



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

KYLE D. HAWKINS
Solicitor General

(512) 936-1700
kyle.hawkins@oag.texas.gov

July 11, 2020

Via E-Filing

Mr. Blake Hawthorne, Clerk
Supreme Court of Texas

Re: No. 20-0524, *In re Hotze*
No. 20-0525, *In re Republican Party of Texas*

Dear Mr. Hawthorne:

Yesterday afternoon, the Court invited the Solicitor General to express the views of the State of Texas in the above-referenced cases. This letter brief responds to that invitation.

I. Introduction

The State has an interest in protecting the constitutional rights of its residents and the orderly conduct of political conventions. The State further has an interest in the proper application of this Court's mandamus jurisdiction. Those interests are implicated here because the petitions seek mandamus relief in connection with alleged unlawful action by the Mayor of Houston and Houston First Corporation. The *Hotze* petition, for example, alleges that Mayor Sylvester Turner has favored the speech and assembly rights of organizations that promote mass protests and civil disobedience, yet disfavored the speech and assembly rights of a political party and its members. *Hotze* Pet. & App. 12-18.* The *Republican Party* petition likewise alleges that Houston First Corporation has violated core constitutional rights by invoking an inapplicable force majeure clause in a contract as a pretext for preventing the Republican Party Convention from convening in Houston to express views that Mayor Turner disfavors. *Republican Party* Pet. 10-14. "Viewpoint discrimination is poison

* All page numbers referenced in the parties' filings are PDF page numbers.

to a free society,” *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring), and cannot withstand constitutional scrutiny. *See id.*; *see also Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002) (recognizing that the First Amendment informs the scope of the Texas Constitution’s “liberty of speech” clause).

The questions now before the Court, however, do not turn on whether Mayor Turner or Houston First Corporation engaged in viewpoint discrimination. Nor do they turn on the fundamental right to select electors, or whether Houston officials have violated Governor Greg Abbott’s executive orders regarding essential activities. Indeed, there should be no doubt that viewpoint discrimination is unconstitutional, that the selection of electors is highly important to our democratic institutions, and that Governor Abbott’s determination of which activities are essential supersedes any contrary views of local officials.

Instead, the questions before the Court are whether (in *Hotze*) mandamus relief is an appropriate judicial remedy to allow a third party to compel the enforcement of a contract between two other parties, and whether (in *Republican Party*) section 273.061 of the Texas Election Code may be used to compel the performance of a contract between private entities. More specifically, the *Hotze* petition asks whether the trial court clearly abused its discretion in declining to award the *Hotze* Relators a temporary restraining order in connection with the performance of a contract between Houston First Corporation and the Republican Party of Texas. On that narrow question, the mandamus record does not support a finding that “the trial court clearly abused its discretion.” *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135 (Tex. 2004). The record appears to indicate that the *Hotze* Relators are neither parties to nor third-party beneficiaries of that contract. It thus is unclear whether or how the *Hotze* Relators could have standing to challenge the performance of *other* parties’ contractual obligations. And even if they have standing, the record does not indicate how they would be entitled to relief on the merits. Third parties typically cannot litigate the contractual rights of others, *see First Bank v. Brumitt*, 519 S.W.3d 95, 102 (Tex. 2017), and it is unclear from the record why that general rule would not apply here. That ambiguity necessarily fails to “establish[] that only one outcome in the trial court was permissible under the law.” *In re Murrin Bros. 1885, Ltd.*, No. 18-0737, 2019 WL 6971663, at *2 (Tex. Dec. 20, 2019) (orig. proceeding).

Citing section 273.061 of the Texas Election Code, the *Republican Party* Relator asks this Court to order Houston First Corporation, the City of Houston, Mayor Sylvester Turner, and Brenda W. Bazan to allow the Convention to proceed as scheduled. But it is unclear from the record and briefing what specific “duty imposed by law” the Republican Party wants this Court “to compel the performance of.” Tex. Elec. Code § 273.061. Neither the pleadings nor the record indicate that the Legislature has imposed any duty relevant here on the Respondents that Relator named. While Houston First Corporation may have important contractual duties to the Republican Party, it is not clear that any such duty is one “imposed by law” within the meaning of section 273.061. Indeed, to conclude that a private contractual obligation is a “duty” under section 273.061 could usher a host of routine breach-of-contract disputes into this Court’s original mandamus jurisdiction. It is doubtful the statutory text or legislative intent supports that outcome, and the Republican Party does not appear to have established this Court’s mandamus jurisdiction on any other basis. This Court should not adopt an expansive reading of section 273.061 on the basis of limited and extraordinarily expedited briefing before any lower court has had the opportunity to weigh in first.

