NO. 03-17-00662-CV

IN THE COURT OF APPEALS
FOR THE THIRD JUDICIAL DISTRICT
AUSTIN, TEXAS

IN RE
ROLANDO PABLOS, SECRETARY OF STATE FOR THE STATE OF TEXAS, AND KEITH INGRAM, DIRECTOR, TEXAS ELECTIONS DIVISION OF THE SECRETARY OF STATE,
RELATORS,

Original Proceeding to Cause No. D-1-GN-17-003451
Pending in the 98th Judicial District Court,
Travis County, Texas,
Honorable Tim Sulak, Presiding

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

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STATEMENT REGARDING ORAL ARGUMENT

Real parties in interest the League of Women Voters of Texas, Texas State Conference of the National Association for the Advancement of Colored People (NAACP), and Ruthann Geer do not believe oral argument is necessary because this Court's precedent forecloses each argument in the Petition for Writ of Mandamus. However, real parties in interest will of course participate in oral argument if it will aid the Court.

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TO THE HONORABLE THIRD COURT OF APPEALS:

Relators' Petition for Writ of Mandamus is based on a theory that has never been accepted by this Court or any other Texas court. The district court, Relators assert, was required to rule on their Plea to the Jurisdiction ("PTJ") within *two weeks* after Relators belatedly filed it. In fact, Relators began demanding a ruling from the district court just *three days* after filing that Plea. The district court, quite reasonably, declined to issue a ruling on the PTJ immediately. To be clear, the court did not deny

the PTJ. Nor did it categorically refuse to rule on the PTJ. Nor did it refuse to rule in the near future. The court simply explained that it was not yet ready to resolve the dispositive motion, and that it could resolve the PTJ as early as the following week or at another time. Rather than wait for the court to consider and rule on the PTJ, however, Relators rushed to this Court and demanded emergency relief.

The question at the heart of the case is thus whether the district court had to rule on Relators' late-in-the-day PTJ immediately. And because this case arrives on a petition for mandamus, the issue is really whether Relators have "a clear and indisputable right" to an immediate ruling that is "beyond dispute" as a matter of law. *In re Tharp*, 351 S.W.3d 598, 600 (Tex. App.—Austin 2011). The answer is obvious: Relators have not established such a clear right to relief.

This Court has never before taken issue with a decision not to resolve a motion after two weeks. That is unsurprising, because Relators' approach would impose a draconian and unrealistic burden on courts, demanding decisions on complicated and significant issues before judges can evaluate the proper course of action and write an opinion laying out their reasoning. District courts, experts at managing their heavy dockets, need time to weigh arguments, decide if discovery is warranted, and draft opinions. Especially if no emergency exists (as is the case here), judges should rely on their experience managing thousands of cases to decide when to rule. To allow district judges to do so, Relators' Petition must be denied.

STATEMENT OF FACTS

After Relator Secretary of State Rolando Pablos made clear that his office planned to turn over sensitive voter data to the Presidential Advisory Commission on Election Integrity (the "Commission"), the League of Women Voters of Texas, Texas State Conference of the National Association for the Advancement of Colored People (NAACP), and Ruthann Geer (collectively, "Plaintiffs"), filed a Petition for Declaratory Relief on July 20, 2017 (amended on September 20 and September 21, 2017). Rec. 1-79. In that petition, Plaintiffs explained that the voter data is not widely available in Texas, and instead can be released only under certain circumstances and conditions according to Texas's voting laws. Rec. 34-39, 50-54, 58-62; *see also* Tex. Elec. Code § 18.066; Tex. Gov't Code § 552.101. Individuals and entities seeking large-scale voter information can only access some data in Texas's computerized voter registration files, and even then only if they have met certain conditions, including executing a notarized affidavit stating that they will not use the data for certain purposes. Rec. 50-54. As Plaintiffs' petition set forth, the Commission cannot satisfy these requirements. Rec. 45-62.

On August 18, 2017, Relators filed an answer, providing a general denial of Plaintiffs' claims. Supp. Rec. 1-3. They did not, at that time, file a Plea to the Jurisdiction or assert any sovereign immunity defense.

