No. ___

In the Supreme Court of Texas

In re GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS; MATTHEW MCDADE PHELAN, IN HIS OFFICIAL CAPACITY OF AS THE SPEAKER OF THE TEXAS HOUSE OF REPRESENTATIVES; AND THE STATE OF TEXAS,

Relators.

On Petition for Writ of Mandamus

to the 250th Judicial District Court, Travis County

PETITION FOR WRIT OF MANDAMUS

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The State of Texas

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"App." refers to the appendix to this petition. "MR" refers to the mandamus record.

Statement of the Case

Nature of the underlying proceeding:	Nineteen Democratic members of the Texas House of Representatives sought injunctive and declaratory relief that Governor Greg Abbott, the Speaker of the Texas House of Representatives Matthew Phelan, and the State of Texas have no authority to compel them to attend a special session of the Legislature by arresting them. MR.004-30.
Respondents:	The Honorable Brad Urrutia, 450th Criminal District Court, Travis County The Honorable Lora Livingston, 261st Civil District Court, Travis County
Respondents' challenged actions:	The trial court issued a temporary restraining order enjoining the Relators from detaining Democratic members of the Texas House of Representatives who fail to attend a special session of the Legislature. MR.001-03.

Statement of Jurisdiction

This Court has jurisdiction under Texas Government Code § 22.002(a). Due to exigent circumstances, as described in the Declaration of Dustin Burrows, MR.056-57, the State seeks relief directly in this Court.

Issue Presented

Whether respondents clearly abused its discretion in enjoining the Governor and the Speaker of the House from carrying out their duties under the Texas

Constitution and the rules of the Texas House of Representatives to secure a quorum during a legislative session.

To the Honorable Supreme Court of Texas:

Late last night, during the second day of the second special session of the Texas Legislature, a trial judge issued a two-page order forbidding the Governor, the Speaker of the Texas House of Representatives, and the State ("Relators") to utilize their express constitutional authority to compel the attendance of absent legislators. This unprecedented *ex parte* order, issued at the behest of nineteen of Democratic legislators (hereinafter "Plaintiffs") who fled the State last month with the explicit purpose of denying the Legislature a quorum and preventing it from passing legislation, vitiates core principles of separation of powers, inflicts irreparable harm on the State, and should be promptly vacated or reversed.

At the outset, the trial court lacked jurisdiction to issue this order, because it implicates an archetypal political question that the judiciary lacks the authority to resolve. The Texas Constitution—like the United States Constitution and those of forty-one other States—authorizes each House of the Legislature to "compel the attendance of absent members, in such manner and under such penalties as each House may provide." TEX. CONST. art. III, § 10. The House Rules, in turn, authorize the sergeant-at-arms, or an officer acting at his direction, to "sen[d] for and arrest" absent legislators when the House so directs. App.C at 87. This represents a "textual commitment" of the issue of legislative attendance to the Legislature, and neither Plaintiffs nor the trial court has offered any judicially manageable standards that would allow the courts to police such intra-branch squabbling.

The trial court also clearly erred in finding that the Relators wrongly interpreted the Texas Constitution and that Plaintiffs established irreparable injury. The Texas

Constitution and House Rules clearly and unambiguously permit the Legislature to compel the attendance of its members by arresting them and transporting them back to the Capitol. That interpretation is confirmed by over a century of constitutional history from this Court and the United States Supreme Court. The Relators also have no adequate means for obtaining relief through the regular appellate process: the trial court's order robs the Legislature of the ability to obtain a quorum for nearly half of the current special session, and the hearing on the motion has been set for August 20—nearly halfway through the Session.

STATEMENT

I. Plaintiffs Flee the State After the Governor Calls a Special Session of the Legislature

On July 7, 2021, Governor Greg Abbott called a special session of the Legislature to convene on July 8. MR.032-33. The agenda for the special session included several action items that the Legislature was unable to complete during the recently concluded 87th Regular Session, including bail reform, election integrity, border security, relief for retired teachers, and more. *Id.*

Fifty-six State Representatives and nine State Senators from the Democratic caucus publicly fled to Washington, D.C. on privately chartered jets. MR.009-10; Jane C. Timm, Democrats flee state in effort to block GOP-backed voting restrictions, NBC News (July 12, 2021), https://www.nbcnews.com/politics/elections/texas-democrats-flee-state-effort-block-gop-backed-voting-restrictions-n1273667. The stated purpose of the Democrats' abscondment was to deny the House of Representatives its required quorum and thereby thwart the ability of the

Legislature to pass laws favored by a majority of Texas's elected Legislators. *See* MR.008-10; *In re Turner*, slip op. 6; Press Release, Texas Democrats, Breaking: Texas Democratic State Lawmakers Once Again Make History, Breaking Quorum to Defend Voting Rights (July 12, 2021), *available at* https://www.texasdemocrats.org/media/breaking-texas-democratic-state-lawmakers-once-again-make-history-breaking-quorum-to-defend-voting-rights/.

