No. 21-0667

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 261st Judicial District, Travis County

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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Plaintiffs' Response is long on rhetoric, short on the law, and more befitting of a press statement than a legal brief. It does nothing to ground in the law the trial court's unprecedented *ex parte* order restraining the Governor, Speaker of the House, and the State from availing themselves of the long-established constitutional power to compel truant legislators to attend the Legislature's special session.[1] And it fails to show why this Court should bless the misguided efforts of a minority of one House of the Legislature to stymie the proceedings for their own partisan ends.

The trial court clearly abused its discretion in awarding relief. This Court confirmed just last week that the judiciary has no business policing intra-branch disputes of the Legislature like this one, because they present nonjusticiable political questions. *In re Turner*, 2021 WL 3486611 (Tex. 2021). Regardless, the Texas Constitution unambiguously authorizes each House of the Legislature to compel the attendance of absent members, and over a century of constitutional history and precedent confirms that arrest is a constitutionally sound "manner" of ensuring that Legislators return to their posts.

Relators also have no adequate appellate remedy. Plaintiffs have prevented the Legislature from conducting the State's business for more than a month, and a single trial judge has now robbed the House of a key constitutional tool to stop this obstructionist behavior. Plaintiffs' claims of "irreparable harm," on the other hand, are

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[1] Plaintiffs have now dismissed their claims against the State with prejudice. They should have done so against the Governor as well; he has no role in enforcing the House's prerogatives.

problems of their own making. Plaintiffs may return to their posts whenever they wish and carry out the duties that they sought. Alternatively, they can resign if they no longer wish to perform the task. But they may not abscond from the Capitol and simultaneously claim to be harmed by that choice.

ARGUMENT

I. The Trial Court Clearly Abused its Discretion in Granting a Temporary Restraining Order.

A. Plaintiffs' lawsuit raises a nonjusticiable political question.

Just last week, this Court held that a "political dispute within the legislative branch is not an issue of separation of powers that we can decide." *In re Turner*, 2021 WL 3486611, at *4. Rejecting an attempt to enlist the judiciary in legislators' efforts to superintend the Governor's power to veto legislation and to call a special session, this Court rightly concluded that the case presented nothing more than "a disagreement between [House Democrats] and their legislative colleagues over the order in which to consider legislation"—an issue that that the Legislature "can resolve for [itself]" without "the judiciary's intervention." *Id.* at *4-*5.

This case—in which nineteen members of the House Democratic caucus ask the Texas courts to forbid the House from compelling their attendance at the special session via arrest—presents precisely the same concerns. Plaintiffs' lawsuit asks the Texas courts to hold that the House chose the wrong "manner" and wrong "penalties" by which to compel their attendance at the special session. But Article III section 10 of the Texas Constitution "textually . . . commits" that choice to the Legislature, which may "compel the attendance of absent legislators, *in such manner and*

under such penalties as each House may provide." That leaves no room for "the judiciary's intervention." *In re Turner*, 2021 WL 3486611, at *5. And Plaintiffs have failed to articulate any "judicially discoverable and manageable standards" that would allow a court to supplant the House's judgment as to the most appropriate "manner" of compelling legislative attendance. Pet. 6-7. Any attempt to do so would "express[] lack of the respect due coordinate branches of government." *Baker v. Carr*, 369 U.S. 186, 217 (1962); Pet. 7. That is why federal and state courts around the country have dismissed intra-legislative disputes like this one as nonjusticiable political questions. *See* Pet. 7-8 (collecting authorities).

Plaintiffs' Response offers no coherent rejoinder to this straightforward analysis. Tellingly, they completely ignore this Court's on-point decision in *In re Turner*. And the arguments they do advance are makeweights.

