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No. 22-1044

IN THE SUPREME COURT OF TEXAS

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

RESPONSE TO PETITION FOR MANDAMUS AND MOTION IN INTERVENTION

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Motion for Intervention

Intervenor-Respondent Texas Organizing Project ("TOP") files this Motion to Intervene as Real Party in interest in the above-styled cause and, due to the exigent circumstances, includes herewith its Response to the State of Texas's Petition for Writ of Mandamus. Harris County is statutorily required to conduct its canvass of votes no later than today, November 22, 2022, and it is TOP's understanding that some local political subdivisions may have already canvassed votes.

TOP is in actuality a Real Party in Interest in this action, and should have been named as such, because the action itself is an attempt to end-run around and collaterally attack a district court action instituted by TOP in which the State is an Intervenor, *Texas Organizing Project v Harris County et al.*, No.2022-73765 (334th District Court Harris County, Nov. 8, 2022), and about which the State already has pending a Petition for Writ of Mandamus, *In re State of Texas*, No. 22-0997. The proper course of action for the State's requested relief would have been further filings in the already-pending action, or, at a minimum, to name TOP as a Real Party in Interest in this action.

TOP respectfully requests that the Court grant its Motion to Intervene and accept its Response to Petition for Writ of Mandamus. Should this Court not grant the Motion for Intervention, TOP respectfully requests that its filing be accepted as an amicus filing and that the State's Petition be denied for the reasons more fully set forth below.

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Mandamus Should Be Denied

The State's Petition improperly seeks the extraordinary remedy of a Writ of Mandamus to try to enjoin Harris County election officials from following the statutorily mandated procedures for processing provisional ballots and canvassing votes.

As an initial matter, mandamus is not an appropriate vehicle for the State's request. First, under the Election Code, the Court's mandamus authority is limited to "compel[ling] the performance of any duty imposed by law in the holding of an election." Tex. Elec. Code §273.061. The State has not identified any duty which Harris County election officials are failing to take. Rather they are trying to enjoin the County from complying with its duty, imposed by the Texas Election Code, to canvass votes. The State's underlying complaint is with a district court's Election Day order that extended voting hours as contemplated by the Texas Election Code. What the State actually seeks is a writ of injunction prohibiting the County from counting what TOP believes are approximately 2,100 votes cast by eligible voters who acted pursuant to an in-force district court order.

Mandamus is further inappropriate because there are other remedies at law available to any party wishing to challenge the propriety of the provisional ballots at issue in this case, which have been counted and maintained separately pursuant to this Court's Stay Order in *In re State of Texas*, No. 22-0997, the Help America Vote Act, and as contemplated by Texas Election Code Section 63.011(e) ("a person who is permitted under a state or federal court order to cast a ballot in an election for a federal office after the time allowed by [Texas Election Code Section 41.031], must cast the ballot as a provisional vote."). Because the votes have been segregated, any party with jurisdiction can file an election contest if they wish to challenge the validity of the votes. A party could also seek normal injunctive relief in a district court to contest the ballots at issue if they believe they will be harmed by the counting of those ballots.

The State entered into an Agreed Order with the other parties to the initial district court action – TOP, Harris County and its relevant officials, the Harris County Republican Party, and the Harris County Democratic Party – which contemplated the County processing and tabulating the provisional votes as required by state law. Now, at the last second, rather than moving to alter that order, the State improperly attempts to invoke this Court's mandamus jurisdiction.

Further, the district court acted well within its long-recognized equitable authority to extend polling hours to remedy a violation of Texas Election Code Section 41.031 (requiring polling places to be open at 7 a.m.) and require that any ballots cast after 7 p.m. be cast provisionally and kept segregated from other ballots. While the State argues that such a remedy is foreclosed by the Texas Election Code, the State carefully leaves out numerous provisions of the Texas Election Code, the Texas Administrative Code, and the Help America Vote Act, which expressly contemplate court orders extending hours for polling locations. It also conveniently elides any mention of the fact that the State of Texas, on the same day that it challenged the propriety of a court order extending hours in Harris County, actually advised Bell County to seek such an order from a Bell County district court.

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Issues Presented

- 1. Whether petitioning for a writ of mandamus is the appropriate vehicle to enjoin county election officials from taking certain statutorily-required actions when the petitioning party has not identified any ministerial duties the county is failing to perform and when other legal remedies are available.
- 2. Whether, when presented with a record that a county has violated Texas Election Code Section 41.031 by not opening polling locations by 7 a.m., district courts have the legal and equitable power to extend the hours for voting at Election Day as contemplated by Texas Election Code Section 43.007(p) ("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.").

