No. 24-0884

In the Supreme Court of Texas

IN RE TEXAS HOUSE OF REPRESENTATIVES,
Relator.

On Petition for Writ of Injunction

BRIEF FOR REAL PARTIES IN INTEREST THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, EXECUTIVE DIRECTOR BRYAN COLLIER, TEXAS DEPARTMENT OF CRIMINAL JUSTICE CORRECTIONAL INSTITUTIONS DIVISION, AND MEMBERS OF THE TEXAS BOARD OF CRIMINAL JUSTICE

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[1] Nowhere in Relator's petition, motion for emergency relief, or brief on the merits does it purport to seek extraordinary writ relief against TDCJ's Executive Director, Bryan Collier or various unnamed members of the Texas Board of Criminal Justice. Nevertheless, presumably due to the House Committee's request for emergency relief against "all persons in active concert or participating with" TDCJ, Emergency Mot. at 1, this Court temporarily enjoined them. *See In re Texas House of Representatives*, No. 24-0884, 2024 WL 4521051, at *1 (Tex. Oct. 17, 2024) (per curiam). Counsel lists them as real parties in interest here out of an abundance of caution and without conceding that any of these individuals is properly before this Court.

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Record References

This brief cites the reporter's record (RR) and clerk's record (CR) from Roberson's underlying criminal trial in the 3rd Judicial District Court of Anderson County in State v. Roberson, Cause No. 26162. Excerpts of those transcripts are contained in Real Parties' in Interest Supplemental Record ("Supp.R."). Citations to "Appx." refer to the Appendix appended to the House Committee's Brief on the Merits.

Statement of the Case

Nature of the Underlying Proceeding: Hours before the Texas Department of Criminal Justice was set to execute Robert Roberson for the murder of his two-year-old daughter more than two decades ago, on October 17, 2024, two members of the Texas House of Representatives Committee on Criminal Jurisprudence filed an original petition for a writ of injunction, along with a motion for emergency temporary relief, in this Court purportedly on behalf of the Texas House of Representatives. Pet. 1. Through its petition, the House Committee sought an injunction that would stay the execution of Roberson so that the House Committee could obtain his testimony at an October 21 Committee hearing. That same night, this Court issued an order granting a temporary injunction and thereby invalidating a lawfully issued death warrant and staying Roberson's execution.

Real Parties In Interest: The Texas Department of Criminal Justice; Bryan Collier, Executive Director of the Texas Department of Criminal Justice; the Texas Department of Criminal Justice Correctional Institutions Division; Members of the Texas Board of Criminal Justice

Statement of Jurisdiction

The House Committee seeks to ground this Court's jurisdiction in Texas Government Code § 22.002(c) and Texas Constitution, art. V, § 3(a). *See* Relator BOM 9. As described below, however, neither provision supplies this Court with jurisdiction to issue the relief sought here by the House Committee. *See infra* at 23-40.

Issues Presented

1. Whether this Court has jurisdiction to issue a permanent injunction compelling TDCJ to disobey valid criminal-court orders, repeatedly approved by the Court of Criminal Appeals, that compelled TDCJ to carry out a lawfully imposed death sentence because a legislative committee has issued a subpoena to secure the testimony of a convicted murderer in order to use a legislative hearing to second-guess his two-decade-old conviction.

2. Whether the House Committee is entitled to the extraordinary writ of injunction or mandamus against TDCJ where: a writ of habeas corpus remains an adequate remedy at law, TDCJ is not the subject of the subpoena, the subpoena is defective on its face, counsel for the House Committee has misled this Court while violating ethical rules and even a criminal statute, and the House Committee waited years to seek the testimony and failed to call the witness even after this Court awarded it temporary injunctive relief.

Introduction

On October 17, 2024, two members of the Texas House of Representatives Committee on Criminal Jurisprudence ("House Committee") ran to this Court seeking an "emergency writ" just hours before a lawful execution warrant for Robert Roberson was set to expire. At the time, the House Committee insisted it was "essential" to have Roberson's testimony at a legislative hearing set for the following week, which (supposedly) would be focused on possible amendments to Article 11.073 of the Texas Code of Criminal Procedure. Pet. 10. Staying Roberson's execution was all the more important, the House Committee said, "[g]iven the dispute over some of the facts surrounding his case" suggesting he may be innocent. *Id.*

Now, after the House Committee successfully implicated this Court in its unconstitutional gambit, the truth is laid bare. At its momentous hearing on October 21, 2024, the House Committee *did not even call* Roberson, despite TDCJ agreeing to make him available for remote testimony—the sort of testimony the House Committee had received from five different witnesses just the week before. Gone, too, is the House Committee's supposed focus on Article 11.073; instead, counsel for the House Committee has publicly admitted that "getting [Roberson] a new trial," and thus unsettling final criminal judgments, "remains our *sole objective*." NBCDFW, *Lone Star Politics: Oct. 27, 2024*, at 1:08–10:03 (Oct. 27, 2024), https://tinyurl.com/2m8j9vbw. In the light of recent (and devastating) scrutiny of lengthy trial and post-conviction records that show Roberson's guilt, the House Committee now says it would rather not talk about "the disputed underlying facts of Roberson's case." Relator BOM 23. And the rule of law? That took a back seat to unethical—

indeed criminal—*ex parte* messages in which the House Committee's counsel has now publicly admitted to attempting to influence a Court of Criminal Appeals ("CCA") Judge to change her vote "sua sponte" in Roberson's habeas proceedings because she is a personal "friend" of that legislator.

One thing that has *not* changed, however, is this Court's lack of jurisdiction to grant the extraordinary relief that the House Committee seeks here. Indeed, the Court's eleventh-hour temporary injunction enjoining TDCJ from carrying out a lawfully imposed death sentence, at the urging of two members of a single House Committee, poses grave constitutional consequences going forward and pushes the State to the brink of a constitutional crisis. That crisis is only heightened by the House Committee's forthright admission that it "may again subpoena Roberson or other prisoners." Relator BOM 21. On that view, a handful of members of the Legislature may always run to this Court on the eve of an execution with a legislative subpoena in hand and thereby countermand decades-old criminal court judgments that no state or federal court has seen fit to disturb, after the Constitution's assigned body—the Board of Pardons and Paroles—has rejected pleas for clemency, and in disregard of the Governor's express constitutional authority to grant one 30-day reprieve in a capital case.

If this Court does not correct course now, its recent order will have written the playbook for stopping any execution in its tracks going forward. After all, this Court's temporary injunction blocking TDCJ from carrying out Roberson's execution now requires the State to seek a new execution warrant, which by law may not set a new execution date any earlier than three months from the issuance of that warrant. *See*

Tex. Code Crim Proc. art. 43.141(c). In other words, under the House Committee's view, a condemned prisoner may win a never-ending stream of three-month stays of execution simply by enlisting allies in the Legislature to call upon this Court for extraordinary relief. Such "last-minute attempt[s] to secure a stay of execution [are] an abuse," *In re Cantu*, 94 F.4th 462, 474 (5th Cir. 2024) (Jones, J., concurring), that are regrettably common in federal court and before the CCA. *This Court* should not invite such abuse to enter through the front door.

Because the House Committee's petition remains fatally flawed, the Court should dismiss it for lack of jurisdiction. This Court lacks jurisdiction *four times over*: the relief already granted, as well as the relief ultimately sought, (1) violates the Separation of Powers Clause; (2) represents an improper exercise of criminal habeas jurisdiction; (3) constitutes an unlawful exercise of mandamus jurisdiction; and (4) does not fit within this Court's original jurisdiction to issue writs of injunction. The House Committee devotes just over a single page of argument to these jurisdictional obstacles and, unsurprisingly, it does not move the needle.

Even if the Court had jurisdiction, the House Committee's petition demonstrates that extraordinary writ relief is not merited. A petition for a writ of habeas corpus remains an adequate remedy at law; neither this Court nor the trial court had authority to issue coercive orders to an agency that is not even the subject of the subpoena; the subpoena is defective on its face, as even the House Committee now concedes; and, at minimum, the House Committee's delay in seeking Roberson's testimony—and the House Committee's refusal to hear that testimony when offered—disentitles it to the extraordinary remedies sought. Furthermore, the House

Committee's unclean hands—including admitted ethics violations and even a criminal attempt to influence a judge—independently bar equitable relief.

Counsel for the House Committee has candidly proclaimed that the ruse it deployed here was "unprecedented . . . anywhere in American history." The Court should act now to ensure that this first-in-history scheme becomes the *last* in the history of this State, too.

BACKGROUND

A. A Texas Jury Convicts Roberson of Beating His Two-Year-Old Daughter to Death, and Across Two Decades Courts Repeatedly Reject Efforts to Upset His Conviction and Sentence.

1. In 2002, Robert Roberson brought his two-year-old daughter, Nikki, to the emergency room in Palestine, Texas. Supp.R.54-57 (42.RR.183:12–186:15). Upon arrival, Nikki had extensive bruising to her chin, face, ears, eyes, shoulder, and mouth, and the back of her skull was "mushy." Supp.R.18, 30-32, 42-43 (41.RR.115:21-23, 116:1-4, 117:5-18; 42.RR.82:20–83:13; 5.CR.660). Due to the severity of her injuries, Nikki was flown to Texas Children's Hospital in Dallas where she later succumbed to her injuries. *See* Supp.R.34 (41.RR.135).

Roberson was the only adult with Nikki in the hours before her death, having been caring for her alone for the first time since obtaining custody of Nikki three months prior. Supp.R.45-53 (42.RR.129-34, 162-64). Initially, after bringing his bruised and unconscious child to the hospital, Roberson claimed she died from a 22-inch fall out of bed because she was "a clumsy child." *See* Supp.R.23-29, 38, 42 (41 RR 170:21; 41 RR 66:19–67:24, 69:13–23, 70:18–21; 41 RR 86:22–23, 95:21–25;

42 RR 82:7); Supp.R.72-73 (50 RR, State's Exh. 37) (Roberson's signed statement to police). An autopsy signed by seven different physicians, however, concluded that Nikki died from "blunt force head injuries," not mere shaking. Supp.R.75-82 (51.RR, State's Exh. 48). And a nurse who examined Nikki in the Palestine emergency room later testified that the head injuries sustained by Nikki were typical of victims who suffered a massive car wreck or impact. Supp.R.33 (41.RR.123).

