No. 21-0538

In the Supreme Court of Texas

IN RE CHRIS TURNER, IN HIS CAPACITY AS A MEMBER OF THE TEXAS HOUSE OF REPRESENTATIVES AND HIS CAPACITY AS CHAIR OF THE HOUSE DEMOCRATIC CAUCUS; TEXAS AFL-CIO; HOUSE DEMOCRATIC CAUCUS; MEXICAN AMERICAN LEGISLATIVE CAUCUS; TEXAS LEGISLATIVE BLACK CAUCUS; LEGISLATIVE STUDY GROUP; THE FOLLOWING IN THEIR CAPACITIES AS MEMBERS OF THE TEXAS HOUSE OF REPRESENTATIVES: ALMA ALLEN, RAFAEL ANCHÍA, MICHELLE BECKLEY, DIEGO BERNAL, RHETTA BOWERS, JOHN BUCY, ELIZABETH CAMPOS, TERRY CANALES, SHERYL COLE, GARNET COLEMAN, NICOLE COLLIER, PHILIP CORTEZ, JASMINE CROCKETT, YVONNE DAVIS, JOE DESHOTEL, ALEX DOMINGUEZ, HAROLD DUTTON, JR., ART FIERRO, BARBARA GERVIN-HAWKINS, JESSICA GONZÁLEZ, MARY GONZÁLEZ, VIKKI GOODWIN, BOBBY GUERRA, RYAN GUILLEN, ANA HERNANDEZ, GINA HINOJOSA, DONNA HOWARD, CELIA ISRAEL, ANN JOHNSON, JARVIS JOHNSON, JULIE JOHNSON, TRACY KING, OSCAR LONGORIA, RAY LOPEZ, EDDIE LUCIO III, ARMANDO MARTINEZ, TREY MARTINEZ FISCHER, TERRY MEZA, INA MINJAREZ, JOE MOODY, CHRISTINA MORALES, EDDIE MORALES, PENNY MORALES SHAW, SERGIO MUÑOZ, JR., VICTORIA NEAVE, CLAUDIA ORDAZ PEREZ, EVELINA ORTEGA, LEO PACHECO, MARY ANN PEREZ, ANA-MARIA RAMOS, RICHARD RAYMOND, RON REYNOLDS, EDDIE RODRIGUEZ, RAMON ROMERO JR., TONI ROSE, JON ROSENTHAL, CARL SHERMAN, SR., JAMES TALARICO, SHAWN THIERRY, SENFRONIA THOMPSON, JOHN TURNER, HUBERT VO, ARMANDO WALLE, GENE WU, AND ERIN ZWIENER; AND THE FOLLOWING IN THEIR CAPACITIES AS LEGISLATIVE EMPLOYEES: KIMBERLY PAIGE BUFKIN, MICHELLE CASTILLO, RACHEL PIOTRZKOWSKI, AND DONOVON RODRIGUEZ,
Relators.

On Petition for Writ of Mandamus

to Gregory S. Davidson, in his official capacity as Executive Clerk to the Governor; Jose A. Esparza, in his official capacity as Deputy Secretary of State and Acting Secretary of State of the State of Texas;

and Glenn Hegar, in his official capacity as Comptroller of Public Accounts of the State of Texas

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INTRODUCTION

Recognizing that "one of the greatest threats to liberty is the accumulation of excessive power in a single branch of government," the Texas Constitution guarantees the separation of powers. *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990) (en banc). Relators' petition—backed by leaders from both major parties—asks only that the Court honor that guarantee.

Respondents have little to say about the separation of powers. They admit that, despite Governor Abbott's stated intention to punish legislators, his veto is unconstitutional as to legislators' salaries—leaving over 2,100 staffers to bear the economic brunt of the veto. Resp. at 2, 16. Respondents then baldly assert that the Legislature "can continue to fulfill its duties if the veto takes effect." *Id.* at 15. But Respondents fail to explain how the Legislature can fulfill its duties without any staff at all, much less how the nonpartisan agencies will function.

Instead, Respondents focus on jurisdictional arguments, contending that Relators are unharmed by the defunding of their positions and loss of income. But Respondents' arguments ring hollow

given the ongoing harms the Governor's veto inflicts on the Legislature and its staff.

