
NO. 14-0667

IN THE SUPREME COURT OF TEXAS

In re:

**JARED WOODFILL; STEVEN F. HOTZE, MD;
F.N. WILLIAMS, SR.; and MAX MILLER,**

Relators.

**RESPONSE TO
PETITION FOR WRIT OF MANDAMUS**

HAYNES AND BOONE, LLP

Lynne Liberato
State Bar No. 00000075
Kent Rutter
State Bar No. 00797364
William Feldman
State Bar No. 24081715
Katie Dolan-Galaviz
State Bar No. 24069620
1221 McKinney, Suite 2100
Houston, Texas 77010-2007
Telephone: (713) 547-2000
Telecopier: (713) 547-2600
Lynne.Liberato@haynesboone.com
Kent.Rutter@haynesboone.com
William.Feldman@haynesboone.com
Katie.Dolan-Galaviz@haynesboone.com

**COUNSEL FOR RESPONDENTS,
ANNISE D. PARKER, MAYOR, CITY OF HOUSTON;
ANNA RUSSELL, CITY SECRETARY, CITY OF HOUSTON;
AND THE MEMBERS OF THE CITY COUNCIL, CITY OF HOUSTON**

IDENTITY OF PARTIES AND COUNSEL

I. Relators:

Jared Woodfill; Steven F. Hotze, MD; F.N. Williams, Sr.;
and Max Miller

II. Counsel for Relators:

Andy Taylor
Amanda Peterson
ANDY TAYLOR & ASSOCIATES, P.C.
2668 Highway 36S, #288
Brenham, Texas 77833

III. Respondents:

Annise D. Parker, Mayor, City of Houston
Anna Russell, City Secretary, City of Houston
City Council, City of Houston, consisting of the following members:
Annise D. Parker, Mayor
Stephen C. Costello, At Large 1
David W. Robinson, At Large 2
Michael Kubosh, At Large 3
C.O. "Brad" Bradford, At Large 4
Jack Christie, At Large 5
Brenda Stardig, District A
Jerry Davis, District B
Ellen Cohen, District C
Dwight Boykins, District D
Dave Martin, District E
Richard Nguyen, District F
Oliver Pennington, District G
Ed Gonzalez, District H
Robert Gallegos, District I
Mike Laster, District J
Larry Green, District K

IV. Counsel for Respondents:

Lynne Liberato
Kent Rutter
William Feldman
Katie Dolan-Galaviz
HAYNES AND BOONE, LLP
1221 McKinney, Suite 2100
Houston, Texas 77010-2007

V. Of Counsel for Respondents:

David Feldman
Lynette Fons
Judith L. Ramsey
CITY OF HOUSTON LEGAL DEPARTMENT
900 Bagby, 4th Floor
Houston, Texas 77002

Geoffrey Harrison
Alexander Kaplan
Kristen Schlemmer
SUSMAN GODFREY LLP
1000 Louisiana Street, Suite 5100
Houston, Texas 77002

Edward B. "Teddy" Adams, Jr.
Andrew Price
Seth Isgur
Geraldine W. Young
NORTON ROSE FULBRIGHT
1301 McKinney, Suite 5100
Houston, Texas 77010-3095

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSELi

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIESv

RECORD REFERENCES vii

STATEMENT OF THE CASE..... viii

STATEMENT OF JURISDICTION.....ix

ISSUES PRESENTED.....x

STATEMENT OF FACTS 1

I. The Houston Equal Rights Ordinance 1

II. The petition drive and referendum process 1

III. The HERO referendum petition failed4

IV. Relators’ pending lawsuit6

V. Mandamus proceeding in court of appeals..... 7

VI. Mandamus proceeding in this Court..... 7

SUMMARY OF THE ARGUMENT8

ARGUMENT 9

I. Relators are not entitled to suspension of HERO 10

II. Relators are not entitled to reconsideration of HERO..... 11

A. Numerous fact issues preclude mandamus relief 11

B. Relators have an adequate remedy at law 15

1.	Relators are not entitled to any immediate action	16
2.	Trial is set for January.....	17
3.	Secretary Russell has no remaining ministerial duty.....	17
C.	The Respondents have complied with their ministerial duties.....	18
1.	The City Secretary reviewed the Referendum Petition and reported its noncompliance.....	18
2.	The Mayor and City Council have no ministerial duty to order a referendum.....	20
III.	Secretary Russell has no further ministerial duty.....	21
	CONCLUSION AND PRAYER	22
	CERTIFICATE OF COMPLIANCE.....	26
	VERIFICATION.....	27
	CERTIFICATE OF SERVICE	28