The State thereafter indicted Roberson for capital murder, and on February 11, 2003, after being instructed on the prosecution's theory that Roberson killed Nikki "by causing blunt force head injuries," the jury unanimously found him "'Guilty' of the offense of capital murder." Supp.R.2-14 (5.CR.613–625). The jury credited the evidence that pointed to external blows and undercut Roberson's alternative explanations that the little girl died from mere shaking, or from a 22-inch fall out of bed. *See* Supp.R.24-26, 28, 33, 39-40, 44 (41.RR.69:22–23; 41.RR.89:19–21; 41.RR.123:18–20; 41.RR.176:10–14, 177:6; 42.RR.85:14–15). The same day that the jury reached its verdict, it later determined that Roberson's crime warranted the death penalty, Supp.R.15-17 (5.CR.643-45), and the district court thereafter entered a final judgment sentencing Roberson to death. In its Judgment and Sentence, the court ordered the following: "The Defendant is now remanded to the custody of the Sheriff of Anderson County, Texas, to be transported to the Texas Department of Criminal Justice, Institutional Division at Huntsville, Texas, there to await the action of the Court of Criminal Appeals and the further orders of this Court." Supp.R.15-17 (5.CR.643–645). The CCA affirmed Roberson's conviction and sentence on

direct appeal in 2007. *See Roberson v. Texas*, No. AP-74,671, 2002 WL 34217382 (Tex. Crim. App. June 20, 2007), *cert. denied*, 522 U.S. 1314 (2008) (Mem.).

2. Since his conviction was affirmed on direct appeal, Roberson has repeatedly sought to enlist various federal and state courts to undo his conviction and sentence. But after five state habeas applications, one federal habeas application, four certiorari petitions, seven motions to stay his execution, and countless other filings, judges in state and federal court have cast more than 100 votes against his arguments. *See, e.g.*, *Ex parte Roberson*, Nos. WR-63,081-03, WR-63,081-04, WR-63,081-05 (Tex. Crim. App. Oct. 17, 2024).

Relevant here, in Roberson's third state habeas application filed in June 2016, he moved for habeas relief under Article 11.073 of the Code of Criminal Procedure alleging that "new scientific evidence contradicts evidence of Shaken Baby Syndrome that the State relied on at trial." *Ex parte Roberson*, No. WR-63,081-03, 2023 WL 151908, at *1 (Tex. Crim. App. Jan. 11, 2023). In response, the CCA "remanded the claims to the habeas court for resolution," where that court held a lengthy evidentiary hearing. *Id.* After a seven-day evidentiary hearing, the state habeas trial court carefully considered Roberson's arguments, rejected all of them, and reaffirmed that he beat his daughter to death. *See, e.g.*, Supp.R.103-05 (*Ex parte Roberson*, No. 26162-A, Findings of Fact at ¶¶ 21, 24, 26, 33, 35, 36, 37, 40, 41 (3rd Judicial Dist. Ct. Feb. 14, 2022)). The CCA, after reviewing the record, found that it supported the district court's findings of fact, adopted those findings in full, and denied habeas relief. *Ex parte Roberson*, 2023 WL 151908.

Following the conclusion of Roberson's two decades of post-conviction proceedings, on July 1, 2024, the 3rd Judicial District Court of Anderson County issued an Execution Order directing that Roberson "shall be kept in custody by the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, Huntsville, Texas, until Thursday, the 17th day of October, 2024, upon which day . . . at some time after the hour of 6:00 p.m. . . . the said Director, acting by and through the executioner designated by said Director as provided by law, is hereby commanded, ordered and directed to carry out this sentence of death by intravenous injection of a substance or substances in a lethal quantity sufficient to cause the death of the said Robert Leslie Roberson, III and until the said Robert Leslie Roberson, III is dead." Supp R.84-85 (*Ex parte Roberson*, No. 26162, Execution Order at 1–2 (3rd Dist. Ct. July 1, 2024)).

Consistent with that order, the Clerk of Court issued a Warrant of Execution the same day. It likewise provided that "[t]he Director of the Correctional Institutions Division of the Texas Department of Criminal Justice is hereby commanded . . . to keep Robert Leslie Roberson, III and to execute the sentence of death at any time after the hour of 6:00 p.m., on October 17, 2024, as provided in Texas Code of Criminal Procedure Article 43.14." Supp.R.91 (*Ex parte Roberson*, No. 26162, Execution Warrant at 3 (3d Dist. Ct. July 1, 2024)).

B. The House Committee on Criminal Jurisprudence Waits More Than Twenty Years to Wield Hearing and Subpoena Power to Upset a Final Criminal Judgment.

Roberson was convicted and sentenced to death in 2003, 5.CR.613–625, 643–645; the Texas Legislature added Article 11.073 to the Texas Code of Criminal Procedure in 2013, S.B. 344, 83rd Leg., R.S. (2013); and the CCA denied Roberson relief under Article 11.073 in January 2023. Nevertheless, the House Criminal Jurisprudence Committee scheduled a committee hearing for October 16—just one day before Roberson's scheduled execution. *See Notice of Public Hearing*, Tex. Leg. Online, https://tinyurl.com/yc8ypc8a. Although ostensibly for the purpose of inquiring into "[c]riminal procedure related to capital punishment and new science writs under Article 11.073, Code of Criminal Procedure," *id.*, the hearing focused almost exclusively on Roberson. For example, the Committee took testimony from Roberson's attorney and a detective who investigated Roberson's case. *See Witness List*, Tex. Leg. Online, https://tinyurl.com/5ktw7vbt.

At the close of the eight-hour hearing, the Committee claimed that it had not heard enough testimony on the subject and needed Roberson's "unique, important testimony" because it was "necessary to effectively carry out [the Committee's] lawmaking powers." Relator BOM 38. As the Committee assured this Court, it viewed Roberson's testimony as necessary because: the Committee was considering proposing legislative amendments to Article 11.073 of the Texas Code of Criminal Procedure; Roberson's conviction supposedly rests on a disputed theory of "shaken baby syndrome" and his efforts to invoke Article 11.073 have failed; and his legal

claims "are unique because he is a person with autism in a case unlike any other in the State of Texas." *See, e.g.*, Pet. 5–6, 9–10.

On the evening of October 16, the Committee took the unprecedented step of issuing a subpoena to Roberson compelling him to appear at the Texas Capitol on October 21—four days *after* he was scheduled to be executed. *See* Appx., Tab 6. That is, the House Committee waited *twenty-one years* after Roberson's conviction, *eleven years* after Article 11.073 was codified, and almost *two years* after the CCA denied relief on his habeas application under Article 11.073 to claim that Roberson's testimony was "necessary."

C. The Texas Court of Criminal Appeals Lawfully Exercises Jurisdiction to Deny a Stay of Execution, but this Court Thereafter Orders the Warden to Disregard Binding Criminal Judgments.

1. Texas law provides that a legislative committee "authorized by . . . the rules of procedure of the creating house" may issue process to compel a witness to testify concerning matters within that committee's jurisdiction. Tex. Gov't Code §§ 301.014, 301.024. The Rules of the Texas House of Representatives, in turn, provide that a standing committee—like the Criminal Jurisprudence Committee—may issue subpoenas. H.R. 4, § 21(a), at 64, 88th Leg. (2023). The Criminal Jurisprudence Committee's subject-matter jurisdiction includes, among other things, "criminal procedure in the courts of Texas." H.R. 3, § 7, at 33, 88th Leg. (2023). Although state law provides that a subpoena should be issued "in the name of the committee," Tex. Gov't Code § 301.024(b), the House's Rules separately provide that "all subpoenas" must "be signed by the speaker," H.R. 1, § 13, at 13, 88th Leg. (2023).

If necessary to obtain compliance with a subpoena, a committee may issue writs of attachment. Tex. Gov't Code § 301.024(c). Failing that, the committee may take steps toward holding the person targeted by the subpoena in criminal contempt. Namely, the committee may notify the Speaker of the House about a witness's failure to testify, the Speaker of the House shall certify facts about that failure to a prosecuting attorney, and the prosecuting attorney shall bring the matter before a grand jury. Tex. Gov't Code § 301.026. Texas law provides no similar mechanism to coerce state agencies that are *not* the target of a committee's subpoena. Instead, the Government Code provides only that a standing committee "may request necessary assistance" from an agency and the agency shall provide it. Tex. Gov't Code § 301.028. Unsurprisingly, however, state law nowhere provides that a state agency must violate state law, including state law as expressed in a binding state court judgment, to assist a committee with a subpoena request.

2. The House Committee eschewed these methods of compliance. As far as TDCJ is aware, the House Committee has never issued a writ of attachment in this case—whether against Roberson or anyone else—and it has not moved to hold Roberson in contempt. Instead, on the afternoon that Roberson was scheduled to be executed, two members of the Committee on Criminal Jurisprudence filed suit in the name of the Texas House of Representatives in Travis County district court seeking to stay Roberson's execution through a temporary restraining order against *TDCJ*—even though TDCJ was never named in any subpoena by the House Committee and even though TDCJ was operating under independent state-court judgments commanding it to hold Roberson in custody and execute his death sentence.

On October 17, the district court granted the request for a temporary restraining order. *Tex. House of Representatives v. TDCJ*, No. D-1-GN-24-008489, Temporary Restraining Order (Travis County—53rd Dist. Ct. Oct. 17, 2024). It did so even though the CCA had just denied Roberson's fifth state habeas application the day before. *See Ex parte Roberson*, No. WR-63,081-05 (Tex. Crim. App. Oct. 16, 2024). The CCA's denial of habeas relief meant that TDCJ remained bound to hold Roberson in its custody (pursuant to the final criminal judgment) and to execute his death sentence (pursuant to the execution order). Accordingly, TDCJ sought an order from the CCA confirming that the district court had no authority to award habeas relief that the CCA had already denied. The CCA granted a writ of mandamus vacating the TRO because "[t]he effect of [the district court's] order was to stay Roberson's execution, circumvent our decision, and disobey our mandate." *In re TDCJ ex rel. Paxton*, No. WR-96,121-01, 2024 WL 4512269, at *2 (Tex. Crim. App. Oct. 17, 2024) (per curiam).