Because the Texas Constitution and House Rules permit each House of the Texas Legislature to compel the attendance of absent members, TEX. CONST. art III, § 10, App.C at 87, on July 13, 2021, a majority of then-present Representatives voted to direct the Sergeant-at-Arms to arrest absent State Representatives and bring them back to the Capitol so that the business of the Legislature could finally proceed. MR.40-41. On July 15, pursuant to that authority, the Speaker of the House issued a warrant directing that the Sergeant-at-Arms "or any officer appointed by him" to apprehend one of the absent legislators, Representative Phillip Cortez. MR.053-54.

II. Plaintiffs Seek a Temporary Restraining Order After Governor Abbott Calls a Second Special Session of the Legislature.

With the special session required to adjourn on August 7. Without much progress on passing legislation due to lack of a quorum in the House, on August 5, Governor Abbott issued a Proclamation convening a second special session to commence on August 7. MR.034-37.

Rather than accept well-established constitutional authority of the Legislature to compel their attendance, on August 8, Plaintiffs sued seeking *ex parte* temporary and permanent injunctive relief and a declaration that Governor Abbott, Speaker

Phelan, and the State of Texas have no authority to compel them to attend the special session by arresting them. MR.04-27. At 8:14 p.m. on Sunday August 8, the 261st Judicial District[1] issued a perfunctory, *ex parte* TRO enjoining the Governor and the Speaker from "[d]etaining, confining, or otherwise restricting a Texas House Democrat's movement without his or her consent"; issuing "warrants or other instruments" so commanding; or commanding "law enforcement officials" from carrying out such an order. MR.001-03. The trial court has scheduled the hearing Plaintiffs' petition for temporary injunctive relief for August 20—more than halfway into the special session. MR.002.

ARGUMENT

Mandamus relief is available where the trial court's error "constitute[s] a clear abuse of discretion" and the relator lacks "an adequate remedy by appeal." *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). Both elements are easily met here.

I. The Trial Court Clearly Abused Its Discretion by Enjoining the Texas Legislature from Obtaining a Quorum.

The trial court's entry of an *ex parte* temporary restraining order was a clear abuse of discretion, and this Court should vacate the order with instructions for the trial court to dismiss the case. Relators are immune from suit for the acts complained of in the complaint. Moreover, Plaintiffs' petition is a political question concerning

[1] The trial court's order was issued by the 261st Judicial District, Travis County, over which the Honorable Lora Livingston presides. The order, however, appears to be signed by the Honorable Brad Urrutia of the 450th Criminal District Court, Travis County. MR.001-003. Out of an abundance of caution, the Relators seek relief from both Respondents.

an intra-legislative dispute that the judiciary lacks the competence to adjudicate. Finally, over a century of constitutional text, history, and precedent confirms that the Legislature has the authority to compel the attendance of absent legislators by arrest.

A. Relators Are Immune From Suit.

At the outset, Plaintiffs' claims fall outside the jurisdiction of the Court. The State and Governor Abbott are not proper defendants due to sovereign immunity because Governor Abbott has no role in compelling the plaintiffs to attend the house. *Cf. City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009); *City of Austin v. Paxton*, 943 F.3d 993, 1102 (5th Cir. 2019).[2] The only Relator who *does* have such a role in compelling their attendance is absolutely immune from suit for legislative acts under the Texas Speech and Debate Clause. *Canfield v. Gresham*, 17 S.W. 390, 392-93 (1891).

B. The Political Question Doctrine Bars Judicial Review of this Legislative, Intra-Branch Dispute.

Even if Relators were not immune, the trial court should never have even entertained Plaintiffs' Petition, because Texas courts lack the power to judicially review this intra-branch dispute between legislators, which is a quintessential political question. *See In re Turner*, slip op. 9 (Tex. 2021). Drawing on the United States Supreme Court's jurisprudence on the political-question doctrine, this Court has held that certain political questions lie "beyond the courts' power to decide." *Am. K-09*

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[2] For similar reasons, the real parties in interest lack standing to sue the Governor or the State because nothing this Court can order from these two Relators would redress the alleged harm. *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 487 (Tex. 2018) (citing *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc)).