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Introduction

The State asks this Court to disenfranchise what TOP believes are approximately 2,100 voters who acted pursuant to a valid district court order and to do so on a minimally briefed and incomplete reading of Texas Election law. This Court should reject such a request.

On the same day the State told this Court that state law did not permit a district court to order Harris County to hold open its polling locations for one additional hour as a remedy for numerous locations opening substantially late, the Texas Secretary of State ("SOS") advised Bell County that it should seek a court order to hold open its polling locations one hour late for the exact same reason. The SOS's advice to Bell County was not surprising because the court-ordered remedy of holding polling places open for some additional amount of time in response to election-day issues is both contemplated in federal and state statutes, specifically accounted for on Texas provisional ballots, and routinely ordered by Texas state courts.

More surprising was that the State determined that this routine court order as applied to Harris County was legally problematic and sought immediate mandamus relief from this Court as to Harris County (but not Bell County which acquired the exact same remedy and has counted such ballots). Although this Court issued a stay as to the District Court's order, that stay did not issue until approximately 2,100 voters had cast their ballots under the District Court's valid order. Now, the State seeks even more extreme mandamus relief: to throw out votes cast under a legally obtained and in-force temporary restraining order. This Court should reject the State's petition.

Statement of Facts

On Election Day, November 8, 2022, in response to numerous Harris County polling locations opening well over an hour late,¹ TOP sought a declaration that Harris County had violated Texas Election Code Section 43.031, which requires that polling locations "be opened at 7 a.m. for voting." After a full evidentiary hearing,² the District Court issued a Temporary Restraining Order ("TRO"), requiring Harris County polling locations to stay open an extra hour, and allowing voters who were in line by 8:00 p.m. to cast provisional ballots. In accordance with 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

¹ The Texas Governor also agrees that there were delays in Harris County. *Governor Abbott Calls For Investigation Of Harris County Elections*, Office of the Texas Governor Greg Abbott, November 14, 2022,

https://gov.texas.gov/news/post/governor-abbott-calls-for-investigation-of-harris-county-elections.

² The District Court held a hearing at which witnesses, including TOP members and an affected voter, testified that the identified polling locations were closed for several hours and hundreds of people left the polling locations without being able to vote. At the hearing, both major political parties in the county intervened and did not specifically oppose the one-hour extension, while counsel for Harris County represented that the extension was logistically possible.

remain open for the length of time required in the court order," this TRO applied countywide.

At 7:42 p.m., while voters were already casting their ballots according to the District Court's TRO, the State filed a Petition for Writ of Mandamus before this Court asking it to "vacate or reverse the trial court's temporary restraining order." *See* Petition for Writ of Mandamus at 3, *In re: State of Texas*, Case No. 22-0997 (Tex. Nov. 8, 2022). The State argued that the Texas Election Code prohibits courts from extending polling place hours beyond 7 p.m. *Id.* at 2. This is despite the fact courts regularly remedy delayed polling location openings with extended voting hours. In fact, the Texas Secretary of State instructed a separate county on Election Day, Bell County, to seek a court order to hold its polls open later, and publicly opined on the legal validity of such a process: "[o]nly a Texas district court can grant such an extension [for voting past 7:00 p.m.], . . . so Bell County [was] taking the appropriate legal action."³

At approximately 8 p.m., and virtually contemporaneously with respondent TOP filing a Response to the Petition, this Court issued a Stay of the TRO, halting further voting. The Stay Order instructed that the votes cast after 7 p.m. "should be

³ Lauren Dodd, Bell County polling locations extended to 8 p.m., officials say, Killeen Daily Herald, Nov. 8, 2022 https://kdhnews.com/news/local/bell-county-polling-locations-extended-to-8-p-m-officials-say/article_b78f18dc-5f75-11ed-afd2-636e89875ecd.html.

segregated." This comports with the Texas Election Code⁴ and the federal Help America Vote Act,⁵ which both have specific provisions addressing district court orders that extend polling hours and how those later-cast provisional ballots should be handled.

In response to this Court's Stay Order, Harris County polling locations stopped accepting votes, and the provisional ballots that had already been cast by people who got in line after 7 p.m. were segregated from other ballots as contemplated by state and federal law and this Court's Stay Order.