Contemporaneous with these proceedings before the CCA, however, the House Committee initiated original proceedings in this Court, seeking a so-called "Writ of Mandamus, Writ of Prohibition, and Writ of Injunction to Preserve the House's Constitutional Authority" and emergency relief staying Roberson's execution. Emergency Mot. 1. Just hours after the CCA rebuffed the House Committee's last-minute effort to win a stay of execution by granting a writ of mandamus and vacating the district court's TRO, this Court granted the House Committee a temporary injunction. Among other things, it ordered that: "The Texas Department of Criminal Justice and its executive director Bryan Collier, the Texas Department of Criminal

Justice Correctional Institutions Division, and the members of the Texas Board of Criminal Justice are temporarily enjoined from impairing Mr. Roberson's compliance with the Subpoena and Writ of Attachment issued by the Committee on Criminal Jurisprudence, including by executing Mr. Roberson, until further order of this Court." *In re Texas House of Representatives*, No. 24-0884, 2024 WL 4521051, at *1 (Tex. Oct. 17, 2024) (per curiam). Because this temporary injunction—and the ultimate relief sought by the House Committee—is afflicted with multiple jurisdictional and merits-based defects, TDCJ filed a motion for reconsideration and to dismiss the House's petition for lack of jurisdiction. That motion remains pending.

D. The House Committee Does Not Call Roberson at the October 21 Hearing, Attempts Its Own Retrial of the Case, and Ignores Extensive Evidence of Guilt.

Emboldened by this Court's temporary injunction, however, the House Committee next endeavored to coerce TDCJ into bringing Roberson to the Capitol to testify *in person* for its October 21 hearing. Shortly after this Court's October 17 order issued, counsel for the House Committee improperly contacted non-lawyers at TDCJ—their opposing party in this case—to discuss this litigation without the presence of TDCJ's lawyers. *See* Tex. R. Disc. Prof'l Cond. 4.02(a). By sidelining both TDCJ's in-house and outside counsel, the House Committee sought to obtain assurances from TDCJ that it would bring Roberson to the Capitol without affording TDCJ the input and advice of its counsel. *See* Relator's Response in Opposition to Motion to Reconsider and Dismiss 4. But later, when informed by TDCJ of the agency's actual and counseled position—*i.e.*, that Roberson would *not* be

transported from death row to the Capitol—the House Committee ignored its ethical lapses and instead *complained* to this Court that it did not like the answer it got in return. *See id.*; *see also* Relator BOM 14–15. This Court seemingly sought to ameliorate the dispute by clarifying in a subsequent order that its temporary injunction "does not address or govern the manner or method of compliance with relator's subpoena." *In re Texas House of Representatives*, No. 24-0884, 2024 WL 4530038, at *1 (Tex. Oct. 20, 2024) (per curiam). In other words, the temporary injunction did *not* command TDCJ to bring a death-row inmate to the seat of our state government.

TDCJ, for its part, agreed to make Roberson available via remote videoconference technology—the very same technology the House Committee had used to obtain the testimony of multiple witnesses the previous week. *Compare* Respondents' Reply in Support of Motion to Reconsider and Dismiss, Ex. A (TDCJ requesting "instructions for virtual testimony"), *with* House Committee on Criminal Jurisprudence, Hearing at 0:59:26, 2:04:38, 2:47:48, 3:48:14, 5:45:20, 88th Leg. (Oct. 16, 2024), https://tinyurl.com/5pje6r7c [*October 16 Hearing*] (witnesses Jeffrey Singer, Estelle Hebroh-Jones, Frances Green, Roland Auer, and Allyson Mitchell all giving virtual testimony).

The House Committee rebuffed that offer—as did Roberson himself on the advice of his attorney—and moved forward with its October 21 hearing *without* electing to call Roberson at all. Indeed, despite insisting to this Court that Roberson's testimony is "unique," "important," "essential," "necessary," "relevant," and "invaluable," Relator BOM 13, 19, 29, 35, 38, the House Committee contented itself with other witnesses and conducted a one-sided retrial of Roberson's criminal case

twenty-one years after his conviction. *See* House Committee on Criminal Jurisprudence, Hearing, 88th Leg. (Oct. 21, 2024), https://tinyurl.com/yc4mwazr [*October 21 Hearing*]. Yet as one member of the House has already explained to this Court, witnesses and committee members alike simply ignored the extensive evidence pointing to Roberson's guilt—and in many instances flatly contradicted the trial court record. *See supra* at 4–5; Amicus Brief for Rep. Harris et al. at 6 n.6, 7 n.15, 8 n.19, 13 n.35, 14 n.36.

For example, Roberson's attorney declared, without refutation, that he is just a "sweet, impaired man" who has "no history of violence" and poses "zero" security risks. *October 16 Hearing, supra*, at 6:55:21; *October 21 Hearing, supra*, at 7:56:00, 8:46:17. But the jury heard testimony from Roberson's ex-wife, Della, that he choked her with "a coat hanger," forcing her to "fight for her life," Supp.R.66 (47.RR.15:11–24); punched her while she was pregnant because she "wasn't walking fast enough for him," Supp.R.67 (47.RR.16:2–12); and hit both her and her unborn baby, Victoria, Supp.R.68 (47.RR.18:13–25). Roberson's attorney also asserted "there is not a record of . . . child abuse." *October 21 Hearing, supra*, at 8:08:56–8:09:10. But record evidence includes contemporaneous statements from victims saying Roberson sexually molested a nine-year-old girl one month before he killed Nikki, Supp.R.19, 21 (5.CR.677, 679), and may have confessed to a cellmate that he raped his two-year-old daughter, Supp.R.21 (5.CR.687). Witnesses even claimed—incredibly—that the jury heard no evidence that Nikki had been beaten because the prosecution's sole focus was "shaken baby syndrome." *October 21 Hearing, supra*, at 1:58:43–1:59:31; *id.* at 2:41:50–2:42:14; *id.* at 7:57:20–7:57:36. But no one explained

why the evidence at trial repeatedly described "external" injuries caused by "impact" from being "struck" with objects or forcible "blows." *See, e.g.*, Supp.R.31-33, 60, 61, 103-05 (41.RR.117:16–21, 123:15–25; 42.RR.103:10–19; 43.RR.54–55).[2]

Most tellingly, the House Committee accepted Roberson's latest theory of Nikki's death—a bad case of pneumonia—without even acknowledging how radically his story has changed over time. At first, of course, Roberson told nurses and investigators that Nikki was a clumsy kid who fell out of bed and plummeted to her death—from a height of just 22 inches. *Supra* at 4. Shortly thereafter, Roberson told his girlfriend—who asked point blank "Did you kill Nikki?"—that he might have "snapped" and killed the girl, but he just can't remember. Supp.R.58 (42.RR.190:11–25). Then, while in pre-trial custody, Roberson allegedly confided to a cellmate that he'd "put[] his dick in the baby's mouth" before hitting, dropping, and leaving the child on the floor. Supp.R.21 (5.CR.687); *see also* Amicus Brief of Cody Harris et al. 5-10 (documenting Roberson's shifting explanations).

Besides ignoring these reasons to doubt rather than embrace Roberson's mutually inconsistent explanations, the House Committee also ignored what prosecutors

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[2] Steve Cubstead, the foreman of the jury that convicted Roberson, recently released a statement through Representative Cody Harris in response to the House Committee's hearings: "I didn't vote to convict Roberson due to shaken baby syndrome; I voted to convict him for the bruises on Nikki's face, her crushed skull, and the evidence that proved beyond a reasonable doubt Roberson is guilty of murdering a 2-year-old girl." Brad Johnson (@bradj_TX), X (Nov. 3, 2024, 9:39 AM), https://tinyurl.com/2z5we63c; *see also* Cameron Abrams, *Jury Foreman from Nikki Curtis Case Calls Roberson 'A Monster,' Criticizes Push for Retrial*, THE TEXAN (Nov. 3, 2024), https://tinyurl.com/mvf6rucb (Cubstead describing how Roberson's lawyer has repeatedly come to his home pressuring him to "change my mind" and stating the juror's testimony at the House Committee's October 21 hearing "was an outright lie").

actually said. In closing statements to the jury, prosecutors reiterated that their theory was *not* that Nikki was shaken, "but was beaten about the head." Supp.R.63 (46.RR.25:13–23). They could hardly have been clearer:

bit earlier. But are we talking about an either or? Are we talking about he just shook her? You know, an out of control parent is frustrated because their child is sick and they pick them up and they shake them, shake them. Is that an out of control parent? No. He did this and then he starts punching them he slams her down and he throws her on the ground. And that's not intentionally or knowingly? Talked about her battered face. Did he just shake her? No. Frenulum is busted, ripped, torn, blood coming out. Multiple impacts to the head. You saw bruising to the shoulder. Take a look at her face on the photographs. This not just, 'I shook her and then I realized, well, maybe I shouldn't be doing that because they may file some sort of criminally negligent homicide, so I stopped.

Supp.R.64 (46.RR.61:4–16).

Notably, after boasting publicly of winning a stay of Roberson's execution from this Court, the House seems to have lost all interest in Article 11.073. Following that hearing, the House's counsel now says the House Committee's focus is on "just this specific case" and that "getting [Roberson] a new trial remains our sole objective." NBCDFW, *supra*, at 1:08–10:03; *see also* WFAA, *Lawmakers Could Soon Travel to Death Row to Speak with Inmate Robert Roberson*, at 3:10–3:15 (Oct. 27, 2024), https://tinyurl.com/bddc5tf4 ("All we want is to push the pause button and to secure a new trial for him."); The Mark Davis Show, *October 25, 2024 9am Hour*, at 3:35–17:30 (Oct. 25, 2024), https://tinyurl.com/ymm53f4e (Leach making no

mention of Article 11.073 but, instead, making "credibility" assertions and questioning whether guilt "beyond a reasonable doubt" was met).

E. After the Hearing, the House Committee's Lawyers Claim to Seek an End to this Litigation While Privately Attempting to Change the Votes in Roberson's Capital Habeas Proceedings.

The House Committee claims that it initially saw "no need to continue this litigation and wished it to be dismissed." Relator BOM 18. And it alludes to certain meetings "between members of the Committee and representatives of the executive branch"—whom it never names—claiming the House Committee sought to "reach[] an agreement" that might resolve this dispute. *Id.* at 14–17.

In particular, the House Committee discusses a meeting that supposedly took place "[o]n the morning of October 22, 2024." *Id.* at 16. Neither TDCJ nor TDCJ's counsel were informed of or present for such a meeting. At that meeting with certain unnamed "executive branch representatives," the House claims "[t]he parties agreed that they would jointly sign a request to terminate this litigation." *Id.* at 17. Based on that agreement, the House Committee suggests that Chairman Moody was somehow induced to adjourn the still-pending committee hearing begun the previous day—only for the (again) unnamed officials in "the executive branch" to later renege on a previous agreement. *Id.* Having been excluded from this meeting, neither TDCJ nor the Office of Attorney General—which represents TDCJ—can speak to the House Committee's veracity.

