

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 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 Court, Travis County

RELATORS' EMERGENCY MOTION FOR TEMPORARY RELIEF UNDER RULE 52.10

TO THE HONORABLE SUPREME COURT OF TEXAS:

Late last night, a state trial judge signed an *ex parte* temporary restraining order against Relators purporting to prevent the Speaker of the Texas House of Representatives from exercising express authority granted to the House under the Texas Constitution, and forbidding the Governor and State from interfering with the Plaintiffs' liberty within the State of Texas. Specifically, when House Democrats left the State to prevent a quorum in the Legislature's special session, a supermajority of the remaining House members voted to "instruct the sergeant-at-arms or officers appointed by the sergeant-at-arms to send for all absentees whose absence is not excused, for the purpose of securing and maintaining their attendance, under warrant of arrest if necessary." MR.040. Compelling the attendance of its members is a prerogative given to the House by the Texas Constitution. Tex. Const. art. III, § 10. The House Rules of Procedure provide: "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 should be secured and retained.” Tex. H.R. Rule 5, § 8, 87th Leg., R.S., 2021 H.J. of Tex., *reprinted in* Texas Legislative Manual 87 (2021).

Despite this clear-cut authority—and the centuries of historical practice on the federal and state levels throughout the country—the trial court held *ex parte* that Relators “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” the quorum break. And the trial court set a temporary-injunction hearing on August 20, which could ultimately restrain Relators from performing their lawful duties through the entirety of the special session. Accordingly, Relators respectfully request temporary relief under Texas Rule of Appellate Procedure 52.10, to stay the effect of the temporary restraining order pending this Court’s action on the petition for writ of mandamus. As the special session is currently ongoing, and House Democrats’ return to Texas is imminent, **Relators request an order granting temporary relief as soon as possible, but in any event, no later than Tuesday, August 10, at 5:00 P.M.**

BACKGROUND

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

On July 7, 2021, Governor Greg Abbott issued a proclamation calling a special session of the 87th Legislature to convene on July 8. MR.31-33. Governor Abbott’s

agenda for the session included several items for the Legislature’s consideration that it was unable to complete during the recently concluded regular session, including bail reform, election integrity, border security, education, and more. MR.32-33.

Fifty-six state representatives and nine state senators from the Democratic caucus publicly—and with much media fanfare—fled to Washington, D.C. on privately chartered jets. Jane C. Timm, *Democrats flee state in effort to block GOP-backed voting restrictions*, NBC News (July 12, 2021), <https://tinyurl.com/3bs89rdc>. The stated purpose of the Democrats’ absence 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 duly elected Legislators. *See* Press Release, Texas Democrats, Breaking: Texas Democratic State Lawmakers Once Again Make History, Breaking Quorum to Defend Voting Rights (July 12, 2021), <https://tinyurl.com/vh4dcr9w>.

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

During the first special session, a majority of the House of Representatives voted to direct the Sergeant-at-Arms to arrest these absent Members and bring them back to the Capitol so that a quorum might be obtained and the business of the Legislature could finally proceed. MR.40. No one was been arrested. Indeed, the closest thing to it was when the Speaker issued a warrant to arrest a legislator who returned to Texas, promised to remain, but absconded a second time. *See* Eva Ruth Morales & Elise Viebeck, *Texas House speaker signs first warrant for Democrat who fled to block voting bill*, Wash. Post (July 26, 2021), <https://tinyurl.com/56kc8cfm>.

The first special session was required to adjourn sine die on August 7. Without much progress on passing legislation due to the 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, however, Plaintiffs sued. Simultaneously, they moved immediately for a temporary restraining order and, in the alternative, a temporary injunction on the grounds that the “interpretation and application” of the Constitution and House Rules violated various provisions of Texas criminal law, the Texas Constitution, and the United States Constitution.

