

IN THE SUPREME COURT OF TEXAS

No. 21-0538

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, ET AL., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

PER CURIAM

The Texas Constitution gives the Governor a line-item veto on appropriation bills enacted by the Legislature. “If any bill presented to the Governor contains several items of appropriation he may object to one or more of such items” TEX. CONST. art. IV, § 14. If the bill is not “presented to the Governor ten days (Sundays excepted) prior to [the Legislature’s] adjournment,” the Governor has twenty days from adjournment to object to one or more items, and if he does so, “such item or items shall not take effect.” *Id.*

On May 30, 2021, the day before the 87th Legislature adjourned, Democratic members of the House of Representatives left the chamber, thereby breaking quorum and preventing passage of pending legislation that they opposed. *See* H.J. of Tex., 87th Leg., R.S. 5467 (2021). Several days later, when the general appropriations bill for the next biennium (beginning September 1, 2021) was presented to Governor Greg Abbott, he vetoed the Legislature’s appropriation for its own operations, explaining that “[f]unding should not be provided for those who quit their jobs early.” Tex. Gov. Proclamation No. 41-3844, 87th Leg., R.S., ch. 1053, 2021 Tex. Gen. Laws __ (available at 46 Tex. Reg. 3984). In this original mandamus proceeding, the House Democratic

Caucus and all but one of the 67 Democratic House members¹ argue that the Governor’s veto threatens the Legislature’s ability to operate and therefore violates the constitutional separation of powers.

The Legislature convenes in regular session in odd-numbered years for 140 days, commencing on the second Tuesday in January.² The 87th Legislature convened in regular session on January 12, 2021. Governor Abbott in his State of the State Address on February 1 identified legislation on “election integrity” as one of five emergency items. *See* S.J. of Tex., 87th Leg., R.S. 45 (2021).³ That legislation, Senate Bill 7, was introduced on March 11. *Id.* at 212. One version passed the Senate on April 1, *id.* at 586, and another passed the House on May 7. H.J., 87th Leg., R.S. at 2510-12. The Conference Committee report was completed on May 29 and adopted by the Senate the same day. S.J., 87th Leg., R.S. at 2913-14. Under its rules, the House had until midnight

¹ Relators include Democratic House members 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, Chris Turner, John Turner, Hubert Vo, Armando Walle, Gene Wu, and Erin Zwiener. Relators also include the Mexican American Legislative Caucus, Texas Legislative Black Caucus, Legislative Study Group, Texas AFL-CIO, and legislative employees Kimberly Paige Bufkin, Michelle Castillo, Rachel Piotrkowski, and Donovan J. Rodriguez.

² TEX. CONST. art. III, § 5(a) (“The Legislature shall meet every two years at such time as may be provided by law and at other times when convened by the Governor.”); *id.* art. III, § 24(b) (“No Regular Session shall be of longer duration than one hundred and forty (140) days.”); TEX. GOV’T CODE § 301.001 (“The legislature shall convene at the seat of government in regular session at 12 noon on the second Tuesday in January of each odd-numbered year.”).

³ The other four emergency items were expansion of broadband access, prevention of cities from defunding police, bail reform, and civil-liability protections for individuals, businesses, and healthcare providers that operated safely during the pandemic. *See* S.J., 87th Leg., R.S. at 44-46.

the next day to adopt the Conference Committee report. Tex. H.R. Rule 8, § 13(f), 87th Leg., R.S., H.J. of Tex. 49, 126 (2021). Shortly before 11:00 p.m., Democratic House members began leaving the chamber to deprive the body of a quorum to do business. *See* H.J., 87th Leg., R.S. at 5466-67. The House has 150 members, and two-thirds, or 100, constitute a quorum. TEX. CONST. art. III, § 10. House members included 83 Republicans and 67 Democrats,⁴ so the departure of most Democratic members would have the effect of breaking quorum. The House recessed a few minutes later. H.J., 87th Leg., R.S. at 5467-68. The regular session adjourned *sine die* on May 31. *Id.* at 5506.

After adjournment, the Legislature sent the Governor the General Appropriation Act, enacted on May 27, for the 2022-2023 fiscal-year biennium. *Id.* at 4177. On June 18, Governor Abbott issued a proclamation objecting to Article X of the Act, which contained appropriations for the operation of the Legislature. Tex. Gov. Proclamation No. 41-3844, 87th Leg., R.S., ch. 1053, 2021 Tex. Gen. Laws __ (available at 46 Tex. Reg. 3984).⁵ The Governor included the following statement of his objections to Article X:

Texans don't run from a legislative fight, and they don't walk away from unfinished business. Funding should not be provided for those who quit their job early, leaving their state with unfinished business and exposing taxpayers to higher costs for an additional legislative session. I therefore object to and disapprove of these appropriations.