TABLE OF AUTHORITIES

CASES

<i>In re Angelini</i> , 186 S.W.3d 558 (Tex. 2006) (orig. proceeding)	ix, 10, 12
<i>Bell Helicopter Textron Inc. v. Walker</i> , 787 S.W.2d 954 (Tex. 1990) (orig. proceeding)	ix
<i>Brady v. Fourteenth Court of Appeals</i> , 795 S.W.2d 712 (Tex. 1990) (orig. proceeding)	ix
<i>In re Francis</i> , 186 S.W.3d 534 (Tex. 2006) (orig. proceeding)	2
<i>In re Lee</i> , 412 S.W.3d 23 (Tex. App.—Austin 2013, orig. proceeding)	14, 15
<i>In re Prudential Ins. Co. of Am.</i> , 148 S.W.3d 124 (Tex. 2004) (orig. proceeding)	16
<i>In re Reece</i> , 341 S.W.3d 360 (Tex. 2011) (orig. proceeding)	9, 10
<i>In re Roof</i> , 130 S.W.3d 414 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding)	19
<i>Strachan v. Lanier</i> , 867 S.W.2d 52 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding)	15
<i>Walker v. Packer</i> , 827 S.W.2d 833 (Tex. 1992) (orig. proceeding)	15, 16
<i>In re Woodfill</i> , __ S.W.3d __, 2014 WL 4088704 (Tex. App.—Houston [14th Dist.] Aug. 15, 2014, mand. filed)	<i>passim</i>

STATUTE

TEX. ELEC. CODE § 277.00321, 22

SECONDARY SOURCES

City Charter Art. VII-a.....*passim*

City Charter Art. VII-b.....*passim*

Code of Ordinances, Chapter 2, Art. VII, § 2-25819

Texas Municipal Clerk’s Handbook (10th ed.)3

Mike Morris, *Foes Drop TRO Bid to Force ERO Ordinance to
November Ballot*, Houston Chronicle (Aug. 15, 2014)7

RECORD REFERENCES

Respondents will cite the record as follows:

Relator's Mandamus Record	-	Rel.MR:[#]
Respondent's Mandamus Record	-	Resp.MR:[#]

STATEMENT OF THE CASE

Nature of the Case:

Relators have brought their Original Petition for Writ of Mandamus in an attempt to require Respondents to (1) immediately suspend the enforcement of Houston Ordinance No. 2014-530, the Houston Equal Rights Ordinance (“HERO”), (2) immediately reconsider whether HERO should be repealed in its entirety, and (3) if the City Council does not repeal HERO, then submit HERO to popular vote. In the alternative, Relators request that the Court direct the City Secretary to “complete her review” of the HERO referendum petition signatures, and “certify the number of valid signatures immediately.”

Respondents:

Respondents are Annise D. Parker, Mayor, City of Houston; Anna Russell, City Secretary, City of Houston; and the members of the Houston City Council (as listed above).

Course of Proceedings:

Relators have brought this original proceeding in this Court pursuant to Section 273.061 of the Texas Election Code. Relators seek the same relief in a declaratory judgment and injunctive relief lawsuit that is now pending in the 152nd District Court of Harris County and set for trial on January 19, 2015.

Court of Appeals:

In a per curiam opinion by Justices Boyce, Christopher, and Jamison, the Fourteenth Court of Appeals denied the petition for writ of mandamus “because relators have an adequate remedy by appeal after judgment in the pending trial case.” *In re Woodfill*, __ S.W.3d __, 2014 WL 4088704 (Tex. App.—Houston [14th Dist.] Aug. 15, 2014, mand. filed). (Resp.MR:1.)

STATEMENT OF JURISDICTION

This Court does not have jurisdiction to grant the relief requested in Relators' Petition for Writ of Mandamus. Relators' request for relief presents disputed issues of fact, which this Court lacks jurisdiction to resolve in this mandamus proceeding. *See In re Angelini*, 186 S.W.3d 558, 560 (Tex. 2006) (orig. proceeding); *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990) (orig. proceeding). Moreover, this Court lacks jurisdiction to resolve this mandamus petition because Relators have an adequate remedy at law. *See Bell Helicopter Textron Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990) (orig. proceeding).

ISSUES PRESENTED

1. Are Relators entitled to mandamus relief for claims in which there are disputed facts regarding the validity of the signatures and verifications on the Houston Equal Rights Ordinance Referendum Petition?
2. Are Relators entitled to mandamus relief where they have an adequate remedy at law through their concurrently filed lawsuit, which is pending in Harris County District Court and which seeks the same relief that Relators seek here?
3. Are Relators entitled to mandamus relief where Respondents have complied with their ministerial duties?

STATEMENT OF FACTS

I. The Houston Equal Rights Ordinance.

Relators' mandamus petition arises out of the Houston City Council's passage of Ordinance No. 2014-530, better known as the Houston Equal Rights Ordinance ("HERO"). HERO prohibits discrimination based on an individual's sex, race, color, ethnicity, national origin, age, familial status, marital status, military status, religion, disability, sexual orientation, genetic information, gender identity, or pregnancy in city employment and city services, city contracts, public accommodations, private employment (excluding religious organizations), and housing. (Rel.MR:A.)

