IN THE SUPREME COURT OF TEXAS

NO. 20-0739

IN RE STEVEN HOTZE, M.D., HON. ALLEN WEST, REPUBLICAN PARTY OF TEXAS, HON. SID MILLER, HON. MARK HENRY, HON. CHARLES PERRY, HON. PAT FALLON, HON. BILL ZEDLER, HON. CECIL BELL, JR., HON. STEVE TOTH, HON. DAN FLYNN, HON. MATT RINALDI, HON. RICK GREEN, HON. MOLLY WHITE, HARRIS COUNTY REPUBLICAN PARTY/HON. KEITH NIELSEN, HON. BRYAN SLATON, HON. ROBIN ARMSTRONG, M.D., JIM GRAHAM, HON. CATHIE ADAMS, HON. JOANN FLEMING, JULIE MCCARTY, SHARON HEMPHILL, AND AL HARTMAN, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

CHIEF JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE GUZMAN, JUSTICE LEHRMANN, JUSTICE BOYD, JUSTICE BLACKLOCK, JUSTICE BUSBY, and JUSTICE BLAND joined.

JUSTICE BLACKLOCK filed a concurring opinion, in which JUSTICE BUSBY joined except as to part I.C.

JUSTICE DEVINE filed a dissenting opinion.

Governor Abbott issued a proclamation on March 13, 2020,[1] certifying under the Texas Disaster Act of 1975[2] ("the Act") that the novel coronavirus COVID-19 poses an imminent threat

[1] All dates referred to are in 2020.

[2] TEX. GOV'T CODE §§ 418.001–.261.

of disaster in all Texas counties.[3] On July 27, the Governor issued another proclamation,[4] again citing the Act, suspending two provisions of the Texas Election Code as they relate to the general election on November 3. One provision states that "early voting by personal appearance begins on the 17th day before election day"[5]—this year, October 19. The other provision requires that a voter "deliver a marked ballot in person to the early voting clerk's office only while the polls are open on election day."[6] Under the July 27 proclamation, early voting by personal appearance begins six days earlier, on October 13, and early voting ballots may be delivered to the clerk's office "prior to and including on election day."[7]

On September 23, relators, including the Republican Party of Texas, voters, candidates, and current and former state officials,[8] initiated an original proceeding in this Court, seeking a writ

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[3] The Governor of the State of Texas, Proclamation No. 41-3720, 45 Tex. Reg. 2087, 2094–95 (2020).

[4] The Governor of the State of Texas, Proclamation No. 41-3752, 45 Tex. Reg. 5449, 5456–57 (2020).

[5] TEX. ELEC. CODE § 85.001(a).

[6] *Id.* § 86.006(a-1).

[7] *Supra* note 4. On October 1, while this case was under submission in this Court, the Governor issued yet another proclamation adding to the July 27 proclamation's provisions security protocols for in-person delivery of mail-in ballots. The Governor of the State of Texas, Proclamation No. 41-___, 45 Tex. Reg. ___, ___ (2020).

[8] Relators are Steven Hotze, M.D.; Hon. Allen West, Chair, Republican Party of Texas; Republican Party of Texas; Hon. Sid Miller, Texas Agriculture Commissioner; Hon. Mark Henry, County Judge, Galveston County, Texas; Hon. Charles Perry, Texas State Senator, Dist. 28; Hon. Pat Fallon, Texas State Senator, Dist. 30 and candidate for U.S. Representative, Dist. 4; Hon. Bill Zedler, Texas State Representative, Dist. 96; Hon. Cecil Bell, Jr., Texas State Representative, Dist. 3; Hon. Steve Toth, Texas State Representative, Dist. 15; Hon. Dan Flynn, Texas State Representative, Dist. 2; Hon. Matt Rinaldi; Hon. Rick Green; Hon. Molly White; Harris County Republican Party; Hon. Keith Nielsen, Chair, Harris County Republican Party; Hon. Bryan Slaton, candidate for Texas State Representative, Dist. 2; Hon. Robin Armstrong, M.D., Texas Republican National Committeeman; Jim Graham, Executive Director, Texas Right to Life; Hon. Cathie Adams; Hon. JoAnn Fleming, Executive Director, Grassroots America–We the People; Julie McCarty, President, Northeast Tarrant Tea Party; Sharon Hemphill, candidate for Judge of the 80th Dist. Court, Harris County; and Al Hartman.