On November 11, 2022, the parties to the District Court action and the parties requesting intervention into the District Court action – TOP, Harris County and relevant county officials, the Harris County Republican Party, the Harris County Democratic Party, and the State of Texas – filed an Agreed Order permitting the processing of the late-cast provisional ballots to proceed, pursuant to state law, while keeping them segregated from other provisional ballots and regular ballots.

Initially, the draft Agreed Order contained a paragraph reading:

The V-drive containing images of the Later Cast Provisional Ballots shall not be tabulated as part of the November 2022 general election

⁴ Tex. Elec. Code § 63.011(e) ("[A] a person who is permitted under a state or federal court order to cast a ballot in an election for a federal office after the time allowed by [Texas Election Code Section 41.031], must cast the ballot as a provisional vote.")

 $^{^{5}}$ 52 U.S.C. § 21082(c) ("Any individual who votes in an election for Federal office as a result of a Federal or State court order or any other order extending the time established for closing the polls by a State law in effect 10 days before the date of that election may only vote in that election by casting a provisional ballot Any such ballot cast under the preceding sentence shall be separated and held apart from other provisional ballots cast by those not affected by the order.").

results until a court with jurisdiction over the proceedings in this case enters an order requiring that the Later Cast Provisional Ballots be tabulated.

After discussions between the Harris County Republican Party and Harris County, it was agreed that this paragraph should be removed "based on the understanding that the Texas Supreme Court's order does not prohibit the tabulating of those votes as long as the ballots themselves remain [segregated]."⁶ The other parties to the action, including the State, agreed with removing the paragraph.⁷ For the next ten days, no party, including the State, sought any further clarity from this or any other court, and the County and the Early Voting Ballot Board continued to process the provisional ballots while keeping them segregated pursuant to the Agreed Order, should an appropriate party later wish to challenge those votes through an election contest or request for injunction.⁸

Now, on the afternoon before the statutorily mandated canvassing of votes, *see* Tex. Elec. Code § 67.003(c), the State files a new Petition for Writ of Mandamus arguing that the ballots should not be accepted and tabulated pursuant to the Agreed Order and Texas Election Code Section 65.051 *et seq.*, which outline the process for the handling of provisional ballots.

⁶ See State's Ex. E at MR.34–35, 40, 41.

⁷ *See* State's Ex. E at MR.34–45.

⁸ See State's Ex. E.

Argument

Mandamus is an extraordinary remedy, available only when the lower court has clearly abused its discretion and the relators have no other adequate remedy. *In re Murrin Bros. 1885, Ltd.*, 18-0737, 2019 WL 6971663, at *2 (Tex. Dec. 20, 2019); *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding). The State has failed to meet its burden to satisfy either requirement.

A. Mandamus is Improper at this Juncture Because an Election Contest or Injunction is the Appropriate and Available Remedy for Challenging the Results and the State's Delay in this Matter Will Prejudice the Parties.

Under Texas law, a party must demonstrate that it does not have an adequate remedy at law before a mandamus will issue, because a mandamus is an extraordinary remedy not meant for grievances that may be addressed by other remedies. *In re Murrin Bros. 1885, Ltd.*, 18-0737, 2019 WL 6971663, at *2 (Tex. Dec. 20, 2019); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding).

The Texas Election Code, Texas Secretary of State's Regulations, and the federal Help America Vote Act all set out the process for having votes cast after hours pursuant to a court order, specifically stating that they be cast provisionally and kept segregated from other ballots. *See* Tex. Elec. Code § 63.011(e); 1 Tex. Admin. Code § 81.172; 52 U.S.C. § 21082(c). These provisions exist precisely to keep the results of these later-cast provisional ballots distinguishable because the

appropriate remedy should a party disagree with court-ordered extended hours voting is an election contest or other normal court procedures for obtaining an injunction to remove those ballots from the count. The procedure for election contests is set out in detail by the Legislature in Chapters 221-243.

As set forth more fully below, far from being an extraordinary act, the District Court's Order was firmly in line with both legislative and court precedent and history. Voters then relied on that valid and existing order to cast their ballots. Although the State seeks to upend existing law concerning extending polling place locations, it should not come at the expense of voters who acted in compliance with the law.