Passed on May 14, 2014, HERO was officially published on June 3, 2014.

Id.

II. The petition drive and referendum process.

Displeased with the City Council's passage of HERO, Relators and others organized a petition drive to try to force the City Council either to repeal HERO, or, if it was unwilling to do so, to place HERO on the ballot for a referendum vote.

The HERO referendum petition was governed by the multi-step referendum process in Section VII-b of the City Charter. First, within 30 days after an ordinance is published, citizens opposed to the ordinance may compile signatures on a referendum petition "protesting against the enactment or enforcement" of the

ordinance. The petition must be “signed and verified” by a number of signers equal to at least 10% of the total vote cast in a mayoral election within the last three years, and must be filed with the City Secretary. (Charter Art. VII-b, § 3, Resp.MR:2.)

To be valid, a referendum petition must be signed and verified in the “manner and form” set out in the City Charter. The referendum procedures cross-reference and incorporate the City Charter’s procedures for recall petitions in Article VII-a. (Charter Art. VII-b, §§ 3, 2(a), Art. VII-a, Resp.MR:2.) Among other requirements, a person collecting signatures on a petition (a “petition circulator”) must sign an affidavit (a “circulator’s affidavit”) before a notary public on each page of signatures confirming the following:

1. the circulator is one of the signers of the petition,
2. the statements in the petition are true,
3. each signature on the page was made in the circulator’s presence on the day and date it purports to have been made, and
4. the signature is a genuine signature of the person whose name it purports to be.

(Charter Art. VII-a, § 3, Resp.MR:2.) If a page does not contain a proper affidavit, with a proper signature, the signatures on that page are invalid and may not be counted. *In re Francis*, 186 S.W.3d 534, 539 (Tex. 2006) (orig. proceeding)

("[T]he omission of any statutorily required information on a petition renders signatures on that petition invalid.").

Once a referendum petition is filed with the City Secretary, she must within 30 days certify to the City Council (1) the greatest total vote cast for mayor at any city general election held within the last three years, and (2) the "number of valid signatures on [the] petition." As part of a petition's review, it must be confirmed that every signature on the petition complies with all legal requirements in the Texas Election Code and in the City Charter, including the circulators' affidavit requirement.¹ The City Secretary must then present the petition and certificate to the City Council. (Charter Art. VII-b, § 2(b), 3, Resp.MR:2.)

If valid petition pages include a sufficient number of valid signatures, then the City Council must reconsider the ordinance. If it does not repeal the ordinance, the City Council must submit it to popular vote at a special election or at the "next city general election," held in November 2015. (Charter Art. VII-b, § 3 Resp.MR:2.) The ordinance takes effect only if it receives a majority of the votes in an election. *Id.*

¹ Circulators' affidavits are a standard item that city secretaries must review when examining a petition. (Charter Art. VII-a, § 3, Resp.MR:2; Texas Municipal Clerk's Handbook (10th ed.) at page 8-2 (2014). (Resp.MR:4).)

III. The HERO referendum petition failed.

On July 3, 2014, the petition organizers presented to City Secretary Anna Russell a referendum petition that they claimed included approximately 55,000 signatures, 31,000 of which were allegedly “pre-verified.” The “pre-verification” process resulted in the deletion of approximately 40% percent of the signatures for unexplained reasons. (Rel.MR:E.)

When Russell received the HERO Referendum Petition, she began her review. On August 4, 2014, she sent Mayor Annise Parker a memorandum summarizing her conclusions. (Rel.MR:C.)² In her memorandum, Russell first explained that 17,269 signatures were required under the City Charter to pass the referendum. *Id.* She then stated that many of the signatures on the petition were invalid because they were on pages that did not contain a proper circulator’s affidavit, as required by Article VII-a of the City Charter. *Id.* Her memorandum explains:

According to the City Attorney’s Office and reviewed by the City Secretary the analysis of the City Attorney’s Office, 2,750 pages containing 16,010 signatures do not contain sufficient acknowledgment as required by the Charter. Therefore, according to the City Attorney’s Office only 2,449 pages containing 15,249 signatures can lawfully be considered toward the signatures required.

² The memorandum was incorrectly dated August 1, 2014. (Resp.MR:6 ¶ 13.)

Id. Therefore, the referendum failed because it fell short of the required number by approximately 2,000 signatures. Russell has made clear that Relators' "contention that my staff or I 'validated' the July 3 Petition is not correct." (Resp.MR:6 ¶ 12.)

On August 4, 2014, Mayor Parker and City Attorney David Feldman confirmed at a press conference that the referendum petition was rejected because it lacked a sufficient number of valid signatures. The City press release issued that day explained that the petitioners had submitted 5,199 pages of signatures, but only 2,449 pages qualified for consideration. (Rel.MR:D.) That was true because the City Charter requires that each signature be "accompanied by the printed name, address, voter registration number or date of birth and the date signed." *Id.* The press release also explained that the circulators of each page "must also have personally signed the petition, and have appeared before a notary to acknowledge under oath that the signatures were made in their presence." *Id.* It concluded that "[t]housands of the signatures" on the referendum petition "failed to meet one or more of these requirements and had to be disregarded." *Id.*

Because the petition did not contain the required number of valid signatures, the referendum process failed, and the City Council was not required to reconsider HERO or place it on the ballot in the next City general election.