Id. at 3986.

⁴ The split is now 82 Republicans and 67 Democrats. The seat for Texas House District 10 became vacant July 30 with the election of former Republican Representative Jake Ellzey to Congress.

⁵ Article X also contains appropriations for the Legislative Budget Board, Legislative Council, the Commission on Uniform State Laws, the Sunset Advisory Commission, the State Auditor's Office, and the Legislative Reference Library. *See* Tex. S.B. 1, 87th Leg., R.S. at X-1 to X-9 (2021).

The Governor may call a special session of the Legislature lasting no longer than 30 days and limited to considering subjects designated in the call.⁶ On June 22, Governor Abbott announced that he would call a special session of the Legislature to convene on July 8.⁷ He did not announce at the time the subjects to be considered.

On June 25, Relators filed their petition for writ of mandamus in this Court. They argued that Governor Abbott’s veto was an “[a]ttempt to [a]bolish the Legislature,” Mandamus Pet. 21, by depriving it of the funding necessary for its staff and operations⁸ in violation of the constitutional principle of separation of powers.⁹ Relators acknowledged that Governor Abbott had announced that he would call a special session and that he could designate an appropriation for the Legislature as a subject to be considered. But, they contended, Governor Abbott might not add the subject to the call, or he might veto a re-enactment of Article X funding unless the

⁶ See TEX. CONST. art. III, § 5(a) (“The Legislature shall meet every two years at such time as may be provided by law and at other times when convened by the Governor.”); *id.* art. IV, § 8(a) (“The Governor may, on extraordinary occasions, convene the Legislature . . . His proclamation therefor shall state specifically the purpose for which the Legislature is convened.”); *id.* art. III, § 40 (“When the Legislature shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, or presented to them by the Governor; and no such session shall be of longer duration than thirty days.”).

⁷ See Office of the Tex. Governor, *Governor Greg Abbott Announces Special Session Date* (June 22, 2021), <https://gov.texas.gov/news/post/governor-greg-abbott-announces-special-session-date>.

⁸ Relators argue that the veto deprives legislators of their compensation set by the Texas Constitution: “Members of the Legislature shall receive from the Public Treasury a salary of Six Hundred Dollars (\$600) per month . . . Each member shall also receive a per diem set by the Texas Ethics Commission for each day during each Regular and Special Session of the Legislature.” TEX. CONST. art. III, § 24(a). The Attorney General, representing Respondents, acknowledges that Governor Abbott’s veto cannot deprive legislators of their constitutionally guaranteed compensation. See *Spears v. Sheppard*, 150 S.W.2d 769, 770 (Tex. 1941) (orig. proceeding) (recognizing that Article III, Section 24 “does not make [a legislator’s] right to . . . per diem dependent upon actual attendance on the sessions of the Legislature”).

⁹ TEX. CONST. art. II, § 1 (“The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.”).

Legislature enacted voting legislation and other legislation that he sought. *Mandamus Pet. 23*. “It is no answer,” they argued, “that the Legislature can pass the budget again in special session—after it has bent to Governor Abbott’s will on the other bills he first places before it. A Legislature that can earn the right to exist only after fully executing the Governor’s agenda is not a co-equal branch and the Governor could simply veto the funding again.” *Id.* at 31 n.14.

Relators asked that the respondents named in their petition—the Executive Clerk to the Governor, the Acting Secretary of State, and the Comptroller—be ordered “to give Article X full effect and to perform their duties consistent with that provision.” *Id.* at 37. In a response filed on July 5, Respondents argued that the Executive Clerk and Acting Secretary of State have no authority to enforce appropriations, and that while the Comptroller is in charge of disbursing appropriated funds, the veto of Article X does not impact legislative funding until September 1, when the General Appropriations Act takes effect.¹⁰ Thus, Respondents contended, Relators’ claims are not ripe, and, relatedly, Relators have suffered no concrete injury sufficient for standing.

By proclamation issued on July 7, the Governor formally called the special session and designated 11 subjects for the Legislature’s consideration, including “[l]egislation strengthening the integrity of elections in Texas” and “[l]egislation providing appropriations to the Legislature and legislative agencies in Article X of the General Appropriations Act.” *Tex. Gov. Proclamation No. 41-3848, 87th Leg., R.S., 2021 Tex. Gen. Laws __* (available at 46 *Tex. Reg.* 4238). The Legislature convened on July 8, but three days later Democratic House members again broke

¹⁰ This Court cannot issue mandamus against the Governor. *See* TEX. CONST. art. V, § 3(a) (“The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.”); TEX. GOV’T CODE § 22.002(a) (“The supreme court . . . may issue . . . all writs of quo warranto and mandamus agreeable to the principles of law regulating those writs, against . . . any officer of state government except the governor . . .”).

quorum, this time by leaving the state for the District of Columbia. A bill replacing Article X passed out of House committee on July 9 but could not be considered on the House floor. *See* H.J. of Tex., 87th Leg., 1st C.S. 32 (2021). Voting legislation similar to Senate Bill 7 passed the Senate on July 13, and a companion bill in the House was voted out of committee. *See* S.J. of Tex., 87th Leg., 1st C.S. 23 (2021).

