No. 22-0142
IN THE SUPREME COURT OF TEXAS

IN RE JOHN PEREZ

ORIGINAL EMERGENCY PETITION FOR WRIT OF MANDAMUS

RESPONSE BY REAL PARTY IN INTEREST VIRGINIA ELIZONDO IN OPPOSITION TO RELATOR'S PETITION FOR WRIT OF MANDAMUS

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I. Introduction

The Relator seeks a writ of mandamus from this Court to force the Spring Branch Independent School District ("SBISD" or "the district") to reverse a tactical choice in federal litigation to which the relator is not a party. That litigation decision is discretionary and wholly within the district's jurisdiction. No legal basis exists for any writ to countermand discretionary actions by Texas governmental entities. Not unsurprisingly, the Relator has failed to identify a ministerial duty that the district has violated or ignored. The 2022 May SBISD trustee election is continuing, separate and apart from the federal litigation that is currently pending. Candidates have filed for office and SBISD is preparing to hold its election in May. Yet, despite this, the relator employs hyperbolic rhetoric in an attempt to induce this Court into committing the imprudent and dangerous error of attempting to micromanage federal litigation involving the legality of an election under federal law. Even if this Court were to question the wisdom of SBISD's strategic or tactical decision in the pending federal litigation, SBISD has not acted beyond the scope of its discretionary authority.

For every conceivable reason, the Court should deny Relator's request. There is no cause of action in Texas law that authorizes a court to mandate that a litigant take a certain, specified, position in pending federal litigation. There also is no Texas

precedent that would authorize a non-party to micromanage the litigation choices of a school board or any other governmental unit in federal litigation. Even if such a precedent existed, no basis exists for the relief the Relator seeks because SBISD has fulfilled all of its ministerial duties associated with the 2022 May school board election, at this time; thus, mandamus cannot issue. Moreover, even if this Court could enjoin SBISD from taking a tactical position the Court disagrees with, it could only do so prospectively and, thus, the emergency relief sought by the relator has no merit. The Real Party in Interest is unaware of any Texas case, administrative rule, statute, guidance from any legally-binding authority, or advisory opinion that would allow a candidate in an election to micromanage the litigation choices of a school board or any other governmental unit in a proceeding to which he is not a party. Even if such authority existed, no basis exists for the relief the Relator seeks here because he is not cognizably injured were the May trustee election to be moved to November, as the district did as recently as in 2020.

Yet, there is even more significant reason why this Court should deny mandamus. If this Court should insert itself into the discretionary litigation decision-making process by Texas government bodies, in pending federal litigation, the Court doubtless will find it under siege by both non-parties and parties attempting to dictate litigation results in other pending proceedings, through the state court mandamus process. This Court would render itself a magnet for collateral or satellite litigation

with all state and local government bodies concerning their discretionary litigation decisions. Don't like that the State of Texas has met with federal litigants to discuss resolution of challenges to redistricting maps? Seek mandamus with this Court. Want Texas to permit mail-in voting for all Texans pursuant to the 24th Amendment? Seek mandamus with this Court and try to force the State of Texas to discontinue its opposition to the plaintiff's position in *Texas Democratic Party, et al v. Abbott*. Dislike the fact your City allowed a commercial litigant more time to respond to discovery in a pending contractual dispute? File a mandamus petition with this Court and hope for a Hail Mary.

This Court is the most important state court in Texas, but the People have not granted it the constitutional authority to serve as general counsel for every political subdivision in this State.

The petition for mandamus should be denied.

II. The Law of Mandamus

Mandamus is an extraordinary remedy, available only when the relator can show (1) the trial court clearly abused its discretion or a public official violated a duty imposed by law; and (2) there is no adequate remedy by way of appeal. *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). Relator cites Election Code section 273.061 as the basis for jurisdiction in this Court. That statute authorizes mandamus proceedings in this Court unconnected to any district court

proceedings. *See In re Woodfill*, 470 S.W.3d 473, 481 1 (Tex. 2015) (orig. proceeding) (*per curiam*)(recognizing the Election Code authorizes mandamus proceedings to "originate in the appellate courts"). This statutory authorization allows this Court to issue writs 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." TEX. ELEC. CODE ANN. §273.061(a). When no ministerial duty has been clearly violated, mandamus may not issue.