But one thing is certain. While the House Committee's counsel was purportedly undertaking "many efforts and offers" and "act[s] of good faith" to resolve this

litigation, *id.* at 14, 17, it was actively working behind the scenes to revive related litigation and pressuring a judge to change her vote—in flagrant violation of state bar ethics rules and state criminal laws punishable by up to a year in jail. *See* Tex. Penal Code § 36.04; Tex. R. Disc. Prof'l Cond. 3.05. On October 25, 2024, the CCA informed counsel in Roberson's capital habeas cases that counsel for the House Committee in *this case* sent private text messages asking a Judge on the CCA to change her vote and grant Roberson a new trial "[a]s my friend and as a wonderful Judge who I have so much faith in." Letter, *Ex parte Roberson*, Nos. WR-63,081-03, WR-63,081-04, WR-63,081-05 (Tex. Crim. App. Oct. 25, 2024). In its public letter, the CCA explained that these communications constituted "a clear violation of Texas Disciplinary Rule of Professional Conduct 3.05."

Counsel for the House Committee later publicly confessed that he had "sent a text message to my friend, Judge Michelle Slaughter, asking her to reconsider the case of Robert Roberson." Jeff Leach (@leachfortexas), X (Oct. 28, 2024, 5:50 PM), https://tinyurl.com/43t62tuk. Although he claimed he was not "aware of any pending dispute before the Court of Criminal Appeals," *id.*, his own text messages prove the opposite: He implored Judge Slaughter to reconsider Roberson's pre-existing habeas application, advised her that she could "sua sponte do so," and stressed that "[o]ne Judge" was "all that is needed"—all the while acknowledging that his messages might be inappropriate both "legally and ethically." Letter, *Ex parte Roberson*,

Nos. WR-63,081-03, WR-63,081-04, WR-63,081-05 (Tex. Crim. App. Oct. 25, 2024).[3]

Summary of Argument

The House's petition remains beset by a multitude of jurisdictional and merits-based errors that demand careful and expeditious attention—and stern correction.

I. At the outset, this Court lacks jurisdiction to award the relief requested through this petition *four times over*. *First*, the relief the House Committee seeks would run this Court headlong into the Separation of Powers Clause, which forbids one branch of government to exercise the powers granted by the Constitution to another branch. *See* Tex. Const. art. II, § 1. For one, by greenlighting the notion that the issuance of a legislative subpoena is enough to invalidate a death warrant lawfully issued by a criminal court, the relief sought would effectively grant a single committee of a single chamber of the Legislature the power to override the judgments of criminal courts—a power the Constitution reserves for the Court of Criminal Appeals, *see* Tex. Const. art. V, § 5(a); *see also id.* art. V, § 5(b)-(c). For another, the relief sought by the House Committee here usurps the Governor's exclusive prerogative to grant one thirty-day reprieve in a capital case, Tex. Const. art. IV, § 11(b), as

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[3] *See also October 21 Hearing, supra*, at 4:29:40–4:36:35 (Leach: "So, if—if one of the current Judges between now and January—if later today, or tomorrow, or next week—had a change of heart or a change of mind, which I think we're all gonna still continue to hope and pray for, they could actually act now sua sponte and claw this back? … It sounds to me like there is a tool in the toolbox for our current court …. One judge. One. Judge. Saying, 'I think I got it right, but I'm, willing to admit that I might have gotten it wrong.' That's all it would take."); Mark Davis Show, *supra*, at 9:52–10:19 (Leach: "[W]e are just one vote away, one vote away on the Court of Criminal Appeals from getting Roberson a new trial. And the court can on its own volition, today, if they wanted, if one judge wanted," reconsider Roberson's habeas application.).

the House Committee's conception of its hearing-and-subpoena power would allow it to press pause on a capital sentence for a minimum of *ninety days*, see Tex. Code Crim Proc. art. 43.141(c)—and perhaps even longer—by simply issuing a subpoena for testimony at a date sometime after an outstanding death warrant expires. It is a basic principle of interpretation that the specific governs the general. The Constitution's specific grants of authority to the CCA and the Governor with respect to criminal judgments and temporary reprieves, respectively, thus necessarily trump any general subpoena power.

Second, the relief the House Committee seeks necessarily constitutes an exercise of criminal habeas authority because it would release Roberson from a validly issued death warrant and order his wardens to produce his body *in person* for testimony—both quintessential forms of habeas relief under state and federal law—all in contravention of validly issued criminal court orders remanding him to the custody of TDCJ and compelling it to carry out his death sentence. And in death-penalty cases, *only* the CCA is authorized to award habeas relief. *See, e.g.*, Tex. Code Crim. Proc. art. 11.071, §§ 4(a), 5(c), 6(a)–(b), 11. This Court, by contrast, has narrow authority to issue writs of habeas corpus only "when a person is restrained . . . on account of the violation of an order . . . entered by the court or judge in a *civil case*." Tex. Gov't Code § 22.002(e) (emphasis added). The Court thus has no authority to issue orders respecting criminal punishment, and certainly not to nullify the Constitution's specific grant of power to the CCA.

Third, this Court lacks authority to issue an original writ of mandamus. The House's petition, and this Court's temporary-injunction order, is in effect a request

to countermand the CCA's judgment that Roberson's execution should proceed. *See In re TDCJ ex rel. Paxton*, 2024 WL 4512269, at *2. Yet the Legislature has "specified," Tex. Const. art. V, § 3(a), that this Court may *not* issue mandamus "against . . . the court of criminal appeals, or a judge of the court of criminal appeals," Tex. Gov't Code § 22.002(a). Nor can the House Committee avoid this conundrum by arguing that the Executive Director of TDCJ or individual members of the Board of Criminal Justice are proper subjects for mandamus relief as "officers of the executive departments of the government of the state." Tex. Gov't Code § 22.002(c). The executive "officers" referred to in section 22.002(c) are the "Officers Constituting the Executive Department" listed in article IV, section 1 of the Texas Constitution other than the Governor—that is, the Lieutenant Governor, Comptroller, Land Commissioner, and Attorney General. *See A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 672–73 (Tex. 1995). That group does *not* include the Executive Director of TDCJ or the members of the Board of Criminal Justice.

Finally, "this court has no original jurisdiction to issue a writ of injunction." *Lane v. Ross*, 249 S.W.2d 591, 593 (Tex. 1952). Instead, this Court "has the correlative authority to issue a writ of injunction to make the writ of mandamus effective." *Id.* Yet as explained, this Court lacks authority to issue mandamus relief here.

II. Even if it had jurisdiction, the face of the House's petition reveals multiple, merits-based defects that bar the extraordinary writ relief it seeks. To begin, because a writ of habeas corpus remains an effective and adequate remedy at law, the House Committee is not entitled to the equitable writ of injunction that it seeks here. Furthermore, this Court lacks jurisdiction to issue coercive orders to TDCJ because it is

not the subject of the subpoena. The subpoena likewise remains flawed on its face—it was not signed by the Speaker of the House, the return of service was signed by an agent of a different committee, and it was not served on Roberson, the witness himself, but instead on his capital habeas attorney. Finally, the Court must not lose sight of the House Committee's *years-long* delay in seeking Roberson's testimony, coupled with their counsel's various ethical violations in connection with this case and the fact that they chose not to call Roberson as a witness at the October 21 hearing even *after* this Court issued the Committee temporary injunctive relief. Equity does not reward those with unclean hands—and it is hard to imagine a clearer example of unclean hands than falsely telling this Court that Roberson's hearing testimony is essential while disregarding basic rules of professional ethics and engaging in criminal *ex parte* communications.

Standard of Review

The Court may exercise original jurisdiction only if the House Committee's petition is construed as a petition for writ of mandamus (though this Court's original mandamus authority is ultimately inapplicable here); it may *not* do so if this petition is construed as a petition for a writ of injunction. *See* Part I.D. That matters because the standards and scope of review are different. *E.g., In re The Dallas Morning News, Inc.*, 10 S.W.3d 298, 306 (Tex. 1999) (orig. proceeding) (Baker, J., concurring in part). Mandamus relief is appropriate when there has been a clear abuse of discretion for which the relator has no adequate remedy by appeal. *In re Facebook, Inc.*, 625 S.W.3d 80, 86 (Tex. 2021) (orig. proceeding). Under the abuse-of-discretion standard, the Court considers legal conclusions de novo. *Id.* "It is well established Texas

law that an appellate court may not deal with disputed areas of fact in an original mandamus proceeding" at all. *In re Angelini*, 186 S.W.3d 558, 560 (Tex. 2006) (orig. proceeding) (quoting *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990) (orig. proceeding)). Fact questions, however, can be raised regarding whether a mandamus is timely filed. *E.g., In re Hotze*, 627 S.W.3d 642, 645 (Tex. 2020) (orig. proceeding). They can also be implicated in constitutional challenges. *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 91 (Tex. 1997) (whether state action is at issue).

In the instances where this Court can consider requests for injunctive relief, such as preserving the parties' rights, this Court has previously borrowed from the rules governing the grant of permanent injunctive relief in trial courts. *In re State*, No. 240325, 2024 WL 2983176, at *2 (Tex. June 14, 2024) (orig. proceeding) (citing Tex. Civ. Prac. & Rem. Code § 65.011). To obtain a permanent injunction, the House Committee must prove by a preponderance of the evidence "(1) a wrongful act, (2) imminent harm, (3) an irreparable injury, and (4) the absence of an adequate remedy at law." *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 792 (Tex. 2020); *see* Tex. Civ. Prac. & Rem. Code § 65.011.

ARGUMENT

I. The Court Lacks Jurisdiction Based on the Relief the House Committee Seeks.

Multiple jurisdictional barriers preclude this Court from entertaining the petition. The House Committee's effort to enlist the judiciary in the efforts of a handful of legislators to undo a decades-old, lawful state-court conviction runs afoul of the Separation of Powers Clause in multiple directions. Moreover, the order this Court

issued—regardless of how it is styled—can only be an exercise of criminal habeas jurisdiction and an improper exercise of original mandamus authority. Additionally, this Court has authority to issue original writs of injunction only where it has independent mandamus authority, which is not the case here.