Detection Servs., LLC v. Freeman, 556 S.W.3d 246, 252 (Tex. 2018); *see also In re Turner*, slip op. 9 ("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"). As relevant here, nonjusticiable political questions include those legal questions that involve "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Freeman*, 556 S.W.3d at 253 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

The Texas Constitution's "textually demonstrable constitutional commitment" to the Texas Legislature of the issue of compelling legislative attendance could hardly be clearer. Article III, section 10 of the Texas Constitution provides that while "[t]wo-thirds of each House shall constitute a quorum to do business . . . a smaller number may … compel the attendance of absent members, in such manner and under such penalties as each House may provide." The Speech and Debate clause similarly protects this constitutional authority. *Canfield*, 17 S.W. 390, 392-93; *see Kilbourn*, 103 U.S. at 190. And pursuant to this express constitutional authority, Rule 5, Section 8 of the Texas House Rules Manual provides that "[a]ll absentees for whom no sufficient excuse is made may, by order of a majority of those present, be sent for and arrested, wherever they may be found, by the sergeant-at-arms or an officer appointed by the sergeant-at-arms for that purpose, and their attendance should be secured and retained." App.C. at 87.

There is no merit to Plaintiffs' argument that this Court should conclude that the House exceeded its authority under the Constitution by authorizing the arrest of

Representatives who have refused to show up for work. Article III, section 10 expressly gives the House and Senate the power to "provide" the "manner" and "penalties" under which members may be compelled to attend legislative sessions. And Plaintiffs offer no "judicially discoverable and manageable standards for resolving" the question whether the "manner" and "penalties" chosen by the Legislature here for carrying out its ends were somehow constitutionally excessive. *Freeman*, 556 S.W.3d at 253.

Rather, all Plaintiffs can do is invite Texas courts to substitute their own judgment for the Legislature's about the best way to compel the legislators to attend the special session. But that invitation merely underscores the nonjusticiable, political nature of the question posed, because the question cannot be "decid[ed] without an initial policy determination of a kind clearly for nonjudicial discretion" and without the court "expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217.

For these reasons, federal and state courts around the country—including this Court—have long recognized that lawsuits seeking to entangle the courts in settling intra-legislative squabbling are nonjusticiable political questions. *See*, *e.g.*, *In re Turner*, slip op. 8; *Berry v. Crawford*, 990 N.E.2d 410, 413, 421 (Ind. 2013) (questions concerning "the issuance and collection of fines as legislative discipline" for legislators who "left the state to prevent the formation of a quorum" are "nonjusticiable and the doctrine of separation of powers preclude judicial consideration of the claims for relief"); *Rangel v. Boehner*, 20 F. Supp.3d 148, 166-76 (D.D.C. 2013) (constitutionality of U.S. House of Representatives' censure of Representative Charles

Rangel was a nonjusticiable political question); *In re Opinion of the Justices*, 47 So.2d 586, 588-89 (Ala. 1950) ("declin[ing] to express an opinion on matters which, under the Constitution of [Alabama], *only* the Senate of Alabama has jurisdiction"); *see also State ex rel. Turner v. Scott*, 269 N.W.2d 828, 831 (Iowa 1978) ("numerous state courts have held that once the state legislature has been made the judge of the qualifications of its members by their state constitution, the legislature has the sole authority to do so, there being no alternative judicial resolution due to the specific constitutional delegation"). The Court should follow this well-established path here.

C. The Texas Constitution Expressly Permits the Legislature to Compel the Attendance of Absent Members.

Plaintiffs' declaratory-relief claim is likewise meritless. Together, Article III, section 10 of the Texas Constitution and Rule 5, Section 8 of the Texas House Rules Manual set out a clear, straightforward constitutional rule: Legislators who fail to show up to work to fulfill their constitutional duties may be arrested, brought to the Capitol, and compelled to carry out their constitutionally assigned duty to participate in the legislative process. TEX. CONST. art III, § 10; Tex. H.R. Rule 5, § 8. The interpretive commentary to section 10 confirms this: "[t]he usual manner to secure a quorum when members absent themselves so as to prevent a quorum is to arrest the absentees and force them to attend the sessions of the house of which they are members." TEX. CONST. art III, § 10 interp. commentary. This prerogative is further protected by the absolute immunity provided the Speaker in the pursuit of his legislative duties. *Supra* at I.A.

This principle of constitutional law is hardly unique to Texas. At least forty-one other States have a similar compulsion-of-attendance provisions in their Constitutions. And each of these compulsion-of-attendance clauses finds its genesis in the United States Constitution, which has a provision that is identically worded to Texas's: "a Majority of each [House of Congress] shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide." U.S. CONST. art I., § 5, cl. 1; *see* Tex. Const. art. III, § 10, interp. commentary ("This provision is borrowed from the Federal Constitution applicable to the Congress."). As Justice Joseph Story has explained, the purpose of the Compulsion-of-Attendance clause is to ensure that "the interests of the nation and the d[i]spatch of business are not subject to the caprice or perversity or negligence of the minority." 1 J. Story, Commentaries on the Constitution § 836 (5th ed. 1891). This was thought necessary by the Founders because "[i]t was a defect in the articles of confederation that . . . no vote, except for adjournment, could be determined, unless by the votes of a majority of the States; and no power of compelling the attendance of the requisite number existed." *Id.* In the single reported case describing the reach of this Clause, the U.S. Supreme Court has observed that "the penalty which each House is authorized to inflict in order to compel attendance of absent members may be imprisonment." *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880).