of mandamus[9] directing the Texas Secretary of State to conduct the November 3 general election according to the statutory provisions suspended by the Governor's July 27 proclamation. Relators argue that the proclamation was not authorized by the Act, or if it was, that the Act violates Article I, Sections 19[10] and 28[11] of the Texas Constitution. The State responds that relators have not identified a justiciable interest and therefore lack standing; that the Secretary of State has no power to enforce the two statutory provisions at issue, let alone a ministerial duty that could be compelled by mandamus; that the Act is not unconstitutional; and that relators have delayed too long since the Governor issued the proclamation to seek mandamus relief.

The Governor has repeatedly asserted his authority under the Act to modify election procedures beginning shortly after his March 13 disaster proclamation. On March 18, he suspended sections of the Election Code and Water Code to allow political subdivisions with elections scheduled for May 2 to move them to November 3 and required county election officials to furnish service as requested.[12] Two days later, the Governor suspended sections of the Election Code to postpone the primary runoff election from May 26 to July 14.[13] On May 11, he suspended provisions of the Election Code to extend the statutory early voting period for the July 14 runoff

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[9] Relators assert jurisdiction under section 273.061 of the Election Code, which states: "The supreme court or a court of appeals may issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer."

[10] TEX. CONST. art. I, § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.").

[11] *Id.* § 28 ("No power of suspending laws in this State shall be exercised except by the Legislature.").

[12] The Governor of the State of Texas, Proclamation No. 41-3723, 45 Tex. Reg. 2271, 2272–73 (2020).

[13] The Governor of the State of Texas, Proclamation No. 41-3724, 45 Tex. Reg. 2271, 2273–74 (2020).

election from 10 days to 17 days.[14] Later in May, he publicly announced his intention to extend the early voting period for the November election.[15] He followed through by issuing the July 27 proclamation. The same day, in accordance with the Governor's directive, the Secretary of State emailed a copy of the proclamation to election officials, explaining that early voting would begin on October 13 and that voters would be allowed to hand-deliver their marked mail ballots to the early voting clerk's office before election day. All the Governor's actions were widely publicized. And his proclamations have not focused on elections alone. The Governor has issued a long series of proclamations invoking the Act as authority to address the impact of the COVID-19 pandemic on a wide range of activities in the State.

Relators delayed in challenging the Governor's July 27 proclamation for more than ten weeks after it was issued. They have not sought relief first in the lower courts that would have allowed a careful, thorough consideration of their arguments regarding the Act's scope and constitutionality. Those arguments affect not only the impending election process but also implicate the Governor's authority under the Act for the many other actions he has taken over the past six months. Relators' delay precludes the consideration their claims require.

The dissent argues that relators acted diligently because they filed their petition in this Court four days after they received an email confirming that the Harris County Clerk intended to comply with the Governor's July 27 proclamation. But relators' challenge is to the validity of the

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[14] The Governor of the State of Texas, Proclamation No. 41-3733, 45 Tex. Reg. 3389, 3396–97 (2020).

[15] Patrick Svitek, *Texas will extend early voting period this fall, Gov. Greg Abbott says*, Tex. Trib., May 28, 2020, https://www.texastribune.org/2020/05/28/texas-2020-early-voting-greg-abbott-coronavirus/.

proclamation, not the Clerk's compliance.[16] Relators could have asserted their challenge at any time in the past ten weeks. The dissent also argues that the Court has granted relief after similar delays. But none of the cases the dissent cites bears out its argument.[17]

Moreover, the election is already underway. The Harris County Clerk has represented to the Court that his office would accept mailed-in ballots beginning September 24. To disrupt the long-planned election procedures as relators would have us do would threaten voter confusion.

The United States Supreme Court has repeatedly warned against judicial interference in an election that is imminent or ongoing.[18] "[C]ourt changes of election laws close in time to the election are strongly disfavored."[19]

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[16] The same challenges made here to the July 27 proclamation are also made in two other mandamus proceedings pending in this Court, one against the Harris County Clerk, *In re Hotze*, No. 20-0751 (pet. filed Sept. 28, 2020), and the other against the Tarrant County Clerk, *In re McCarty*, No. 20-0760 (pet. filed Sept. 28, 2020). We deny them for the same reasons explained in this opinion. The State has advised that a portion of the arguments made in No. 20-0751 may have been mooted by the proclamation issued October 1 by the Governor superseding the July 27 proclamation, effectively limiting the in-person delivery of marked mail ballots to a single office with poll watchers present.