A. An order enjoining TDCJ to violate a lawfully imposed criminal-court judgment flouts the separation of powers.

An order from this Court enjoining TDCJ and its executive director to disregard a lawfully imposed death sentence would violate the Constitution's Separation of Powers Clause several times over. *See* Tex. Const. art. II, § 1. Pursuant to that Clause, the "governmental authority vested in one department of government cannot be exercised by another department unless expressly permitted by the constitution." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). Likewise, "the interference by one branch of government with the effectual function of another raises concerns of separation of powers." *In re Turner*, 627 S.W.3d 654, 660 (Tex. 2021) (orig. proceeding). "Concerns over the separation of powers involve not only disagreements between the executive and legislative branches, when they arise, but also the judiciary's intervention." *Id.* Thus, "courts should not interfere in the executive's administration of the state government . . . unless the law shows that an official's conduct (or lack of conduct) is unlawful and not an exercise of discretion." *In re Stetson Renewables Holdings, LLC*, 658 S.W.3d 292, 297 (Tex. 2022) (orig. proceeding).

Although this Court has not had occasion to delineate a precise test for assessing Separation of Powers Clause violations, other Texas courts have long recognized

that "[a] separation of powers violation may occur in one of two ways." *Martinez v. State*, 503 S.W.3d 728, 733 (Tex. App.—El Paso 2016, pet. ref'd) (citing *Martinez v. State*, 323 S.W.3d 493, 501 (Tex. Crim. App. 2010)); *see also Black v. Dall. Cnty. Bail Bond Bd.*, 882 S.W.2d 434, 438 (Tex. App.—Dallas 1994, no writ) (same); *DFPS v. Dickensheets*, 274 S.W.3d 150, 156 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (same). "First, it is violated when one branch of government assumes, or is delegated, to whatever degree, a power that is more 'properly attached' to another branch." *Martinez*, 503 S.W.3d at 733 (quoting *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim App. 1990)). "The second occurs 'when one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers.'" *Id.* (quoting *Martinez*, 323 S.W.3d at 501).

1. In this case, the relief sought by the House Committee amounts to nothing less than an attempt to arrogate to itself "a power more 'properly attached' to another branch." *Id.* For one, by permitting an eleventh-hour legislative subpoena to halt a lawful execution, this Court elevated a single committee of a single chamber of the state legislature to a perch above binding and final criminal judgments of the *judiciary*, including the Court of Criminal Appeals, whose "determinations shall be final, in all criminal cases of whatever grade." Tex. Const. art. V, § 5(a); *see id.* art. V, § 5(b)-(c). The House Committee does not seriously dispute that the relief it seeks—what it euphemistically calls the "temporary interruption" of a death sentence, Relator BOM 10, 22, 23, 34, 42—has countermanded, and would continue to

countermand, validly issued criminal-court orders and judgments that bound TDCJ to carry out Roberson's sentence.

Instead, the House Committee's only response is to cite an intermediate court of appeals opinion that involved the Legislature's decriminalization of certain conduct for convictions not yet final, and which concluded that legislative change did not encroach on judicial or executive power. Relator BOM 34–35 (citing *Martinez*, 503 S.W.3d 728). But the House Committee has never suggested that *capital murder* should no longer be a crime, so *Martinez* is irrelevant. Rather, the House Committee disagrees with state criminal courts' adjudication of "just this specific case" of capital murder. NBCDFW, *supra*, at 3:30–3:40. Yet Roberson's judgment of conviction for murdering two-year-old Nikki became final more than a decade ago. And "if the rule of law means anything, it means the final result of proceedings in courts of competent jurisdiction *establishes* what is correct 'in the eyes of the law.'" *Edwards v. Vannoy*, 593 U.S. 255, 290–91 (2021) (Gorsuch, J., concurring); *contra October 21 Hearing, supra*, at 14:43–15:30 (Harrison). The House Committee nevertheless claims for itself the mantle of factfinder, questioning whether two decades of legal process is correct, asking whether evidence supports Roberson's guilt, and stressing its need "to judge his credibility as a witness." Relator BOM 13; *see also* Mark Davis Show, *supra*, at 13:30–13:40, 14:25–14:43, 16:05–16:15. But our Constitution entrusts that specific question to criminal courts—not the House.

For more than two hundred years, the tradition in this Country has been that the lawmaking power cannot revise the judgments of courts or direct the outcome of a specific case. *See, e.g.*, *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Engelman Irrig.*

Dist. v. Shields Bros., Inc., 514 S.W.3d 746, 753–54 (Tex. 2017); *see generally Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (holding that "a judgment conclusively resolves the case" because the "'judicial Power is one to render dispositive judgments'" (quoting Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990)). Neither the executive nor the legislative department may revise final courts judgments directly. *See, e.g.*, *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); *San Jacinto River Auth. v. Medina*, 627 S.W.3d 618, 638 & n.10 (Tex. 2021) (Blacklock, J., dissenting). And neither branch may accomplish the same thing indirectly by instructing a different court to do the revising of a particular judgment. *See Plaut*, 514 U.S. at 218–27.

This Court would not take it lightly if a litigant disobeyed an order of this Court, as the House urges, simply because of the "incidental effect" of some other directive the party chose to follow instead. Relator BOM 37. If this Court permits such legislative disregard of judicial orders from other courts, such as the CCA, it does so at the peril of *its own* judgments, too: "The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law." Tex. Const. art. V, § 1. Roberson's final judgment and sentence, with which the House disagrees, reflects an exercise of judicial power by the CCA and by the 3rd Judicial District Court of Anderson County. This judicial power will not admit of revision by the legislative branch (let alone by a mere subpoena issued by one committee of one chamber, not even duly enacted legislation), and any effort to do so unconstitutionally

"infringe[s] on the power of the judicial branch to render dispositive judgments." *Engelman*, 514 S.W.3d at 754.

2. The House Committee also asks this Court to reassign to the lawmaking branch power that our Constitution assigns exclusively to the *executive*—namely, the power to grant limited reprieves from criminal sentences. *See* Tex. Const. art. IV, § 11(b). And it seeks to enlist the judiciary in efforts to enforce a legislative subpoena in ways reserved only to the Legislature. *See supra* at 10.

For example, the House admits (repeatedly) that its exercise of subpoena-and-hearing authority, and subsequent enlistment of this Court in that effort, effectively stayed Roberson's execution. *See* Relator BOM 10 (the House and this Court "temporarily interrupt[ed] the imposition of [Roberson's] sentence"); *id.* at 11 (the request for hearing testimony "interrupted his execution"); *id.* at 14 (this Court "granted temporary relief that precluded [Roberson's] execution"); *id.* at 21 (this Court's order "delayed Roberson's execution"); *id.* at 34 (subpoena had the "effect of temporarily interrupting the final imposition of Roberson's sentence"); *id.* at 37 (the request for hearing testimony caused "[t]he delay in Roberson's execution"); *id.* at 46 (the relief sought was that "Roberson not be executed before he can testify"). And that stay will, at a minimum, delay Roberson's execution by three months. Tex. Code Crim Proc. art. 43.141(c).

The House Committee may refuse to call this hearing-and-subpoena-to-delay-an-execution gambit what it really is. But others do not hesitate to acknowledge what is obvious: "It amounted to what [legal commentators] have called 'a legislative reprieve.'" Austin Sarat, *A Texas Man's Execution Was Stayed. Now Ken Paxton Wants*

to Silence Him, MSNBC (Oct. 25, 2024), https://tinyurl.com/bdeadjdr. The problem, of course, is that the Constitution assigns a 30-day reprieve power to the Governor alone. Tex. Const. art. IV, § 11(b); *see generally* Amicus Br. for Governor Abbott. And no other provision of our Constitution "expressly permit[s]" the Legislature to share in that authority—much less to exercise a reprieve power three times as long as the Governor's. Tex. Const. art. II, § 1. If this is not an outright attempt to "assume[] . . . a power more 'properly attached' to another branch," it surely represents undue interference with the Governor's exclusive power to grant one 30-day reprieve in capital cases. *Martinez*, 503 S.W.3d at 733.

The House Committee's argument that, despite the obvious "overlap," Relator BOM 19, there was no encroachment on the constitutional powers of the Executive Branch here because the Committee's "purpose" was something other than extending "grace" to Roberson cannot withstand the barest scrutiny, Relator BOM 35, 47. After all, if a 30-day reprieve is by itself an "act of grace," it is hard to describe the House's claim to unfettered authority to forestall death sentences for an indeterminate amount of time as anything other than an "act of grace." And were there any doubt, the Committee members' own statements explaining that the purpose of its efforts is to secure Roberson a new trial and erase his conviction and sentence leave little doubt of that fact. *See supra* at 16-17. The House's test is also impossible to apply: Because the Governor need not furnish *any* reason for granting or denying a limited reprieve, it would always be impossible to assess whether the Legislature's "purpose" impermissibly overlapped with the Governor's.

More fundamentally, whatever the House's motivation, the constitutional rule that the specific governs the general must control. *See, e.g.*, *Oakley v. State*, 830 S.W.2d 107, 110 (Tex. Crim. App. 1992); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000). The Constitution provides the CCA with specific authority to make final criminal determinations on behalf of the judiciary and to exercise criminal habeas authority. The Constitution also provides the Governor with specific authority to grant temporary reprieves. No legislative body can rely on a general subpoena power—which is not specifically directed to criminal issues at all, let alone punishment—to nullify those specific grants of constitutional authority.

3. Finally, even after being given a second opportunity to respond, the House Committee *still* does not have an answer for the broader separation-of-powers problems its approach could create. Indeed, it makes matters worse by conceding the authority it claims today could be wielded on behalf of "any sentence and any prisoner," Relator BOM 21–22, but then arguing that exercise of such power is "unlikely to be repeated," *id.* at 37. In previous briefing, TDCJ already explained why the House Committee's trust-me assurances are ephemeral. Reply at 3. Now, the House Committee offers only this: "So far, since 1846, no pattern of abuse has materialized." Relator BOM 41. But that is only because the House Committee opened Pandora's Box just last month; the House Committee's assurances thus ring hollow.

