

No. 20-0800

In The Supreme Court of Texas

**IN RE: JUAN GERARDO PEREZ PICHARDO AND
PUBLIC INTEREST LEGAL FOUNDATION, INC.**

Relators

**HARRIS COUNTY VOTER REGISTRAR ANN HARRIS BENNETT'S
RESPONSE TO PETITION FOR WRIT OF MANDAMUS**

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STATEMENT OF THE CASE

Nature of the case:

Relators incorrectly claim Respondent Harris County Voter Registrar Ann Harris Bennett “consistently” approved voter registration applications where the applicants did not affirm their citizenship. There is no evidence of this, and Respondent’s staff verifies that every application contains a certification of citizenship. Respondent’s staff additionally submits each application to the Secretary of State to confirm his or her identity.

Respondent explains in this Opposition that Relators’ petition should be dismissed because: (1) Relators lack standing, (2) this case is barred by *res judicata* and collateral estoppel, (3) this case is untimely under Texas law, the doctrine of laches, and the *Purcell* doctrine, and (4) Relators fail to meet their burden for mandamus.

Relators:

Juan Gerardo Perez Pichardo

Public Interest Legal Foundation, Inc.

Respondent:

Harris County Voter Registrar Ann Harris Bennett, in her official capacity

RESPONSE TO STATEMENT OF JURISDICTION

As explained in more detail below, this Court does not have jurisdiction over this mandamus because Relators lack standing, this case is barred by *res judicata* and collateral estoppel, and this case is untimely under Texas law, the doctrine of laches, and the *Purcell* doctrine.

RESPONSE TO STATEMENT OF THE ISSUES PRESENTED

Respondent suggests the following to be the most accurate statement of the issues presented:

1. Whether Relators have standing to bring a mandamus action when they fail to allege particularized injury?
2. Whether Relators' claims are barred by the doctrines of *res judicata* and collateral estoppel because Relators signed a Consent Decree in a federal court with continuing jurisdiction over the issues raised in this case?
3. Whether Relators' claims are untimely under Texas law, the doctrine of laches, and the *Purcell* doctrine because Relators delayed bringing this mandamus for two and a half years until after the 2020 elections started and it became physically impossible to comply with their demands?
4. Whether Relators failed to satisfy the requirements for a mandamus because they cannot identify a single example of a non-citizen voter application being accepted under Registrar Bennett's administration, and Registrar Bennett's staff is trained to properly screen applications?

TO THE HONORABLE SUPREME COURT OF TEXAS:

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This is the *fourth* time the Public Interest Legal Foundation filed suit against Harris County Voter Registrar Ann Harris Bennett based on an unsubstantiated claim that her office accepted voter registration applications from non-citizens. There is no evidence that Registrar Bennett or her staff approved any voter application without confirming that the applicant certified his or her citizenship and verifying the applicant's identity with the Texas Secretary of State or other sources.¹ Further, Relators' own analysis found only 55 applications—out of 2.4 million voters—accepted in error by prior administrations. These errors were caught, and the voters removed from the rolls over the last seven years.

Not surprisingly, Relators' previous lawsuits have been dismissed, and no court has awarded their requested attorney's fees. This Court should also dismiss this petition for writ of mandamus for four reasons:

- (1) **Relators have no standing.** As the Fourteenth Court of Appeals twice ruled, Relators lack standing to bring this petition because they fail to allege particularized injury.
- (2) **This claim is barred by the doctrines of *res judicata* and collateral estoppel.** Relators' claims are barred by the doctrines of *res judicata* and collateral estoppel because Relators signed a Consent Decree in the Southern District of Texas, which has continuing jurisdiction over the subject matter of this petition.

¹ Tab 1, Declaration of Harris County Voter Registrar Ann Harris Bennett at 2 and Tab 2, Declaration of Harris County Director of Voter Registration Sue Hastings at 2 and 4.

- (3) **This claim is untimely under the doctrine of laches and the *Purcell* doctrine.** Relators' claims are moot because it is both physically and legally too late to comply with the remedies they request; Texas law does not permit a challenge to an election procedure once the election begins, and their claims are barred under the doctrine of laches and the *Purcell* case.
- (4) **Relators fail to meet the requirements for a mandamus.** Relators fail to identify a single example of a non-citizen voter application accepted under Registrar Bennett's watch, and Registrar Bennett has trained her staff not to accept application unless the voter certifies his or her citizenship and the Texas Secretary of State verifies his or her identify.

RESPONSE TO STATEMENT OF FACTS

I. Registrar Bennett trains and directs her employees to review each voter application for compliance with § 13.002, confirm applicant identities with the Texas Secretary of State, and rejects any application where there is a discrepancy or uncertified citizenship.