Although the Texas appellate courts have not had the opportunity to construe the Compulsion-of-Attendance Clause, the Speech or Debate Clause (at least in this

context), or the applicable House Rule implementing these provisions, this Court has analyzed the Legislature's authority under an analogous provision: the authority to imprison non-members for forty-eight hours if they obstruct legislative proceedings. *Canfield*, 17 S.W. at 390 (interpreting Tex. Const. art. III, § 15). In *Canfield*, a newspaper reporter had caused the Speaker of the House to be arrested during the legislative session. *Id.* at 391. Deeming this act to be an "obstruction of its proceedings," the Texas House of Representatives invoked its power under Article III, § 15 and directed the House Sergeant-at-Arms to arrest the reporter and confine him in the Travis County Jail. *Id.* at 391-92. The reporter subsequently sued the Sergeant-at-Arms and the House Members who had voted to detain him for unlawful arrest and false imprisonment. *Id.* at 390. This Court, in affirming a directed verdict for the Seargeant-at-Arms and the members of the House, reasoned that "[t]he house had unquestionably the right to determine whether or not the acts of plaintiff were an obstruction to its proceedings within the meaning of the constitution, and, having so determined, to cause him to be imprisoned as he was." *Id.* at 393.

In this case, there can be little doubt that the Plaintiffs' arrest and subsequent transport back to the Capitol falls comfortably within the Legislature's (and the Speaker's) broad power to compel the attendance of its members. After all, if the arrest and imprisonment of members is permissible under the federal constitution's identically worded clause, *Kilbourn*, 103 U.S. at 190, and the arrest and imprisonment of *nonmembers* is constitutionally sound under an analogous provision of the Texas Constitution, *Canfield*, 17 S.W. at 393, then the less intrusive method of arrest and transport to the Capitol is surely well within constitutional limits. Even

more so, the Compulsion-of-Attendance Clause was designed precisely to remedy the type of legislative stasis wrought upon Texas by Plaintiffs. To wit: Plaintiffs are a part of a legislative "minority" that has sought to thwart the "d[i]spatch of business" by fleeing the State and subjecting Texans to their own "caprice," "perversity" and "negligence." 1 Story § 836. Without this Clause, a determined minority could prevent *any* legislative business from getting done by simply fleeing the State and remaining there until the next election in hopes of capturing a majority. But because the Constitution is "not a suicide pact," *Kennedy v. Mendoz-Martinez*, 372 U.S. 144, 160 (1963), tools like the Compulsion-of-Attendance Clause are available to prevent such "public mischief," 1 Story § 836.

D. None of Plaintiffs' Contrary Arguments Has Merit.

Plaintiffs' Petition offers four reasons why the Texas courts should ignore constitutional text, history, and precedent, but none has the slightest merit.

First, Plaintiffs argue that any peace officer would lack the authority to arrest them because peace officers, such as those employed by the Department of Public Safety ("DPS"), only possess the statutory authority to arrest persons who have committed a "crime" and Plaintiffs have not committed any crime. MR.011. To the extent that Plaintiffs are claiming that that peace officers' *statutory* authority conflicts with their *constitutionally* based authority to arrest absent legislators, "the statute must yield." *In re Expunction*, 497 S.W.3d 505, 509 (Tex. App.—Houston [1st Dist.] 2016, no pet.). Regardless, there is no such conflict. DPS is statutorily authorized to "execute subpoenas and other process directed to the sheriff that are issued by the speaker of the house of representatives, the president of the senate, or the

chairman of a committee of either house of the legislature." Local Gov't Code § 85.022; *see also* Gov't Code § 411.021, .022(a) (authorizing the Texas Rangers, a "major division" of DPS, to exercise the powers of the sheriff). And here any warrant for the arrest of an absent legislator will be issued by the Speaker. *See, e.g.*, MR.053-54.

Second, Plaintiffs try to argue that the U.S. Constitution's Due Process Clause and the Texas Constitution's Due Course of Law Clause would prevent DPS from arresting them and transporting them to the Capitol, because such conduct would deprive them of "liberty." MR.011. "Liberty interests protected by the due process clause can arise from two sources, 'the Due Process Clause itself and the laws of the States.'" *O'Donnell v. Harris County*, 892 F.3d 147, 157 (5th Cir. 2018) (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). But both the federal and state constitutions make plain that Plaintiffs have no liberty interest in legislative truancy. To the contrary, the federal and state constitutions expressly *foreclose* any such claim by authorizing Congress and the Texas Legislature to "compel the attendance of absent members" in any manner and via any penalties that they see fit. U.S. CONST. art I., § 5, cl. 1; TEX. CONST. art III, § 10.