IV. Relators' pending lawsuit.

On August 5, 2014, Relators filed a lawsuit in Harris County District Court, seeking declaratory judgment and injunctive relief to prohibit enforcement of HERO. (Rel.MR:E.)

A temporary restraining order hearing was held that day before visiting Judge John Coselli, but he entered no order. (Resp.MR:11.) In a letter brief submitted the next day, the City stipulated that it would not enforce HERO until after a trial on the merits. (Resp.MR:7.)

A second hearing was conducted on August 7 by Judge Jeff Shadwick, as ancillary judge.³ Rather than entering a TRO, Judge Shadwick entered a “show cause order” stating that the City had agreed to suspend enforcement of HERO until the temporary injunction hearing, and ordering the City to do so. Judge Shadwick set a temporary injunction hearing for August 15. (Rel.MR:L.)

The parties appeared before Judge Robert Schaffer for the hearing on August 15, at which City representatives reaffirmed that HERO would not be enforced until the legal proceedings were resolved. The court expressed doubt that Relators could obtain the temporary injunctive relief they sought given that stipulation, and scheduled trial for January 2015. Relators withdrew their request for temporary

³ Judge Coselli's appointment as ancillary judge had expired at that time.

injunctive relief. (Resp.MR:12 at 31.) In a press conference, Relator Woodfill expressed his satisfaction that HERO would not be enforced until the case was resolved.⁴ Relators' counsel acknowledged that they had received an "expedited" trial date.⁵

V. Mandamus proceeding in court of appeals.

On August 11, 2014, while their lawsuit was pending in the trial court, Relators filed a mandamus petition in the court of appeals. In that petition, Relators copied *verbatim* most of the allegations and argument from their trial court pleadings, and requested the same relief that they requested in the trial court.

The court of appeals denied the petition on August 15, 2014. Recognizing that Relators were "simultaneously pursuing the same relief" in the district court, the court of appeals found that "mandamus relief [was] foreclosed because relators have an adequate remedy by appeal after judgment in the pending trial case." (Resp.MR:1.)

VI. Mandamus proceeding in this Court.

Despite having withdrawn their request for temporary injunctive relief at the August 15 hearing, and having obtained an expedited trial date, Relators filed this

⁴ Mike Morris, *Foes Drop TRO Bid to Force ERO Ordinance to November Ballot*, Houston Chronicle (Aug. 15, 2014). (Resp.MR:8.)

⁵ *Id.*

mandamus petition on August 26, 2014. Just as they did in the court of appeals, Relators again recite many of the same allegations and seek the same relief as they do in the trial court. Specifically, they request that this Court issue a writ of mandamus directing the Respondents to: (1) immediately suspend HERO, (2) immediately reconsider HERO by vote of the City Council, and (3) if HERO is not repealed, to place the issue on the ballot. (Pet. at 21.) In the alternative, Relators request that the Court direct Secretary Russell to “complete her review” of the petition signatures and “certify the number of valid signatures immediately.” (Pet. at 12.)

SUMMARY OF THE ARGUMENT

Relators led an unsuccessful referendum petition drive to repeal HERO. After filing suit in the trial court, and unsuccessfully seeking mandamus relief in the court of appeals, they have now filed a mandamus petition in this Court. Their request for relief is barred by the most fundamental principles governing the right to mandamus in an appellate court.

First, mandamus relief is barred when there are factual disputes. The central controversy here—whether the HERO referendum petition contains a sufficient number of valid signatures to trigger the referendum process—is an inherently factual dispute that is inappropriate for mandamus resolution.

Second, mandamus relief is unavailable if a relator has an adequate remedy at law. Relators have an adequate remedy at law, which they are pursuing through their pending lawsuit. The City has stipulated that it will not enforce HERO until after a trial on the merits currently scheduled for January 2015. Thus, if Relators were entitled to relief, which they are not, the trial court proceeding provides an adequate remedy.

Finally, even if they could overcome these barriers, Relators have not established entitlement to relief on the merits. Relators' legal actions are based on the false premise that the City Secretary "validated" their referendum petition. She did not. Instead, the evidence shows that the City Secretary reported the referendum results to the City Council, but at no time validated the referendum petition. Because the petition failed to garner the necessary number of valid signatures, the Mayor and City Council members had no ministerial duty to reconsider HERO, or submit it to popular vote.

Because Relators have failed to meet the most basic requirements to obtain mandamus review, this Court should deny their Petition.