Harris County Registrar of Voters Ann Harris Bennett assumed office on January 1, 2017 and maintains approximately 2.4 million Harris County voter records. Since her term began, Registrar Bennett has consistently directed her employees to faithfully comply with all provisions of the Texas Election Code, including § 13.002, which requires that a person seeking to register to vote submit a written and signed application stating (among other things) he or she is a United States citizen.² Registrar Bennett also trains and directs her employees to comply

² Tab 1 at 1-2 and Tab 2 at 1-4.

with § 13.071(a), which requires the registrar to review each application “to determine whether it complies with Section 13.002.” As the Registrar explains:

All employees responsible for processing voting applications in my office are trained to verify that each applicant has certified he or she is a United States citizen and to reject any voting application that does not certify that the applicant is a United States citizen, unless (or until) that person can provide evidence of citizenship.³

In addition to verifying that each application complies with § 13.002, Registrar Bennett’s office uploads each application to the Texas Secretary of State’s Office, which uses databases from the Social Security Administration, Department of Public Safety, Texas driver’s license information, and other records to confirm the identifies of each applicant. The Secretary of State then notifies the Registrar’s Office of any discrepancy. If a discrepancy is found, Harris County does not accept the prospective voter’s application unless the discrepancy can be explained within 10 days.⁴

II. Registrar Bennett investigates evidence placing a registered voter’s citizenship in question.

Even after the Secretary of State approves a voter’s application, the Harris County Registrar’s Office continues to investigate all evidence that places a registered voter’s citizenship status in question. Harris County Director of Voter Registration Sue Hastings explains in the attached declaration that the Registrar’s

³ Tab 1 at 2.

⁴ Tab 2 at 2.

Office receives reports from the District Clerk and Secretary of State when anyone responding to a jury summons claims not to be a citizen. Each report is acted upon, and the Registrar demands the voter supply proof of citizenship. If the person does not comply within 30 days, his or her voter registration is automatically canceled.⁵

III. Relators cannot identify a single non-citizen placed on the voter rolls during Registrar Bennett's tenure.

In the last two years, the Public Interest Legal Foundation, Inc. filed four lawsuits suggesting Registrar Bennett permitted non-citizens to register to vote. Two were dismissed outright, one was resolved, and contrary to Relators' insinuation, the Public Interest Legal Foundation was not awarded any attorney's fees at all—much less the \$210,000 referenced in their Petition.⁶ To dispel allegations against her office, Registrar Bennett agreed in the case of *Public Interest Legal Foundation v. Bennett*, No. 4:18-cv-00981 (S.D. Tex., filed March 29, 2018), to produce seven years of Harris County voter records.⁷

Even when armed with these documents, Relators cannot identify a single non-citizen placed on the voter rolls during Registrar Bennett's tenure. In fact, in a

⁵ Tab 2 at 2.

⁶ Relators' Petition at 5.

⁷ Under the Consent Decree, the Southern District of Texas retains jurisdiction over the production of these records. *See*, Relators' Appendix at 16 § 19. While Relators now complain about documents produced in that case, they have not conferred with the attorney handling that matter, have not complied with the relevant Federal Rules of Civil Procedure, and have not filed a motion to compel in the federal suit. Instead, Relators inexplicably bypassed their own federal case and brought their discovery complaints to the Texas Supreme Court. The Supreme Court is not the proper venue to resolve a federal discovery dispute.

County with 2.4 million voters, Relators could find only 55 instances in the last seven years where an application was inadvertently accepted after the applicant either failed to check a box certifying he or she was a U.S. citizen, or checked a box indicating he or she was not a U.S. citizen.

Relators appear to acknowledge that all but six of these voters were removed from the rolls before they voted.⁸ Thus, out of 2.4 million eligible voters, Relators complain about six votes that may have been improperly cast in the last seven years because of clerical errors in prior administrations. That is an error rate of 0.00025% from prior administrations, and a known error rate of 0.0% from this administration.⁹

IV. Relators' own evidence establishes Registrar Bennett canceled the registration of those who did not properly certify their citizenship.

Registrar Bennett caught four errors from prior administrations during her own investigation of voter records, which Relators acknowledge in the Churchwell Affidavit on pages 22, 27, 33, and 43 of their appendix:

- (1) On page 22 of Relators' Appendix, Registrar Bennett canceled the registration of a person who did not certify his or her citizenship and had previously been permitted to vote under another administration. This cancellation occurred on August 10, 2018.

⁸ Appendix to Relators' Petition at 167-168 showing only six of the 55 applicants complained about have "Voting Credit." *See also*, Tab 2 at 3.

⁹ Tab 2 at 4.

- (2) On page 27 of Relators' Appendix, Registrar Bennett canceled the registration of a person who did not certify his or her citizenship (but does not appear to have voted). This cancellation occurred on February 28, 2017.
- (3) On page 33 of Relators' Appendix, Registrar Bennett canceled the registration of a person who did not certify his or her citizenship (but does not appear to have voted). This cancellation occurred on July 26, 2018.
- (4) On page 43 of Relators' Appendix, Registrar Bennett canceled the registration of a person who did not certify his or her citizenship. This cancellation occurred on September 6, 2017.