Moreover, even if such a novel and counter-textual liberty interest did exist, the procedures established by Rule 5, Section 8 of the Texas House Rules Manual provide Plaintiffs with all of the process that they are due. "The amount of process due is measured by a 'flexible standard' that turns on the 'practical requirements of the circumstances.'" *Tex. Tech Univ. Health Scis. Ctr. v. Enoh*, 545 S.W.3d 607, 620 (Tex. App.—El Paso 2016). That standard turns on the assessment of three factors:

"(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

None favors Plaintiffs. The "private interest" here is completely non-existent, since Plaintiffs would be arrested due to the failure to carry out the *public* duties that they willingly sought out through election. Likewise, the risk of "erroneous" deprivation of any private interest (assuming there is such an interest) is slight, as it is exceedingly unlikely that the sergeant-at-arms or his delegee would arrest the wrong legislator. Further, additional "procedures" would serve only to slow down the process of regaining a quorum to enable the Legislature to conduct business. Such "administrative burdens" would overwhelm any marginal benefit to Plaintiffs.

Third, Plaintiffs claim that the House may not to compel them to attend the special session by arresting them because it would conflict with their "legislative privilege[] from arrest during the session of the Legislature, and in going to and returning from the same." MR.012 (quoting TEX. CONST. art. III, § 14). But section 14 has no application here. This provision was designed to "aid[] in the uninterrupted performance of the legislator's duties." TEX. CONST. art III, § 14, interp. commentary. As Justice Story explained when interpreting the similarly worded provision in the U.S. Constitution, the privilege applies to members "during their attendance at the sessions of Congress, and their going to and returning from them." 1 Story § 859. Thus, the legislative privilege from arrest has no application where, as here, the legislators

in question are actively *avoiding*, rather than "going to and returning from" or "attend[ing]"a legislative session. TEX. CONST. art III, § 14. Plaintiffs' alternative interpretation of section 14 makes little sense, as it would rob the Legislature of a key tool for reining in obstructionist legislators and effectively hand control over the Legislature to a recalcitrant minatory insistent upon preventing any legislative business from being accomplish. Accordingly, because "constitutional … provisions will not be … construed or interpreted as to lead to absurd conclusions, great inconvenience, or unjust discrimination, if any other construction or interpretation can reasonably be indulged in," the Court should reject Plaintiffs' argument. *Cramer v. Sheppard*, 167 S.W.2d 147, 155 (Tex. 1942).

Finally, Plaintiffs argue that enforcing article III, section 10 against them would violate their rights under the First and Fourth Amendments of the United States Constitution. MR.012. Relators are aware of no authority endorsing such a novel argument, and Plaintiffs have cited none. They cannot do so for good reason: accepting their argument would mean that analogous and identically-worded provisions in the U.S. Constitution—and forty-one other States—are unconstitutional. Such a radical argument should be rejected out of hand because "[t]he first ten amendments and the original Constitution were substantially contemporaneous and should be construed in pari materia." *Patton v. United States*, 281 U.S. 276, 298 (1930). In any event, no Fourth Amendment violation is in view. The warrant issued by the Speaker of the House is amply supported by probable cause to believe that the Plaintiffs have violated House Rules by failing to appear without sufficient cause. *See, e.g.,* M.R.054 (warrant); *cf.* U.S. CONST. amend. IV. Indeed, Plaintiffs brazenly tout the fact that

they fled the State in order to deny the House a quorum and obstruct legislative business. MR.008-10.

Nor has the First Amendment been violated here. "[A] public employee ha[s] no right to object to conditions placed upon the terms of employment—including those which restrict[] the exercise of constitutional rights." *Connick v. Myers*, 461 U.S. 138, 143 (1983). And while the "First Amendment protects a public employee's right, in certain circumstances to speak as a citizen addressing matters of public concern," *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006), in this case no restrictions whatsoever have been placed upon Plaintiffs' First Amendment right "to speak, assemble, petition, and provide effective representation to constituents," MR.012—the very fact of their jaunt to Washington D.C. (and accompanying media blitz) is enough to refute that specious claim. But even if there were First Amendment issues here, a requirement to actually attend legislative sessions is doubtless a reasonable "condition" of employment as a legislator that in no way restricts the Plaintiffs right "to speak as … citizen[s] addressing matters of public concern." *Garcetti*, 547 U.S. at 417.