[17] *See In re Williams*, 470 S.W.3d 819, 821 (Tex. 2015) (per curiam) (mandamus petition filed two days after ballot language adopted); *In re Palomo*, 366 S.W.3d 193, 194 n.7 (Tex. 2012) (per curiam) (mandamus petition filed the same day the court of appeals declared candidate ineligible to run for office); *Bird v. Rothstein*, 930 S.W.2d 586, 587 (Tex. 1996) (mandamus petition filed three days after candidate denied place on the ballot); *Davis v. Taylor*, 930 S.W.2d 581, 582 (Tex. 1996) (mandamus petition filed two days after candidate denied place on the ballot); *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991) (time elapsed from refusal to call an election and filing of mandamus not stated); *Painter v. Shaner*, 667 S.W.2d 123, 124 (Tex. 1984) (mandamus petition filed no more than 32 days after candidate denied place on the ballot), Petition for Writ of Mandamus at 1, 3 & Exh. 4, *LaRouche v. Hannah*, 822 S.W.2d 632 (Tex. 1992) (per curiam) (No. D-1988) (mandamus petition filed six days after candidate was notified of the denial).

[18] *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, ___ U.S. ___, 140 S. Ct. 1205, 1207 (2020) (noting Supreme Court's repeated emphasis that "lower federal courts should ordinarily not alter the election rules on the eve of an election."); *N. Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (staying a lower court order that changed election laws thirty-three days before the election); *Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014) (staying a lower court order that changed election laws sixty days before the election); *Veasey v. Perry*, 574 U.S. ___, 135 S. Ct. 9 (2014) (denying application to vacate Court of Appeals' stay of district court injunction that changed election laws on eve of election); *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (staying a lower court order changing election laws twenty-nine days before the election). *see also Andino v. Middleton*, No. 20A55, slip op. at 2, ___U.S.___,___(Oct. 5, 2020) (Kavanaugh, J., concurring).

[19] *Tex. Alliance for Retired Americans v. Hughs*, No. 20-40643, slip op. at 3–4___ F.3d ___, ___ (5th Cir. Sept. 30, 2020).

Mandamus is an "extraordinary" remedy that is "available only in limited circumstances."[20] When the record fails to show that petitioners have acted diligently to protect their rights, relief by mandamus is not available.[21] The record here reflects no justification for relators' lengthy delay.

Accordingly, relators' petition for writ of mandamus is denied.

Nathan L. Hecht
Chief Justice

Opinion delivered: October 7, 2020

[20] *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

[21] *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993).

IN THE SUPREME COURT OF TEXAS

No. 20-0739

IN RE STEVEN HOTZE, M.D., HON. ALLEN WEST, REPUBLICAN PARTY OF TEXAS, HON. SID MILLER, HON. MARK HENRY, HON. CHARLES PERRY, HON. PAT FALLON, HON. BILL ZEDLER, HON. CECIL BELL, JR., HON. STEVE TOTH, HON. DAN FLYNN, HON. MATT RINALDI, HON. RICK GREEN, HON. MOLLY WHITE, HARRIS COUNTY REPUBLICAN PARTY/HON. KEITH NIELSEN, HON. BRYAN SLATON, HON. ROBIN ARMSTRONG, M.D., JIM GRAHAM, HON. CATHIE ADAMS, HON. JOANN FLEMING, JULIE MCCARTY, SHARON HEMPHILL, AND AL HARTMAN, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE BLACKLOCK, joined by JUSTICE BUSBY except as to Part I.C., concurring in the denial of the petition for writ of mandamus.

"Jurisdiction is the power to decide." *Martin v. Sheppard*, 201 S.W.3d 810, 813 (Tex. 1947). Limitations on this Court's jurisdiction are a "constitutional curb on judicial power" and restrict "our very authority to decide cases in the first place." *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 474 (Tex. 2011) (Willett, J., dissenting). The petitioners raise important questions about the constitutionality of government action during the coronavirus crisis, but their petition does not successfully invoke the Court's jurisdiction. This Court can no more decide cases without jurisdiction than it can enact statutes or amend the Constitution.