For Relators to now repeatedly claim to the Supreme Court that Registrar Bennett “is not complying with her ministerial duty to reject insufficient applications”¹⁰ and that she “will continue to” approve “applications that do not contain ‘a statement that the applicant is a United States citizen’” is inaccurate.¹¹

ARGUMENT

I. Relators' petition for writ of mandamus must be dismissed because Relators have no standing.

Before a court can reach the merits of a petition for writ of mandamus, it must first determine whether a relator has standing to bring suit in the first place. *In re Hotze*, No. 14-08-00421-CV, 2008 WL 4380228, at *1 (Tex. App.—Houston [14th Dist.] July 10, 2008, no pet.) (per curiam) (mem. op.). Standing is an element of a court's subject-matter jurisdiction and can never be presumed, and the lack of

¹⁰ Relators' Petition at 1, 17.

¹¹ Relators' Petition at 17.

subject-matter jurisdiction is fundamental error that cannot be waived. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993).

Relators claim standing under Tex. Elec. Code § 273.061, which permits the Supreme Court to issue a writ of mandamus to compel the performance of any duty in connection with the holding of an election or political party convention. However, just because a statute authorizes a remedy does not confer standing on anyone in the world to exercise that remedy.

To have standing under § 273.061, Relators must show: (1) “injury in fact” that is “concrete and particularized” and “actual or imminent”, (2) the injury must also be “fairly traceable” to the defendant’s challenged actions, and (3) it must be “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 154-155 (Tex. 2012).

Relators cannot establish any of this, and the Fourteenth Court of Appeals twice correctly held Relators failed to even show the first element—“an interest in a conflict distinct from that of the general public, such that the defendant’s actions have caused the plaintiff some particular injury.” *In re Pichardo*, No. 14-20-00685-CV, 2020 WL 5950178, at *2 (Tex. App. Oct. 8, 2020), quoting *In re Kherkher*, 604 S.W.3d 548, 533 (Tex. App.—Houston [14th Dist.] 2020, orig. proceeding).

A. The Public Interest Legal Foundation, Inc. is an Indianapolis, Indiana corporation with no apparent ties to Texas.

The Public Interest Legal Foundation, Inc. is an Indianapolis, Indiana corporation with no apparent ties to Texas—much less Harris County. This out-of-state corporation is not (and could never be) a candidate for office in Harris County, and its only reason for filing suit is a vague academic interest in voter education and research.

The only “harm” the Foundation alleges is that it spent money filing unsuccessful lawsuits against Harris County and reviewing seven years of records in an unsuccessful attempt to find evidence that Registrar Bennett accepted non-citizen voter applications.¹² As the Fourteenth Court of Appeals properly explained: “The mere fact that the Foundation has incurred expenses and legal fees to bring this litigation does not establish a particularized injury that is sufficient to confer standing to bring an action under section 273.061 of the Election Code. The Foundation cites no authority that supports its standing argument.” *In re Pichardo*, No. 14-20-00685-CV, 2020 WL 5950178, at *2 (Tex. App.—Houston [14th Dist.] Oct. 8, 2020).¹³

¹² Relators’ Petition at 3, 18-19.

¹³ Appendix to Relators’ Petition at 187.

B. Juan Gerardo Perez Pichardo is a non-candidate who cannot identify any particularized harm in this case.

In an attempt to create standing, the Foundation added Juan Gerardo Perez Pichardo to its most recent suits. Pichardo is also not a candidate for any office and has no interest in the outcome of the 2020 election, except as a voter. His one-page affidavit states only that he plans to vote in Harris County.¹⁴ In briefing, Relators vaguely suggest Mr. Pichardo is “at risk of having his vote canceled out by an ineligible vote.”¹⁵ However, Relators never explain who Mr. Pichardo plans to vote for, who this ineligible voter is, who this ineligible voter plans to vote for, how that would change the outcome of a particular election, or what specific, particularized injury this would cause Mr. Pichardo.

To support his standing argument, Mr. Pichardo cites *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) and *Gill v. Whitford*, 138 S.Ct. 1916 (2019) for the proposition that he is “Threatened With a Violation of His Right to Vote.”¹⁶ However, both cases are inapposite, as they relate to out-of-state legislative gerrymandering of districts. The *Reynolds* case dealt with a 1962 Alabama Legislative reapportionment that caused urban counties to be underrepresented in

¹⁴ Appendix to Relators’ Petition at 170.

¹⁵ Relators’ Petition at 20.

¹⁶ Relators’ Petition at 19.

the state senate. Mr. Pichardo never attempts to explain how that 58-year-old case relates to his instant petition for writ of mandamus.

In the *Gill* case, a group of Wisconsin democratic voters alleged the Wisconsin state legislature disenfranchised them by gerrymandering their districts. The United States Supreme Court did not find standing, but held open the possibility that a voter specifically harmed because his district was redrawn as part of a scheme to disenfranchise him might have standing. Those facts are very different from the instant case. No one moved Mr. Pichardo's district or took deliberate steps to disenfranchise him, and Mr. Pichardo does not even suggest how, for which office, or by whom his vote would be "cancelled out," or how that would harm him more than an average voter.