While in the District of Columbia, Democratic House members have met with members of the Biden administration and Congress to urge passage of federal legislation on voting and have held public meetings to draw attention to their cause. They have publicly stated that the importance of defeating the Republican-supported elections bill justified their departure from Texas and breaking quorum¹¹ even though it also prevented the Texas House from restoring Article X funding. They have not returned to the House to allow it to continue business. The Republican House members, for their part, have insisted that the House pass the elections bill and perhaps other legislative priorities before addressing Article X funding. The special session expired on August 6.

These public statements and events make it clear that the subject of the petition for writ of mandamus—the lack of Article X funding for the Legislature—continues to exist *not* because of a dispute between the Governor and the Legislature, nor even because of one between the Governor and a minority of House members. Rather, the principal dispute is among the members of the Legislature. Relators do not argue that the Legislature would have failed to pass Article X funding had they been present in the House to provide a quorum to do business. They argue only that Governor Abbott might veto the funding again if they did. This argument is entirely speculative.

¹¹ *See, e.g.*, Texas House Democratic Caucus, *Statement: Texas House Democrats Break Quorum* (July 12, 2021), <https://texashousedems.com/statement-texas-house-democrats-break-quorum>.

And if a complete loss of legislative funding were imminent, one would expect other legislators besides members of the House Democratic Caucus to express concern. Neither the Legislature's leadership nor any of its Republican members have joined in Relators' complaint that the Governor is violating the separation of powers.¹²

The special session has shifted disagreement from Article X funding to the order in which legislation is considered, a matter entirely internal to the Legislature. Legislators have decided to prioritize passage of legislation on elections and other subjects over passage of an appropriation bill to replace the vetoed Article X. While Democratic members object to this ordering of bills, such internal disagreements among legislators are routinely part of the legislative process and do not implicate the separation-of-powers doctrine. Fundamentally, as our cases uniformly hold, “[t]he separation of powers doctrine prohibits one branch of government from exercising a power belonging inherently to another.”¹³ The powers to veto legislation and call special legislative sessions belong constitutionally to the Governor, not the Legislature. The Governor has expressed

¹² Former Lieutenant Governor William Ratliff and former Speaker Joseph Richard Straus III, both Republicans, have submitted an amicus brief, joined by former Speaker James Earl Laney, a Democrat, in support of Relators. They argue that “[t]he Governor has used his veto power to render inoperable a co-equal branch of government.” But the veto has yet to affect legislative funding at all. The House members breaking quorum have rendered the Legislature inoperable to vote on the funding that they insist is crucial.

One Republican House member has joined an amicus brief submitted by the Democratic members of the Texas Senate, three law professors, a former judge, and four former House members. They argue that the Governor's veto “assumed for the Executive the Legislature's duty to determine what laws should be enacted, and it unduly interfered with the Legislature's ability to operate during the upcoming two fiscal years.” Neither is true. The Governor has given the Legislature the opportunity to consider Article X funding during the special session, and as noted below, during a second special session.

Both amicus briefs were submitted on July 5, before the Governor's proclamation listing the subjects to be considered in the special session. Neither brief mentions the possibility of a special session or the opportunity it would present for the Legislature to consider re-enactment of Article X funding.

¹³ *In re Dean*, 393 S.W.3d 741, 747 (Tex. 2012); *see also Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 600 (Tex. 2001); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *State Bd. of Ins. v. Betts*, 308 S.W.2d 846, 851-52 (Tex. 1958).

his view on legislative priorities, as he is entitled to do, but he has not exercised the Legislature's power to order its own proceedings.

While the interference by one branch of government with the effectual function of another raises concerns of separation of powers, the issue presented here is primarily one of differences among legislators. Although the Governor certainly seeks to advance legislation he favors, the majority of the members of the Legislature support the same legislation. Relator House members oppose that legislation and have broken quorum to further their opposition. It appears from the record of the special session that they could have restored Article X funding for the Legislature had they been present to vote to do so. They have chosen to continue to absent themselves in order to prevent passage of voting legislation. The legislative majority could have chosen to restore Article X funding before taking up the legislation the Governor favors. They have chosen not to do so. Relators argue that the Governor is unconstitutionally coercing them to vote for legislation that he favors. But the Governor has not forced the Legislature to enact his priorities before addressing its own funding. The Legislature was free to use the special session to reinstate Article X funding. It could have done so without addressing any of the other items listed in the Governor's call, and it could have enacted an Article X funding bill more than ten days before adjournment, which would have enabled it to override any attempt by the Governor to again veto Article X. *See* TEX. CONST. art. IV, § 14.