Without jurisdiction, this Court is prohibited from deciding the petitioners' claims by the very separation-of-powers principles the petitioners invoke. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) ("One limit on courts' jurisdiction under both the state and

federal constitutions is the separation of powers doctrine."). The petition asks the Court to say whether another branch of government has exceeded its constitutional authority. The irony, of course, is that by answering that question without jurisdiction, we would be exceeding our own constitutional authority. A court that carelessly exceeds the constitutional boundaries on its own power can hardly claim the authority to determine whether another co-equal branch of government has done the same. "Just as other government officials must not exceed their rightful power in extraordinary circumstances, this Court also must not do so." *In re Salon a la Mode*, ___ S.W.3d ___, ___ (Tex. 2020) (Blacklock, J., concurring).

I.

The Court lacks jurisdiction for several reasons. To begin with, there are multiple deficiencies in the petitioners' standing. "Standing is a constitutional prerequisite to maintaining suit." *Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001). It requires "a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 154 (Tex. 2012). Texas has adopted the federal courts' standing doctrine into our rules for the constitutional jurisdiction of state courts. *Id.* To maintain standing, petitioners must show: (1) an "injury in fact" that is both "concrete and particularized" and "actual or imminent"; (2) that the injury is "fairly traceable" to the defendant's challenged actions; and (3) that it is "'likely,' as opposed to merely 'speculative,' and that the injury will be 'redressed by a favorable decision.'" *Id.* at 154–55 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). These elements make up the "irreducible constitutional minimum of standing," and must all be present. *Lujan*, 504 U.S. at 559. Because deciding cases without jurisdiction would exceed the judicial branch's authority, the standing inquiry must be especially

rigorous where the suit "seek[s] to correct an alleged violation of the separation of powers" by another branch of government. *In re Abbott*, 601 S.W.3d 802, 809 (Tex. 2020).

A.

First, the petitioners have sued the Secretary of State, but the injury they claim is not "fairly traceable" to her actions. Petitioners challenge the Governor's suspension of Election Code section 85.001, governing the schedule for early voting, and section 86.001(a-1), governing the in-person delivery of mail-in ballots to the early voting clerk's office. Even if the petitioners are injured by the Governor's adjustment of these statutory rules pursuant to his emergency powers, that injury is not traceable to the Secretary of State, who neither conducts early voting nor receives hand-delivered mail-in ballots. Local election officials, not the Secretary of State, carry out the duties prescribed by the statutes in question. Neither is the Secretary responsible for the proclamation itself, which was issued unilaterally by the Governor. Assuming for argument's sake that the Governor's proclamation injures the petitioners, that injury is not at the hands of the Secretary of State. As a result, the petitioners cannot establish the "traceability" element of standing.

B.

Second, it is not "likely," or even possible, that the claimed injury would be redressed by a writ of mandamus directed to the Secretary of State. Because the Secretary does not implement the laws in question and does not control whether local officials do so, this Court ordering the Secretary to do or not do anything would not change local officials' obligation to implement the law in accordance with the Governor's proclamation. The petitioners point to language in the Governor's proclamation directing the Secretary of State to notify county judges of the

proclamation. But the proclamation itself, not the notice from the Secretary, is the source of the local officials' obligation to adjust their practices. Even if the Court agreed with the petitioners on the merits, directing the Secretary of State to rescind her notice or to send a new one contradicting the first would not redress the situation because the proclamation itself would remain in effect.

C.

Third, the petition does not demonstrate that the challenged election activities will inflict a concrete and particularized injury-in-fact on any of the petitioners. Many of the petitioners are citizens who want their government to comply with the law as they see it. That is a commendable motive, but both this Court and the U.S Supreme Court have repeatedly held that an "undifferentiated public interest in executive officers' compliance with the law" does not confer standing. *Lujan*, 504 U.S. at 577; *see also Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001) ("Our decisions have always required a plaintiff to allege some injury distinct from that sustained by the public at large."). Although all citizens share a general interest in lawful government action, "recognizing standing based on such an undifferentiated injury is fundamentally inconsistent with the exercise of the judicial power." *Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722, 731 (7th Cir. 2020) (Barrett, J.). To paraphrase Judge Barrett (and the repeated statements of this Court and the U.S. Supreme Court), merely alleging that the government is violating the law does not invoke the courts' jurisdiction. Instead, the plaintiff must allege, and ultimately prove, that the government's conduct inflicts a concrete and particular injury *on the plaintiff* that is distinct from the undifferentiated injury to the public caused by unlawful government action. *In re Abbott*, 601 S.W.3d at 811.