It thus is the view of the State that, despite their troubling factual allegations, the petitions do not properly invoke this Court’s mandamus authority, and they should be denied on that narrow basis. The State further notes that although the mandamus records before the Court do not support findings that “the trial court clearly abused its discretion,” *In re Prudential*, 148 S.W.3d at 135, or that Houston First Corporation violated a “duty imposed by law,” Tex. Elec. Code § 273.061, that does not foreclose Relators’ opportunity to win relief. The Republican Party has sought contractual remedies, including specific performance, and the trial court has set a hearing on that request for the day after tomorrow—Monday, July 13. If granted, that request would provide the Republican Party the relief it seeks here, permit the Convention to proceed as scheduled, and obviate the need for emergency mandamus relief.

II. Background

The State takes the facts as the Relators present them (as supplemented, with respect to the *Republican Party* proceeding, by reference to documents available on the docket of the underlying trial-court proceeding). See *Hotze* Pet. & App. 13-18; *Republican Party* Pet. 10-15; Docket, *Republican Party of Tex. v. City of Houston*,

No. 2020-40850 (333rd Dist. Ct., Harris County). At the time this letter was finalized for submission to the Court, neither the Respondents nor the Real Parties in Interest in either proceeding had filed responses setting out alternative statements of facts.

A. In re Hotze

The *Hotze* Relators are five individuals: Steven Hotze, Josh Flynn, Cathie Adams, Rick Hotze, and Greg Blume. *Hotze* Pet. & App. 1. On July 9, 2020, those five individuals filed an original verified petition in a Harris County district court, naming as defendants Mayor Sylvester Turner and Houston First Corporation. *See id.* at 39-57. Among other forms of relief, Relators sought “a temporary restraining order that enjoins Defendants from canceling the Texas Republican Convention.” *Id.* at 56. The petition attached a sworn declaration of Josh Flynn describing the “irreparable injury” plaintiffs face, should the Convention be canceled. *Id.* at 62. Relators noticed a hearing for July 9, 2020, *id.* at 112, and Houston First Corporation filed a plea to the jurisdiction challenging, among other things, Relators’ standing, *id.* at 117-18. Houston First Corporation argued that Relators lacked standing because it “did not have a contract with [Relators]; rather, [the] contract was with the Republican Party of Texas.” *Id.* at 118.

Yesterday morning, the trial court issued a written order denying Relators’ application for a temporary restraining order. *Id.* at 129. The trial court did not provide any analysis. *Id.* The court set a hearing on Relators’ motion for a temporary injunction for July 14, 2020, at 9:30 a.m. *Id.*

Relators’ mandamus petition followed a few hours later. Relators ask this Court to decide “[w]hether the trial court abused its discretion by denying [their] Application for a Temporary Restraining Order that sought to enjoin the real parties in interest from canceling the Texas Republican Convention.” *Id.* at 11.

B. In re Republican Party of Texas

The *Republican Party* Relator is the Republican Party of Texas. *Republican Party* Pet. 2. On July 9, 2020, it filed an original petition in a Harris County district court, naming the City of Houston, Mayor Sylvester Turner, Houston First Corporation, and its president, Brenda Bazan, as defendants. *Republican Party* Mand. Record 5-25.

The petition asserted a claim for breach of contract, *id.* at 24, and it sought specific performance, a temporary restraining order, temporary injunctive relief, and declaratory relief, *id.* at 19-25. Among other things, it attached a copy of the license agreement “by and between the Houston First Corporation . . . and Republican Party of Texas.” *Id.* at 31. That agreement grants the Republican Party a license to use and occupy portions of the George Brown Convention Center in connection with its 2020 State Convention. *Id.* It also includes a force majeure clause. *Id.* at 37. That clause sets out the circumstances under which either party may “terminate [the] agreement or suspend its obligations” due to force majeure, which the clause defines to include, among other things, “epidemics in the City of Houston.” *Id.*

According to the docket, the trial court signed an order denying the Republican Party’s request for a temporary restraining order before Houston First Corporation answered the petition with a general denial. Order, *Republican Party of Tex. v. City of Houston*, No. 2020-40850 (333rd Dist. Ct., Harris County, July 9, 2020); Answer, *Republican Party of Tex. v. City of Houston*, No. 2020-40850 (333rd Dist. Ct., Harris County, July 10, 2020). The court’s order also set a temporary injunction hearing for July 13, 2020, at 9:30 a.m. Order, *Republican Party of Tex. v. City of Houston*, No. 2020-40850 (333rd Dist. Ct., Harris County, July 9, 2020). The trial court separately ordered that the case not be transferred to another court. Order, *Republican Party of Tex. v. City of Houston*, No. 2020-40850 (333rd Dist. Ct., Harris County, July 10, 2020).