First, Plaintiffs cite no authority to support the proposition that an issue may only be textually committed to a nonjudicial branch if the constitutional provision in question uses the word "sole." Resp. 19. Neither this Court nor the U.S. Supreme Court has ever insisted upon such a requirement. *Cf. Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Am. K-9 Detection Servs., LLC v. Freeman*, 556 S.W.3d 246 (Tex. 2018). And while the word "sole" in Article I, § 3, cl. 6 of the federal constitution made it easier for the Supreme Court to conclude that the Constitution reposes the power to try impeachments only in the Senate, nothing in *Nixon v. United States* even hints that use of the word "sole" is a prerequisite to finding a textual commitment of an issue to a coordinate branch. 506 U.S. 224 (1993). *Powell v. McCormack*, 395 U.S. 486 (1969), is also of little help. In *Powell*, the Supreme Court held that

Article I, section 5's statement that "[e]ach House shall be the Judge of the Elections, Returns, and Qualifications of its own Members," did not allow the House to refuse to seat a member based on qualifications set by the House. *Id.* at 547-48. That was because a different provision of the Constitution, Article I, section 2, set the minimum qualifications for office, and the House was not free to add to them. *See Nixon*, 506 U.S. at 237. Here, no provision of the Texas Constitution limits the House's power under Article III, section 10 to compel the attendance of absent legislators. *See infra* at 5-7.

Second, the Court should reject Plaintiffs' effort to analogize House Rule 5, Section 8 to a hypothetical rule providing "that only absent members of a racial minority [a]re subject to discipline or that absent members should be shot on sight without notice." Resp. 21. Though a court may judicially review legislative rules that "ignore[] constitutional restraints or violate fundamental rights"—such as the two examples Plaintiffs provide—outside of those two categories, a legislative chamber's "power to make [internal] rules" is "absolute and beyond the challenge of any other body or tribunal." *United States v. Ballin*, 144 U.S. 1, 5 (1892). Here, the House's authorization of the arrest and transport of absent members back to the Capitol neither "ignores constitutional restraints" nor "violates fundamental rights." *Id.*; Pet. 14-15; *infra*. at 7-8.

Finally, Plaintiffs point this Court to a 2003 decision of a trial court that held that the Department of Public Safety lacked statutory authority to arrest absent House members. Resp. 21-22. That was wrong for reasons explained in the Petition. Pet. 11-12. And Plaintiffs fail to mention that the Third Court *reversed* the trial court's

decision. *Davis v. Burnham*, 137 S.W.3d 325 (Tex. App.—Austin 2004, no pet.). Moreover, contrary to Plaintiffs' statement, the court did not address the political question doctrine. *Contra* 22. It merely observed that "*the district court* decided that the authority of the Department to arrest missing House members is . . . not a political question." *Burnham*, 137 S.W. 3d at 330 n.8. *Burnham* therefore is inapposite.

B. The Texas Constitution expressly authorizes the House to compel the attendance of truant members like Plaintiffs.

Plaintiffs' declaratory-relief claim also fails on the merits. The plain language of Article III, section 10 of the Texas Constitution and Rule 5, Section 8 of the Texas House Rules set out a clear rule: Legislators who refuse to show up to work 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; App. C. at 87. The interpretive commentary confirms that "[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. And this reading of the Compulsion-of-Attendance Clause is confirmed by over a century of constitutional history from this Court, the United States Supreme Court, and other States. Pet. 9-11.

Plaintiffs' principal response is that the United States Supreme Court's interpretation of the identically worded federal Compulsion-of-Attendance Clause is irrelevant. Resp. 29-30. But the interpretive commentary to section 10 states that the Compulsion-of-Attendance Clause "is borrowed from the Federal Constitution as

applicable to the Congress." TEX. CONST. art III, § 10 interp. commentary. It is quite relevant that the U.S. Supreme Court has held 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), when Plaintiffs claim it is unconstitutional to compel their attendance through the less invasive method of arrest and transport to the Capitol. *Marshall v. Gordon*, far from undercutting *Kilbourn*, Resp. 23, reaffirms it by confirming that Legislatures may use "imprisonment" "to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed." 243 U.S. 521, 542 (1917).

Plaintiffs next repeat their argument that the Compulsion-of-Attendance Clause conflicts with their "legislative privilege[] from arrest during the session of the Legislature, and in going to and returning from the same," TEX. CONST. art. III, § 14. Resp. 24. But these two constitutional provisions serve the same purpose: Like the Compulsion-of-Attendance Clause, the privilege from arrest is aimed at "aid[ing] in the uninterrupted performance of the legislator's duties." TEX. CONST. art. III, § 14, interp. commentary. Pet. 13-14. Plaintiffs' response offers no way to harmonize these two constitutional provisions. They say that the Constitution only permits the House to "*insist*" on "member attendance." Resp. at 3. But Article III, section 10 is not precatory; it uses the verb "compel," which means "[t]o cause or bring about by force, threats, or overwhelming pressure." *Compel*, Black's Law Dictionary (11th ed.