The petition does not even attempt to meet this burden. It does not allege that the Governor's proclamation burdens the petitioners' voting rights or otherwise concretely injures the petitioners as citizens or voters. Some of the petitioners are political organizations, but the petition does not allege that the Governor's action will harm their preferred candidates' electoral prospects. Some petitioners are candidates, but the petition does not allege how the challenged adjustments to election procedures injure their candidacies.[1] Some of the petitioners are current legislators, but the petition alleges no particular injury to them. In general, individual legislators lack standing to sue to vindicate the Legislature's institutional prerogatives against executive-branch encroachment. *Raines v. Byrd*, 521 U.S. 811, 830 (1997) (holding that individual members of Congress lacked standing to bring constitutional challenge to the Line Item Veto Act). The petition makes no argument for why these petitioner-legislators nevertheless have standing.

The petition does allege that petitioner Mark Henry, the Galveston County Judge (the petition does not say whether he is suing in his official or individual capacity), is being "unlawfully forc[ed]" to implement the Governor's order. The only example provided is that Judge Henry was the recipient of the Secretary of State's notice informing Galveston County of the Governor's proclamation. Merely receiving a notice is obviously not injury on its own. It is conceivable that the county judge's role in administering elections is such that he will suffer a legally cognizable injury-in-fact if he is required to comply with the Governor's proclamation. But the petition makes no attempt to explain why that is so. What is the county judge forced to do by the proclamation

[1] The petitioners in two related cases the Court also denies today, Nos. 20-0751 and 20-0760, sued a county clerk rather than the Secretary of State, but those petitions make no allegation of injury particular to the petitioners beyond the generalized injury suffered by the public when the Election Code is violated. Thus, the petitioners in those cases also did not adequately allege and prove the injury-in-fact required for standing.

that he would otherwise not do? How is he injured by taking that action? Is the county clerk, rather than the county judge, the local official truly responsible for implementing the proclamation? Is the county judge asserting personal injury or injury to the county? The petition makes no attempt to address these questions or to otherwise explain how the Governor's action injures the county judge. Of course, even if the petition could establish an injury traceable to the *Governor*'s proclamation, that would not confer standing on the county judge to sue the *Secretary of State*, who is not the source of the alleged illegality and who can do nothing to remedy it.

D.

For these reasons, the petitioners have not alleged facts sufficient to establish the "constitutional prerequisite" of standing. *Williams*, 52 S.W.3d at 178. Even if their *allegations* were sufficient, however, that would not empower this Court to grant the requested relief. When standing is in doubt, the plaintiff must not just *allege* sufficient facts. He must come forward with *evidence* demonstrating a "particular personal interest which separates [him] from the general public." *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984). Petitioners neither provide such evidence nor explain why it is not required.[2]

[2] The lack of evidence supporting the petitioners' standing points to an additional defect in this original mandamus proceeding. In litigation originating in district court, jurisdictional questions can be explored, including through the presentation of evidence, and the parties' jurisdictional theories can be refined and sharpened in preparation for appeal. This does not necessarily have to take a great deal of time, *see State v. Hollins*, ___ S.W.3d ___ (Tex. App.—Houston [14th Dist.] 2020, pet. granted), but it is generally an essential part of the judicial process. In an original mandamus proceeding in the Supreme Court, there is no mechanism for evidentiary development and nothing for the Court to consider besides the briefs of the parties and their attachments. That is just one of the many reasons why granting relief in this procedural posture should be reserved for situations in which the entitlement to relief is clear and the urgent timeframe admits of no alternative. Here, as the majority opinion correctly observes, the alleged time crunch is due entirely to the petitioners' unexplained delay in challenging gubernatorial actions announced over two months ago.

E.