The Commission formally requested the data from the State on September 13, 2017, and Relators intended to turn over that data within 15 business days. Rec. 76-79, 128. Plaintiffs applied for a temporary restraining order ("TRO") on September 20, 2017. Rec. 80-105. In connection with Plaintiffs' TRO application, Plaintiffs' cybersecurity and counterterrorism expert explained the significant data security risks—and the resulting risk of irreparable harm to Plaintiffs—posed by Relators' planned disclosure to the Commission. Supp. Rec. 4-19.

The district court scheduled a hearing on the TRO for September 29, 2017. Appx. A at 1-2. Three days prior to the hearing, on September 26, 2017, Relators filed their PTJ—their first time advancing a sovereign immunity defense in this case. Rec. 106-169. Plaintiffs filed a response two days later, on September 28, 2017, explaining that (1) Texas statutes expressly waive immunity for this claim, *see City of El Paso v. Tom Brown Ministries*, 505 S.W.3d 124, 139 (Tex. App.—El Paso 2016) (concluding that Section 273.081 sets forth a "private right of action" "to enforce the Texas Election Code through injunctive relief") (emphasis omitted); and (2) the *ultra vires* exception to sovereign immunity applies because Relators' actions went beyond their authority as a matter of Texas law, *see, e.g.*, *Cobb v. Harrington*, 190 S.W.2d 709, 712 (Tex. 1945). Rec. 172-83.

On September 29, 2017, the district court held the planned hearing on the TRO application, and heard argument regarding the PTJ. Appx. A at 1-2. At the hearing,

the court made clear that it would rule on the TRO within a few days, given the emergency need to do so, but did not provide a date certain by which it would resolve the PTJ. Appx. A at 2; Appx. C at 9-11.

On October 3, 2017, the court issued a TRO, Appx. C at 10, prohibiting Relators from turning over enumerated categories of sensitive voter data. Rec. 184-87. In issuing the TRO, the court explained that unless Relators are "immediately restrained" from turning over data, they will do so, and "[t]he injury resulting from such acts will be irreparable." Rec. 185. The court explained that,

> [i]f the private information contained in the Texas Computerized Voter Registration List is transmitted without appropriate safeguards, it is likely to become public. The public disclosure of this information without appropriate checks on its use may cause a variety of harms not readily susceptible to monetary measurement, including but not limited to the violation of Plaintiffs' privacy rights, their interests in avoiding commercial solicitation, chilling of their First Amendment rights, and the diminution of their efforts to encourage voting.

Id.

A district court's TRO can last only for fourteen days, and Texas rules require that "[e]very restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought." Tex. R. Civ. P. 680. Consistent with those parameters, the court set a hearing on the Application for Temporary Injunction for October 16, 2017. Rec. 187. Relators demanded an immediate ruling on their PTJ before that hearing, even though Relators had only filed it on September 26. On October 4, 2017, Relators wrote to the court asking for a ruling on the PTJ.

Appx. C at 9-10. Plaintiffs told Relators that they would consent to a hearing addressing the issues raised by the PTJ during the week of October 30, 2017, Appx. D at 15, but Relators insisted on a ruling before the upcoming hearing.

Ultimately, the district court indicated that it was not yet ready to rule on the PTJ. On October 4, eight days after Relators had filed their PTJ, the staff attorney for the court informed the parties that "[t]he Court has declined to rule on the plea to the jurisdiction without prejudice to consideration of the same at the time of the temporary injunction hearing (or at another time)." Appx. C at 9.

On October 10, just two weeks after Relators filed their PTJ, Relators filed this Petition for Writ of Mandamus.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO RULE ON RELATORS' PTJ WITHIN TWO WEEKS.

