

No. \_\_\_\_\_

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# In the Supreme Court of Texas

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*In re* STATE OF TEXAS,  
*Relator.*

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On Petition for Writ of Mandamus to  
to the Harris County Commissioners Court,  
Judge Lina Hidalgo, in her official capacity as Harris County Judge, and  
Clifford Tatum, in his official capacity as Harris County Elections Administrator

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## PETITION FOR WRIT OF MANDAMUS

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The State of Texas

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### **Respondents:**

Harris County Commissioners Court

Judge Lina Hidalgo, in her official capacity as Harris County Judge

Clifford Tatum, in his official capacity as Harris County Elections Administrator

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## STATEMENT OF THE CASE

- Nature of the proceeding:* On election night, the Texas Organizing Project filed an emergency application in a Harris County district court seeking a TRO that would extend the hours of operation for polling stations in the entire county by one hour. MR.2–20. Without notice to the State, the trial court granted the TRO and ordered that “any voters who arrive at Harris County polling locations after 7:00 p.m. and are in line at or before 8:00 p.m. are permitted to cast a provisional ballot.” MR.24–27. The State of Texas intervened, MR.21–23, and asked this Court to stay the TRO. The Court granted that request, *In re State of Texas*, No. 22-0997 (Tex. Nov. 8, 2022), and ordered that: (1) “[v]oting should occur only as permitted by Texas Election Code Section 41.032” and (2) “[l]ater cast votes should be segregated.” *Id.*
- Respondents:* Harris County Commissioners Court  
Judge Lina Hidalgo, in her official capacity as Harris County Judge  
Clifford Tatum, in his official capacity as Harris County Elections Administrator
- Respondents’ challenged actions:* Harris County’s canvass of the election will include votes cast by voters who arrived at polling places after 7:00 p.m., MR.30–36, in contravention of section 41.032 of the Election Code and this Court’s November 8 order.

## STATEMENT OF JURISDICTION

The Court has original jurisdiction to issue a writ of mandamus “to compel the performance of any duty imposed by law in connection with the holding of an election.” Tex. Elec. Code § 273.061. The State has a compelling reason to request mandamus from this Court in the first instance. *See* Tex. R. App. P. 52.3. The Harris County Commissioners Court will canvass the election on Tuesday, November 22

and will violate the Election Code when it does so. The ongoing disregard of the State's election laws constitutes irreparable harm warranting mandamus relief, and exigent circumstances prevent the State from obtaining relief from lower courts in the first instance.<sup>1</sup>

### **ISSUE PRESENTED**

Whether respondents are violating their nondiscretionary duties under the Election Code by including votes in the canvass that were not lawfully cast.

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<sup>1</sup> Because of the urgency with which Relator had to draft this petition, Relator requests that the Court alternatively treat this as a motion for temporary relief under Texas Rule of Appellate Procedure 52.10.

## TO THE HONORABLE SUPREME COURT OF TEXAS:

Once again, election day in Harris County was plagued by issues with election administration. Some polling places opened late, others dealt with paper shortages, and a striking number of voting machines were affected by technical issues. A trial court's last-minute intervention only made matters worse. Three hours before the close of the polls in Harris County, the Texas Organizing Project filed an emergency petition and application in a Harris County trial court seeking an order extending voting hours at polling locations across the entire county. Less than an hour before polling locations were set to close, the court extended voting hours one hour beyond the statutorily mandated 7:00 p.m. closing time. The State moved as quickly as possible to stem the damage from the unlawful TRO, and this Court almost immediately issued a stay order. But by the time the stay order issued, it was too late to unwind the clock. The result was that some ballots were cast in violation of the Election Code.

The trial court acted without authority. Even if some Harris County officials violated section 41.031 of the Code—which requires polls to *open* at 7:00 a.m.—that failure did not justify allowing polls to *remain* open after 7:00 p.m. This Court made that clear when it ordered voting to be conducted in strict compliance with section 41.032 of the Code, which requires polling places to close at 7:00 p.m.