The question now is whether the Court will allow full briefing to inform thorough consideration of these important issues. It should. Governor Abbott's veto of the Legislature's funding presents a vital question of not a "preferred policy outcome[]," Resp. at 1, but of Texas constitutional law: whether one branch of government may effectively abolish another. If accepted, Respondents' position would allow the Governor to eliminate funding for any branch or constitutional office that declines to follow his wishes—be it the Legislature now or the judiciary tomorrow.

The Court "cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution; [we] cannot pass it by because it is doubtful; . . . [we] must decide it." *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 777 (Tex. 2005) (quotations omitted). The Court should therefore order full briefing to address this "serious question." Tex. R. App. P. 52.8(b).[1]

---

[1] Relators intend to provide a complete response to Respondents' merits arguments, as well as further argument concerning jurisdiction, if afforded full briefing.

ARGUMENT

I. The Court Has Jurisdiction to Resolve this Dispute and Should Order Full Merits Briefing

A. Relators' Claims Are Ripe Because the Governor's Veto Is Harming Them Now

Relators were harmed the moment Governor Abbott vetoed Article X funding and Respondents failed to take the required ministerial steps to enroll and publish the law. The facts have therefore "developed sufficiently so that an injury has occurred or is likely to occur." *Patterson v. Planned Parenthood of Houston & Southeast Texas, Inc.*, 971 S.W.2d 439, 442 (Tex. 1998). Further delay will only exacerbate these injuries.

1. The veto is already harming the Legislative Employee Relators as they rearrange their lives to plan for the imminent loss of their salaries. They are front-loading expenses and medical appointments, App. E ¶ 8, App. B ¶ 6, eliminating expenses, App. B ¶ 6, selling possessions, *id.*, revisiting plans to purchase a home and prepare for a wedding, App. A ¶ 7, and cancelling vacations, App. E ¶ 9. They are experiencing considerable stress as a result. *Id.* ¶ 4; App. C ¶ 12.

These staffers also face imminent future harm in the form of lost income and benefits. A controversy is ripe if parties "demonstrate that the harm is imminent, but has not yet impacted them." *Waco Ind. School*

Dist. v. Gibson, 22 S.W.3d 849, 852 (Tex. 2000). The full force of the veto will land in less than two months: as of September 1, staff will have difficulties making ends meet, App. A ¶ 5, supporting their families, App. B ¶ 5, App. C ¶¶ 10–11, paying rent, App. D ¶ 7, and buying groceries, App. E ¶ 7. They may have to drop out of school. App. A ¶ 6. And the loss of health insurance will disrupt necessary medical screenings, *id.* ¶ 8, and continuity of critical medications, App. E ¶ 5.

2. As to the Legislative Member Relators, Respondents have conceded that the veto is unconstitutional to the extent it attempts to eliminate legislators' salaries—although they fail to acknowledge whether the Comptroller will pay the warrants. Resp. at 16. But the veto also eliminates the funding legislators need to do their jobs effective September 1. That is not only an imminent future injury: the legislators must plan now for that shortfall, expending staff time and resources. And—more troublingly—the Governor's veto presently exerts coercive pressure on legislators to do his bidding to get their funding back.

3. Respondents assert that this controversy is unripe because "the Legislature *may* pass, and the Governor *may* sign" an appropriation.

Resp. at 1, 7 (emphasis added). But even so, that would not remedy the injury to our constitutional structure: any other policies passed this special session, under these circumstances, cannot be deemed the will of the Legislature. Regardless, it is Respondents' defense—not Relators' claims—that "depend[s] on . . . contingencies being resolved in a specific, adverse way." *Id.* at 7. The "hypothetical possibility" that future actions moot Relators' claims does not obviate the harm they are experiencing now. *Patterson*, 971 S.W.2d at 442. It is relief from the unconstitutional veto that is speculative; the injury is not. Indeed, while the Governor added Article X to the special session call, he has not represented that he will sign an appropriation, and the Speaker of the House has stated that the Governor "expects us to deliver" on the Governor's bills first. *See* Reena Diamante (@reenajade), Twitter (July 7, 2021, 2:49 PM CT), https://twitter.com/reenajade/status/1412861350892691461.

In the context of election law, this Court has adopted a "bright-line rule—a set time after which judicial proceedings may be commenced and actively prosecuted, even if legislative action remains a possibility." *Perry v. Del Rio*, 66 S.W.3d 239, 256 (Tex. 2001). That bright line is "the adjournment of the Legislature's regular session," even if subsequent

action in special session "is quite possible." *Id.* The mere possibility of developments in the special session therefore has no bearing on ripeness. Delaying adjudication of this dispute would only compound the coercive effect of the veto and the uncertainty for legislators and staff.