The Republican Party’s mandamus petition, however, does not challenge any order of the trial court. It instead invokes section 273.061 of the Texas Election Code. Relator argues that the license agreement creates a “duty imposed by law in connection with the holding of an election or a political party convention,” Tex. Elec. Code § 273.061, and that this Court may “issue a writ of mandamus to compel performance of” that duty. *Republican Party* Pet. 7, 8, 17, 18, 23.

III. Argument

In requesting mandamus relief, Relators seek “an extraordinary remedy [that] will only issue if the lower court has clearly abused its discretion and the relators have no other adequate remedy.” *Murrin Bros.*, 2019 WL 6971663, at *2 (citing *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding)); see *Sabre Travel Int’l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 730 (Tex. 2019) (noting

that “mandamus is an extraordinary immediate remedy used to compel a state official, usually a trial judge, to act according to law”). As this Court reaffirmed a few months ago, “[m]andamus relief is only appropriate when the relators have established that only one outcome in the trial court was permissible under the law.” *Murrin Bros.*, 2019 WL 6971663, at *2. Discretion is thus the antithesis of mandamus relief; if a trial court or other respondent was entitled to choose among various courses of action, then a relator has necessarily not demonstrated that “only one outcome in the trial court was permissible under the law.” *Id.*

As an entity that often seeks mandamus relief, *e.g.*, *In re State*, No. 20-0394, 2020 WL 2759629 (Tex. May 27, 2020), and against which mandamus relief is routinely sought, *e.g.*, *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455 (Tex. 2011), the State has a strong interest in the Court’s application of the proper mandamus standard. Any alteration of that standard would have ramifications for the State and other governmental entities beyond the contours of this case.

A. In re Hotze

The pleadings and record do not establish that the *Hotze* Relators have met the particularly high and unforgiving mandamus standard. While Relators present substantial allegations that Mayor Turner engaged in unconstitutional viewpoint discrimination and refused to abide by Governor Abbott’s executive orders, the record does not establish “that only one outcome in the trial court was permissible under the law.” *Murrin Bros.*, 2019 WL 6971663, at *2.

In particular, as set out above, Real Parties in Interest challenged Relators’ standing as third parties to litigate the performance of contractual claims by *other* parties. *Hotze* Pet. & App. 117-18; *see First Bank*, 519 S.W.3d at 102 (“As a general rule, the benefits and burdens of a contract belong solely to the contracting parties, and ‘no person can sue upon a contract except that he be a party to or in privity with it.’” (quoting *House v. Hous. Waterworks Co.*, 31 S.W. 179, 179 (Tex. 1895))). Those standing arguments are at least colorable. *See S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007) (per curiam) (“[G]eneral beneficence does not create third-party rights, else every Texan could challenge or seek to enforce any government contract and the presumption against third-party-beneficiary agreements would disappear.”); *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999) (“The fact that a person might receive an incidental benefit from a contract to

which he is not a party does not give that person a right of action to enforce the contract.”).

Indeed, it is unclear how Relators have standing to assert their claims. And even if they demonstrate standing, the record before this Court does not indicate an entitlement to relief on the merits because Relators have not shown that Houston First Corporation and the Republican Party “expressed a clear intent to directly benefit” Relators, and “[a]ll doubts must be resolved against conferring third-party beneficiary status.” *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011); *see also City of Houston v. Williams*, 353 S.W.3d 128, 146 (Tex. 2011) (“[T]he presumption is the parties contracted only for themselves, absent a clear showing otherwise.”); *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002) (per curiam) (“[A]n agreement must clearly and fully express an intent to confer a direct benefit to the third party.”).

Indeed, Relators have not even pleaded that they are third-party beneficiaries. *Cf. MCI Telecomms. Corp.*, 995 S.W.2d at 651 (“A court will not create a third-party beneficiary contract by implication.”); *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004) (“[I]f the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.”); *see also Wheeler v. White*, 314 S.W.3d 225, 230 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (“Ultimately, there is no dispute by the parties that all portions of the agreement relevant to the jurisdictional analysis are in the record.”); *Galveston ISD v. Clear Lake Rehabilitation Hosp., L.L.C.*, 324 S.W.3d 802, 811 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding insufficient plaintiff’s “bare assertion that it is a third-party beneficiary ‘by operation of law’”). This Court traditionally prefers for lower courts to resolve complex issues like this in the first instance. *See, e.g., City of Houston v. Williams*, 216 S.W.3d 827, 829 (Tex. 2007). Relators do not cite any authority that required the trial court to disregard those procedural obstacles and grant a temporary restraining order.