A. SBISD has not violated a ministerial duty

The Relator has failed to point to any ministerial duty connected to the May 2022 school board election that SBISD has failed to execute. This is fatal to his petition for mandamus relief. Although this Court's constitutional and statutory grant of mandamus jurisdiction is broad, it is not unbounded. Specifically, in this context, this Court may only "issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election." TEX. ELEC. CODE ANN. §273.061 (a). Relator has not identified any duty imposed by the Election Code that would justify the grant of mandamus here and his petition should be denied.

Relator asserts obliquely that: "Spring Branch ISD's tacit agreement to postpone the election constitutes a clear breach of its ministerial duty (and also

constitutes a clear abuse of discretion) to administer and complete an ongoing election for which it is responsible." Relator's Pet. at p. 8. To be clear no agreement exists between the parties in the federal litigation to postpone the May SBISD trustee election. SBISD has opposed the preliminary injunction application the Real Party in Interest has filed in the pending federal Voting Rights case. If expressing non-opposition to some aspect of a litigation opponent's position were a clear breach of a statutory duty imposed on SBISD, then the Relator should be able to identify a statute that delineates what non-discretionary duty SBISD has failed to perform. Relator has not done so, because no such duty exists.

B. Legal positions taken by litigants are discretionary

A writ of mandamus may be used to compel a public official to perform a "ministerial act," which, for purposes of mandamus, is an act where "the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion." *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991)."Ministerial acts" are those "where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015) (quoting *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994)). Conversely, "discretionary acts" are those that "require the exercise of judgment and personal deliberation." *Id*.

Litigation choices made by parties are discretionary. The choice of counsel and strategic legal decisions made by parties and their counsel are not subject to the strict "precision and certainty" necessary to be subject to mandamus. Even if such decisions could be or should be subject to mandamus in other circumstances, they are not here. Before this Court issues any writ of mandamus, both the Relator and this Court should be able to articulate a non-discretionary duty that would compel the writ. Here there is no such non-discretionary duty. Thus no writ can properly issue.

C. Mandamus cannot undo what already has been done

SBISD filed its response to the Preliminary Injunction on February 15, 2022. In a rare allowance by any court, Jenny Morace, an *Amicus*, was permitted to respond to the preliminary injunction on February 16, 2022. The Plaintiff filed her reply to the responses on February 22, 2022. The issue has been joined for the United States District Court to rule. The die is cast.

This mandamus petition is in the nature of an *ultra vires* claim, a category of legal action brought against a public official that supposedly does not seek to control government, but rather to reclaim control from an official or officials allegedly acting in violation of the law. *See e.g. City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009). The Relator asserts that SBISD *has* acted without authority. *Ultra Vires claims*, like this one, are not subject to retrospective relief. *Heinrich*, 284 S.W.3d at

376. The Relator seeks a writ "ordering and compelling Respondent to withdraw its agreement to cancel the May 7, 2022 election.' Relator's Pet. at p. 16. Again, there no such "agreement" exists; SBISD has simply expressed a lack of opposition to one aspect of Real Party in Interest's request for federal court injunctive relief. However, a writ of mandamus cannot undo an official act that has already occurred; it can only compel an official to fulfill a duty prescribed by law.

D. Relator is not injured by a delay in the Election

A Relator who is uninjured is not entitled to relief. The Relator suggests that if the May trustee election were postponed, that somehow would injure his candidacy. However, this is not the first time SBISD has postponed its trustee elections. Like many school districts in Texas, SBISD often holds its trustee elections in May. But it has not always done so. In the Spring of 2020, for example, SBISD faced a choice. Holding an election in May 2020 meant requiring voters and election workers to vote, largely in person, during the COVID-19 pandemic. On March 30, 2020, the SBISD board of trustees chose to move its 2020 election date to November. This move was not met with opposition by any affected party, including the Relator. No SBISD citizen or trustee candidate filed suit hyperbolically claiming that a brief postponement in the election date from May to November in

some manner "completely destroyed" any voter's rights or would result in the "total disenfranchisement" of any anyone's "right to vote."[1]

Relator again stretches to overstate the current state of the election. The election is scheduled on May 7, 2022. No ballots have been printed. No mail ballots have been mailed. No votes have been cast. The earliest possible in-person early vote will not occur until April 25, 2022. There is no chance of disruption at this time, just as there was no such disruption, confusion or maladministration in 2020, when SBISD chose on March 30, 2020 to postpone the May 2020 election, much closer to that election than now. Where, as is true here, there is no disruption or injury, then there is no cognizable basis for mandamus or injunction.