"No Texas court has ever recognized that a plaintiff's status as a voter, without more, confers standing to challenge the lawfulness of governmental acts." *Brown v. Todd*, 53 S.W.3d 297, 302. Even when a voter's "preferred candidate . . . has less chance of being elected," the "harm" is not "a restriction on voters' rights and by itself is not a legally cognizable injury sufficient for standing." *Becker v. FEC*, 230 F.3d 381, 390 (1st Cir. 2000); *see also Berg v. Obama*, 586 F.3d 234, 240 (3d Cir. 2009); *Gottlieb v. FEC*, 143 F.3d 618, 622 (D.C. Cir. 1998). Even when a voter discovers that a candidate is ineligible to be on the ballot, he has no standing to have the candidate removed. *See e.g., Clifton v. Walters*, 308 S.W.3d

94, 99 (Tex. App—Fort Worth 2010, pet. denied); *Brimer v. Maxwell*, 265 S.W.3d 926, 928 (Tex. App—Dallas 2008, no pet.).

In this case, the Fourteenth Court of Appeals correctly held:

Pichardo argues that he has standing to obtain mandamus relief under section 273.061 because, unless Bennett is compelled to comply with the Election Code, he is at risk of having his vote canceled out by an ineligible vote. But that alleged harm is true of every member of the general public who is registered to vote. Pichardo lacks standing because he has not shown that he has an interest or particularized injury that is distinct from that of the general public.

In re Pichardo, No. 14-20-00685-CV, 2020 WL 5950178, at *2 (Tex. App.—Houston [14th Dist.] Oct. 8, 2020).¹⁷

II. Relators’ petition for writ of mandamus must be dismissed because Relators have a related lawsuit in the Southern District of Texas.

Assuming, *arguendo*, Relators had standing, the second reason their petition should be dismissed is that they filed a federal lawsuit and signed a Consent Decree limiting their remedies and agreeing that Judge Andrew Hanen retains jurisdiction over their claims against Registrar Bennett.

Two and a half years ago, Relators filed *Public Interest Legal Foundation v. Bennett*, No. 4:18-cv-00981 (S.D. Tex., filed March 29, 2018), seeking Harris County voter registration records to determine whether voter rolls might contain non-citizens. Although the National Voter Registration Act of 1993 only requires that records be maintained for two years, Registrar Bennett agreed to provide seven

¹⁷ Relators’ Appendix to the Petition at 187.

years of records, and the parties signed a Consent Decree where Relators agreed to a “full settlement” to “resolve all civil liability of Defendant” with the exception of any costs, expense, or attorney’s fees.¹⁸ The parties (and court) further agreed: “This Court retains jurisdiction over this action” to resolve any disputes regarding the Consent Decree.¹⁹

When parties enter into a consent decree, the effects of that decree are *res judicata* as to those parties, regardless of what other statutory rights or remedies might exist. *Jones v. Jones*, 900 S.W.2d 786, 787 (Tex. App.—San Antonio, 1995), *writ denied* (Sept. 14, 1995) (divorce consent decree was *res judicata* despite its non-compliance with federal law).

Res judicata refers to the conclusive effects of a final judgment. *Puga v. Donna Fruit Co.*, 634 S.W.2d 677, 679 (Tex. 1982). Claim preclusion prevents a party from relitigating a claim or cause that has been finally adjudicated, “as well as related matters that, with the use of diligence, should have been litigated in the prior suit.” *Barr v. Resolution Tr. Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628 (Tex. 1992). Issue preclusion, or collateral estoppel, prevents relitigating issues already resolved in a prior suit. *Id.*

In this case, Relators are attempting to relitigate both the terms of their Consent Decree by requesting additional voting records and new issues that could

¹⁸ Relators’ Appendix to Petition at 18.

¹⁹ Relators’ Appendix to Petition at 16.

have been brought in the federal case. This Court has cautioned against “splitting a cause of action” and expressed a policy reflecting “the need to bring all litigation to an end, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery.” *Id.*, 837 S.W.2d at 629, citing Zollie Steakley & Weldon U. Howell, Jr., *Ruminations on Res Judicata*, 28 Sw.L.J. 355, 358–59 (1974).

Even without a federal judgment, Relators would be contractually bound by their Consent Decree. In the *Robinson* case, the Dallas Court of Appeals denied a petition for writ of mandamus by a school trustee candidate who won a primary election by one vote. The candidate agreed to a recount, which resulted in a run-off that he lost. He sought mandamus to enforce the original election results, but was collaterally estopped because he had agreed to the recount. *Robinson v. Plano Bd. of Ed., Plano Indep. Sch. Dist.*, 514 S.W.2d 135, 138 (Tex. Civ. App. 1974).