B. This Court's temporary injunction against TDCJ impermissibly exercises criminal habeas jurisdiction.

Even if the relief the House Committee seeks would not violate the Separation of Powers Clause, it would nevertheless constitute an impermissible exercise of

criminal habeas jurisdiction. Historically, the writ of habeas corpus provided a vehicle "for asking '*why* the liberty of [a] subject[ ] is restrained.'" *Edwards*, 593 U.S. at 283 (Gorsuch, J., concurring) (quoting 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131 (1768)). For a prisoner held in custody pursuant to a final judgment of conviction, habeas had very little to do, because a final criminal judgment furnished the prototypical, lawful basis to restrain an individual's liberty and "was 'conclusive on all the world.'" *Brown v. Davenport*, 596 U.S. 118, 127–129 (2022) (quoting *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202–203 (1830)).

As a policy matter, Texas has seen fit to expand this historic office of the writ to allow even convicted prisoners to contest their custody and undo final criminal judgments via the writ of habeas corpus. *See Ex parte Rivers*, 663 S.W.3d 683, 691 (Tex. Crim. App. 2022). But state law nevertheless imposes important restrictions on this post-conviction use of habeas power, like abuse-of-the-writ doctrine. *See generally Ex parte Brooks*, 219 S.W.3d 396, 399 (Tex. Crim. App. 2007). Especially relevant here, state law provides that "[t]he writ of habeas corpus is *the* remedy to be used when any person is restrained in his liberty." Tex. Code Crim. Proc. art. 11.01 (emphasis added).

As a general matter, "[t]he court of criminal appeals, the district courts, the county courts, or any judge of those courts may issue the writ of habeas corpus." Tex. Code Crim. Proc. art. 11.05. But in death-penalty cases, *only* the CCA is authorized to award habeas relief. *See, e.g.*, Tex. Code Crim. Proc. art. 11.071, §§ 4(a), 5(c), 6(a)–(b), 11. This Court, by contrast, has narrow authority to issue writs of habeas corpus only "when a person is restrained . . . on account of the violation of an order

. . . entered by the court or judge in a *civil case*." Tex. Gov't Code § 22.002(e) (emphasis added); *see In re Reece*, 341 S.W.3d 360, 375 (Tex. 2011) (explaining that this Court has "limited its exercise of mandamus review to civil matters").

Although "[n]o one rule clearly defines the content or contours of criminal law matters'" beyond this Court's jurisdiction, the Court "look[s] to the essence of the case to determine whether its issues are "more substantively criminal or civil." *Heckman v. Williamson County*, 369 S.W.3d 137, 146 (Tex. 2012). Under that inquiry, criminal-law matters include cases that arise "'as a result of or incident to a criminal prosecution'" or "'over the enforcement of statutes governed by the Texas Code of Criminal Procedure,'" as well as disputes "where 'criminal law is the subject of the litigation.'" *Id.* (quoting *Harrell v. State*, 286 S.W.3d 315, 318 (Tex. 2009)). That is precisely the case here. For one, Roberson's restraint and sentence stem from a criminal case—not a civil one. This Court therefore has no authority to issue orders to TDCJ's executive director, who has custody of Roberson's body, ordering that state official to do something different than the final criminal judgments that command him to restrain Roberson and execute his sentence. This Court purported to do just that, however, even though the CCA—the only court authorized to award habeas relief in a capital case like this one—has repeatedly denied Roberson's efforts to undo his conviction and sentence. That temporary injunction—and therefore any future grant of permanent injunctive relief—thus can only be criminal habeas relief.

It is no answer that any relief from this Court may not order Roberson's ultimate release. The Texas habeas statute expressly provides that release from a death sentence—the exact result of this Court's temporary injunction and any future

permanent injunction—*is* a form of habeas relief. *See* Tex. Code Crim Proc. art. 11.071, § 1 ("relief from a judgment imposing a penalty of death"); *Ex parte Alba*, 256 S.W.3d 682, 685 (Tex. Crim. App. 2006). Consistent with Texas law, federal habeas law likewise recognizes that releasing a prisoner from his death sentence—even if his custodial confinement remains intact—nevertheless constitutes habeas relief. *See, e.g.*, *Magwood v. Patterson*, 561 U.S. 320, 323 (2010); *Penry v. Johnson*, 532 U.S. 782, 788, 792 (2001); *Herrera v. Collins*, 506 U.S. 390, 403 (1993). This Court's temporary injunction, and any future permanent injunction from this Court, does just that by forestalling a lawful death sentence. That is why Roberson has sought to intervene in this action, praying for a "stay of his execution." *See* Emergency Mot. to Intervene & for Temporary Stay 1.

Indeed, the House Committee has already given away the game by claiming that it is entitled to require Roberson to be presented *in person* at the Texas Capitol. That is precisely what habeas corpus is—an order to bring the body.

The House Committee's single-paragraph response underscores the point. Relator BOM 34. For one thing, it gets the history of the habeas writ's historic office and subsequent alteration completely backwards. It hurts—not helps—that the Anglo-American legal tradition had a special writ to allow prisoners to testify (*ad testificandum*). A prisoner under a final judgment of conviction could almost never use what came to be known as the Great Writ (*ad subjiciendum*) to secure release from a final criminal judgment—because the conviction provided a manifestly lawful basis for confinement. *Edwards*, 593 U.S. at 283–86. That is why the author of the opinion the House Committee cites would prohibit *almost any* post-conviction use of the

habeas writ to evade final criminal judgments. *Id.* at 295 (Gorsuch, J., concurring) (citing *Brown v. Allen*, 344 U.S. 443, 548 (1953) (Jackson, J., concurring in result)). In any event, even if courts could otherwise issue process allowing death-row inmates to provide some form of testimony, the House Committee ignores the inescapable fact that its efforts to use such process here sought (and in fact obtained) a kind of release from binding criminal judgments.

C. The Court lacks authority to issue mandamus relief here.

The exercise of criminal habeas jurisdiction sought by the House points to a related problem. Just as this Court cannot award criminal habeas relief, it also cannot exercise mandamus authority over the CCA. Under the Texas Constitution, this Court or its members may issue writs of mandamus (1) in aid of its appellate jurisdiction or (2) in exercise of original jurisdiction "as may be specified" in law, "except against the Governor." Tex. Const. art. V, § 3.

This Court's order could not possibly be an exercise of its appellate jurisdiction. For one thing, the House Committee members have never appealed any lower court order to this Court. After all, they *prevailed* in the Travis County District Court and obtained a TRO. There was no appellate jurisdiction for this Court to "aid" by issuing a writ. Nor did this Court issue its order *to the district court*. Regardless, the proceeding before the district court sought criminal habeas relief for the reasons just explained, see Part I.B, and for others elaborated below, see Part II.A. Because the CCA *alone* has jurisdiction over capital habeas proceedings, this Court could not properly exercise any appellate jurisdiction even if there had been an appealable order.

The Court's order must therefore be an exercise of its original mandamus jurisdiction. But on that score, as the Legislature has "specified," Tex. Const. art. V, § 3(a), this Court may *not* issue mandamus "against . . . the governor, the court of criminal appeals, or a judge of the court of criminal appeals," Tex. Gov't Code § 22.002(a). Or as Justice Young put it: "the statute describing this Court's general mandamus jurisdiction simultaneously announces some proper respondents ('a statutory county court judge, a statutory probate court judge, a district judge, a court of appeals or justice of a court of appeals, or any officer of state government') and excludes some potential respondents ('the governor, the court of criminal appeals, or a judge of the court of criminal appeals')." *In re Dailey*, 692 S.W.3d 480, 480–81 (Tex. 2024) (Young, J., concurring in denial of petition for writ of mandamus).

Thus, the CCA could not be a proper target of this Court's mandamus authority. Nor is it any answer that this Court's temporary injunction was a proper exercise of this Court's authority "to issue a writ of mandamus or injunction . . . against any of the officers of the executive departments of the government of the state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform," Tex. Gov't Code § 22.002(c). *See* Relator BOM 9. To begin, that provision speaks of writs of mandamus directed to "officers" of the State government, but TDCJ is an entity, not an individual officer, so it does not fall within this Court's original mandamus authority. *Cf. Superior Oil Co. v. Sadler*, 458 S.W.2d 55, 56 (Tex. 1970) (per curiam); *Betts v. Johnson*, 73 S.W. 4, 5 (Tex. 1903). Nor can the House fix this problem by arguing that this Court can mandamus TDCJ's executive director or individual members of

the Board of Criminal Justice. The executive "officers" referred to in section 22.002(c) are the "Officers Constituting the Executive Department" listed in article IV, section 1 of the Texas Constitution other than the Governor—that is, the Lieutenant Governor, Comptroller, Land Commissioner, and Attorney General. *See, e.g.*, *A&T Consultants*, 904 S.W.2d at 672–73. Neither TDCJ's executive director nor the members of the Board of Criminal Justice appear on that list.

Lastly, and even if TDCJ's executive director or the members of the Board of Criminal Justice were "officers of the executive departments" of this State, the mandamus relief sought here is not the *kind* of relief authorized by section 22.002(c). Indeed, far from "authoriz[ing]," *id.*, TDCJ's executive director or the members of the Board of Criminal Justice to halt Roberson's execution, state law—in the form of multiple state court judgments—"commanded [and] ordered" them to carry it out. Section 22.002(c), therefore, supplies no authority for this Court to order TDCJ's executive director to undertake an act that state law expressly forbade.

The Court's temporary injunction thus can only be an exercise of mandamus authority against the CCA. The CCA has repeatedly denied Roberson habeas relief, including shortly before this Court granted a temporary injunction. That means TDCJ remained bound by state court judgments to detain Roberson and to execute his sentence. Hours later, this Court countermanded the CCA's judgment and commanded the TDCJ warden to do what the CCA prohibited him from doing. And this Court's social-media account confirmed that it prohibited what the CCA had just commanded. Supreme Court of TX (@SupremeCourt_TX), X (Oct. 17, 2024, 9:49 PM), https://tinyurl.com/mr9b9xcc (explaining that its October 17 order

"effectively halt[ed] the execution of Robert Roberson"). Nor does it matter that this Court stylized its order a "writ of injunction," for that would unlawfully "exalt form over substance," *e.g.*, *CMH Homes v. Perez*, 340 S.W.3d 444, 453 (Tex. 2011) (citing *Wagner & Brown, Ltd. v. Horwood*, 53 S.W.3d 347, 351 (Tex. 2001)). The House Committee should not be permitted to embrace this principle when it helps but eschew it when it hurts. *See* Relator BOM 46. And as explained below, this Court lacks jurisdiction to issue original writs of injunction anyway. *See* Part I.D.