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

Relator lacks an adequate remedy for the trial court's unlawful action by ordinary appeal. Mandamus is an appropriate remedy when a party is "in danger of permanently losing substantial rights." *In re Goodyear Tire & Rubber Co.*, 437 S.W.3d 923, 927 (Tex. App.—Dallas 2014, orig. proceeding. That is precisely the case here.

The trial court's TRO forbids the Legislature from utilizing a constitutionally authorized tool for obtaining a quorum for at least fourteen days, thus robbing the Legislature of nearly half of the time allotted for this special session. Relators' injury is thus immediate and ongoing, and any recourse to the regular channels of appellate review will come too late to remedy Relators' injury, which grows more acute each passing hour. When the ordinary appellate process cannot afford timely relief, mandamus is proper. *See In re Woodfill*, 470 S.W.3d, 480-81 (Tex. 2015) (per curiam).

By contrast, the Plaintiffs' claimed "irreparable injury" is anything but. Plaintiffs implausibly claim that they face "the loss of real and personal property, familiar and friendly love, and homestead comfort," because they have no choice but to remain outside of the State or face arrest. MR.017. But these are problems of Plaintiffs' own making. Plaintiffs are nineteen state legislators who sought and obtained public office and swore an oath to uphold the Texas Constitution—they very same Constitution that authorizes each House to compel the attendance of its members. If Plaintiffs no longer wish to fulfill their public duties, they are free to resign and return to Texas. They are also free to return to Texas, provide input on pending legislation on behalf of their constituents, and, if so moved, register their dissent from that legislation. *In re Turner*, No.21-0538 at 8 ("They have chosen to absent themselves in order to prevent passage of voting legislation."). But what they may not do is hold hostage the proceedings of the Legislature because they have policy differences with the majority's agenda.

Prayer

The Court should grant the petition and either, vacate or reverse the trial court's temporary restraining order.

Respectfully submitted.

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Certificate of Service

On August 9, 2021, this document was served electronically on Samuel E. Bassett, lead counsel for Real Parties in Interest, at sbasset@mbfc.com.

/s/ Judd E. Stone II
Judd E. Stone

Certificate of Compliance

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/s/ Judd E. Stone II
Judd E. Stone

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Relators.

On Petition for Writ of Mandamus to the
261st Judicial District Court, Travis County

APPENDIX

Tab A: Temporary Restraining Order

Filed in the District Court
Of Travis County, Texas

August 09, 2021, 09:08:33
At ____________
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-21-003760

REP. GINA HINOJOSA, REP. ALMA A. ALLEN, REP. MICHELLE BECKLEY, REP. JASMINE CROCKETT, REP. JOE DESHOTEL, REP. BARBARA GERVIN-HAWKINS, REP. VIKKI GOODWIN, REP. CELIA ISRAEL, REP. RAY LOPEZ, REP. ARMANDO "MANDO" MARTINEZ, REP. TREY MARTINEZ FISCHER, REP. INA MINJAREZ, REP. CHRISTINA MORALES, REP. MARY ANN PEREZ, REP. ANA-MARIA RAMOS, REP. RICHARD PEÑA RAYMOND, REP. RON REYNOLDS, REP. EDDIE RODRIGUEZ, REP. RAMON ROMERO, JR., *Plaintiffs,*	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
GREG ABBOTT, in his official capacity as Governor of the State of Texas, and MATTHEW McDADE PHELAN, in his official capacity as the Speaker of the Texas House of Representatives, and the STATE OF TEXAS. *Defendants.*	§	261ST JUDICIAL DISTRICT

TEMPORARY RESTRAINING ORDER

On this date, the Court heard Plaintiffs' application for a temporary restraining order. After considering the pleadings, affidavits, and arguments of counsel, the Court GRANTS the application for a temporary restraining order *ex parte* and ORDERS as follows:

1. The Court finds that it clearly appears from the facts set forth in Plaintiffs' Original Petition and the affidavits and evidence attached thereto that Defendants have erroneously interpreted Texas law and legislative rules to permit the detention, confinement, or other restriction of members of the Texas House of Representatives within the State of Texas in response to a call for quorum, and that, unless Defendants are immediately restrained as

set forth below, Plaintiffs will suffer imminent and irreparable harm by either the loss of liberty or the loss of real and personal property, personal, professional, and political relationships with family, friends, staff, and constituents, and mental anguish of being separated from home.

2. The Court further finds that immediate and irreparable injury, loss, or damage will result to Plaintiffs before notice of a temporary restraining order application can be served and hearing had thereon. Specifically, Defendants announced on Saturday, August 7, 2021, that the next Special Session in which Plaintiffs would be purportedly require to attend will begin on Monday, August 9, 2021, but, as State government workers, Defendants' counsel are presumably unavailable to receive notice or appear at a hearing on the only date between those key dates.