It is hornbook law that mandamus is "an extraordinary remedy, available only in limited circumstances." *In re Moffitt*, No. 07-13-0041, 2013 WL 625727, *1 (Tex. App.—Amarillo Feb. 20, 2013, orig. proceeding) (per curiam). Relators bear the "burden of establishing an abuse of discretion and … this burden is a heavy one." *In re CSX Corp.*, 124 S.W.3d 149, 151 (Tex. 2003, orig. proceeding). "A clear abuse of discretion [only] occurs when an action is 'so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.'" *Id.* (quoting *CSR Ltd. v. Link,* 925 S.W.2d 591, 596 (Tex. 1996)). So to obtain relief, Relators "must show a clear right

to the relief sought, meaning that the relief sought must be clear and indisputable such that its merits are beyond dispute with nothing left to the exercise of discretion or judgment." *In re Tasby*, 120 S.W.3d 443, 444 (Tex. App.—Texarkana 2003) (internal quotation marks omitted); *see also Tharp*, 351 S.W.3d at 600 (same).

Relators cannot meet their burden here. First, Relators have not identified any authority indicating that mandamus is proper when a court takes a dispositive motion under submission for two weeks. And while Relators asserted that this case uniquely warrants mandamus relief after two weeks, they offered no proof for that claim, and the facts undercut their position. Second, there is nothing about Travis County's centralized assignment system that requires judges to issue rulings within two weeks. Third, Relators' contention that the court was required to rule on the PTJ before granting the TRO and setting the temporary injunction hearing is baseless and runs afoul of this Court's precedent.

A. Relators Have Not Established That The District Court Refused or Failed To Rule Within A Reasonable Time.

To "obtain mandamus relief compelling a trial court to rule on a properly filed motion, a relator must establish that the trial court (1) had a legal duty to rule on the motion; (2) was asked to rule on the motion; and (3) either refused or failed to rule on the motion within a reasonable time." *In re Smith*, No. 03-13-00519, 2013 WL 5272847, *1 (Tex. App.—Austin 2013); *see also In re Chavez*, 62 S.W.3d 225, 228 (Tex. App.—Amarillo 2001, orig. proceeding) ("[T]he court has a reasonable time

within which to perform [its] duty."). As an initial matter, Relators' argument that the district court refused to rule on the PTJ is baseless. The district court merely delayed ruling on the PTJ until "the time of the temporary injunction hearing"—then set for October 16—"(or [] another time)." Appx. C at 9. Taking a matter under submission is simply not the same thing as refusing to rule.

Relators' position that a "reasonable time" passed in this case two weeks after they filed their PTJ is likewise unsupportable. While the parties agree that no bright line rule exists to determine whether a reasonable period has lapsed, Relators have not cited a single case in which a party sought and received mandamus after so little time between the filing of a motion (let alone a dispositive PTJ) and refusal to rule. Plaintiffs found none, in this or any other court of appeals.

To the contrary, Texas case law consistently comes out against Relators. *See In re Urtado*, No. 03-15-00710, 2015 WL 7694867, *2 (Tex. App.—Austin Nov. 24, 2015, orig. proceeding) (noting that "three months does not ordinarily constitute an unreasonable length of time for a motion to remain pending"); *In re Halley*, No. 03-15-00310, 2015 WL 4448831, *2 & n.12 (Tex. App.—Austin July 14, 2015, orig. proceeding) (explaining that "a longer period of time is usually required to elapse" to merit mandamus than "four months or six months," and collecting cases); *In re Moore*, No. 10-15-00452, 2016 WL 192280, *2 (Tex. App.—Waco Jan. 14, 2016, orig. proceeding) ("[Petitioner] allegedly brought this matter to the attention of the