B. Relators Have Standing for the Same Reasons

1. Respondents' standing arguments fail for the same reasons. Notwithstanding the speculative possibility of further action in a special session, *see* Resp. at 8–9, Relators are both experiencing actual injury today and facing "certainly impending" injury in a matter of weeks.[2] *In re Abbott*, 601 S.W.3d 802, 812 (Tex. 2020).

Respondents repeatedly mischaracterize Relators' claims. Respondents suggest that Relators complain of "the Governor's mere threat to withhold funding," Resp. at 9, but the Governor made good on that threat with his veto. Similarly, Relators' injury does not accrue simply "because funding for a branch of government is open to debate at

[2] Respondents' argument regarding rollover funds is hard to parse. The amount of such funds is irrelevant; "[f]or standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017). And the absence of substantial rollover funds only undermines Respondents' argument that the Legislature can function in the absence of further appropriations. *See* Resp. at 15.

the beginning" of a legislative session, *id.*—it accrued because Governor Abbott eliminated that funding after the session was adjourned.

2. Respondents further assert that the Legislative Member Relators cannot sue to redress their institutional injuries. Resp. at 10. But those injuries are inseparable from their financial ones. The legislators "have been deprived of something to which they *personally* are entitled," *Raines v. Byrd*, 521 U.S. 811, 821 (1997) (emphasis added): their funding, without which they cannot discharge their functions free from undue pressure. That is why the Court has held that members of the judiciary, *see Vondy v. Comm'rs Court of Uvalde Cnty.*, 620 S.W.2d 104 (Tex. 1981), and school districts, *Neeley*, 176 S.W.3d at 775, may sue to obtain funding for their duties. And neither of the veto examples Respondents offer, Resp. at 10, come anywhere close to this veto, which would eliminate all funding for a co-equal branch of government.

3. Respondents' arguments as to traceability, Resp. at 10–12, falter on similar grounds as their ripeness analysis. The Comptroller's imminent refusal to pay Relators' salaries harms them now. And the Deputy Secretary of State's failure to publish the duly enacted appropriations bill as required, *see* Tex. Const. art. IV, § 21; Tex. Gov't

Code § 405.14, harms Relators by impeding the disbursement of funding. *See* Resp. at 5–6.

Respondents' arguments boil down to a complaint that the petition does not name the Governor—even though they admit this Court has no jurisdiction to issue a writ of mandamus against him, that the petition names officials who can provide relief, and that past cases have recognized exactly the sort of relief Relators seek. Resp. at 11–12. The petition does not name the Governor because there is nothing for this Court to order him to do: when he issued the unconstitutional veto, his role was complete. Respondents also speculate that the Comptroller (and other state officials) might ignore the veto and pay Relators, *see* Resp. at 12, but that hypothetical possibility does not defeat standing. Even if the Governor's veto was one link in the causal chain, Respondents' decisions to abide by it are the proximate cause of Relators' injuries and provide a basis for standing.

C. The Court Has Jurisdiction Over Every Respondent

Respondents do not dispute this Court's jurisdiction as to the Comptroller, and so their arguments as to the Executive Clerk and the Deputy Secretary of State would not dispose of the petition. *See* Resp. at

4–6. But their arguments are also unfounded: the Deputy Secretary of State and Executive Clerk are both proper Respondents because their failure to treat Article X as valid law is harming Relators. Moreover, given that the Executive Clerk is charged with the administration of an essential part of the legislative process, and this proceeding "involves questions which are of general public interest and call for a speedy determination," *Betts v. Johnson*, 73 S.W. 4, 5 (Tex. 1903), he should be treated as an officer within the ambit of Tex. Gov't Code § 22.002(a).

D. The Political Question Doctrine Does Not Bar Review of the Governor's Unlawful Attempt to Abolish the Legislature

Finally, Respondents assert that the constitutionality of Governor Abbott's veto presents a nonjusticiable political question. Resp. at 12–14. But in both the state and federal systems, "political questions are a rarity." *Neeley*, 176 S.W.3d at 780. In identifying them, this Court considers whether an issue "involve[s] either 'a textually demonstrable constitutional commitment of the issue[s] to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving [them].'" *Id.* at 778 (quotation omitted). Neither applies here.