Relator relies on this Court's recent pronouncement in *In re Khanoyan,* but overstates its holding. *In re Khanoyan* concerned a partisan election that would have affected hundreds of candidates in dozens of elections in Harris County. This Court discussed the trouble with issuing a writ of mandamus after the conclusion of the filing period by listing a series of problematic questions that could arise if the relators in that cause were successful.

> "Would this Court order its production and then its use? Some other court? Would the commissioners court have to meet to enact a new map? Would the commissioners court be obligated to adopt it, or would

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[1] *See* Amicus Jenny Morace's Response to Plaintiff's Motion for Preliminary Injunction and Reply to Defendant SBISD's Response to Plaintiff's Motion for Preliminary Injunction, ¶13 (Dkt 33)("Morace Response"), *Elizondo v. SBISD, et al*, NO. 4:21-cv-01997.

> that court have the traditional discretion to consider other factors in determining the boundaries between precincts? Would a new candidate filing period be required? Would the commissioners' primary elections be delayed and conducted separately from other primaries? Would, as Respondents contend, relief here also throw the elections in many other Texas counties into disarray?"

In re Khanoyan, No. 21-1111, 6-7 (Tex. Jan. 6, 2022).

None of these questions are implicated here. SBISD conducts and administers its own elections. No other elections other than those of SBISD will be affected if the May trustee election were postponed to November. Postponing the May election would allow the United States District Court to render its decision on the merits of Plaintiff's Voting Rights Act claim and, if the Plaintiff is successful, for SBISD to craft a remedy that to redress the injuries of the Real Party in Interest and similarly-situated minority voters in SBISD. More to the point, it is not this Court's role to decide whether *it* would choose to delay the SBISD elections pursuant to its precedents; but rather, whether it can mandate that SBISD take a position in a lawsuit contrary to what the Board apparently believes is in the best interests of its school district. Under existing precedent, the answer to that question is "No." Regardless, due to Relator's inability to articulate any impact other than on the timing of his campaign – which the Relator must do in any event, a writ of mandamus cannot properly issue.

E. The real threat posed by this Mandamus

Real Party in Interest suggests that the Court reflect on the ramifications of

the relief the Relator seeks. The Relator appears before this Court with no cognizable injury, cites no precedent or law authorizing an order to direct the discretionary decisions of a Texas public entity in pending federal litigation, and requests that the Court grant a remedy that has never been issued in the State's history. He asks that this Court substitute its judgment for that of the district and its counsel in pending federal litigation to which the Relator is not a party.

Should this Court issue the writ requested, it will likely open the floodgates to similar cases, resulting in multifarious collateral litigation to that already pending in both State and Federal courts. Non-parties will be incentivized to try to usurp and undermine the tactical and strategic choices made by Texas government entities to which the non-litigants take exception. And this Court will be faced with a torrent of similar improper requests to micro-manage the litigation decisions entrusted to thousands of Texas public entities and their counsel.

III. Conclusion

The Real Party in Interest respectfully requests that this Court deny the Relator's petition for mandamus.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing petition for writ of mandamus has been sent by electronic mail to Relators, on February 28, 2022.

/s/ Barry Abrams
Barry Abrams,
Attorney for Real Parties in Interest

CERTIFICATE OF COMPLIANCE

I certify that this document was prepared using Microsoft Word, and according to the program's word-count function, the body of the foregoing brief contains 2,439 words. I also certify that the text of the body contained herein is 14-point type, with footnotes being 14-point type.

/s/ Barry Abrams
Barry Abrams,
Attorney for Real Party in Interest

CERTIFICATE OF ACCURACY

I certify that I have reviewed the response and concluded that, unless otherwise stated, every factual statement in the petition is supported by competent evidence included in an appendix or record.

/s/ Barry Abrams
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Attorney for Real Party in Interest