B. In re Republican Party of Texas

The Republican Party attempts to invoke this Court’s mandamus authority under section 273.061 of the Texas Election Code. *Republican Party Pet. 7* (“This is an original proceeding brought under Texas Election Code Section 273.061.”). But it is far from clear that a private contractual obligation is a “duty imposed by law” within

the meaning of that provision. And the mandamus petition does not suggest that jurisdiction would be available on any other basis. Absent more, the Court should not conclude that the Republican Party has demonstrated a clear entitlement to “an extraordinary immediate remedy.” *Sabre Travel*, 567 S.W.3d at 730 (citation omitted).

Indeed, this Court’s cases suggest a distinction between duties “imposed by law,” as section 273.061 contemplates, and those imposed by contract. For example, the Court has distinguished “a duty created under [a] contract” as legally distinct from “a duty imposed by law.” *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991); *see also Int’l Printing Pressmen & Assistants’ Union of N. Am. v. Smith*, 198 S.W.2d 729, 735 (Tex. 1946) (noting that “an action in tort is for a breach of duty imposed by law” and that “actions in contract and in tort are to be distinguished” (cleaned up)). The fact that the Court has juxtaposed “a duty created under [a] contract” with “a duty imposed by law,” *Sw. Bell*, 809 S.W.2d at 494, suggests that section 273.061’s reference to a “duty imposed by law” might not include contractual duties. *See id.*; *see also In re Int’l Profit Assocs., Inc.*, 274 S.W.3d 672, 677 (Tex. 2009) (“We said that a claim is brought in contract if liability arises from the contract, while a claim is brought in tort if liability is derived from other general obligations imposed by law.”).

Moreover, Relator’s proposed understanding of section 273.061 would appear to permit many applications that may significantly expand this Court’s mandamus jurisdiction. Suppose, for example, the Convention went ahead as scheduled, but the Republican Party refused to perform a contractual duty to pay the event caterer. Could the caterer invoke section 273.061 to seek mandamus relief in this Court to compel the Republican Party to pay her invoice on the theory that her catering contract created a “duty imposed by law in connection with the holding of . . . a political party convention”? Or suppose a delegate who planned to fly to Houston to attend the Convention decided to cancel his refundable ticket, and the airline has refused to provide a refund despite a contractual duty to do so. Can the delegate invoke section 273.061 to demand this Court compel the airline to perform its duty to refund his airfare? Relator’s broad, contract-based view of section 273.061 seems to suggest the answer to these hypotheticals would be “yes,” and nothing in Relator’s filing suggests a different view or limiting principle that would require otherwise. But it is difficult to imagine that the Legislature created such a dramatic expansion of this Court’s mandamus authority in section 273.061. It is telling that Relator does not

cite a single case in which a court cited section 273.061 to compel performance of a private contractual duty. The State has not been able to find any such case.

Section 273.061 is, of course, not the only potential basis for mandamus jurisdiction. The Court often invokes Texas Government Code section 22.002 when conditionally granting petitions for writs of mandamus. *E.g.*, *In re Panchakarla*, No. 19-0585, 2020 WL 2312204, at *4 (Tex. May 8, 2020) (orig. proceeding); *In re Kuntz*, 124 S.W.3d 179, 180 (Tex. 2003) (orig. proceeding). But that provision authorizes mandamus relief against only “a statutory county court judge, a statutory probate court judge, a district judge, a court of appeals or a justice of a court of appeals, or any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals.” Tex. Gov’t Code § 22.002(a); *see* Tex. Const. art. V, § 3(a) (“The Legislature may confer original jurisdiction on th[is] Court to issue writs of . . . mandamus in such cases as may be specified, except as against the Governor of the State”). Relator did not seek mandamus relief against any such official. *See Republican Party* Pet. 3, 8 (identifying only Houston First Corporation, the City of Houston, Mayor Sylvester Turner, and Brenda W. Bazan as Respondents and failing to challenge any action of an official identified in section 22.002(a)); *cf. Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 87 (Tex. 1997) (original proceeding in which a relator sought mandamus relief against a district judge).

Given the limits of section 273.061 and Relator’s petition, emergency mandamus relief appears unavailable here. Additionally, Relator is concurrently seeking contract-based remedies in the trial court for an alleged breach of contract. The possibility that the Republican Party may win the relief it seeks just two days from now casts doubt on the notion it “ha[s] no other adequate remedy.” *Murrin Bros.*, 2019 WL 6971663, at *2.