In the *Pendleton* case, two candidates in a primary for county judge ended a close race. One candidate challenged the results, and while the recount was in progress, the candidates agreed to a second election. The loser of that election filed a petition for writ of mandamus, and the appellate court explained that the candidates’ agreement to a second race was binding, and that “appellant cannot now maintain a mandamus” after waiving his rights. *Pendleton v. Pace*, 9 S.W.2d 437, 440 (Tex. Civ. App. 1928), *writ refused* (Oct. 8, 1928).

Relators had the opportunity to raise each issue in this mandamus in their federal case, but rather than bring their complaints to Judge Hanen, they are attempting two bites at the apple by filing an entirely new suit based on substantially the same subject matter. Relators agreed to resolve their claims against Registrar Bennett in federal court, and they are bound by that deal.

III. Relators' petition for writ of mandamus must be dismissed because it was filed after the election began and is untimely, moot, and in violation of the doctrine of laches and the *Purcell* case.

Assuming, *arguendo*, Relators had standing and were not estopped from bringing this mandamus, the third reason Relators' petition should be dismissed is that they waited too long to file suit. October 5 was the deadline to register to vote, and the rolls for the 2020 election are finalized and should not be disrupted unless there is an individual challenge to a specific voter.

Relators filed their federal lawsuit March 29, 2018, yet fail to explain why they waited two and a half years—until after the election had already begun—to seek mandamus and review of Harris County's 2.4 million voter applications. If Relators seriously believed there were substantive inaccuracies in these records, they would have filed this petition in time to request a meaningful remedy. As Hastings explains in her declaration, it is now impossible to comply with Relators' demands before the election:

... based on our experience complying with the existing order, I can firmly attest it would not be physically possible for our staff to

produce these 2.4 million documents in time for the November, 2020 election. The election has already started, Harris County has record early voting turn out, and our staff is stretched thin as they deal with both the election and the COVID-19 pandemic.²⁰

It is not only physically too late to comply with the demands of Relators' mandamus—it is also legally too late. As the Fourteenth Court of Appeals explained:

Additionally, the election is already underway. The Harris County Clerk has represented to the Texas Supreme Court that his office would accept mail-in ballots beginning September 24. *In re Hotze*, No. 20-0430 (Tex. Oct. 7, 2020), available at <https://www.txcourts.gov/media/1449868/200739.pdf>. “The United States Supreme Court has repeatedly warned against judicial interference in an election that is imminent or ongoing.” *Id.* (citations omitted).

In re Pichardo, No. 14-20-00685-CV, 2020 WL 5950178, at *3 (Tex. App. Oct. 8, 2020).

A. Texas courts have long barred challenges to election procedures once early voting begins.

The doctrine of laches “applies to an unreasonable delay in pursuing mandamus relief.” *In re Universal Image, Inc.*, No. 05-00-00506-CV, 2000 WL 378525 (Tex. App. – Dallas 2000, orig. proceeding). Texas courts have long held that “when absentee voting begins the election is in progress,” and that once an election is in progress, it is too late to file a petition for writ of mandamus to challenge pre-election matters. *Austin v. City of Alice*, 193 S.W.2d 290, 292 (Tex.

²⁰ Tab 2 at 5.

Civ. App. 1946), *writ refused NRE*, citing *Skelton v. Yates*, 131 Tex. 620, 620, 119 S.W.2d 91, 91 (1938). In one prominent case, an appellate court denied mandamus as untimely because:

... relator delayed seeking relief for a period of twenty-two days, and, at the time he instituted this proceeding, absentee balloting had been in progress for fourteen days. Neither his petition for mandamus nor the affidavits filed in support thereof disclose reasonable grounds for such delay. Whatever harsh consequences may flow from our overruling of his petition for mandamus are the result of his delay in seeking relief until a time when we can enter no order which would be effective to govern this election.

Tafolla v. City of Uvalde, 428 S.W.2d 486, 488 (Tex. Civ. App. 1968).

Relators acknowledge their writ of mandamus is barred by laches, but claim Respondent's defense is "impaired" because Relators are dissatisfied with the pace of discovery in their federal lawsuit.²¹ When a party has a discovery dispute in a federal case, the remedy is to confer with the attorney handling that case, follow the Federal Rules of Civil Procedure and local rules, and if necessary, bring the dispute to the attention of the federal judge.

Under no circumstances is it appropriate to file a petition for writ of mandamus in the Supreme Court to resolve a discovery dispute in federal court, yet that is exactly what Relators did by asking this Court to order the production of 2.4 million voter records. Further, none of this has anything to do with Relators' two and a half year delay seeking mandamus. This claim is prohibited by laches.

²¹ Petition for writ of mandamus at 5.

B. Relators’ petition for writ of mandamus is barred by *Purcell*.

The United States Supreme Court also prohibits challenges to election procedures when an election is imminent and there is “inadequate time to resolve the factual disputes.” *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Here the election is not just imminent—it is happening. Relators seek to pull staff from their election duties and audit 2.4 million voter records while voting takes place. That would cause precisely the “serious disruption of election process” and “confusion” that the United States Supreme Court warns against. *See Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968).