ARGUMENT

Mandamus is an "extraordinary remedy" that may issue only if the relator establishes both (1) a respondent's violation of a ministerial duty imposed by law, and (2) the absence of a clear and adequate remedy at law. *In re Reece*, 341

S.W.3d 360, 374 (Tex. 2011) (orig. proceeding). This Court “may not deal with disputed areas of fact in an original mandamus proceeding.” *In re Angelini*, 186 S.W.3d 558, 560 (Tex. 2006) (orig. proceeding).

Relators’ mandamus petition fails because the relief it seeks cannot be granted without the resolution of numerous disputed facts regarding the validity of the HERO referendum petition signatures. And, despite their contention that they have no adequate remedy at law, Relators are simultaneously pursuing the same claims and relief in the trial court, with trial set to occur in three months. Even aside from these hurdles, Relators’ petition fails on the merits.

I. Relators are not entitled to suspension of HERO.

As an initial matter, Relators’ request for immediate suspension of HERO is moot because the ordinance will not be enforced until these legal challenges are resolved. Mayor Parker has said so publicly. Furthermore, the City stipulated in its August 6 letter brief to the trial court that it “will not enforce [HERO] . . . until after a trial on the merits.” (Resp.MR:7.) At the August 15, 2014 temporary injunction hearing, City Attorney David Feldman again stipulated that the City would “suspend the enforcement of [HERO] pending disposition of Trial on the Merits.” (Resp.MR:12 at 9.) And, as Relators note, Respondents again “agreed to suspend the enforcement of [HERO] until time of trial” during the August 15 in-chambers meeting with all counsel. (Pet. at 10.) Because HERO is not and will not

be enforced until the pending trial court matter is resolved, Relators' request for "immediate suspension" of HERO is moot.

Moreover, Relators are not entitled to a writ of mandamus directing Respondents to suspend HERO. (Pet. at 1, 21.) Under the City Charter, Respondents have a ministerial duty to suspend a legally-enacted ordinance only if the challengers first submit a referendum petition that contains the requisite number of valid signatures. (Charter, Art. VII-b, § 3, Resp.MR:2.) Because the HERO referendum petition failed to garner the necessary number of valid signatures, the Respondents were not required to suspend the ordinance. The mere fact that Relators challenge the City Secretary's review of the referendum petition does not entitle them to the suspension of HERO while their challenge is resolved in court.

II. Relators are not entitled to reconsideration of HERO.

Relators are also not entitled to a writ of mandamus directing the City Council to reconsider HERO or place it on the ballot.

A. Numerous fact issues preclude mandamus relief.

Relators cannot obtain the mandamus relief they request without the resolution of numerous disputed facts regarding the validity of many of the signatures on the HERO referendum petition. This Court lacks jurisdiction to

resolve disputed issues of fact in a mandamus proceeding. *In re Angelini*, 186 S.W.3d at 560.

Relators have repeatedly acknowledged the inherently factual nature of this dispute. During the TRO hearing, Relators' counsel said that he "didn't go the mandamus route" because the court "wouldn't have jurisdiction" given the genuine issues of fact. (Resp.MR:11 at 19.) He also explained that he had brought the case before the trial court because that was "exactly and precisely" where the issues regarding the validity of the signatures should be resolved. *Id.*

Indeed, this controversy centers on an inherently factual dispute: whether the HERO referendum petition contains a sufficient number of valid signatures to trigger the referendum process. At trial, the court will have to explore the numerous problems and irregularities among the petition pages. For instance, on hundreds of petition pages there is no record that the circulator signed the petition. Hundreds of more pages do not contain a legible circulator's name. Many other pages do not contain a circulator's name or signature at all. On still other pages, circulators improperly notarized their own oath. At trial, the fact-finder will have to resolve factual disputes concerning, among other things:

- whether the statements in the petition pages were true, as required by the City Charter;⁶
- whether certain signatures were properly verified by a circulator, as mandated by the City Charter;
- whether some petition circulators notarized their own oaths; and
- whether fraud was committed by the signers, circulators, or notaries.

Consistent with the fact-intensive nature of this case, the parties have engaged in discovery in advance of trial. In particular, Relators have deposed Secretary Russell regarding the details of her review process. (Resp.MR:10.)

Nevertheless, Relators now assert that no genuine factual disputes exist because Russell “validated” the petition, and because other Respondents’ purported “disqualification” of petition signatures is irrelevant. (Pet. at 17.) But that argument serves only to further highlight the factual issues inherent in this dispute. Indeed, Russell herself has rejected Relators’ characterization of her findings. In her affidavit, she made clear that “[t]he contention that my staff or I ‘validated’ the July 3 Petition is not correct. I made *no determination of the*

⁶ (Charter Art. VII-a, § 3, Resp.MR:2.) In particular, despite the petition’s claims, HERO includes no special provision allowing biological males to enter women’s restrooms. Office of Mayor, Press Release, Broad-Based Group Ready to Defend HERO (Resp.MR:9); Opinion of D. Feldman Re Legislative History of HERO Pertaining to Gender Identify (Resp.MR:5).