Equitable considerations also some into play in determining whether mandamus is appropriate. *See, e.g., In re Self*, 652 S.W.3d 829, 830 (Tex. 2022) ("Mandamus generally 'aids the diligent and not those who slumber on their rights.'"). The State's entrance into an Agreed Order and subsequent delay should foreclose its requested relief. The State filed its Writ of Mandamus on the very eve of the statutorily mandated canvassing of votes. *See* Tex. Elec. Code § 67.003(c). If the State disagreed with the course of action set out for processing provisional ballots and canvassing votes as required by state law and as agreed to by the parties in the other case, rather than prejudicing all the parties involved by filing a last-minute Writ of Mandamus, it should have sought further clarity from a court sooner. This Court's Stay Order only stayed any further voting and stated that the already cast votes should be kept segregated. As explained above, this corresponds to state and federal laws and regulations, and all of the parties involved, including the State, agreed to have the provisional ballot process proceed. The State's last-minute change of heart should not prejudice the parties, and the voting records have been sufficiently segregated such that any purportedly aggrieved candidate can file an election contest or a person or entity can file a lawsuit for injunctive relief as contemplated by the Election Code should they disagree with those votes being included in the final count.

B. The District's Court Order Did Not Violate Texas Election Code Section 41.031 and Such Orders Are Sanctioned by the Texas Legislature.

A writ of mandamus is also not appropriate because the District Court's TRO did not constitute an abuse of discretion as the State argues. Far from violating the Texas Election Code, district court orders extending polling hours are explicitly contemplated by the Texas Legislature, are in accordance with historical practice, and have been advised by the State of Texas and enforced in other counties as recently as November 8, 2022.

Texas courts in counties across the State, including in Harris County, can and have remedied violations of Texas Election Code Section 41.031 by ordering counties to keep polling locations open after 7 p.m. in order to offset late openings which burden voters. *See, e.g.*, Order, *Texas Organizing Project v. Harris County*, No. 2018-80292 (295th District Court Harris County, Nov. 6, 2018) (finding that voters have the legal right to have twelve hours of voting on Election Day, and requiring polling locations in Harris County to stay open beyond 7 p.m. to guarantee that right); Order, *La Unión Del Pueblo Entero v. Hidalgo County*, No. 3842-20-F (370th District Court Hidalgo County, Nov. 3, 2020) (requiring polling locations in Hidalgo County to stay open until 8 p.m. after late openings); Order, *In the Interest of Upshur County Voters*, No. 514-20 (115th District Court Upshur County, Nov. 3, 2020) (same). Indeed, just this last Election Day, a court ordered Bell County to keep polling places open until 8 p.m. after late poll openings of 8 polling places. Order, No. 22-DCV-335320 (146th District Court Bell County, Nov. 8, 2022).

Not only is the court-ordered remedy of keeping polling places open routine, it is also contemplated by statute. Texas Election Code Section 43.007(p) is telling as to the Legislature's intent on court orders to keep polling locations open past 7 p.m. The provision explicitly envisions courts ordering counties to extend Election Day hours and requires 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." Section 43.007(p) was added by the Legislature in 2019 in response to the ruling in *Texas Organizing Project v. Harris County*, No. 2018- 80292 (295th District Court Harris County, Nov. 6, 2018), in which the District Court only ordered certain polling locations (those that had experienced delays) to stay open past 7 p.m. The Legislature did not respond to this court order by attempting to limit the ability of courts to hold polling places open. Indeed, as set forth below such action would present considerable separation of powers concerns. Rather, the Legislature consciously acted to set out what it believed to be the appropriate equitable remedy – that, for counties with countywide polling, all locations should remain open rather than some.

That the Legislature passed Section 43.007(p), which specifically envisions court orders to keep polling places open, after Section 41.031 demonstrates that the Legislature did not interpret Section 41.031 to curtail a court's powers to order polling places to be open later.

Texas Election Code Section 63.011(e) also explicitly envisions courts ordering counties to have extended hours at Election Day polling locations, and requires any votes cast during court-ordered extended hours to be cast provisionally: "A person who is permitted under a state or federal court order to cast a ballot in an election for a federal office after the time allowed by Subchapter B, Chapter 41, must cast the ballot as a provisional vote in the manner required by this section."

The State's reading of Section 41.031 would render both Section 43.007(p) and Section 63.011(e) superfluous, in direct violation of rules of statutory construction. *See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d

238, 256 (Tex. 2008) ("The Court must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous.").

The Secretary of State prescribes provisional ballot forms, and the provisional ballot form itself has a box for the election judge to check off if a provisional ballot is voted because a court ordered a polling location to stay open past 7 p.m. *See* Tex. Elec. Code § 63.011. Further, the Secretary of State has codified these provisions into the Texas Administrative Code. *See* 1 TAC 81.172(a)(7). That the State's official provisional ballot form, codified into state law, provides an option to identify a provisional ballot as a late-cast ballot underscores its permissibility under the Texas Election Code.