IV. Relators petition for writ of mandamus must be dismissed because they cannot meet their burden.

Assuming this Court reaches the merits of this claim, it should deny mandamus. “Mandamus is intended to be an extraordinary remedy, available only in limited circumstances.” *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). “Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law.” *Id.* (quoting *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985)).

To obtain a writ of mandamus under Texas Election Code § 273.061, a relator must establish (1) “a clear abuse of discretion” by the respondent and (2) the lack of “a clear and adequate remedy at law, such as a normal appeal.” *Id.* (citations omitted). Further, “[d]isputed facts ... prevent the Court from resolving

issues in a mandamus proceeding.” *In re Angelini*, 186 S.W.3d 558, 560 (Tex. 2006) (orig. proceeding).

The attached declarations establish no clear abuse of discretion or violation of duty imposed by law, and the Registrar and her staff are diligently following state law and addressing a *de minimis* number of clerical errors from past administrations. Further, Relators had an adequate remedy in their federal lawsuit—as federal judges routinely intervene in election matters. However, Relators abandoned that remedy.

CONCLUSION AND PRAYER

Relators’ petition for writ of mandamus is an untimely, duplicative lawsuit that was filed without standing or evidence. For the reasons provided, Respondent respectfully requests that it be dismissed for lack of standing and under the doctrines of *res judicata*, collateral estoppel, laches, and *Purcell*. If this Court reaches the merits of Relators’ mandamus, Respondent respectfully requests that it be denied.

Respondents further request that all costs and attorney’s fees be taxed to Relators.

Respectfully submitted,

VINCE RYAN
HARRIS COUNTY ATTORNEY

/s/ Seth Hopkins
SETH HOPKINS
State Bar No. 24032435
Assistant County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 755-5141

ATTORNEY FOR RESPONDENT

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this document was produced on a computer and printed in a conventional typeface no smaller than 14-point, except for footnotes, which are no smaller than 12-point. This document also complies with the word-count limitations of Tex. R. App. P. 9.4. Relying on the word count of the computer program used to prepare this document, it contains 4,377 words, excluding the portions listed in Tex. R. App. P. 9.4(i)(1).

/s/ Seth Hopkins
SETH HOPKINS

CERTIFICATE OF SERVICE

I certify that on the 19th day of October, 2020, a true and correct copy of the foregoing instrument was served by electronic filing and electronic mail on Relators, through their counsel of record.

/s/ Seth Hopkins
SETH HOPKINS

CERTIFICATION

I have reviewed the response and concluded that every factual statement is supported by competent evidence included in the appendix.

/s/ Seth Hopkins
SETH HOPKINS

INDEX TO THE APPENDIX

TAB NO.	DESCRIPTION
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- | | |
|---|--|
| 1 | Declaration of Harris County Voter Registrar Ann Harris Bennett |
| 2 | Declaration of Harris County Director of Voter Registration Sue Hastings |

TAB 1

IN THE SUPREME COURT OF TEXAS

IN RE: JUAN GERARDO PEREZ PICHARDO AND PUBLIC INTEREST
LEGAL FOUNDATION, INC.

**DECLARATION OF HARRIS COUNTY TAX ASSESSOR-COLLECTOR
AND VOTER REGISTRAR ANN HARRIS BENNETT**

Pursuant to Texas Civil Practices and Remedies Code § 132.001, I, Ann Harris Bennett, make this unsworn declaration:

“My name is Ann Harris Bennett, and I am an employee and elected official of the following governmental agency: the Harris County Tax Office/Voter Registration Office. I am executing this declaration as part of my assigned duties and responsibilities. I declare under penalty of perjury that the foregoing is true and correct:

I am over the age of 18, have never been convicted of a crime of moral turpitude, and am of sound mind and qualified to make this declaration. I am personally familiar with the facts contained in this declaration, or am familiar with the facts contained in this declaration through official documents kept in the regular course of business in my office.

I am the Harris County, Texas Tax Assessor and Voter Registrar, and I have held this position since January 1, 2017. I am responsible for processing voter applications, maintaining Harris County’s roll of approximately 2.3 million voters, and complying with the Texas Election Code. Because Harris County is so large, I rely on a staff of trained employees to complete these tasks.

I am familiar with the case captioned above and the claims made in this case. The Harris County Voter Registration Office’s policy is to comply with the Texas Election Code, including the provision that requires voters to certify they are United States Citizens. Our office reviews all new applications received for compliance with Texas Election Code Section 13.002(c)(3) and 13.071(a) and does not accept applications unless the applicant certifies he or she is a United States citizen.

All employees responsible for processing voting applications in my office are trained to verify that each applicant has certified he or she is a United States citizen and to reject any voting application that does not certify that the applicant is a United States citizen, unless (or until) that person can provide evidence of citizenship.

I am not aware of any employee of the Harris County Tax Office/Voter Registration Office to have ever knowingly accepted registration from a prospective voter who did not certify his or her United States citizenship. I have never heard of any employee of the Harris County Tax Office/Voter Registration Office being instructed that it was acceptable to register a prospective voter who did not certify his or her United States citizenship.