Finally, in addition to lacking jurisdiction as a constitutional matter, the Court also lacks jurisdiction as a statutory matter.[3] The petition invokes the Court's original jurisdiction under section 273.061 of the Election Code: "The supreme court or a court of appeals may issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election . . . ." The petition is vague about which of the Secretary of State's "dut[ies] imposed by law" the Court should compel. Its most specific request is in the prayer for relief, which asks the Court to order the Secretary of State to "require" that in-person early voting not begin until the 17th day before election day. It further asks this Court to order the Secretary to "only allow the delivery of a marked ballot in person to the early voting clerk's office while the polls are open on election day." The petition never identifies what authority the Secretary of State has to override the Governor's actions and "require" or "allow" all 254 counties to ignore the Governor's proclamations. Even if the Secretary thought the proclamation illegal, we are pointed to no authority that would authorize her—much less impose a duty on her—to issue her own orders to local election officials contradicting the Governor's. *See Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972) (holding that Secretary's title "chief election officer" is not "a delegation of authority to care for any breakdown in the election process"). Because the actions the petitioners want the Secretary ordered to take are not "dut[ies] imposed by law," the original jurisdiction conferred by section 273.061 is lacking.

[3] Because constitutional standing is lacking, it would not matter if the petition triggered statutory jurisdiction under section 273.061. Statutory grants of jurisdiction do not eliminate the constitutional restrictions on the Court's power. *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 582 n.83 (Tex. 2013).

For each of these independent reasons, the Court lacks jurisdiction over this petition. It therefore lacks the power to decide the constitutional questions the petition raises.

II.

In the end, the petition seeks an advisory opinion declaring the Governor's proclamation invalid. *But see Brown*, 53 S.W.3d at 303 ("[O]ur separation of powers article, TEX. CONST., art. II, § 1, prohibits courts from issuing advisory opinions that decide abstract questions of law without binding the parties."). The petition's approach—and that of the dissent—seems to be that because of the gravity of the legal questions at stake, it does not matter much whether the petitioners' alleged injuries are traceable to the defendant's actions, or whether the Court is ordering the proper defendant to perform a duty imposed by law, or whether the performance of that duty will redress the alleged injury. The Court should overlook the jurisdictional, procedural, and prudential problems with this case and just resolve the merits of a pressing legal dispute. Then, presumably, everyone will be expected to abide by the Court's improperly solicited opinion of what the law is on a topic of overwhelming public importance. Any court that took such a cavalier approach to its jurisdiction would have no right to insist that its decisions be followed.

By declining to decide this case and others like it that have not been properly brought before us, this Court is by no means "abandon[ing] the constitution at the moment we need it most." *In re Salon a la Mode*, ___ S.W.3d at ___ (Blacklock, J., concurring). Quite the opposite. The Court is refusing to use the current crisis as an excuse to bypass the constitutional restrictions on its power. *Id.* To borrow from the dissent's regrettably overheated rhetoric, the true "disservice to the citizens of the State of Texas and the Texas Constitution" would be to violate the

constitutional restrictions on our power in order to decide whether other branches of government have violated the constitutional restrictions on their power.

I respectfully concur.

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James D. Blacklock
Justice

OPINION DELIVERED: October 7, 2020

IN THE SUPREME COURT OF TEXAS

NO. 20-0739

IN RE STEVEN HOTZE, M.D., HON. ALLEN WEST, REPUBLICAN PARTY OF TEXAS, HON. SID MILLER, HON. MARK HENRY, HON. CHARLES PERRY, HON. PAT FALLON, HON. BILL ZEDLER, HON. CECIL BELL, JR., HON. STEVE TOTH, HON. DAN FLYNN, HON. MATT RINALDI, HON. RICK GREEN, HON. MOLLY WHITE, HARRIS COUNTY REPUBLICAN PARTY/HON. KEITH NIELSEN, HON. BRYAN SLATON, HON. ROBIN ARMSTRONG, M.D., JIM GRAHAM, HON. CATHIE ADAMS, HON. JOANN FLEMMING, JULIE MCCARTY, SHARON HEMPHILL, AND AL HARTMAN, RELATORS

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE DEVINE dissenting from the Court's order denying the petition for writ of mandamus and motion for stay.

Today the Court does a disservice to the citizens of the State of Texas and the Texas Constitution. Relators[1] ask the Court to exercise its mandamus power granted by the Election Code to compel the Secretary of State—the chief election officer—to comply with the Election Code's specific provisions. In such a situation, as here, where our state, local, and national elections are at issue and the Court is "properly called on," *In re Salon a La Mode*, No. 20-0340, 2020 WL 2125844 (Tex. May 5, 2020) (Blacklock, J., concurring), the Court should exercise its mandamus authority over officials empowered to carry out our election laws.