3. The Court RESTRAINS defendants the State of Texas, Governor Greg Abbott, and Speaker of the House Matthew McDade "Dade" Phelan from:

   a. Detaining, confining, or otherwise restricting a Texas House Democrat's movement without his or her consent so as to interfere substantially with his or her liberty within the State of Texas under the alleged authority of Article III, Section 10 of the Texas Constitution, House Rule 5, Section 8, or a Call to the House passed on or after July13, 2021;

   b. Issuing any warrants or other instruments commanding the detention, confinement, or other restriction of a Texas House Democrat's movement without his or her consent so as to interfere substantially with his or her liberty within the State of Texas under the alleged authority of Article III, Section 10 of the Texas Constitution, House Rule 5, Section 8, or a Call to the House passed on or after July13, 2021; and

   c. Commanding the Texas House sergeant-at-arms, officers appointed by the Texas House sergeant-at-arms, Department of Public Safety, Texas Rangers, Texas Highway Patrol Officers, Capitol Police Officers, or other law enforcement officials to detain, confine, or otherwise restrict a Texas House Representative's movement without his or her consent so as to interfere substantially with his or her liberty within the State of Texas under the alleged authority of Article III, Section 10 of the Texas Constitution, House Rule 5, Section 8, or a Call to the House passed on or after July13, 2021.

4. The Court ORDERS the Clerk to issue notice to defendants the State of Texas by and through the Attorney General, Governor Greg Abbott, and Speaker of the House Matthew McDade "Dade" Phelan to show cause why a temporary injunction should not be issued against them, and that the hearing on Plaintiffs' application for temporary injunction is set for:

August 20, 2021 at 2:00 AM / PM.

The purpose of the hearing will be to determine whether the temporary restraining order should be made a temporary injunction pending a full trial on the merits.

5. The Court finds that the temporary restraining order or temporary injunction is against the State and officers of the State in their governmental capacity and that Defendants have no pecuniary interest in the suit and no money damages can be shown; nonetheless, the Court sets bond at: $1.00.

6. This Order is binding upon all of Defendants' agents, servants, employees, attorneys, and all persons in active concert or participation with Defendants who receive actual notice of this order by personal service or otherwise.

7. This Order expires within fourteen (14) days unless extended as permitted by Tex. R. Civ. P. 680.

SIGNED on August 8, 2021 at 8:14 PM.

JUDGE PRESIDING

Tab B: Tex. Const. art. III, § 10

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article III. Legislative Department

Vernon's Ann.Texas Const. Art. 3, § 10

§ 10. Quorum; adjournments from day to day; compelling attendance

Currentness

Sec. 10. Two-thirds of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each House may provide.

Vernon's Ann. Texas Const. Art. 3, § 10, TX CONST Art. 3, § 10
Current through legislation effective June 18, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

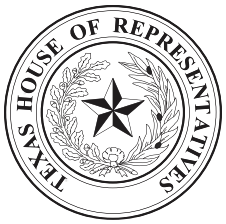
End of Document

Tab C: House Rule 5

House Rules Manual

House Rules of Procedure
Housekeeping Resolution
Government Code

87th Legislature



Rule 5
Floor Procedure

Chapter A. Quorum and Attendance

Sec. 1. Quorum. Two-thirds of the house shall constitute a quorum to do business.

CROSS-REFERENCE

Tex. Const. Art. III, § 10—Constitutional rule.

Sec. 2. Roll Calls. On every roll call or registration, the names of the members shall be called or listed, as the case may be, alphabetically by surname, except when two or more have the same surname, in which case the initials of the members shall be added.

Sec. 3. Leave of Absence. (a) No member shall be absent from the sessions of the house without leave, and no member shall be excused on his or her own motion.

(b) A leave of absence may be granted by a majority vote of the house and may be revoked at any time by a similar vote.

(c) Any member granted a leave of absence due to a meeting of a committee or conference committee that has authority to meet while the house is in session shall be so designated on each roll call or registration for which that member is excused.

Sec. 4. Failure to Answer Roll Call. Any member who is present and fails or refuses to record on a roll call after being requested to do so by the speaker shall be recorded as present by the speaker and shall be counted for the purpose of making a quorum.

Sec. 5. Point of Order of "No Quorum". (a) The point of order of "No Quorum" shall not be accepted by the chair if the last roll call showed the presence of a quorum, provided the last roll call was taken within two hours of the time the point of order is raised.

(b) If the last roll call was taken more than two hours before the point of order is raised, it shall be in order for the member who raised the point of order to request a roll call. Such a request must be seconded by 25 members. If the request for a roll call is properly seconded, the chair shall order a roll call.