I am not aware of anyone placed on the voter rolls during my administration who did not properly certify as to being a United States citizen, and whose identity has not been confirmed by the Texas Secretary of State or other sources. Our office actively investigates any evidence that a registered voter may not be a United States citizen and requires such voters to prove their citizenship to remain on the voter rolls.

I am aware of several investigations by my office which resulted in voters being removed from the voter rolls when they could not verify their citizenship, and I will continue to instruct my office to remove such voters. However, it is extremely unusual for such applications to inadvertently be accepted, and my understanding is that after reviewing seven years of records, the Public Interest Legal Foundation found only 55 examples out of 2.4 million voters, and only six of those voted.

Our entire staff is working at a frantic pace to keep up with the demands of an historic early voting turnout in Harris County during the COVID-19 pandemic, and will continue to be working at this pace until the completion of the election. I can firmly attest it would not be physically possible for our staff to produce the documents requested by Juan Gerardo Perez Pichardo and Public Interest Legal Foundation, Inc. in time for the November, 2020 election.

Executed in Harris County, State of Texas, on the 17th day of October, 2020.


ANN HARRIS BENNETT"

TAB 2

IN THE SUPREME COURT OF TEXAS

IN RE: JUAN GERARDO PEREZ PICHARDO AND PUBLIC INTEREST
LEGAL FOUNDATION, INC.

DECLARATION OF SUE HASTINGS

Pursuant to Texas Civil Practices and Remedies Code § 132.001, I, Sue Hastings, make this unsworn declaration:

“My name is Sue Hastings, and I am an employee of the following governmental agency: the Harris County Tax Office/Voter Registration Office. I am executing this declaration as part of my assigned duties and responsibilities. I declare under penalty of perjury that the foregoing is true and correct:

I am over the age of 18, have never been convicted of a crime of moral turpitude, and am of sound mind and qualified to make this declaration. I am personally familiar with the facts contained in this affidavit, or am familiar with the facts contained in this affidavit through official documents kept in the regular course of business in my office.

I work in the Harris County Tax Office/Voter Registration Office as Director of Voter Registration, and have held this position for 10 months. In total, I have worked in the Tax Office/Voter Registration Office for 28 years. In my current role, I am in charge of the Voter Registration Department and oversee employees that work to maintain the Voter Registration database. I am familiar with the case captioned above, the claims made in this case, and the documents referenced in this case.

I. Voter application process.

Under Voter Registrar Ann Harris Bennett, our office receives voter applications, scans them in batches of (typically) 50 or 100, enters them into our Vemacs computer system, and uploads them to the Secretary of State’s Office to verify the identity of each applicant. My understanding is that the Secretary of State utilizes databases linked with the Social Security Administration, Department of

Public Safety, Texas Driver's License, and others, to confirm the identifies of each applicant.

The Secretary of State then notifies us of any discrepancy. If no discrepancy is found, the prospective voter's application is accepted. If a discrepancy is found, the prospective voter is not registered, and our office sends a letter notifying him or her of the problem and providing 10 days to correct any error in the application or confirm the information that was submitted.

During this screening process, our staff is trained to identify missing information, such as a person failing to sign his or her application or failing to affirm his or her citizenship. Anyone who fails to affirm his or her citizenship, or omits any part of the application that would contain required information will receive a letter from our office notifying him or her that he or she has 10 days to correct the error. Until (and unless) this error is corrected or information confirmed by the person, the person is not a registered voter.

Even when the Secretary of State approves our office to accept a voter application, we continue to investigate all evidence that places a registered voter's citizenship status in question. For example, we receive reports from the District Clerk and the Secretary of State informing us when anyone responding to a jury summons claims not to be a citizen. When we receive these reports, we demand that the registered voter supply proof of citizenship, and if they do not within 30 days, we cancel their voter registration automatically. We also provide a Cancellation Form on our website, through the mail, and in person for anyone who may have improperly registered to vote.

II. A voter application is not accepted unless the applicant affirms his or her United States citizenship.

At no time have I ever seen any employee of the Harris County Tax Office/Voter Registration Office knowingly register a prospective voter who did not certify his or her United States citizenship. At no time have I heard of employees of the Harris County Tax Office/Voter Registration Office being instructed that it was acceptable to register a prospective voter who did not certify his or her United States citizenship. The Harris County Voter Registration Office's policy has always been to comply with the Texas Election Code, including the provision that requires voters to certify they are United States Citizens, and we thoroughly train our employees to comply with the Texas Election Code.

III. The Public Interest Legal Foundation, Inc.'s four cases.

I am aware that the Public Interest Legal Foundation, Inc. is an Indiana corporation that has filed at least four lawsuits against Registrar Ann Bennett related to the same claims.