ARGUMENT

In conjunction with a petition for writ of mandamus, Relators “may file a motion to stay any underlying proceedings or for any other temporary relief pending the court’s action on the petition.” Tex. R. App. P. 52.10; *see In re Alamo Defenders Descendants Ass’n*, 619 S.W.3d 363, 366–67 (Tex. App.—El Paso 2021, orig. proceeding). A stay is warranted when the Court reaches “the tentative opinion that relator is entitled to the relief sought,” and “the facts show that relator will be prejudiced in the absence of such relief.” *Republican Party of Tex. v. Dietz*, 924 S.W.2d 932, 932-33 (Tex. 1996) (per curiam). This Court has routinely granted such stays to allow the Court a “meaningful opportunity to consider” relevant issues “upon less hurried deliberation.” *Del Valle ISD v. Dibrell*, 830 S.W.2d 87, 87-88 (Tex. 1992) (Cornyn, J., joined by Hecht, J., dissenting).^{*} The United States Supreme Court has observed that “the power to stay proceedings is incidental to the

^{*} *See also, e.g.*, Order, *In re State of Texas*, No. 20-0401 (Tex. May 15, 2020); Order, *In re Tex. Pension Review Bd.*, No. 19-1123 (Tex. Jan 21, 2020). The Supreme Court of the United States also routinely grants such stays. *See, e.g., June Med. Servs., L.L.C. v. Gee*, 139 S. Ct. 661, 661 (2019) (ordering a temporary stay because “the Justices need[ed] time to review the[stay-related] filings.”).

power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

A stay is warranted here because Relators easily satisfy the *Dietz* factors. First, the Speaker is absolutely immune from suit for legislative acts under the Texas Speech and Debate Clause. *Canfield v. Gresham*, 17 S.W. 390, 392-393 (1891). Compelling the attendance of absent members by the House is a quintessential legislative act. The trial court’s hasty *ex parte* order ignores this fundamental principle. *See id.*

Moreover, centuries of historical practice establish that courts have no business passing on a legislature’s actions in ensuring a quorum. *See In re Turner*, 21-0538, slip op. at 9 (Tex. Aug. 9, 2021) (“This political dispute within the legislative branch is not an issue of separation of powers that we can decide.”). Further, the temporary restraining order is not appealable and will remain in effect for a significant portion of the special session, and the trial court gave no assurances that it would rule on the House Democrats’ request for temporary or permanent injunctive relief before the claims are mooted by the end of the special session. Indeed, the trial court is not scheduled to even have a *hearing* until August 20. And “waiting until so late in the session to even have a hearing about whether these legislators must attend virtually guarantees that no significant legislation will be passed during this session.” MR.56 (Burrows Declaration). Accordingly, the Court should grant a stay pending its consideration of the petition for writ of mandamus.

I. Relators Are Entitled to Mandamus Relief.

Because Relators have demonstrated a “tentative” right to the relief they seek, the first *Dietz* factor is satisfied. *See* 924 S.W.2d at 932-33. The Texas Constitution grants each House of the Legislature the power to “compel the attendance of absent members” according to the rules of each House. Tex. Const. art. III, § 10. And each House may do so even without a quorum. *Id.* The House’s rules allow present members to authorize the sergeant-at-arms to send for and arrest absent members to secure their attendance, Tex. H.R. Rule 5, § 8, as does the Speech and Debate Clause. *Canfield v. Gresham*, 82 Tex. 10, 17 S.W. 390, 392-393 (1891); *see Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880). Further, this “textually demonstrable constitutional commitment” to the Legislature confirms that the House Democrats’ claims are nonjusticiable political questions. *See Am. K-09 Detection Servs., LLC v. Freeman*, 556 S.W.3d 246, 252 (Tex. 2018). And the centuries of historical practice in Texas, other states, and in the federal government confirm that the House’s quorum-securing practices do not violate either the state or federal Constitution. *Cf. Canfield*, 17 S.W. at 391; *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880).