validity of the July 3 Petition.” (Resp.MR:6 ¶ 12 (emphasis added).) Nor did Respondents other than Secretary Russell “disqualify” signatures. While Secretary Russell sought appropriate legal advice from the City Attorney, she alone determined whether the signatures complied with the Election Code and City Charter requirements. *Infra* Part II.C.1. To the extent that Relators disagree with her conclusions, or question her credibility, that disagreement constitutes a disputed fact issue related to the central question in Relators’ mandamus petition: whether the referendum petition contained a sufficient number of valid signatures under the City Charter.⁷

These genuine disputes of fact distinguish this case from those cases Relators cite in summary fashion, Pet. at 19-20, none of which involved an analogous factual dispute. The purportedly “strikingly similar” case on which Relators rely, *In re Lee*, 412 S.W.3d 23 (Tex. App.—Austin 2013, orig. proceeding), involved an entirely different set of facts. There, town residents sought mandamus to challenge town officials’ rejection of a recall petition to remove the mayor. That case involved a purely legal question: whether the allegations in the petition constituted sufficient ground for recalling a mayor. *Id.* at

⁷ Mandamus relief is not available to require Russell to count all of the signatures because Texas law does not require her to do so. *Infra* Part III.

25. There were no factual disputes as to whether the petition contained a sufficient number of signatures. *Id.* at 27. Here, in contrast, the sufficiency of the signatures is directly at issue.

This case, instead, is analogous to *Strachan v. Lanier*, 867 S.W.2d 52 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding). In *Lanier*, the court denied mandamus relief because it would have required resolution of factual issues—including alleged fraud and forgery—regarding the sufficiency of many signatures on a petition to remove a candidate from an election ballot. *Id.* at 52-53. Fact issues likewise preclude mandamus relief here.

B. Relators have an adequate remedy at law.

Mandamus relief is also unavailable here because Relators have an adequate remedy at law, which they are pursuing through a mirror-image lawsuit for declaratory judgment and injunctive relief in the 152nd District Court. Relators' petition in that suit seeks the same relief they request here. An expedited trial is set for January 2015.

Despite Relators' claims to the contrary, Pet. at 19, this adequate legal remedy precludes mandamus relief. As this Court has stated, “[t]he requirement that persons seeking mandamus relief establish the lack of an adequate appellate remedy is a fundamental tenet of mandamus practice,” which is “well-settled” in Texas. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding).

This Court has expressly disapproved of any authorities that “might be read as abolishing or relaxing this rule.” *Id.* at 842; *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding).

Because Relators’ pending lawsuit confirms that they have an alternative adequate remedy, their request for mandamus relief must be denied. None of Relators arguments in response warrant a different conclusion.

1. Relators are not entitled to any immediate action.

First, Relators contend that their trial court proceedings are inadequate because the City Charter requires Respondents to act “immediately” on submission of the referendum petition. (Pet. at 18.) But the City Charter sets out only two “immediate” referendum requirements, one of which has already occurred, and a second that Relators’ unsuccessful petition did not trigger.

The first requirement—that the City Secretary certify the number of signatures required to pass the referendum and certify the number of valid signatures on the petition—has already occurred. (Charter Art. VII-b, § 2(b), Resp.MR:2.) Russell’s August 2014 memorandum determined both the number of signatures required for passage and that the HERO petition did not meet that number. (Rel.MR:C.) That Russell did not reach the result Relators sought does not mean that she failed to perform her duties. Relators’ disagreement with the City Secretary’s conclusions must be resolved at trial, not in a mandamus proceeding.

Because the City Secretary did not validate the referendum petition, the second step of the referendum processes—the City Council’s “immediate” reconsideration of the ordinance or popular vote—was never triggered. (Charter Art. VII-b, § 3, Resp.MR:2.) The City Charter does not require Respondents to act, immediately or otherwise, on an unsuccessful referendum petition.

2. Trial is set for January.

Second, Relators contend that they have no adequate remedy at law because “there is absolutely no guarantee whatsoever that the Trial Court will not continue” the January 2015 trial for “a host of reasons,” including the “busy schedule” of Respondents’ attorneys. (Pet. at 18.) That argument is pure conjecture.

Respondents’ counsel are preparing for trial on the date set by the trial court, and timely have sought discovery from plaintiffs involved in the referendum process—discovery to which plaintiffs have objected. There is no reason to believe that the trial will not occur as scheduled.

3. Secretary Russell has no remaining ministerial duty.

Third, Relators maintain that they have no adequate remedy because Secretary Russell has not “completed her ministerial duty of reviewing all of the Referendum Petition signatures,” and that the Court “at the very least should order Respondent Russell to finish her review.” (Pet. at 19.) But, as explained below,

Russell is required only to use a statistical sampling method to review the signatures. She has no ministerial duty to review all of the signatures. *Infra* Part III.