The Public Interest Legal Foundation, Inc.'s first lawsuit is captioned *Public Interest Legal Foundation v. Bennett*, No. 4:18-cv-00981 (S.D. Tex., filed March 29, 2018). In that case, Registrar Bennett agreed to provide The Public Interest Legal Foundation with 7 years of voter records and communications, and we have produced most of these documents. That Agreed Order is located at pages 12-19 of the Public Interest Legal Foundation, Inc.'s Appendix.

This was an extremely labor-intensive process made more difficult by our office's closure since March 24, 2020 due to the COVID-19 pandemic. Between May 20 and July 1, we had eight staff members (24% of our total staff) devoting 80 percent to 100 percent of their working hours to produce these documents. Between July 1 and July 5, we had 9 people (27% of our staff) devoting 100 percent of their working hours to produce these documents. Between July 5 and September 11, we had six people (18% of our staff) devoting 50 percent of their working hours to produce these documents. Our staff resources must now focus on the upcoming election, but we are still producing documents, and I am unaware of any filings in the federal lawsuit complaining about the pace or quality of production.

My understanding is that, based on discovery produced in that federal case, the Public Interest Legal Foundation, Inc. (at times joined with Juan Gerardo Perez Pichardo) has filed three new state cases, claiming approximately 55 of Harris County's 2.4 million voters submitted applications between 2013 and 2020 where they either failed to check a box certifying they are U.S. citizens, or checked a box indicating they were not U.S. citizens. The Public Interest Legal Foundation, Inc. appears to acknowledge that all but six of these errors were caught before the applicants voted.

IV. The Voter Registration Office is already complying with the requested relief, and it would be impossible to audit the voter records while the election is taking place.

The Public Interest Law Foundation, Inc. requests the following remedies, which our office opposes for the reasons explained below:

1. The Voter Registration Office already reviews all new applications for compliance with the Texas Election Code.

First, the Public Interest Law Foundation, Inc. seeks to require the Voter Registration Office to “Review all new applications received for compliance with Texas Election Code Section 13.002(c)(3), as required by Texas Election Code Section 13.071(a).” For the reasons explained, our Office already does this.

2. The Voter Registration Office does not accept applications unless the applicant certifies that he or she is a United States citizen.

Second, the Public Interest Law Foundation, Inc. seeks an order requiring that applications be rejected unless the applicant certifies he or she is a United States citizen. As explained above, the Voter Registration Office does not accept any voter application unless the applicant certifies that he or she is a United States citizen, and unless the Texas Secretary of State, or another source, can confirm the applicant’s identity.

After auditing records dating to 2013, the Public Interest Legal Foundation, Inc. could identify only 55 applicants, out of 2.4 million voters, where an application was mistakenly accepted. All of those voters have been removed from the rolls. Out of 2.4 million eligible voters, the Public Interest Legal Foundation, Inc., appears to complain about six votes that may have been improperly cast because of clerical errors in prior administrations. That is an error rate of 0.00025% from prior administrations, and a known error rate of 0.0% from this administration.

None of the applications complained about were submitted since Ann Harris Bennett became registrar of voters on January 1, 2017. In fact, Registrar Bennett caught the clerical errors of earlier administrations and canceled at least four of the voter registrations that the Public Interest Legal Foundation, Inc. complains about. These can be seen in the Churchwell Affidavit on pages 22, 27, 33, and 43 of the Public Interest Legal Foundation, Inc.’s appendix:

On page 22, Registrar Bennett canceled the registration of a person who did not certify his or her citizenship and had previously been permitted to vote. This cancellation occurred on August 10, 2018.

On page 27, Registrar Bennett canceled the registration of a person who did not certify his or her citizenship (but does not appear to have voted). This cancellation occurred on February 28, 2017.

On page 33, Registrar Bennett canceled the registration of a person who did not certify his or her citizenship (but does not appear to have voted). This cancellation occurred on July 26, 2018.

On page 43, Registrar Bennett canceled the registration of a person who did not certify his or her citizenship. This cancellation occurred on September 6, 2017.

3. The Voter Registration Office cannot logistically review or produce applications for all 2.4 million registered voters between now and the election, particularly since the election has already started.

Third, the Public Interest Legal Foundation, Inc. requests a full review of all previously filed applications of Harris County's 2.4 million registered voters, or permit the Foundation to review them. As explained, the parties signed a consent decree in federal court identifying which documents the Foundation was entitled to review, and the Voter Registration Office has devoted extensive staff resources to providing those documents to the Public Interest Legal Foundation, Inc.

I am unaware of any filings in the federal case complaining about the production of these documents. Further, based on our experience complying with the existing order, I can firmly attest it would not be physically possible for our staff to produce these 2.4 million documents in time for the November, 2020 election. The election has already started, Harris County has record early voting turn out, and our staff is stretched thin as they deal with both the election and the COVID-19 pandemic.

Executed in Harris County, State of Texas, on the 17th day of October, 2020.



SUE HASTINGS"

Automated Certificate of eService

This automated certificate of service was created by the eFiling system.
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Andrea Mintzer on behalf of Seth Hopkins
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Status as of 10/19/2020 11:33 AM CST

Associated Case Party: AnnHarrisBennett

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