A. The House Democrats’ claims present quintessential political questions which lie “beyond the courts’ power to decide.” *AM. K-09 Detection Servs., LLC*, 556 S.W.3d at 252; *In re Turner*, 21-0538, slip op. at 9. A nonjusticiable political question exists when there is “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.” *Id.* at 253 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Such a “textually demonstrable constitutional commitment”

is apparent here in article III, section 10 of the Texas Constitution, which specifically allows the House to “compel the attendance of absent members” according to the House’s rules. Tex. Const. art. III, § 10. The House’s rules allow present members to compel that attendance by sending for and arresting absent members who are unwilling to show up to perform their duties as members of the Legislature. Tex. House Rule 5, § 8. Thus, because the trial court granted temporary relief against a legislator who cannot be sued, Relator Phelan is entitled to mandamus relief. *See* Mand. Pet. at 5.

B. The history and tradition of the state and federal legislatures confirm that the House’s actions do not violate the U.S. Constitution. Texas and at least forty-one other states have similar compulsion-of-attendance provisions in their Constitutions. *See* Mand. Pet. at 9. These clauses all have their roots in the U.S. Constitution, which has a provision that mirrors 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.”). This Court has recognized the Legislature’s ability to arrest and imprison *nonmembers* when they act to obstruct the Legislature’s proceedings. *See Canfield*, 17 S.W. at 393. And the arrest and imprisonment of *members* is permissible under the U.S. Constitution’s identically worded clause. *Kilbourn*, 103 U.S. at 190. So when the House carried out

its duty to prevent another thwarted legislative session, it did not violate the U.S. Constitution.

Accordingly, Relators are entitled to mandamus relief on the merits of these claims as well. Indeed, as this Court recognized just today, “the principal dispute” here—like that in *Turner*—“is among members of the Legislature.” Slip op. at 6. For more than 2.5 months now, “Democratic members [have] object[ed] to th[e] ordering of bills” which prioritize policies they disfavor, but “such internal disagreements among legislators are routinely part of the legislative process.” *Id.* at 7. “The separation of power doctrine prohibits one branch of government exercising” —or interfering with— “belonging inherently to another” (quoting *In re Dean*, 393 S.W.3d 741, 747 (Tex. 2012)).

C. Relators have no adequate remedy by appeal. The trial court entered a temporary restraining order, which is not normally appealable. *In re Tex. Nat. Res. Conservation Comm.*, 85 S.W.3d 201, 205 (Tex. 2002). The trial court set the hearing for the temporary injunction on August 20, and gave no indication whether the court would decide the merits of the temporary injunction before the end of the special session. As a result, in the absence of an appealable order, the House Democrats will effectively avoid their legislative obligations by simply waiting out the trial court’s order—only this time in Texas, contrary to the Texas Constitution and the House’s rules.

II. Relators Will Be Prejudiced Absent a Stay.

For similar reasons, Relators satisfy the second *Dietz* element because they will be “prejudiced in the absence” of a stay. 924 S.W.2d at 932-33. As discussed more

thoroughly in the petition for writ of mandamus, the trial court's wielding of the judicial power to authorize improper relief gives the blueprint for all future subversions: Rather than leaving the State to break the quorum, minority factions need only convince a court to ignore the Texas Speech and Debate Clause and secure a temporary restraining order against the Speaker (or any other legislative officer) (extended for good cause, Tex. R. Civ. P. 680) or other temporary injunctive relief to wait out a legislative session and prevent the Legislature from carrying out Texans' interests. "Courts have uniformly recognized that it is not their role to resolve disputes between the two other branches that those branches can resolve for themselves." *In re Turner*, slip op. at 9. This is just such a dispute. The stay is necessary to prevent judicial interference with this unquestionable right of the House and to protect the State from the harm caused by the real parties in interest' continued absence from their posts.

PRAYER

The Court should grant temporary relief under Rule 52.10 to stay the effects of the temporary restraining order pending disposition of this petition for writ of mandamus.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

/s/ Judd E. Stone II

JUDD E. STONE II
Solicitor General
State Bar No. 24076720
Judd.Stone@oag.texas.gov

LANORA C. PETTIT
Principal Deputy Solicitor General

WILLIAM COLE
Assistant Solicitor General

Counsel for Relators

CERTIFICATE OF SERVICE

On September 11, 2020, 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, II

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this brief contains 2,339 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Judd E. Stone, II
JUDD E. STONE, II