Respondent trial court judge on December 20, 2015 and filed his petition for writ of mandamus on December 31, 2015. [Petitioner's motion] has not been pending for a reasonable time…."); *In re Moffitt*, 2013 WL 625727, at *1 (refusing to find failure to rule after "five to six months" unreasonable in that case); *In re Garrett*, No. 07-09-0336, 2009 WL 3849918, *2 (Tex. App.—Amarillo Nov. 18, 2009) ("[T]he motions have been pending before the trial court for four and half and four months, respectively. Ordinarily, such a delay will not be considered unreasonable."); *In re Blakeney*, 254 S.W.3d 659, 662-63 (Tex. App.—Texarkana 2008, orig. proceeding) (finding the five-month delay there not unreasonable); *In re Gonzales*, No. 07-06-0324, 2006 WL 2588696, *3 (Tex. App.—Amarillo Sept. 6, 2006, orig. proceeding) ("Appellant's motion for judicial notice has been pending in the trial court for three months. We decline to hold that period of time constitutes an unreasonable delay."); *In re Villarreal*, 96 S.W.3d 708, 711 (Tex. App.—Amarillo 2003, orig. proceeding) (refusing to "hold that the district court's failure to act within approximately five months [was] unreasonable delay *per se*"); *Ex Parte Bates*, 65 S.W.3d 133, 136 (Tex. App.—Amarillo 2003, orig. proceeding) ("[I]t may well be that the lapse of *extended* periods of time could alone be sufficient to establish the unreasonableness of a court's delay. However, we cannot say that [six months from filing and seven weeks from bringing motions to court's attention] fall within that realm.").

That all the relevant precedent undermines Relators is no surprise. District courts, rather than this Court, must make the tough calls about how best to manage their dockets. *See Chavez*, 62 S.W.3d at 229 ("[A] trial court has great discretion over its docket. And, while it cannot opt to forever avoid hearing a motion, no litigant is entitled to a hearing at whatever time he may choose."). Indeed, in evaluating this Petition, this Court must consider "the state of the court's docket, and the existence of other judicial and administrative matters which must be addressed first." *Id*. That includes "the number of other cases, motions, or issues pending on the trial court's docket, the number of cases, motions, or issues which have pended on its docket longer than that at bar, the number of cases, motions, or issues pending on its docket that lawfully may be entitled to preferential settings, or the trial court's schedule." *Id.* And Relators, seeking an extraordinary writ, have "the obligation to provide [this Court] with evidence of the foregoing indicia (or the like) against which [this Court] could test the reasonableness of the court's supposed delay." *Id.*; *see also Villarreal*, 96 S.W.3d at 711 ("[T]he party requesting mandamus relief has the burden to provide us with a record sufficient to establish his right to same.").

Relators have failed to meet their burden. In this case, as in *Chavez*, Relators supplied this Court with no evidence regarding the volume of pending motions in the lower court, how long they had been pending, or the court's schedule. *See* 62 S.W.3d at 229. That was dispositive in *Chavez*: "Without such evidence, any attempt

to assess whether [the] court acted unreasonably in failing to address the motion within the two months it has supposedly pended, would be mere folly." *Id.*; *see also Garrett*, 2009 WL 3849918, at *2 (denying relief where "no evidence of the state of the trial court's docket is provided, and there is no evidence of whether the trial court must afford other judicial or administrative duties priority," because "[i]t is the burden of the party requesting relief to provide a record sufficient to establish [its] entitlement to mandamus relief"). It should also be dispositive here.[1]

In any event, the evidence regarding the district court's docket undermines Relators' position. According to the Judiciary's statistical reports, there were 17,523 active civil cases in Travis County as of August 31, 2016 (and ten judges to handle them). *See* Office of Ct. Admin., *Dist. Cts.: Activity by Cnty. Summary* (Sept. 1, 2015 to Aug. 31, 2016), at 13, *available at* http://www.txcourts.gov/media/1436602/4-district-activity-summary-by-county.pdf. Two thirds of the civil cases resolved that year took over three months; forty percent took at least one year. *See* Office of Ct. Admin., *Dist. Cts.: Age of Cases Disposed* (Sept. 1, 2015 to Aug. 31, 2016), at 8,

[1] Relators believe it is enough that "the trial court did not indicate a basis for its refusal to rule and there is no evidence that it was due to the court's docket," and that there is also no evidence "that other matters in the case take preceden[ce] over threshold jurisdictional issues." Relators' Br. 13. Both responses miss the mark. As to the former, *Relators* bear the burden to show that the delay was particularly unreasonable and inappropriate, *see Chavez*, 62 S.W.3d at 229; it is not the job of the court to provide a detailed justification in light of its heavy docket. As to the latter, the question is whether there are issues in *any* pending case that would merit preferential treatment when the court manages its docket, not whether there are any in this case. In any event, issues of temporary relief *do* come before rulings on a PTJ when necessary to prevent mootness. *See* Part I.C, *infra*.