I disagree with the Court's decision to dismiss this mandamus as untimely. We have often acted even "after statutory deadlines to protect the electoral process." *In re Palomo*, 366 S.W.3d 193, 194 n.7 (Tex. 2012) (per curiam) (citing *Bird v. Rothstein*, 930 S.W.2d 586, 587 (Tex. 1996);

[1] Because the Court concludes that Relators' suit is untimely, it does not reach the issue of standing. I would conclude Relators, who include candidates on the ballot and a county judge subject to the proclamation, have standing to pursue relief.

Davis v. Taylor, 930 S.W.2d 581, 584 (Tex. 1996); *LaRouche v. Hannah*, 822 S.W.2d 632, 634 (Tex. 1992); *Painter v. Shaner,* 667 S.W.2d 123, 124 (Tex. 1984)). And in *Bird v. Rothstein*, we declined to hold that laches or any similar doctrine barred relief against the Secretary of State given the important interests at stake. 930 S.W.2d at 588. I believe the interests at stake here are of similar importance and worthy of our consideration. Respondent argues, however, that the Election Code imposes no duty on the Secretary that would implicate our mandamus authority. In essence, she argues that the Secretary's title is simply that, a title, to which no consequent duties attach. Without a ministerial task, it is argued that the Secretary cannot be held responsible for carrying out unconstitutional proclamations. But this argument defies common sense.

Texas law has consistently stated that "mandamus may issue to compel public officials to perform ministerial acts, as well as '*to correct a clear abuse of discretion of a public official*.'" *In re Williams*, 470 S.W.3d 819, 821 (Tex. 2015) (emphasis added) (citing *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). On July 27, 2020, Governor Abbott issued a proclamation suspending Texas Election Code sections 85.001(a) and 86.006(a-1) pursuant to his asserted authority under the Disaster Relief Act.[2] *See* TEX. GOV'T CODE §§ 418.001–.261. The Governor called on the Secretary to "take notice" of the changes "immediately." The Governor of the State of Tex., Proclamation No. 41-3752, 45 Tex. Reg. 5449, 5456–5457 (2020). The Proclamation was a mandate to those in his chain of command—including the Secretary—to carry out its directives. Not only that, the Governor was clear that the decision was made "in consultation with the Texas Secretary of State" because of their belief that "strict compliance" with sections 85.001(a) and 86.006(a-1) would not be feasible. *Id.*

[2] Today we miss a second chance to consider the constitutionality of chapter 418. I have previously voiced my concern on chapter 418 as an unconstitutional delegation of legislative power in contravention of the Texas Constitution article 1 section 28. *See In re Hotze*, No. 20-0430, 2020 WL 4046034, at *1–2 (Tex. July 17, 2020) (Devine, J., concurring).

Relators argue that after the proclamation was sent out, the Secretary provided "additional guidance" to local officials. As a result, the Secretary endorsed the Governor's actions in contravention of her duties[3] to carry out the Election Code's clear provisions on the timing and manner of early voting. These actions go beyond acting as a mere intermediary and make the Secretary complicit in the alleged constitutional and statutory violations.

Because the Secretary continues to act pursuant to a potentially unconstitutional proclamation, her conduct is subject to this Court's authority to mandamus public officials who engage in abuses of discretion. I accordingly would grant the relief requested by Relators. Because the Court does not, I respectfully dissent.

John P. Devine
Justice

OPINION DELIVERED: October 7, 2020

[3] Respondent once again attempts to cabin the meaning of "duty" within the scope of this Court's mandamus authority. *See In re Republican Party of Texas,* 605 S.W.3d 47, 51 n.7 (Tex. 2020) (Devine, J., dissenting). That argument is misplaced because Relators here seek to compel the Secretary to act in accordance with her statutory duty as chief election officer. And that duty is prescribed and limited by statute. Although the Governor may have expanded that duty by proclamation, that puts the cart before the horse. It assumes that the Governor's proclamation is constitutional. If it is unconstitutional, which Relators call on this Court to address today, then the Secretary is acting in contravention of those duties prescribed by statute.