Under these circumstances, the Governor's veto of Article X followed by his call of a special session neither prevents the Legislature from funding itself nor forces the Legislature to enact legislation of the Governor's choosing.¹⁴ As the special session makes clear, the pressure on

¹⁴ Had the Governor refused to include Article X funding in the special session call—or refused to do so until the Legislature enacted legislation of his choosing—the tension between the branches would be more pronounced, and the burden on the separation of powers more severe. Those are not the circumstances

Relators to enact the Governor's preferred legislation is coming from Relators' fellow legislators. Relators' alleged injury may have originated with the Governor's veto of Article X; however, it persists only because of a disagreement between Relators and their legislative colleagues over the order in which to consider legislation.¹⁵ This political dispute within the legislative branch is not an issue of separation of powers that we can decide.

Concerns over the separation of powers involve not only disagreements between the executive and legislative branches, when they arise, but also the judiciary's intervention. Courts have uniformly recognized that it is not their role to resolve disputes between the other two branches that those branches can resolve for themselves. Only a few months ago, the Supreme Court of Alaska observed that "courts can usually stay out of veto disputes between the legislative and the executive branches without risk to the constitution's distribution of powers; the powers of the legislative and executive branches are close to equipoise, and those two branches can negotiate political issues from positions of roughly equal strength." *State v. Recall Dunleavy*, ___ P.3d ___, ___, 2021 WL 3012331, at *20 (Alaska July 16, 2021) (internal citations omitted). Similarly, the Supreme Court of Minnesota has explained: "[O]ur constitution does not require that the Judicial Branch referee political disputes between our co-equal branches of government over appropriations and statewide policy decisions when those branches have both an obligation and an opportunity to resolve those disputes between themselves." *Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 624 (Minn. 2017).

before us, and we express no opinion on the appropriate remedy in such a case.

¹⁵ We recognize that the veto made it possible for legislators to prioritize legislation they prefer over restoration of Article X funding and thus gave them a choice they would not have had otherwise. The fact remains that the choice is theirs.

The Supreme Court of New Mexico, asked to review the governor’s veto by mandamus, noted that relief was not warranted as long as “addressing the issue during the special session [was] a plain, speedy, and adequate remedy.” *State ex rel. Stewart v. Martinez*, 270 P.3d 96, 99 (N.M. 2011). And the Supreme Court of Connecticut has written:

While we recognize our role as the ultimate interpreter of the Constitution[,] . . . courts have a duty to avoid unnecessary constitutional issues. When constitutional disputes arise concerning the respective powers of the coordinate branches of government, judicial intervention should be delayed until all possibility of settlement ha[s] been exhausted. Judicial restraint is essential to maintain the delicate balance of powers among the branches established by the constitution.

Sullivan v. McDonald, 913 A.2d 403, 406 (Conn. 2007) (internal citations omitted).

While the inter-branch disputes in these cases differed, the courts shared the same reservations on weighing in, reservations that are themselves grounded in the separation of powers. In the present situation, “we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests.” *Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring). We decline to do so, especially when, as we have shown, the dispute has become one between the members of one branch rather than one between the branches.

Governor Abbott has called a second special session that commenced August 7, the day following the end of the first special session. He has included among the subjects for consideration in the call “[l]egislation strengthening the integrity of elections in Texas” and “[l]egislation providing appropriations from unappropriated available revenues to the Legislature and legislative agencies in Article X of the General Appropriations Act.” Tex. Gov. Proclamation No. 41-__, 87th Leg., 1st C.S., ch. __, 2021 Tex. Gen. Laws __. Relators again have the opportunity to vote to appropriate revenues to the legislative branch. In the meantime, the Governor and legislative

leaders have announced that funding for continued legislative operations has been made available through the end of September.¹⁶

For these reasons, the petition for writ of mandamus is denied.

OPINION DELIVERED: August 9, 2021

¹⁶ Office of the Tex. Governor, *Governor Abbott, Lt. Governor Patrick, Speaker Phelan, Senate Finance, House Appropriations Committee Chairs Announce Additional Month Of Funding For Texas Legislature* (August 6, 2021), <https://gov.texas.gov/news/post/courtesy-copy-governor-abbott-lt-governor-patrick-speaker-phelan-senate-finance-house-appropriations-committee-chairs-announce-additional-month-of-funding-for-texas-legislature>.