(c) Once a point of order has been made that a quorum is not present, it may not be withdrawn after the absence of a quorum has been ascertained and announced.

CONGRESSIONAL PRECEDENT

Applicability of Restrictions Under General Parliamentary Law. — Before the adoption of rules, a member may make a point of order of no quorum based on the Constitutional rule because the House rule restricting its availability is not yet applicable. Wickham ch. 5, § 5.3.

Sec. 6. Motions In Order When Quorum Not Present. If a registration or record vote reveals that a quorum is not present, only a motion to adjourn or a motion for a call of the house and the motions incidental thereto shall be in order.

CROSS-REFERENCE

Rule 7, § 11—Adjourning with less than a quorum.

Sec. 7. Motion for Call of the House. It shall be in order to move a call of the house at any time to secure and maintain a quorum for one of the following purposes:

(1) for the consideration of a specific bill, resolution, motion, or other measure;

(2) for the consideration of any designated class of bills; or

(3) for a definite period of time.

Motions for, and incidental to, a call of the house are not debatable.

CROSS-REFERENCES

Tex. Const. Art. III, § 12—Compelling attendance of absent members.

Rule 5, § 57—Motion for a call of the house during verification of a vote.

EXPLANATORY NOTE

The motion for a call of the house to secure a quorum is in order under general parliamentary law as an exercise of the constitutional power to compel the attendance of absent members. [2021]

HOUSE PRECEDENTS

1. *Bill Considered Under Call of the House Made a Special Order.* — In the 51st Legislature, the Speaker, Mr. Manford, held that when a bill was being considered under a call of the house, pursuant to (1) above, a motion to set the bill as a special order for another time was in order. 51 Tex. Legis. Man. 212 (1949).

2. *Illustration of a "Class of Bills."* — The house was considering H.B. 231. Mr. Pool moved a call of the house until House Bills 231, 232, 233, and 238 were disposed of. Mr. Hale raised a point of order that such was not a valid motion in that it encompassed four separate bills that did not constitute a "class" under Section 2(b) of Rule XV [now this section].

The speaker, Mr. Carr, overruled the point of order, because all four bills dealt with the same general subject matter, i.e., segregation in the public schools, and accordingly it was his opinion that they constituted a proper "class of bills" within the meaning of this section. 55 H. Jour. 1527 (1957).

CONGRESSIONAL PRECEDENTS

Call of the House Before the Adoption of Rules. — A call of the House is in order both under the general parliamentary law and the Constitution. 4 Hinds § 2981; Deschler ch. 1, § 9.8

Interrupting a Call of the House. — The Speaker may interrupt a call of the House to administer the oath to a Member-elect. Wickham ch. 2, § 3.16.

Sec. 8. Securing a Quorum. When a call of the house is moved for one of the above purposes and seconded by 15 members (of whom the speaker may be one) and ordered by a majority vote, the main entrance to the hall and all other doors leading out of the hall shall be locked and no member permitted to leave the house without the written permission of the speaker. The names of members present shall be recorded. All absentees for whom no sufficient excuse is made may, by order of a majority of those present, be sent for and arrested, wherever they may be found, by the sergeant-at-arms or an officer appointed by the sergeant-at-arms for that purpose, and their attendance shall be secured and retained. The house shall determine on what conditions they shall be discharged. Members who voluntarily appear shall, unless the house otherwise directs, be immediately admitted to the hall of the house and shall report their names to the clerk to be entered in the journal as present.

Until a quorum appears, should the roll call fail to show one present, no business shall be transacted, except to compel the attendance of absent members or to adjourn. It shall not be in order to recess under a call of the house.

CROSS-REFERENCES

Tex. Const. Art. III, § 12—Compelling attendance of absent members.
Rule 7, § 11—Compelling the attendance of absent members.

EXPLANATORY NOTE

The procedure outlined in this section is mandatory after a call of the house is "moved," a motion to recess not being acceptable between the "seconding" and the "ordering" vote on the call. However, due to its high priority, a motion to adjourn could come between, or even ahead of, the "seconding" procedure. [1949]

HOUSE PRECEDENTS

1. *No Substitute for a Call of the House.* — In the 51st Legislature, the Speaker, Mr. Manford, held that there is no substitute for a call of the house, i.e., a different time or purpose cannot be substituted. 51 Tex. Legis. Man. 213 (1949).

2. *Call of the House in Effect Pending Verification.* — In the 51st Legislature, the Speaker, Mr. Manford, as the result of a 65 to 64 vote for a call of the house, ordered the doors of the house closed immediately despite a request for verification which he accepted and allowed. 51 Tex. Legis. Man. 213 (1949). [The verification sustained the announced vote.]

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Case Contacts

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