available at http://www.txcourts.gov/media/1436606/6-district-age-of-cases.pdf. No wonder the district court did not believe that it could resolve this entire litigation just two weeks after Relators filed their first dispositive motion.[2]

Against all this, Relators respond that this Court and the Supreme Court have said that jurisdictional questions "must be decided at the 'earliest opportunity' and 'as soon as practicable,'" which (they say) required a ruling on this PTJ within two weeks of its filing. Relators' Br. 13 (quoting *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004)); *see also* Relators' Br. 9 (same). But Relators take *Miranda*'s language out of context. That case turned on whether a court "was required to examine the evidence on which the parties relied" in resolving a PTJ—not whether a PTJ had to be decided immediately. *Miranda*, 133 S.W.3d at 221. In resolving *that* distinct issue, the Court wrote, "When the consideration of a trial court's subject matter jurisdiction requires the examination of evidence, the trial court exercises its discretion in deciding whether the jurisdictional determination

[2] While these reports do not supply average times for resolution of dispositive pending motions, they confirm that appeals from such rulings certainly take longer than two weeks to resolve. The average time between submission and disposition in the courts of appeals was 1.8 months, and the average time from from oral argument to disposition in the Supreme Court was 157 days. *See* Office of Ct. Admin., *Annual Statistical Rep. for the Tex. Judiciary: Fiscal Year 2016*, at E5, E12, available at http://www.txcourts.gov/media/1436989/annual-statistical-report-for-the-texas-judiciary-fy-2016.pdf. It is baffling that Relators thought the district court was required to rule within two weeks (or even three days). These figures also undermine Relators' claims that because (in their view) the case turns upon a pure question of law, it can be resolved rapidly. *See* Relators' Br. 14-15. That issues are legal does not make them easy or straightforward. The Texas Supreme Court and this Court deal primarily in legal issues, but plainly need not resolve all their cases and publish opinions within two weeks.

should be made at a preliminary hearing or await a fuller development of the case, mindful that this determination must be made as soon as practicable." *Id.* at 227.[3] In other words, the Court reiterated that management of a case is best left to a court's "discretion," and that district courts should simply be mindful to act before allowing "a fuller development of the case" (which this court has not yet allowed, beyond addressing emergency temporary relief). *Id.* Nothing in *Miranda* even hints at a need for a ruling within two weeks—or says anything about what time is "reasonable" or "practicable" to decide hotly contested sovereign immunity issues.

B. Relators Have Not Established That Mandamus Is Warranted Just Because This Case Arises Out Of Travis County.

Perhaps cognizant of the fact that they cannot show a "reasonable time" has passed in two weeks, Relators argue that they need not even meet that test. Instead, Relators say, "the trial court's overt refusal to rule on the [PTJ], by itself, justifies mandamus relief—regardless of the amount of time the motion [w]as pending—

[3] Here, in fact, Plaintiffs are entitled to jurisdictional discovery, particularly as it relates to the *ultra vires* exception to immunity. Relators' contrary arguments lack merit. First, Relators' argument that Plaintiffs do not need discovery because "[t]hey have had three months to seek jurisdictional discovery, but they cannot show that they have sent a single discovery request," Relators' Br. at 15 n.4, makes no sense because Relators did not raise any jurisdictional issue until September 26, 2017. Second, Relators cite an exchange between the parties' counsel to support the contention that a deposition of Relator Keith Ingram "would not involve any jurisdictional issues." Br. at 17. But, in context, it is clear that Relators' counsel asked whether a deposition of Mr. Ingram would be "wide-ranging" or "tailored to the TI issues." Appx. D, at 19. In response, Plaintiffs' counsel stated that the deposition would be appropriately tailored (that is, it would not be wide-ranging). The question of jurisdictional discovery simply was not at issue in this exchange.

because judges have a ministerial duty to decide matters assigned to their court." Relators' Br. 9; *see also* Br. 10 (same). This position is radical and untenable.