C. The Respondents have complied with their ministerial duties.

Because Relators have an adequate remedy at law and because there are disputed facts, this Court should not reach the merits. Nonetheless, putting aside these legal hurdles, mandamus relief is not proper on the merits.

1. The City Secretary reviewed the Referendum Petition and reported its noncompliance.

The City Secretary—with appropriate legal advice from the City Attorney—fully exercised her ministerial duty to review the signatures on the petition. She then properly reported that it did not contain the requisite number of valid signatures. Relators nonetheless maintain that the City Secretary “specifically certified” that 17,846 signatures from registered voters appeared on the petition, above the 17,269 signatures required, and that she “validated” the petition. (Pet. at 6.) That argument misrepresents her findings.

In her August 2014 memorandum, the City Secretary explained that a determination of the “validity” of a petition depends on its compliance with the Election Code “together with” the City Charter’s requirements, necessarily including the circulator’s affidavit requirement found in Article VIIa § 3.

(Rel.MR:C; Resp.MR:2.)⁸ Russell confirmed in her affidavit that the legal requirements of the City Charter, including the circulator’s affidavit requirements, applied to the HERO referendum petition. (Resp.MR:6 ¶¶ 5-7.)

Because the referendum process is subject to numerous legal requirements, the City Attorney’s involvement in the petition review process is not unusual. The City Attorney is expected, and required, to advise other departments and department heads, including the City Secretary, about the legal requirements of their jobs. (Code of Ordinances, Chapter 2, Art. VII, § 2-258, Resp.MR:3.) Russell has acknowledged that she would “consult with the City of Houston’s Legal Department” when she had “a question about the legal requirements for a petition,” and that she did so “in connection with the July 3 Petition.” (Resp.MR:6 ¶ 8; Resp.MR:11 at 64-68.) After receiving the HERO petition, Russell and her staff “had discussions with the Legal Department” regarding the applicable legal requirements and “received a list of qualified voters in the City of Houston.” She used that list “during the review to determine whether each signor was a qualified voter of the City of Houston.” (Resp.MR:6 ¶¶ 9, 10; Resp.MR:10 at 65-68.)

⁸ Relators rely on *In re Roof*, 130 S.W.3d 414 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding), to support their argument that the City Secretary must only confirm that signatories are registered Houston voters. (Pet. at 9.) *In re Roof*, however, discussed Galveston’s city charter, not that of Houston. Moreover, *Roof* merely recounted the undisputed obligations of the city secretary in that case. *See id.* at 416-18.

After the petition was reviewed for compliance with all legal requirements, it was determined that many of the signatures were on pages that did not contain a proper circulator's affidavit. (Resp. MR:6 ¶¶ 10, 14.) Russell "personally reviewed" the City Attorney's analysis of the petitions, and attached a copy of the analysis to her memorandum. (Resp. MR:6 ¶ 14; Rel.MR:C.) Applying all of the requirements of the Election Code and the City Charter, Russell reported that 2,750 pages of the petition—containing 16,010 signatures—did not meet all legal requirements:

According to the City Attorney's Office and reviewed by the City Secretary the analysis of the City Attorney's Office, 2,750 pages containing 16,010 signatures do not contain sufficient acknowledgment as required by the Charter. Therefore, according to the City Attorney's Office only **2,449 pages containing 15,249 signatures can lawfully be considered toward the signatures required.**

(Rel.MR:C (emphasis added).) The HERO referendum petition thus fell more than 2,000 signatures short of the number required, and Secretary Russell did not validate the petition. (Resp.MR:6 ¶ 12.) Although she did not reach the result Relators desire, Russell fully performed her ministerial duties.

2. The Mayor and City Council have no ministerial duty to order a referendum.

Because the City Secretary's memorandum reported an insufficient number of valid signatures, the Mayor and City Council had no ministerial duty to reconsider HERO, or submit it to popular vote. (Charter Art. VII-b, § 3,

Resp.MR:2.) As Relators acknowledged during the TRO Hearing, these actions are mandated only if the City Secretary first reports a sufficient number of valid signatures. (Resp.MR:11 at 22-23.) That never occurred.

III. Secretary Russell has no further ministerial duty.

There is no basis for Relators' "alternative" mandamus request—which does not appear in their prayer—that the Court direct Secretary Russell to “complete her review” of the petition signatures, and “certify the number of valid signatures immediately.” (Pet. at 12, 17-18.) The City Secretary has stated that all of the signatures were reviewed by her office and the City Attorney’s office. The City Secretary reviewed the City Attorney’s findings, and she reported to the Mayor and City Council that the City Attorney found that many of the pages were invalid and that any signatures on those pages could not be counted. Therefore, as the City Secretary reported, every signature was reviewed.