* * *

The State has a strong interest in correct application of this Court’s mandamus authority. Because Relators have not properly invoked that authority, the view of the State is that the petitions should be denied. Although there is no basis on the records now before the Court to conclude that “the trial court clearly abused its discretion,” *In re Prudential*, 148 S.W.3d at 135, or that the Houston First Corporation violated a “duty imposed by law,” Tex. Elec. Code § 273.061, Relators may nonetheless win

relief below in a matter of days. *See Hotze Pet. & App. 129* (setting a temporary-injunction hearing for the morning of July 14, 2020); Order, *Republican Party of Tex. v. City of Houston*, No. 2020-40850 (333rd Dist. Ct., Harris County, July 9, 2020) (setting a temporary-injunction hearing for the morning of July 13, 2020).

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy 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/ Kyle D. Hawkins
KYLE D. HAWKINS
Solicitor General
State Bar No. 24094710
Kyle.Hawkins@oag.texas.gov

BILL DAVIS
Deputy Solicitor General

A. LEE CZOCHER
Assistant Solicitor General

Counsel for the State of Texas

CERTIFICATE OF SERVICE

On July 11, 2020, this document was served electronically on: (1) Jared R. Woodfill, counsel for Relators in No. 20-0524, via woodfillservice@gmail.com and jwoodfill@woodfilllaw.com; (2) Ronald Lewis and Gregory A. Holloway, counsel for Real Parties in Interest in No. 20-0524, via ronald.lewis@houstontx.gov and gholloway@taylorbook.com; (3) Tyler B. Talbert, counsel for Relator in No. 20-0525, via talbert@scanesrouth.com; and (4) Gregory A. Holloway, Leah Homan, Suzanne R. Chauvin, Brian Amis, Collyn Peddie, and Pierre Grosdidier, counsel for Real Parties in Interest in No. 20-0525, via gholloway@taylorbook.com, lhoman@taylorbook.com, and suzanne.chauvin@houstontx.gov, Brian.Amis@houstnotx.gov, Collyn.Peddie@houstontx.gov, and Pierre.Grosdidier@houstontx.gov.

/s/ Kyle D. Hawkins
KYLE D. HAWKINS

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this document contains 3,554 words, excluding the exempted portions of the document.

/s/ Kyle D. Hawkins
KYLE D. HAWKINS

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below:

Sylvia Rosales on behalf of Kyle Hawkins
Bar No. 24094710
sylvia.rosales@oag.texas.gov
Envelope ID: 44442952
Status as of 07/11/2020 17:03:36 PM -05:00

Associated Case Party: Houston First Corporation

Name	BarNumber	Email	TimestampSubmitted	Status
Gregory Holloway		gholloway@taylorbook.com	7/11/2020 4:54:30 PM	SENT

Associated Case Party: Mayor Sylvester Turner

Name	BarNumber	Email	TimestampSubmitted	Status
Collyn Peddie		collyn.peddie@houstontx.gov	7/11/2020 4:54:30 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Ronald Charles Lewis	12305450	ronald.lewis@houstontx.gov	7/11/2020 4:54:30 PM	SENT
Jared Woodfill	788715	woodfillservice@gmail.com	7/11/2020 4:54:30 PM	SENT
Bill Davis	24028280	Bill.Davis@oag.texas.gov	7/11/2020 4:54:30 PM	SENT
Amanda Czocher	24095059	lee.czocher@oag.texas.gov	7/11/2020 4:54:30 PM	SENT
Kyle Hawkins	24094710	kyle.hawkins@oag.texas.gov	7/11/2020 4:54:30 PM	SENT

Associated Case Party: Republican Party of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
tyler talbert		talbert@scanesrouth.com	7/11/2020 4:54:30 PM	SENT

Associated Case Party: City of Houston

Name	BarNumber	Email	TimestampSubmitted	Status
collyn Peddie		collyn.peddie@houstontx.gov	7/11/2020 4:54:30 PM	SENT

Associated Case Party: Brenda Bazan

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below:

Sylvia Rosales on behalf of Kyle Hawkins
Bar No. 24094710
sylvia.rosales@oag.texas.gov
Envelope ID: 44442952
Status as of 07/11/2020 17:03:36 PM -05:00

Associated Case Party: Brenda Bazan

Name	BarNumber	Email	TimestampSubmitted	Status
Gregory Holloway		gholloway@taylorbook.com	7/11/2020 4:54:30 PM	SENT