Harris County intends to compound its election day mishaps by including the unlawfully cast ballots as part of the canvass. To prevent that imminent violation of the State's election laws and this Court's November 8 order, the Court should issue an order compelling Harris County to include in its canvass only those ballots cast in

accordance with section 41.032 of the Election Code. *See In re State of Texas*, No. 22-0997 (Tex. Nov. 8, 2022).

## STATEMENT OF FACTS

### I. Statutory Background

The Election Code provides that “the polls shall be opened at 7 a.m. for voting and shall be closed at 7 p.m.” Tex. Elec. Code § 41.031(a). The lone exception to that rule is that certain entities “may close the polls *before* 7 p.m.” when those entities have 50 or fewer registered voters and those voters have already all voted before the polls are set to close. *Id.* § 41.033.

In all other circumstances, voting after 7:00 p.m. is prohibited unless the voter was in line before the polls closed. *See id.* § 41.032(a) (“A voter who has not voted before the time for closing the polls is entitled to vote after that time if the voter is inside or waiting to enter the polling place at 7 p.m.”). If voters are waiting to enter the polling place at closing time, “the presiding judge shall direct them to enter the polling place and shall close it to others.” *Id.* § 41.032(b). But the presiding judge “shall take the precautions necessary to prevent voting after closing time by persons who are not entitled to do so.” *Id.* § 41.032(c).<sup>†</sup>

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<sup>†</sup> To be sure, section 43.007(p) provides that “[i]f a court orders any countywide polling place to remain open after 7 p.m., all countywide polling places located in that county shall remain open for the length of time required in the court order.” Tex. Elec. Code § 43.007(p). But nothing in that provision purports to supersede section 41.032 or authorize the trial court’s sweeping order an hour before the close of voting. Section 43.007(p) limits the potential for impropriety by attempting to keep the playing field level, but it is not an independent source of authority for the trial court’s

## II. Election Day, the Trial Court TRO, and This Court’s Stay

At 4:01 p.m. on election day, the Texas Organizing Project filed suit seeking a judicial order extending the hours of operation for polling stations county-wide by one hour. MR.2–20. Based on alleged late openings at only a dozen polling locations, MR.7, the Texas Organizing Project sought to have nearly 800 sites throughout Harris County held open later than 7:00 p.m., contrary to state law. The court held a hearing without notice to the State and granted a TRO providing that “any voters who arrive at Harris County polling locations after 7:00 p.m. and are in line at or before 8:00 p.m. are permitted to cast a provisional ballot.” MR.25. The State intervened, MR.21–23, and sought mandamus relief from this Court. The Court stayed the TRO and ordered that (1) “[v]oting should occur only as permitted by Texas Election Code Section 41.032” —which, as explained above, does not allow voters to vote if they arrived at the polling place after 7:00 p.m.—and (2) “[l]ater cast votes should be segregated.” *In re State of Texas*, No. 22-0997 (Tex. Nov. 8, 2022).

## III. Post-Election Developments

The Harris County Commissioners Court will canvass the vote on November 22. *See* Tex. Elec. Code 67.003(c). In contravention of this Court’s order, the Harris County Commissioners Court intends to include votes cast by voters who arrived at

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sweeping—and erroneous—decision to order the late closure of hundreds of polling locations on an insufficient evidentiary record.

county polling places *after* 7:00 p.m. in the canvass. MR.31 (representing that the votes at issue “must be counted and canvassed”); *see also* MR.34-36.<sup>‡</sup>

## ARGUMENT

“Mandamus relief is appropriate when a petitioner demonstrates a clear abuse of discretion and has no adequate remedy by appeal.” *In re Geomet Recycling LLC*, 578 S.W.3d 82, 91 (Tex. 2019) (orig. proceeding). The State has shown both elements.