Subsequent developments confirm that the House seeks this Court's assistance in superintending the CCA. The House admits that the proceedings before District Judge Mangrum are related to this one. Relator BOM 8. But it fails to mention that the District Court's TRO was *vacated* by the CCA. *Supra* at 11. By filing an "original" action in this Court seeking the same sort of relief that the District Court granted and the CCA subsequently denied, the House Committee plainly seeks to conscript this Court into countermanding the CCA.

If there were any doubt about that, the unethical and criminal efforts by the House's counsel to privately pressure a CCA Judge to change her vote on Roberson's habeas application should dispel it. *Supra* at 17–19. It blinks reality to say the House does "not ask this Court to address Roberson's sentence or any concerns in his case." Relator BOM 34. When it first came here claiming an emergency, the House Committee expressly sought relief "given the dispute over some of the facts surrounding his case." House Pet. at 6. Perhaps in the light of the evidence recounted above, *supra* at 4–5, 14–17, the House Committee now seeks to downplay this theme, Relator BOM 23, preferring instead to communicate *ex parte* with CCA

Judges. But from start to finish, these proceedings have been about buying time to undo Roberson's conviction and sentence, which has been repeatedly affirmed by the CCA over two decades.

D. The Court also lacks jurisdiction to issue an original writ of injunction or prohibition.

Even if the Court's order was not an exercise of criminal habeas jurisdiction or mandamus oversight of the CCA, this Court would still lack jurisdiction. At most, the House Committee here sought an original injunction—that is, they sought relief "by their petition filed directly in this court." *Lane*, 249 S.W.2d at 592. "It is well settled," though, "that this court has no original jurisdiction to issue a writ of injunction." *Id.* at 593. Instead, this Court "has the correlative authority to issue a writ of injunction to make the writ of mandamus effective." *Id.* This Court has never overruled *Lane*. *See In re Occidental Chem. Corp.*, 561 S.W.3d 146, 156 (Tex. 2018) (orig. proceeding). It therefore could not issue an original writ of injunction, because there is no permissible mandamus jurisdiction to exercise in the first place. *See* Part I.C. And even assuming such jurisdiction obtains, the House has *not* "shown [itself] to be entitled to a writ of mandamus." *Lane*, 249 S.W.2d at 593; *see* Part II.

In the light of the prior briefing on TDCJ's motion, it seems that the House now concedes *Lane* is good law. *Compare* TDCJ Reply at 4, *with* Relator BOM 45. But instead of trying to explain how this proceeding somehow comports with *Lane*, the House injects more confusion. Namely, it says it "has not" and "will not" seek a permanent injunction. Relator BOM 39–40. A temporary injunction, though, may issue only to preserve a court's jurisdiction to award a permanent injunction to a

party likely to merit it. *See, e.g.*, *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 219 (Tex. 1968). Courts are not in the business of wielding the judicial power to settle rights and obligations only for today and not for tomorrow. That is why the civil rules, which presumably control this original proceeding, contemplate that "every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought." Tex. R. Civ. P. 683; *see also In re Texas House of Representatives*, 2024 WL 4521051, at *1 (taking for granted that an underlying "petition for writ of injunction remains pending before this Court").

If the House really means that it does not want anything like a definite adjudication of its rights and obligations, then it should never have filed this petition—and the Court should dismiss it outright. If, instead, the House has asked this Court to award a temporary injunction and then, after winning one, seeks to simply maintain it in place indefinitely, then it effectively asks this Court to convert the temporary injunction into a permanent one—all without requiring the House to shoulder its burden to prove entitlement to relief. The Court should put the House through its paces just like any other litigant. *Contra* Relator BOM 28 (House complaining about the "burdens" of "litigating" even though it filed this action as petitioner).

Finally, although the House Committee's opening brief does not address the issue, thereby forfeiting it, this Court also lacks authority to issue a writ of prohibition in these circumstances. "This writ operates like an injunction issued by a superior court to control, limit or prevent action in a court of inferior jurisdiction." *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 682 (Tex. 1989). It "is typically used to protect the subject matter of an appeal or to prohibit an unlawful interference with

the enforcement of a superior's court's orders and judgments." *Id.* at 683. But critically, "[a]ppellate courts have no authority to issue writs of prohibition to protect unappealed district court judgments." *Id.* That is precisely the case here.

II. No Matter How the Relief Sought Here Is Characterized—Whether Mandamus, Prohibition, or Injunction—the Standards for an Extraordinary Writ Were Not Met.

The House Committee's petition is likewise defective on the merits. Extraordinary writs require extraordinary showings from the parties who seek them. But for at least four reasons, the House Committee is plainly not entitled to the "extraordinary" writ relief it seeks. *See, e.g.*, *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996) (per curiam) (mandamus); *Dunn v. St. Louis Sw. Ry.*, 88 S.W. 532, 533 (Tex. Civ. App. 1902) (prohibition); *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (temporary injunction). It was therefore inappropriate for this Court to issue a temporary injunction against TDCJ, and any permanent injunction would be similarly improper. And at minimum, compelling compliance with such an unprecedented use of a legislative subpoena falls well short of the mandamus standard, which requires a showing of "a clear abuse of discretion." *In re Facebook, Inc.*, 625 S.W.3d at 86.

A. The extraordinary relief the House Committee seeks impermissibly functions as a petition for a writ of habeas corpus.

At the outset, "[t]he issuance of an extraordinary writ is not authorized when the relator has an adequate remedy by appeal." *Holloway*, 767 S.W.2d at 684. But the extraordinary relief sought by the House Committee in this Court here is functionally a petition for a writ of habeas corpus directed to the wrong court. When it sought

a TRO in the district court, extant criminal court orders that had never been overturned or otherwise vacated still commanded TDCJ to:

- take Roberson into TDCJ custody to commence serving his sentence and hold him pending any further orders of the convicting court, Supp.R.17 (5.CR.645); and
- keep Roberson in custody until October 17, 2024, on which day it was "commanded [and] ordered" to carry out his death sentence until it was completed, Supp.R.84-85.

In situations like this, "[t]he writ of habeas corpus is *the* remedy to be used when any person is restrained in his liberty," Tex. Code Crim. Proc. art. 11.01 (emphasis added), and *only* the CCA is authorized to award habeas relief to a capital prisoner like Roberson, *see, e.g.*, Tex. Code Crim. Proc. art. 11.071, §§ 4(a), 5(c), 6(a)–(b), 11.

Roberson's warden could be commanded to act contrary to those extant orders and furnish "relief from a judgment imposing a penalty of death" *only* pursuant to a writ of habeas corpus. Tex. Code Crim. Proc. art. 11.071, § 1. A legislative subpoena, then, could not countermand a final criminal judgment. Nor could an injunction from this Court purporting to require compliance with such a subpoena. Habeas corpus remains an adequate and available remedy at law, even when a habeas petitioner fails to win relief through that remedy. *See, e.g.*, *Jones v. Hendrix*, 599 U.S. 465, 477 (2023).

Because that adequate and alternative habeas remedy exists, extraordinary writs are simply unavailable. It matters not that the nominal "Petitioner" in this habeas proceeding was the House rather than Roberson himself. "Next friend" habeas

actions are common—even if a petitioner like the House would plainly lack standing to seek the relief it prays for here. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 161–62 (1990).

As explained above, if upheld, the House Committee's novel use of legislative subpoena power would allow a single committee in a single chamber of our bicameral legislature to countermand final criminal judgments of the judiciary, and to wield the sort of clemency power lodged in the Governor alone. *See, e.g.*, Tex. Const. art. IV, § 11(b); *Ex parte Gore*, 4 S.W.2d 38, 39 (Tex. Crim. App. 1928) ("[T]he power to parole, to pardon, etc., is one confided by our Constitution to the Governor of this state, over whose discretion in such matters this court has no control or right of review."); *R.R.E. v. Glenn*, 884 S.W.2d 189, 193 (Tex. App.—Fort Worth 1994, writ denied) (Any legislative act which "abridges or infringes upon the power granted to the Governor by Article IV, Section 11, [is] unconstitutional."). That not only eviscerates habeas jurisprudence, but also paves the way to upend *every criminal trial*. Any pre-trial detainee who hires the right lobbyists in Austin could procure a committee subpoena permitting him to: testify instead of attending his trial; confess to the facts of the crime; and win absolute immunity from prosecution. *See* Mot. for Reconsideration and to Dismiss for Lack of Jurisdiction at 2 (citing Tex. Gov't Code § 301.025(c)).

B. The trial court had no authority to issue coercive orders to an agency that is not even the subject of the underlying subpoena.

On its face, the House Committee's subpoena "summon[s] Robert Roberson" to give "testimony before the Committee." It does not summon TDCJ to do anything. In fact, it does not reference TDCJ even once.

Just the same, the House Committee ran to a trial court seeking to subject TDCJ to the coercive power of a court order. That flies in the face of black-letter law and basic principles about judgments. In Texas, the "judicial power" consists of issuing coercive orders that bind *parties* and their privies. *Morrow v. Corbin*, 62 S.W.2d 641, 644 (Tex. 1933). Earlier this year, for example, this Court held that a "probate court could not require [two individuals] to transfer the[ir] shares" back to a trust because they "were not parties to the [underlying] suit." *In re Tr. A & Tr. C*, 690 S.W.3d 80, 88 (Tex. 2024).

The House here enlisted the trial court to do just what these black-letter principles prohibit. No court has authority to order TDCJ's compliance with commands issued to someone else. And statutory law is tellingly silent on enforcement mechanisms in a scenario like this one—further dooming the House Committee's effort to meet the demanding mandamus standard. Instead, as detailed above, Texas law authorizes a legislative committee to seek a writ of attachment against *the witness*. *See supra* at 10. It also authorizes the Legislature to take steps toward holding *the witness* in criminal contempt. *See supra* at 10. But when it comes to agencies that are not the object of a subpoena, it says only that a committee "may request necessary assistance" from an agency and the agency shall provide it. Tex. Gov't Code § 301.028.

Instead of asking TDCJ for some sort of interbranch assistance, though, the House Committee sued TDCJ. The assistance sought here by the House Committee is also not "necessary" given the lengthy delay in seeking it. *See* Part II.D. And, perhaps more importantly, it is not lawful, given the independent court orders that bind TDCJ. *See* Part II.A.

