbott-suspends-hotel-occupancy-tax*; Proclamation (Aug. 23, 2017), *https://gov.texas.gov/news/post/Disaster-Proclamation-Issued-For-30-Texas-Counties-in-Anticipation-Of-Tropical-Depression-Harvey-Making-Landfall*.

[3] *See* Proclamation (Apr. 24, 2018), *https://gov.texas.gov/news/post/governor-greg-abbott-orders-emergency-special-election-for-the-27th-congressional-district-of-texas*.

authority in addressing the pandemic's severe impact on court operations.[4] There is nothing novel—or unconstitutional—about this or section 418.016(a)'s grant of suspension power.

In any event, regardless of whether Relators' suspension arguments have merit, the Court should deny relief because the Proclamation can be upheld based on any power properly delegated to the Governor. The Proclamation generally invokes the Disaster Act, which expressly grants the Governor the authority to "control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area." Tex. Gov't Code § 418.018(c). Even if the suspension power did not exist, the Proclamation could be upheld based on the independent power to limit the occupancy of early voting sites while allowing all voters the chance to cast their votes. Mandamus and other relief should be denied simply because there are valid, alternative grounds to support the Proclamation.

B. The Court next asks whether, "in light of the Governor's July 27, 2020, proclamation, . . . allowing a voter to deliver a marked mail ballot in person to the early voting clerk's office beginning on September 28, 2020, violates Texas Election Code section 86.00[6](a-1)."

The answer to that question is no, mostly for the reasons discussed above. Exercising the Governor's constitutionally delegated authority in section 418.016(a), as well as the authority to control the occupancy of premises under section 418.018(c), the Proclamation "suspend[ed] Section 86.006(a-1) of the Texas Election Code . . . to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early voting clerk's office prior to and including on election day." The Proclamation thus allows voters to personally return their completed mail ballots at any time up to and including election day. The Governor did so by

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[4] *See, e.g.*, Misc. Dkt. Nos. 20-9042, 20-9044, 20-9059, 20-9071, 20-9080, 20-9095, 20-9112 (proclaiming that "all courts in Texas may . . . [m]odify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order"); Misc. Dkt. No. 20-9068 (proclaiming that "[a]ny Texas statute requiring or permitting citation by publication on the website or requiring the Office of Court Administration to generate a return of citation is suspended until July 1, 2020," thereby suspending the explicit deadline in S.B.891, § 9.04, 86th Leg., R.S. (2019)); Misc. Dkt. No. 20-9045 (proclaiming that "[i]n any action for eviction to recover possession of residential property under Chapter 24 of the Texas Property Code . . . [n]o trial, hearing, or other proceeding may be conducted, and all deadlines are tolled").

suspending the requirement that a voter can return the marked mail ballot only on election day.

Importantly, the Proclamation does not change section 86.006's protections for ballot integrity. Only the voter may return his marked ballot in person—no third-party may do so. Tex. Elec. Code § 86.006(a)(3). And when delivering his ballot, the voter "must present an acceptable form of identification described by [Texas Election Code] section 63.0101." *Id.* § 86.006(a-1).

C. Finally, the Court asks whether, "in light of the Governor's July 27, 2020 proclamation, . . . allowing a voter to deliver a marked mail ballot in person to any of [the] eleven annexes in Harris County violates Texas Election Code section 86.00[6](a-1)." The Government Code generally provides that the singular includes the plural. *See* Tex. Gov't Code § 311.012(b). Nothing in section 86.006(a-1) overcomes that presumption or otherwise indicates that "office," as used in section 86.006(a-1), does not include its plural, "offices." Accordingly, the Secretary of State has advised local officials that the Legislature has permitted ballots to be returned to any early-voting clerk office. *See* Attachment B (email dated Aug. 26, 2020).[5]

II. The Court should not reach these questions, however, because Relators lack standing and because mandamus relief is not available.

The Court should not reach any of these issues, however, because Relators do not have standing and because Relators, having slumbered on their rights, are not entitled to mandamus relief.

A. Relators lack standing, so the Court does not have jurisdiction. As explained in response to Relators' parallel petition, Relators do not have constitutional standing because they lack a concrete, justiciable interest in the issues raised. *See* Attachment A at 11–13. Because Relators "seek to correct an alleged violation of the separation of powers, [the Court's] standing inquiry must be especially rigorous."

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[5] To the extent county early-voting clerks maintain several early-voting offices capable of receiving completed ballots, the State has a compelling interest in ensuring the integrity of the protocols in place at such offices. This brief does not opine on the circumstances under which a "watcher" may be "appointed" under Chapter 33 of the Election Code in the context of annexes. Nevertheless, the State notes that counsel for Harris County recently agreed in oral argument before this Court that "poll watchers have been there [at annexes] for a couple of days," and "I don't understand why they couldn't be in a public office building." Oral Argument at 44:05–44:48, *State v. Hollins*, No. 20-0729 (Sept. 30, 2020).

In re Abbott, 601 S.W.3d 802, 809 (Tex. 2020) (per curiam) (internal quotation marks omitted). Their general interest in compliance with the law is the type of generalized grievance that is not cognizable in Texas courts. This petition, like No. 20-0739, should be dismissed for want of jurisdiction.

B. Alternatively, the Court should deny the petition because Relators have waited too long to seek relief. Mandamus is "controlled largely by equitable principles," one of which is that "equity aids the diligent and not those who slumber on their rights." *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 676 (Tex. 2009) (per curiam) (quoting, *inter alia*, *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993)). The Governor extended early voting for the July 14 elections on May 11, 2020. The Governor first announced plans to extend early voting for the general election later in May. The Governor then issued this Proclamation on July 27, 2020—over two months ago. Yet Relators waited until September 28 to ask this Court to "alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). They offer no excuse or explanation for this lengthy delay. And they offer no reason, much less a compelling one, for failing to first seek relief in the court of appeals. *See* Tex. R. App. P. 52.3(e).

To the extent the issues raised here have any merit—which they do not—those questions, and the consequences they have for the State of Texas, deserve careful study and consideration by the parties, the State, and the Court. Such weighty issues deserve more than a hurried disposition necessitated by Relators' dilatory litigation conduct. Because Relators cannot justify their lengthy delay, mandamus relief should be denied. *See Chambers-Liberty Counties Navigation Dist. v. State*, 575 S.W.3d 339, 356 (Tex. 2019); *Rivercenter*, 858 S.W.3d at 367–68.

The Court should dismiss the petition for lack of jurisdiction or deny relief.

Respectfully submitted.

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