### **I. Relators Refuse to Perform Their Ministerial Duties in Compliance with Texas Law and this Court’s Order.**

The Texas Election Code is unambiguous about two critical aspects of election day voting: (1) absent a limited exception that is inapplicable here, polls must close at 7:00 p.m., *see* Tex. Elec. Code § 41.031, and (2) “[i]f voters are waiting to enter the polling place at closing time, the presiding judge shall direct them to enter the polling place and shall close it to others,” *id.* § 41.032(b). The trial court’s order conflicted with those statutory mandates and ordered election officials to allow voters who were “in line at or before 8:00 p.m. . . . to cast a provisional ballot.” MR.25. That order cannot be squared with the mandatory language of section 43.031

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<sup>‡</sup> Unofficial election results are available from the Secretary of State, *see* “Texas Election Results,” Texas Secretary of State, <https://results.texas-election.com/races> (last updated Nov. 10, 2022), and the Harris County Election Administrator’s Office, *see* “November 08, 2022: General and Special Elections,” Harris County Elections, <https://www.harrisvotes.com/Election-Results/Election-Day> (last updated Nov. 18, 2022). The Court may take judicial notice of these preliminary results—which will be canvassed by Respondents on November 22, 2022—to the extent necessary in reaching its decision.

requiring polls to close at 7:00 p.m. Thus, even if local officials violated section 41.031 by failing to open polls at the statutorily required time, that would not justify an additional violation of the statute by failing to close polls at the statutorily required time. Any violation of the opening-time provision was complete and could not have been cured through a prospective court order requiring a violation of the closing-time provision.

The Court ordered that “[v]oting should occur only as permitted by Texas Election Code Section 41.032.” *In re State of Texas*, No. 22-0997 (Tex. Nov. 8, 2022). Because section 41.032 does not permit voters who arrived after 7:00 p.m. to cast ballots, it necessarily follows that the *entirety* of the voting process—including the canvassing of votes, *see* Tex. Elec. Code 67.001 § *et seq.*—will comport with the Election Code only if the unlawfully cast ballots are not included in the canvass. In doing otherwise, Harris County officials are violating their ministerial duties to comply with the Election Code.

## **II. The State Has No Other Adequate Remedy, and Time is of the Essence.**

Mandamus is an appropriate remedy when a party is “in danger of permanently losing substantial rights.” *In re Goodyear Tire & Rubber Co.*, 437 S.W.3d 923, 927 (Tex. App.—Dallas 2014, orig. proceeding). When the ordinary appellate process cannot afford timely relief, mandamus is proper. *See In re Woodfill*, 470 S.W.3d 473, 480-81 (Tex. 2015) (per curiam). That is precisely the case here. The ongoing violation of the State’s laws constitutes irreparable harm, *see State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020) (per curiam), and the Texas Legislature has balanced the

equities in favor of mandamus relief when the petitioner has shown that an election official is disregarding “any duty imposed by law in connection with the holding of an election or a political party convention.” Tex. Elec. Code § 273.061. The State met that standard when it obtained relief on election night that stayed the trial court’s improper TRO, *supra* Section I, and thus, mandamus relief is proper. Moreover, it is no answer for Harris County to point to the availability of an election contest, *see* Tex. Elec. Code § 232.001 *et seq.*, because that procedure is unavailable to the State to protect its substantial rights and interest in ensuring the faithful application of state law.

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## **PRAYER**

The Court should grant the petition and issue a writ of mandamus compelling respondents to include in the Harris County canvass only those ballots cast in accordance with section 41.032 of the Election Code.

Respectfully submitted.

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Counsel for the State of Texas

## **MANDAMUS CERTIFICATION**

Under Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this petition and that every factual statement in the petition is supported by competent evidence included in the appendix or record. I further certify that, under Rule 52.3(k)(1)(A), every document contained in the appendix is a true and correct copy.

/s/ Christopher D. Hilton  
CHRISTOPHER D. HILTON

## **CERTIFICATE OF SERVICE**

On November 21, 2022, this document was served on Christian D. Menefee and Jonathan G. C. Fombonne, lead counsel for Respondents, via Christian.Menefee@harriscountytexas.gov and Jonathan.Fombonne@harriscountytexas.gov.

/s/ Christopher D. Hilton  
CHRISTOPHER D. HILTON

## **CERTIFICATE OF COMPLIANCE**

Microsoft Word reports that this document contains 1562 words, excluding exempted text.