C. The House Committee's subpoena was defective on its face—as the House Committee now admits.

A standing committee of the Texas House of Representatives may issue process when authorized by the rules of procedure governing House operations. Tex. Gov't Code § 301.024(a). But where a subpoena is issued without authority in law, it is invalid from the outset and should be quashed. *Reader's Digest Ass'n, Inc. v. Dauphinot*, 794 S.W.2d 608, 610 (Tex. App.—Fort Worth 1990, no writ); *see also Toliver v. 556 Linda Vista LP*, No. 14-19-00206-CV, 2020 WL 4096113, at *3 n.2 (Tex. App.—Houston [14th Dist.] July 21, 2020, no pet.). That is exactly the case with the subpoena at issue here, as the House Committee seemingly concedes in at least some respects. Relator BOM 12 (admitting "typographical error" in the service block).

First, pursuant to Rule 1, Section 13 of the House Rules of Procedure, all subpoenas issued by the House "shall be signed by the speaker," namely, Dade Phelan. H.R. 4, 88th Leg., at 13 (2023). But the subpoena at issue in this case was signed by the "Chair of the Committee on Criminal Jurisprudence of the House of Representatives," namely, Joe Moody. *See* Appx. Tab 6. The House responds that this requirement applies only to subpoenas issued by the House "as a whole, not a specific committee." Relator BOM 31. But TDCJ is aware of no provision in law authorizing

subpoenas to issue on behalf of the House of Representatives *qua* House of Representatives. The House Committee has never pointed to one. Instead, state law seemingly authorizes subpoenas only for legislative "committees," Tex. Gov't Code § 301.024(a), and the "Texas Legislative Council," *id.* § 323.011. Accordingly, the only thing the House Rules could possibly refer to are committee subpoenas like the one attempted to be issued here. Despite claiming TDCJ's argument belies "a historical record of numerous committee subpoenas signed only by the chair," Relator BOM 31, all the House can muster to support that bold claim is a *single* example from more than a *decade* ago.

Second, even if a committee chairman could properly sign the subpoena, the return of service here was signed by an agent of a different committee. The "Committee on Criminal Jurisprudence" purported to issue the subpoena. But the return was served by an agent of the "Committee on General Investigating." Either the Criminal Jurisprudence Committee is lacking a valid return, or else the General Investigating Committee is lacking an issued subpoena. It is to avoid just this sort of manifest confusion that state law requires both that a subpoena be issued "in the name of the committee" and that the return be served by an agent of "the committee." Tex. Gov't Code § 301.024(b), (d). The House Committee ultimately acknowledges this defect but claims it is "of no moment" because "the party sought by the subpoena—Roberson—has not taken exception to" it. Relator BOM 30–31. That argument further highlights the absurdity of enforcing a subpoena in which TDCJ was not even named as its object. *See* Part II.B.

Third, state law requires that the return be served "to a witness." Tex. Gov't Code § 301.024(a). The only witness identified in the subpoena is Robert Roberson. The subpoena, however, was served not on witness Roberson, but instead on "Gretchen Sween, attorney of record for Robert Roberson." Appx. Tab 6. There is no indication that Sween operates with a blanket power of attorney to accept all service of process on Roberson's behalf. Besides conflicting with Section 301.024(a), such an approach to service of legislative subpoenas would be inconsistent with service in other contexts that typically require personal service upon the subject of the process. *See* Tex. R. Civ. P. 106(a) ("the citation must be served by delivering to the defendant in person"); Tex. R. Civ. P. 176.5 ("A subpoena must be served by delivering a copy to the witness"). Despite TDCJ previously raising this issue, the House Committee does not say whether Sween was authorized to accept service for Roberson, let alone does it offer any documentary evidence demonstrating such authorization.

The House Committee understandably downplays its previous argument that OAG conceded the subpoena's validity by putting it last. Relator BOM 31–32. But it offers no response to TDCJ's argument that validity raises a legal—and not a factual question—and lawyers cannot forfeit the meaning of the law. Reply at 6. The very case the House cites tacitly acknowledges the distinction when it asks whether a given admission "was contrary to an essential *fact* embraced in the theory of recovery." *Peck v. Peck*, 172 S.W.3d 26, 21 (Tex. App.—Dallas 2005, pet. denied).

D. The delay in seeking Roberson's testimony—and refusal to obtain it when offered—disentitles the House to equitable remedies.

The House claims it is "necessary" to hear from Roberson. But it has had *twenty-one years* to subpoena him. Instead, it elected to seek his critical insights only on the night before his execution. "The answer is not . . . to reward those who interpose delay with a decree-ending capital punishment by judicial fiat." *Bucklew v. Precythe*, 587 U.S. 119, 149–51 (2019). Rather than rewarding the House's sandbagging tactic, this Court should use its "'equitable powers' to dismiss or curtail suits that are pursued in a 'dilatory' fashion or based on 'speculative' theories." *Id.* at 151; *see also In re Commitment of Anderson*, 692 S.W.3d 343, 347 (Tex. 2024) (Busby, J., concurring in the denial of the petition for review) (unreasonable delays in seeking habeas relief and pursuing mandamus counsel in favor of denial).

Twenty years, the House Committee insists, overstates things. But no matter when the clock starts, the delay is apparent and unexplained. If the clock runs against Roberson's conviction, then the Committee waited 21 years. If it runs against the passage of Article 11.073, then the Committee waited 11 years. If it runs against Roberson's unsuccessful attempt to use Article 11.073, then the Committee waited 1 year and 10 months. And if it runs from issuance of Roberson's death warrant, then the committee still waited 4 months. Reply at 7. In its brief, the House unwittingly concedes that a months-long delay *would* be "dilatory." Relator BOM 29–30. It just forgets that it did issue a subpoena to Roberson "months later" than the setting of his execution date.

Yet these delays are not even the House Committee's worst infraction for balancing the scales of "equity." Tex. Civ. Prac. & Rem. Code § 65.011(3). Set to one side the communications with the opposing party without their counsel present. Reply at 7. Set to another side the unethical and even criminal *ex parte* communications with a judge of a sister court in related proceedings. *Supra* at 17–19. This Court could deny relief here based on just one undisputed fact.

After conscripting this Court to assist with its unconstitutional project, the House Committee did not even use the emergency relief it obtained here to gather Roberson's allegedly "invaluable" testimony. *Supra* at 12–13. Despite TDCJ's offer to allow Roberson to appear remotely, the House Committee balked. At first, the Committee blamed the refusal on sudden changes to its technology capabilities. *See* Reply at 7–8. Yet that was false; other witnesses again testified remotely on October 21. *See October 21 Hearing, supra*, at 3:22:10, 5:57:53 (witnesses Elsa Alcala and Katherine Judson giving virtual testimony). So, now the House Committee claims it could not use video technology for Roberson because of his autism, Relator BOM 15, even though he appeared in a televised interview with Lester Holt on NBC just one month ago, Erik Ortiz & Nick McElroy, *Texas Man Could Be First to Be Executed in Case of 'Shaken Baby' Death*, NBC NEWS (Oct. 3, 2024), https://tinyurl.com/8pb5u5ym. These shifting excuses further underscore the inequity of the relief sought here.

III. These Proceedings Are Not Moot, As the House Committee Concedes It "May Again Subpoena Roberson or Other Prisoners" for Testimony.

The House Committee does get one thing right: This dispute is not moot. The subpoena that was the subject of this Court's temporary injunction and the House Committee's petition may have expired when the House Committee adjourned its previous hearing on October 22, 2024. But the "impasse [over Roberson] remains today." Relator BOM 11; *see also id.* at 21.

In sworn pleadings, the House Committee continues to claim it is authorized to wield its subpoena power to hear an inmate's testimony—and even to bring a convicted murderer to the State Capitol—whenever it desires his testimony. Relator BOM 19, 21. And it openly admits "the Committee may again subpoena Roberson." *Id.* at 21. Public statements are to the same effect: Counsel for the House Committee have reiterated that the Committee plans to take Roberson's testimony in person when it sees fit. *See, e.g.*, Joe Moody (@moodyforelpaso), X (Oct. 17, 2024, 10:18 PM), https://tinyurl.com/5n7zk7sb; Jeff Leach (@leachfortexas), X (Oct. 20, 2024, 7:40 PM), https://tinyurl.com/vbcnxw3s; NBCDFW, *supra*, at 5:05–5:20.

Even if the dispute could somehow be deemed moot as to Roberson, notwithstanding the House's insistence that "th[e] impasse remains," Relator BOM 11, this case would fit comfortably within the "capable of repetition yet evading review" exception to mootness. *See, e.g.*, *Blum v. Lanier*, 997 S.W.2d 259, 264 (Tex. 1999). That exception applies where "(1) the challenged action was too short in duration to be litigated fully before the action ceased or expired; and (2) a reasonable expectation exists that the same complainant party will be subjected to the same action again."

Williams v. Lara, 52 S.W.3d 171, 184 (Tex. 2001). Both conditions are present. As to the latter, the House Committee has made crystal clear that it also "may again subpoena . . . other prisoners" because it believes the hearing and subpoena authority extends over "any sentence and any prisoner." Relator BOM 21. And as to the former, should the House Committee choose to exercise such authority once again on the eve of an execution—whether by noticing a hearing or by issuing a subpoena—any legal dispute could easily evade plenary review.

And at minimum, even if this case were moot, the presence of multiple jurisdictional defects, *see* Part I, means that the Court is "not duty-bound to address them all if any one of them warrants dismissal" because the Court has "leeway to choose among threshold grounds for denying [an] audience to a case on the merits." *Rattray v. Brownsville*, 662 S.W.3d 860, 868-69 (Tex. 2023) (quoting *Sinochem Int'l Co. v. Malaysia Int'l Shpping Corp.*, 549 U.S. 422, 431 (2007)). Given the House Committee's open acknowledgement that it intends to continue issuing subpoenas to Roberson and possibly other death-row inmates in the future, judicial economy and the public interest favors resolving this case on the threshold jurisdictional grounds raised by TDCJ above.

* * *

The House Committee's gambit should not be rewarded. It usurped the Governor's clemency power, claimed the authority to second-guess final criminal judgments, wrought constitutional havoc in the hours before a scheduled execution, forced Nikki Curtis's family to relieve her brutal death, and never once offered any

serious explanation for the delay—besides the obvious and opportunistic one. Basic constitutional principles require dismissal.

Prayer

The Court should grant TDCJ's motion to reconsider its order entering a temporary injunction against TDCJ and dismiss this petition for lack of jurisdiction.

Respectfully submitted.

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