

Nos. 22-0997, 22-1044

In the Supreme Court of Texas

IN RE STATE OF TEXAS,
Relator

On Petition for Writ of Mandamus
to the 334th Judicial District Court, Harris County

IN RE STATE OF TEXAS,
Relator

On Petition for Writ of Mandamus 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.

MOTION TO DISMISS

TO HONORABLE SUPREME COURT OF TEXAS:

On election night 2022, the Texas Organizing Project sought, MR.2-20, and received an *ex parte* TRO extending operation for polling stations in Harris County by one hour. MR.2-20.¹ The State intervened, MR.21-23, and asked this Court to stay the TRO, *In re Texas*, No. 22-0997 (Tex. Nov. 8, 2022). This Court granted that request 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.*

Subsequently, the State learned that Harris County intended to include votes cast by voters who arrived at polling places after 7:00 p.m. in its canvas. MR.3036.

¹ Citations to *MR.* ___ reference the mandamus record in Case No. 22-1044.

The State sought a second writ of mandamus asserting that the County's actions were in contravention of section 41.032 of the Election Code and this Court's November 8 order. The next day, this Court entered an order, *In re State of Texas*, No. 22-1044 (Tex. Nov. 22, 2022), which required respondents to "provide the Court with a copy of the canvas results, including the separately tabulated 'later cast votes,' as soon as they are available." Accordingly, on November 22, counsel for the Harris County respondents transmitted to this Court a copy of the canvassed election returns for Harris County's November 8, 2022, general election, including the separately tabulated "later cast votes." Respondents also concurrently filed responses to the State's petition for a writ of mandamus. Four candidates subsequently filed election contests disputing, among other matters, the validity of the later-cast votes.

On March 8, 2023, this Court asked the parties to submit status reports no later than April 7, 2023. In those reports, the parties agreed that while the election challenges remained pending at that time, the current petitions were moot "[b]ecause Petitioners' requested relief can no longer be granted." Status Report by the County Defendants at 2, *In re the State of Texas*, No. 22-0997 (Apr. 7, 2023); see also Status Report by the State at 2-3, *In re the State of Texas*, No. 22-0997 (Apr. 7, 2023), accord Case Update for Cause No. 22-0997, Trial Court Cause No. 2022-73765, and Cause No. 22-1044 by Texas Civil Rights Project at 1, *In re State of Texas*, No. 22-0097 (Apr. 7, 2023).

Ordinarily, "[u]nder Texas law," the State "would have an absolute right to nonsuit their own claims for relief" under such circumstances "at any time during the litigation until they have introduced all evidence other than rebuttal evidence at

trial.” *Villafani v. Trejo*, 251 S.W.3d 466, 468-69 (Tex. 2008). Filed pursuant to Texas Rule Civil Procedure 162, such a nonsuit was “effective when it [wa]s filed.” *Univ. of Texas Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz*, 195 S.W.3d 98, 100 (Tex. 2006). This Court has held that “Rule 162 remains the appropriate procedural mechanism for such a non-suit” during the pendency of an interlocutory appeal. *Morath v. Lewis*, 601 S.W.3d 785, 788 (Tex. 2020).

There is no similar mechanism, however, to non-suit an original action brought directly in this Court under Texas Rule of Appellate Procedure 52.

Regardless, the Court should dismiss the petitions for lack of jurisdiction. This Court has “held that adversity between parties is a jurisdictional prerequisite, as without such adversity there is no justiciable controversy.” *Paxton v. Longoria*, 646 S.W.3d 532, 538 (Tex. 2022); *see also Klein v. Hernandez*, 315 S.W.3d 1, 3 (Tex. 2010). Here, there is not even adversity regarding *whether* there is a justiciable controversy: since at least April, the parties have agreed that there is no such controversy.

As reflected in the certificate of controversy, counsel for the State has conferred with counsel for respondents. The County respondents have agreed to the motion. The counsel for the Texas Civil Rights Project has not responded, but no respondent would be prejudiced by this motion.

PRAYER

The Court should grant the motion and dismiss the petitions.

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

On July 13, 2023, undersigned counsel attempted to confer by email with (1) Jonathan G.C. Fombonne, lead counsel for the Harris County respondents, via Jonathan.Fombonne@harriscountytx.gov; and (2) Hani Mirza, lead counsel for Texas Organizing Project respondents, via hani@texascivilrightsproject.org. Harris County respondents indicated they were unopposed. As of the time of filing, counsel for the Texas Organizing Project has not responded.

/s/ Lanora C. Pettit
LANORA C. PETTIT

CERTIFICATE OF SERVICE

On July 14, 2023, this document was served on (1) Jonathan G.C. Fombonne, lead counsel for the Harris County respondents, via Jonathan.Fombonne@harriscountytexas.gov; and (2) Hani Mirza, lead counsel for Texas Organizing Project respondents, via hani@texascivilrightsproject.org.

/s/ Lanora C. Pettit

LANORA C. PETTIT

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this document contains 659 words, excluding exempted text.

/s/ Lanora C. Pettit

LANORA C. PETTIT

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