/s/ Christopher D. Hilton  
CHRISTOPHER D. HILTON

No. \_\_\_\_\_

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# In the Supreme Court of Texas

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*In re* STATE OF TEXAS,

*Relator.*

---

On Petition for Writ of Mandamus to  
to the Harris County Commissioners Court,  
Judge Lina Hidalgo, in her official capacity as Harris County Judge,  
and Clifford Tatum, in his official capacity as Harris County Elections  
Administrator

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## RELATOR'S APPENDIX

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1. Temporary Restraining Order (Nov. 8, 2022).....	A
2. Tex. Elec. Code § 41.031.....	B
3. Tex. Elec. Code § 41.032 .....	C

**TAB A: TEMPORARY RESTRAINING ORDER**

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2022-73765 / Court: 295

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NO. \_\_\_\_\_

TEXAS ORGANIZING PROJECT,

§ IN THE DISTRICT COURT

TRORX  
CASO

*Plaintiff,*

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§

v.

OF HARRIS COUNTY, TEXAS

HARRIS COUNTY, TEXAS, et al.

*Defendants.*

§ \_\_\_\_\_ JUDICIAL DISTRICT

**ORDER ON APPLICATION FOR TEMPORARY RESTRAINING ORDER**

On November 8, 2022, came to be heard Plaintiff's Application for Temporary Restraining Order. The Court, having considered the application along with all supporting and opposing briefing and the applicable law cited therein, evidence presented, arguments of counsel, and the pleadings on file in this case, is of the opinion:

Plaintiff's Application for a Temporary Restraining Order should be GRANTED. The Court further FINDS:

Plaintiff has a substantial likelihood of succeeding on the merits of their claims. If the relief requested by Plaintiff is not granted, Plaintiff and its members will suffer imminent and irreparable harm, and its members' statutory rights under Section 41.031 of the Texas Election Code will be violated.

Plaintiff has notified Defendants of Plaintiff's Petition and Application through their county attorney via phone call and email. Immediate and irreparable injury, loss, and damage will result to Plaintiffs before any other form of notice can be served to Defendants and a hearing had thereon. The threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted.

The grant of an injunction will not disserve the public interest.

Therefore, the Court makes the following **ORDERS**:

Defendants, together with their agents, servants, employees, attorneys and those persons in active concert or participation with them, shall be required to:

1. Operate the following polling locations until 8 p.m. on November 8, 2022:
  - a. Neighborhood Centers Inc Ripley House Campus – Gym, 4410 Navigation Boulevard, Houston, TX 77011
  - b. Green House International Church, 16711 Ella Blvd., Houston, TX 77090
  - c. Bayland Park Community Center – Auditorium, 6400 Bissonnet Street, Houston, TX 77074
  - d. Saint Timothy Lutheran Church – Adult Education Building, 14225 Hargrave Road, Houston, TX 77070
  - e. Helms Community Learning Center – Cafeteria, 503 West 21<sup>st</sup> Street, Houston, TX 77008
  - f. Bruce Elementary School – 510 Jensen Drive, Houston, TX 77020
  - g. Cypresswood Elementary School – Music Room, 6901 Cypresswood Point Avenue, Humble, TX 77338
  - h. Sunnyside Multi-Service Center, 9314 Cullen Boulevard, Houston, Texas 77051
  - i. BakerRipley Cleveland Campus, 720 Fairmont Parkway, Pasadena, TX 77504
  - j. West Gray Center, 1355 W Gray Street, Houston, TX 77019
2. To operate the other polling locations in Harris County until 8 p.m. as required by Texas Election Code Section 43.007(p), which reads, “if a court orders any countywide polling place to remain open after 7 p.m., all countywide polling places located in that county shall remain open for the length of time required in the court order.”
3. Ensure that any voters who arrive at Harris County polling locations after 7:00 p.m. and are in line at or before <sup>8:00</sup>~~9:00~~ p.m. are permitted to cast a provisional ballot.

4. Ensure that any eligible voters who arrive at the polling location at or before 7:00 p.m. are permitted to cast a regular ballot

5. Demarcate those voters who arrive at or before 7 p.m. with a card, monitor, or other reasonable means to ensure that those voters who are otherwise eligible to vote are able to cast a regular ballot not a provisional ballot.

The Elections Administrator's Office will use every single possible source of media to disseminate and

6. Inform the public of this ORDER and the extended hours ordered herein at 6:30 p.m. through its Twitter, Facebook and any other social media page and its website.