Relators' theory that mandamus is proper no matter how much time passes is foreclosed by an unbroken line of appellate decisions. As discussed above, to obtain relief, "a relator must establish that the trial court … either refused or failed to rule on the motion *within a reasonable time*." *Smith*, 2013 WL 5272847 at *1 (emphasis added); *see also, e.g., In re Sarkissian*, 243 S.W.3d 860, 861 (Tex. App.—Waco 2008, orig. proceeding); *Blakeney*, 254 S.W.3d at 661; *In re Hearn*, 137 S.W.3d 681, 685 (Tex. App.—San Antonio 2004, orig. proceeding); *Villarreal*, 96 S.W.3d at 711; *Barnes v. State*, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). Relators' theory, which reads the "reasonable time" requirement out of the case law, is plainly improper.

Relators respond that regardless of the proper rule for most of the State, their position is warranted for cases in Travis County. The basis of their claim is that Travis County, unlike most counties, "operates a central docketing system which randomly assigns matters to available district judges." Relators' Br. 10. As a result, Relators say, "the trial court's refusal to rule on the Plea means that it is violating its duty to decide assigned matters. Instead, it is improperly passing that duty on to the next district court that is assigned this case…." *Id.* In other words, if a judge "considered and held a hearing" on a motion in Travis County, "but then expressly

refused to rule" on it, the motion would be reassigned and the judge would have necessarily violated his ministerial duty to rule. *Id.*

But the fact that this case arises out of Travis County does not change the law. The Court has repeatedly addressed similar mandamus petitions arising from Travis County, and each time reiterated that the motion must have been pending for a "reasonable time." *See, e.g.*, *In re Martin*, No. 03-17-00383, 2017 WL 3471076, *1 (Tex. App.—Austin 2017, orig. proceeding); *In re Heaney*, No. 03-16-00159, 2016 WL 1179087, *1 (Tex. App.—Austin 2016, orig. proceeding); *In re Nelson*, No. 03-16-00717, 2016 WL 6575242, *1 (Tex. App.—Austin 2016, orig. proceeding); *Smith*, 2013 WL 5272847, at *1; *In re Aekins*, No. 03-15-00004, 2015 WL 1143015, *1 (Tex. App.—Austin 2015, orig. proceeding); *In re Hernandez*, No. 03-13-00002, 2013 WL 238720, *1 (Tex. App.—Austin 2013, orig. proceeding). Relators' theory thus cannot be squared with this Court's precedents.

And there is a good reason this Court still applies the reasonable-time prong in Travis County: any other approach is inconceivable. Leaving aside the oddness of a rule where two weeks is unreasonable in Travis County but four months is fine in Williamson County, Relators' theory has no limiting principle. In Relators' world, no room exists to consider the judge's docket, so Relators would be free to demand a ruling no matter what other issues she has to resolve (and which get preference). Most shocking, without the reasonable-time prong, there is (by definition) no place

to consider how much time has passed. Although this Petition arrives two weeks after the hearing, Relators' theory would allow them (or others) to seek mandamus even minutes after a hearing ends. The Travis County court system did not impose such an unrealistic burden on its judges when it adopted the Central Docket system, and nothing in its rules requires immediate rulings after hearings. *See* Dist. Cts. of Travis Cnty., Tex., *Local R. of Civ. P. & R. of Decorum*, June 2, 2014.

Relators' final claims are passing strange. Doubling down on their view that the Central Docket necessarily imposes a duty to rule immediately, Relators argue that allowing the court below to defer this ruling will "forc[e] the State to expend taxpayer money rehearing and rearguing this same matter to the next district court assigned the case." Relators' Br. 11. Relators declare that the "practical effect" will be that "the State's sovereign immunity is 'effectively lost,'" Br. 11-12, and that there will be a risk of inconsistent judgments between the judge that rules on the temporary injunction application and the judge that addresses the PTJ, Br. 15-16. But those assertions lack a basis in law or fact. With respect to the first, sovereign immunity does not protect Relators from costs and burdens associated with arguing the sovereign immunity motion itself. With respect to the second, no special risk of inconsistent judgments exists. Instead, as in any other court system, an initial ruling in this suit is "law of the case," and a future judge cannot toss it aside. Relators' two fears are thus fanciful, and offer no basis to abolish the reasonable-time prong.