2019). Substituting the word "insist" fundamentally alters the meaning of the Clause and reads out the word "compel."

C. The Texas Constitution's Compulsion-of-Attendance Clause does not violate the federal Constitution.

Plaintiffs provide only a cursory defense of their arguments that compelling them to attend the special session of the Legislature violates the First, Fourth, and Fourteenth Amendments of the federal constitution. Resp.27. Relators have already shown why those arguments lack merit, Pet. 12-15, and Plaintiffs fail to rehabilitate them.

The procedural-due-process argument fails because Plaintiffs have no liberty interest in legislative truancy—the Compulsion-of-Attendance Clauses in the Texas and U.S. Constitutions establish that. Pet. 12. Even if they had such a liberty interest, the House Rules, which provide that a majority vote of present legislators is required before absent legislators may be arrested, App. C at 87, is all the process that they are due. Pet. 12-13. Plaintiffs respond that they have a liberty interest in "movement home to loved ones." Resp. 27. Yet Relators are not stopping them from doing so. If Plaintiffs no longer wish to fulfill their public duties, they are free to resign and return home. 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. But they have no "liberty interest" in holding hostage the proceedings of the Legislature merely because they have policy differences with the majority.

Their Fourth Amendment argument that "a probable cause determination [is] wholly absent from the record" is likewise defective. Resp. 27. The civil arrest

warrants were issued because Plaintiffs were absent from the special session "without sufficient cause." Pet. 14; App. C. at 87. More than probable, Plaintiffs' absence is beyond reasonable doubt. Plaintiffs themselves have proudly trumpeted in this Court and in the court of public opinion that they fled Texas with the express purpose of denying the House a quorum and impeding legislative business. *See, e.g.*, MR.09-10. The House vote that this does not constitute "sufficient cause" for their absence is in the record. MR.40-41.

Plaintiffs' First Amendment argument is even less meritorious. Relators have done nothing to restrict Plaintiffs' right to speak, assemble, or petition—as their response tacitly concedes. Resp.27-28. Moreover, a requirement to attend a legislative session is a reasonable condition of employment for a public official that falls well within the bounds of the First Amendment. Pet. 15.

Finally, Plaintiffs introduce a new, equally frivolous argument: that compelling their attendance at the special session via arrest constitutes an "illegal trial by legislature" forbidden by the federal constitution's prohibition on bills of attainder. Resp. 28. That argument cannot withstand scrutiny. A bill of attainder is a "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 846-47 (1984). But "[l]egislative bodies may censure, suspend or otherwise discipline a member"; indeed, "[t]hey have done so under English and American law for centuries." *Zilch v. Longo*, 34 F.3d 359, 363 (6th Cir. 1994). "[T]he absence of a trial here is not problematic or even surprising

because judging a member's qualifications is a *legislative function*, not a judicial one." *Id.*; TEX. CONST. art. III, § 8.

II. Relators Have No Adequate Appellate Remedy.

Relators have no adequate appellate remedy. With every passing day, Plaintiffs rob the Legislature of another day of the special session and stymie its ability to carry out the business of the State. Though the Texas Constitution provides the Legislature with tools to remedy this situation by compelling the attendance of these renegade legislators, a single trial judge has enjoined the Legislature from doing so in an unreasoned, middle-of-the-night, *ex parte* restraining order. This extraordinary temporary restraining order is an irreparable injury to the State's sovereignty as a matter of law. *See State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020). There is no reason for the Court to delay resolution of this critical issue—or to require the Governor to continue calling special sessions ad infinitum—while Relators' injury continues to grow more acute.

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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Mandamus Certification

Pursuant to Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed the petition and this reply and that every factual statement in the petition and this reply is supported by competent evidence included in the appendix or record.

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