A press release sent to all of Defendants' press contacts and through a notice published on the

Official Website for the Harris County Elections Department and on all of Defendants' official

~~social media accounts~~. The message will remind voters that to vote a regular ballot they must

be in line by 7 p.m., and that they will only be allowed to vote a provisional ballot if they get

7.) Supplies, including paper ballots, needed for voting and provisional ballots must be supplied to all polls.  
in line after 7 p.m. and at or before 8 p.m.

It is further ORDERED that the Clerk of this Court issue a Temporary Restraining Order, operative until the 22nd day of November, 2022, and pending the hearing ordered below, restraining Defendant or any of her officers, agents, servants, employees, attorneys, representatives, or any persons in active concert or participation with them who receive actual notice of this Order from acting contrary to the Order.

~~It is further ORDERED that for this Temporary Restraining Order to be effective under the law, cash bond in the amount of \$ \_\_\_\_\_ shall be required of Plaintiff and filed with the District Clerk of Hidalgo County, Texas.~~  
Bond has been waived.  
The Clerk of Court shall forthwith issue a writ of Temporary Injunction in conformity with the law and terms of this Order.

It is further ORDERED that Plaintiff's Petition for a Temporary Injunction, as contained in its verified Original Petition, will be heard on the 21st day of November, 2022, at 11 a.m. p.m.

SIGNED November 8, 2022.

Signed:  
11/8/2022  
6:15 PM



Judge Presiding

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I, Marilyn Burgess, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this November 8, 2022

Certified Document Number: 105010061 Total Pages: 5



Marilyn Burgess, DISTRICT CLERK  
HARRIS COUNTY, TEXAS

**In accordance with Texas Government Code 51.301 and 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail [support@hcdistrictclerk.com](mailto:support@hcdistrictclerk.com)**

**TAB B: TEX. ELEC. CODE § 41.031**

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Vernon's Texas Statutes and Codes Annotated  
Election Code (Refs & Annos)  
Title 4. Time and Place of Elections  
Chapter 41. Election Dates and Hours for Voting (Refs & Annos)  
Subchapter B. Hours for Voting

V.T.C.A., Election Code § 41.031

§ 41.031. Voting Hours

Currentness

- (a) Except as provided by [Section 41.033](#), the polls shall be opened at 7 a.m. for voting and shall be closed at 7 p.m.
- (b) Voting may not be conducted after the time for closing the polls except as provided by [Section 41.032](#).

#### Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by [Acts 1997, 75th Leg., ch. 1070, § 48, eff. Sept. 1, 1997](#).

#### Notes of Decisions (7)

V. T. C. A., Election Code § 41.031, TX ELECTION § 41.031

Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

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**TAB C: TEX. ELEC. CODE § 41.032**

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Vernon's Texas Statutes and Codes Annotated  
Election Code (Refs & Annos)  
Title 4. Time and Place of Elections  
Chapter 41. Election Dates and Hours for Voting (Refs & Annos)  
Subchapter B. Hours for Voting

V.T.C.A., Election Code § 41.032

§ 41.032. Voting After Polls Close

[Currentness](#)

(a) A voter who has not voted before the time for closing the polls is entitled to vote after that time if the voter is inside or waiting to enter the polling place at 7 p.m.

(b) If voters are waiting to enter the polling place at closing time, the presiding judge shall direct them to enter the polling place and shall close it to others. However, if that procedure is impracticable, at closing time the presiding judge shall distribute numbered identification cards to the waiting voters and permit entry into the polling place for voting after closing time only by those possessing a card.

(c) The presiding judge shall take the precautions necessary to prevent voting after closing time by persons who are not entitled to do so.

#### **Credits**

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986.

#### [Notes of Decisions \(2\)](#)

V. T. C. A., Election Code § 41.032, TX ELECTION § 41.032

Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

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Associated Case Party: Clifford Tatum, in his official capacity as Harris County  
Elections Administrator

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Associated Case Party: Judge Lina Hidalgo, in her official capacity as Harris County  
Judge

Name	BarNumber	Email	TimestampSubmitted	Status
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