C. Relators Have Not Established That Mandamus Is Warranted Just Because This Court Addressed Necessary Temporary Relief.

Relators' argument that the court was required to rule on their PTJ prior to issuing a TRO and setting a temporary injunction hearing, *see* Relators' Br. 15 ("[I]t would be unreasonable to delay a ruling past the date of the temporary injunction hearing"), also fails. District courts are free to rule on motions for such temporary relief before resolving issues raised in a PTJ.

Indeed, that is the lesson of *In re Texas Association of Sports Officials*, No. 03-10-00029, 2010 WL 392342 (Tex. App.—Austin Feb. 5, 2010, orig. proceeding), which bears a striking resemblance to the case at bar. *Sports Officials* also involved a suit against a state entity for injunctive relief, a request for a TRO and temporary injunction, and a PTJ asserting sovereign immunity, and arose out of Travis County to boot. *Id.* at *1; *Univ. Interscholastic League v. Southwest Officials Ass'n, Inc.*, 319 S.W.3d 952 (Tex. App.—Austin 2010). In that case, the court granted a TRO (before the defendant had filed the PTJ), and then denied the PTJ. *Sports Officials*, 2010 WL 392342, at *1. The defendant filed an interlocutory appeal. While that appeal was pending, a procedural problem arose; the interlocutory appeal triggered an automatic stay which "prevent[ed] the trial court from extending the [TRO]." *Id.* The TRO was set to expire during the appeal's pendency, and "once the order expires … the UIL will be free to implement its plan to regulate sports officials, thereby rendering moot the underlying suit and the UIL's appeal." *Id*. Although courts

usually first address jurisdictional issues, "TASO [thus sought] a writ of injunction incorporating the terms of the [TRO], pending resolution of the UIL's interlocutory appeal." *Id.* As this Court held, tackling *temporary relief* before a jurisdictional issue (including sovereign immunity) was entirely proper: "This Court has authority to issue writs of injunction if necessary to enforce its own jurisdiction." *Id.* And so this Court granted the writ of injunction before it resolved the sovereign immunity issue at the heart of the appeal. *Id.*

The same result should obtain in this case. As in *Sports Officials*, the grant of a TRO and scheduling of a temporary injunction hearing were critical to protect the court's jurisdiction despite a pending PTJ. Relators planned to provide voter data to the Commission by October 4, 2017. As a result, *before Relators had filed a PTJ*, Plaintiffs sought a TRO to prevent Relators from turning over the voter data. After all, if the data is provided, the genie cannot be put back in the bottle: not only would Plaintiffs be irreparably injured, but the case would be largely moot. That Relators subsequently filed a PTJ did not render the TRO any less necessary. To prevent the case from becoming moot, the court could act to protect its jurisdiction. The same is true of the temporary injunction hearing, which the court had to set under Rule 680. *See* Tex. R. Civ. P. 680 ("Every restraining order shall include an order setting a certain date for hearing on the temporary or permanent injunction sought."). In other

words, the court did not go on to the merits of this case, but has taken only necessary and temporary actions to preserve its jurisdiction.

The merits of Relators' sovereign immunity defense are thus not before this Court in this original proceeding, and Plaintiffs reserve the right to respond to that defense at the appropriate time. In light of Relators' efforts to preview the merits, however, *see* Relators' Br. 14-15, it bears noting that their sovereign immunity defense fails. Relators have expressly waived immunity from Plaintiffs' claims. *See* Tex. Elec. Code § 273.081; *City of El Paso*, 505 S.W.3d at 139 (concluding that Section 273.081 sets forth a "private right of action" "to enforce the Texas Election Code through injunctive relief") (emphasis omitted). And, in any event, because Relators' actions violate Texas law, *see, e.g.*, Tex. Elec. Code § 18.066; Tex. Gov't Code § 552.101, the *ultra vires* exception to sovereign immunity applies. At a minimum, Plaintiffs are entitled to jurisdictional discovery—in particular, with respect to Relators' assertion that the *ultra vires* exception does not apply.