Additionally, federal law, specifically the Help America Vote Act, addresses voters who vote after the polls close and envisions courts ordering counties to extend Election Day hours. Specifically, it states that

"[a]ny individual who votes in an election for Federal office as a result of a Federal or State court order or any other order extending the time established for closing the polls by a State law in effect 10 days before the date of that election may only vote in that election by casting a provisional ballot under subsection (a). Any such ballot cast under the preceding sentence shall be separated and held apart from other provisional ballots cast by those not affected by the order.

52 U.S.C. § 21082. The State conveniently leaves out any discussion of most of these provisions. The omissions are glaring because the State is well aware of these provisions and actually advised Bell County to pursue a court order to extend voting

hours on the very same day it argued that such court orders are impermissible when sought in Harris County.⁹ It goes without saying that the law should be interpreted uniformly for every Texas county regardless of the demographic or political makeup of those counties. The Court should reject the State's attempt to upend this wellestablished election law remedy.

C. The State's Arguments Would Create a Separation of Powers Issue Such that Courts Would Have No Authority To Prevent Irreparable Harm and Maintain the Rights of Parties Through Equitable Temporary Injunctive Relief when Needed.

"The Inherent judicial power of a court is not derived from legislative grant or specific constitutional provision, but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities. The inherent powers of a court are those which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity." *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979). The TRO issued by the District Court was an equitable course of action to prevent irreparable harm and preserve voters' rights to cast a ballot on Election Day (provisionally, thus preserving the rights of adverse parties as well), which right had been impinged by Harris County's failure to open numerous polling locations on time. *Cf. Waites v. Sondock*, 561 S.W.2d 772, 773 (Tex. 1977) (orig. proceeding)

⁹ See supra note 3.

(holding that legislative mandatory continuance clause was unconstitutional where it deprived the trial court the power to prevent irreparable harm to the parties before it).

The State argues that court orders extending hours are abuses of discretion because they conflict with the Election Code. Even setting aside that the Legislature repeatedly and explicitly envisioned court orders extending voting hours, such judicial powers are necessary for courts to preserve the rights of the parties, prevent irreparable injury, and maintain jurisdiction over a case. Indeed, the State's theory that courts lack equitable power to grant relief not specifically contemplated by statute fundamentally misunderstands the nature of equitable power. If a court could not offer equitable relief beyond what is explicitly spelled out in statute, the inherent power of courts would be greatly diminished.

Had voters who were turned away at the polls when they attempted to vote in the morning and could not get to the polls by 7 p.m., been unable to cast a provisional ballot pursuant to the court order, they would have been totally disenfranchised. *See, e.g., Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095, 2010 WL 4226614, at *5 (D. N.D. Oct. 21, 2010) ("Once a citizen is deprived of his right of suffrage in an election there is usually no way to remedy the wrong. There is no process for ordering 're-votes' . . . Once an election is over, it is over and it is little consolation to say that the problem will be remedied in the next election."); *League of Women*

Voters of N. Carolina v. N. Carolina, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce [an] election occurs, there can be no do-over and no redress.").

Under the State's reading, a county could refuse to open all of its polling locations until 1 p.m. on Election Day, disenfranchising many thousands of voters, and there would be no recourse for those voters. Ordering polls to remain open while providing that any ballots cast should be cast provisionally and remain segregated is exactly the type of equitable power that is inherent to the existence of courts and preserves both the rights of the voters and the rights of candidates or other parties -3. Respectfully Submitted, <u>By: /s/ Edgar Salar</u> Har who wish to later challenge the provisionally cast ballots.

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CERTIFICATE OF SERVICE

I hereby certify that on the November 22, 2022, a true and correct copy of the

foregoing Response to Petition for Mandamus and Motion for Intervention was

served upon counsel of record in this proceeding via email and e-service.

<u>/s/ Edgar Saldivar</u> Edgar Saldivar

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this document contains 4226 words, excluding the portions of the document exempted by Rule 9.4(i)(1).

/s/ Edgar Saldivar EL RETRIEVED FROMDENO Edgar Saldivar

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

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

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Jonathan Fombonne	24102702	jonathan.fombonne@harriscountytx.gov	11/22/2022 10:08:03 AM	SENT
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Associated Case Party: Texas Organizing Project

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Edgar Saldivar		esaldivar@aclutx.org	11/22/2022 10:08:03 AM	SENT

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Zachary Dolling	zachary@texascivilrightsproject.org	11/22/2022 10:08:03 AM	ERROR

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