1. “Courts have historically exercised their jurisdiction,” *Ingleside v. Corpus Christi*, 469 S.W.3d 589, 592 (Tex. 2015), to decide issues concerning the separation of powers. *See* Pet. at 27–29. Whenever one branch “exceed[s] its authority, by usurping powers not belonging to it, its act is a nullity, not binding upon the other departments, and may be totally disregarded by them.” *Houston Tap & B. Ry. Co. v. Randolph*, 24 Tex. 317, 336 (1859). Review is particularly appropriate when one branch “aggrandiz[es] its power at the expense of another.” *Zivotofsky v. Clinton*, 566 U.S. 189, 197 (2012) (quotation omitted).

The Court has therefore often reviewed the constitutionality of the Governor’s vetoes. *See* Pet. at 25 (citing cases); *see also Pickle v. McCall*, 24 S.W. 265, 268 (Tex. 1893) (invalid for failing to specify a line item). Respondents assert that these cases “involve very specific aspects” of the veto power. Resp. at 13. But because the Governor’s veto power “exists only to the extent granted by the Constitution,” *Jessen Associates Inc. v. Bullock*, 531 S.W.2d 593, 598 (Tex. 2007), it is the courts that have the “ultimate authority” to decide whether the Governor’s veto transgresses the separation of powers. *Morath v. Texas Taxpayer & Student Fairness Coalition*, 490 S.W.3d 826, 846–47 (Tex. 2016).

Respondents rely on *Ex parte Perry*, but that case similarly recognized that the Governor's veto power is effective only "if it is exercised in compliance with the state constitution." 483 S.W.3d 884, 901 (Tex. Crim. App. 2016). *Ex parte Perry* also involved an effort to prosecute the Governor over a concededly valid veto, rather than the antecedent question of whether the Governor's veto was itself lawful.

2. The judiciary has long possessed manageable standards for adjudicating separation-of-powers issues. Courts ask whether one branch has "assume[d]" or "unduly interfere[d] with" the exercise of powers vested in another branch. *Armadillo Bail Bonds*, 802 S.W.2d at 239; *see* Pet. at 27–30, 33–34 (citing additional cases). These familiar standards are no less manageable than the "admittedly imprecise" standards of "adequacy, efficiency, and suitability" that the Court relied upon in *Neeley*. 176 S.W.3d at 778. Rather, these principles "sound in familiar principles of constitutional interpretation." *Zivotofsky*, 566 U.S. at 201.

3. Respondents' other counterarguments are unpersuasive. Reviewing the Governor's actions for constitutional defects neither "eliminate[s]" the Governor's veto power nor allows the courts to "wield

the appropriations power." Resp. at 13. It simply ensures that, like other government actions this Court reviews, the power is exercised in accord with the Constitution.

Respondents' reliance on *Ninetieth Minnesota State Senate v. Dayton* illuminates why review here is crucial. 903 N.W.2d 609 (Minn. 2017). The Minnesota court refused to set aside that veto because the legislature had "sufficient funds available to sustain it as an independent, functioning branch of state government." *Id.* at 622, 624. In contrast, Governor Abbott barred the Legislature from using rollover funds, even assuming they would be sufficient for its needs. His veto therefore prevents the Legislature from exercising its constitutional powers, raising the very circumstance distinguished in *Dayton*.

Given the issues at stake, the Court "must decide" the dispute at hand; it "cannot pass it by." *Neeley*, 176 S.W.3d at 780. The Constitution's guarantee of the separation of powers and the livelihoods of 2,100 state employees demand no less.

CONCLUSION

The Court should order full briefing.

Dated: July 8, 2021

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MANDAMUS CERTIFICATION

Under Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this reply and that every factual statement in the reply is supported by competent evidence included in the appendix or record. I further certify that, under Rule 52.3(k)(1)(A), every document contained in the appendix is a true and correct copy.

/s/ Chad W. Dunn
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CERTIFICATE OF SERVICE

I certify that on July 8, 2021, this document was served via e-File upon counsel of record in this proceeding.

/s/ Chad W. Dunn
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CERTIFICATE OF COMPLIANCE

I certify that this reply complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(E) because, per Microsoft Word, this document contains 2,396 words, excluding the portions of the document exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

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