II. THIS COURT MUST AT LEAST PRESERVE ITS EXTENSION OF THE TRO, OR ALLOW THE DISTRICT COURT TO GRANT TEMPORARY RELIEF BEFORE IT RULES ON THE PTJ.

Relators' request for mandamus is not supported by any authority. It is, however, consistent with an effort to moot Plaintiffs' claims before any court has the opportunity consider the merits of those claims. Even if this Court believes that extraordinary relief is proper, this Court should act to protect its and the lower court's

jurisdiction to resolve this case. As explained above, Part I.C, *supra*, this Court can grant temporary relief where necessary. *See* Tex. Gov't Code Ann. § 22.221(a) (West 2004) ("Each court of appeals ... may issue … all other writs necessary to enforce the jurisdiction of the court."); *Sports Officials*, 2010 WL 392342, at *1 (same). As further detailed above, such temporary relief is necessary here, where Relators believe they have a duty to turn over voter data to the Commission, and where such an action would moot the case.

Relators' representations to this Court that they will not turn over data while the PTJ is pending (because the Commission has agreed to toll its request during that time) are insufficient. Although the Commission promised to toll its request for the voter data until there is a "*ruling*" on the PTJ, Appx. E at 23 (emphasis added), that means the Commission plans to renew its request even if the court (correctly) *denies* the PTJ. Whether by design or otherwise, that presents a serious dilemma under Texas's procedural rules. Once the district court rules on the PTJ, Relators will file an appeal. After they do so, Texas rules stay further proceedings in the district court. *Southwest Officials*, 319 S.W.3d at 955 n.4 ("An interlocutory appeal from an order denying a [PTJ] 'stays all other proceedings in the trial court pending resolution of the appeal.'") (quoting Tex. Civ. Prac. & Rem. Code § 51.014(b) (West 2008)). Once there is a stay, the court below can no longer issue a new order barring Relators from turning over the voter data, which they will do because that is what they believe state

law requires. But that, troublingly, will moot this case—before this Court resolves the immunity issue Relators will be appealing. In other words, regardless of whether the district court grants or denies the PTJ, there will be a "gap" in between the court's PTJ ruling and the appellate proceedings during which Relators will turn over the data and leave Plaintiffs irreparably harmed.

That is why a ruling granting or maintaining temporary relief is necessary *before* the lower court adjudicates the pending PTJ. If such an order predates a ruling on the PTJ, it would necessarily predate the automatic stay that flows from Relators' inevitable interlocutory appeal, and so would remain valid. In order to prevent such gaps, even if this Court grants Relators' petition it should either (1) maintain the TRO, or (2) permit the court below to hold a hearing on Plaintiffs' application for a temporary injunction and grant relief before ruling on the PTJ.

PRAYER

For these reasons, the Real Parties in Interest request that this Court deny Relators' Petition for Writ of Mandamus. In the alternative, they request that this Court maintain the TRO, or permit the court below to hold a hearing on Plaintiffs' application for a temporary injunction and grant relief before ruling on the PTJ.

Respectfully submitted,

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MANDAMUS CERTIFICATION

Pursuant to Texas Rules of Appellate Procedure 52.3(j) and 52.4, I certify that I have reviewed this response and that every factual statement in the response is supported by competent evidence included in the appendix or record.

/s/ Charles W. McGarry
Charles W. McGarry

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing response has been sent via ECF on this 23rd day of October, 2017 to the following attorney of record for Relators:

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In addition, this is to certify that a true and correct copy of the foregoing response has also been sent to Respondent via facsimile, (512) 854-9332, and by regular mail, on this 23rd day of October, 2017.

/s/ Charles W. McGarry
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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), this brief contains 5,571 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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