Moreover, Relators provide no legal authority that would require Russell to count all of the signatures or to “extrapolate” her findings. Rather, Section 277.003 of the Texas Election Code provides that the City Secretary “may use any reasonable statistical sampling method” to count petition signatures. TEX. ELEC.

CODE § 277.003.⁹ The City Secretary has discretion to select a sampling method, so long as it counts no less “than 25 percent of the total number of signatures appearing on the petition or 1,000, whichever is greater.” *Id.* As Relators acknowledge, the City Secretary’s method counted 30% (19,177) of the signatures on the petition. (Pet. at 17.) Russell therefore complied with her ministerial duties under the Election Code. Russell may not be ordered by mandamus to perform a duty not required by law.

Finally, Relators’ request that the City Secretary review “all 55,000+ signatures” is frivolous, because Relators crossed through all but 31,000 signatures before they delivered the petition to the City. (Resp.MR:10 at 28.) The Secretary is not obligated to review signatures that Relators previously removed from the petition.

CONCLUSION AND PRAYER

For these reasons, Respondents respectfully request that this Court deny the petition for writ of mandamus. Respondents also request all further relief to which they are entitled.

⁹ This section applies to petitions containing more than 1,000 signatures. TEX. ELEC. CODE § 277.003.

Respectfully submitted,

HAYNES AND BOONE, LLP

/s/ Lynne Liberato

Lynne Liberato

State Bar No. 00000075

Kent Rutter

State Bar No. 00797364

William Feldman

State Bar No. 24081715

Katie Dolan-Galaviz

State Bar No. 24069620

1221 McKinney, Suite 2100

Houston, Texas 77010-2007

Telephone: (713) 547-2000

Telecopier: (713) 547-2600

Lynne.Liberato@haynesboone.com

Kent.Rutter@haynesboone.com

William.Feldman@haynesboone.com

Katie.Dolan-Galaviz@haynesboone.com

Counsel for Respondents

*Annise D. Parker, Mayor, City of
Houston; Anna Russell, City Secretary,
City of Houston; and the Members of the
Houston City Council, City of Houston*

OF COUNSEL:

CITY OF HOUSTON LEGAL DEPARTMENT

David Feldman
State Bar No. 06886700
Lynette Fons
State Bar No. 13268100
Judith L. Ramsey
State Bar No. 16519550
900 Bagby, 4th Floor
Houston, Texas 77002
Telephone: (832) 393-6462
Telecopier: (832) 393-6259
David.Feldman@houstontx.gov
Lynette.Fons@houstontx.gov
Judith.Ramsey@houstontx.gov

SUSMAN GODFREY LLP

Geoffrey Harrison
State Bar No. 00785947
Alexander Kaplan
State Bar No. 24046185
Kristen Schlemmer
State Bar No. 24075029
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
Telephone: (713) 651-9366
Telecopier: (713) 654-6666
gharrison@susmangodfrey.com
akaplan@susmangodfrey.com
kschlemmer@susmangodfrey.com

NORTON ROSE FULBRIGHT

Edward B. "Teddy" Adams, Jr.

State Bar No. 00790200

Andrew Price

State Bar No. 24002791

Seth Isgur

State Bar No. 24054498

Geraldine W. Young

State Bar No. 24084134

1301 McKinney, Suite 5100

Houston, Texas 77010-3095

Telephone: (713) 651-5151

Telecopier: (713) 651-5246

teddy.adams@nortonrosefulbright.com

andrew.price@nortonrosefulbright.com

seth.isgur@nortonrosefulbright.com

geraldine.young@nortonrosefulbright.com

CERTIFICATE OF COMPLIANCE
TEX. R. APP. P. 9.4(i)(3)

I hereby certify that this Response contains a total of 4,485 words, excluding the parts of the brief exempted under TEX. R. APP. P. 9.4(i)(1), as verified by Microsoft Word 2010. This Response is therefore in compliance with TEX. R. APP. P. 9.4(i)(2)(D).

Dated: October 20, 2014.

/s/ Lynne Liberato

Lynne Liberato

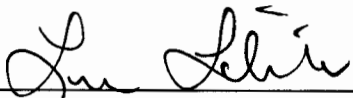
Counsel for Respondents

*Annise D. Parker, Mayor, City of
Houston; Anna Russell, City Secretary,
City of Houston; and the Members of the
Houston City Council, City of Houston*

VERIFICATION

STATE OF TEXAS §
 §
COUNTY OF HARRIS §

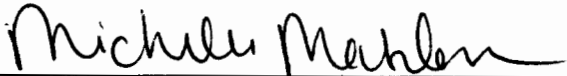
BEFORE ME, the undersigned Notary Public, on this day personally appeared Lynne Liberato, who, being by me duly sworn on her oath, deposed and said that she is an attorney for Respondents Annise D. Parker, Houston Mayor; City of Houston; Anna Russell, Houston City Secretary; and Houston City Council; that she has read the foregoing Response to Petition for Writ of Mandamus; that the documents included in the mandamus record are true and correct copies of the originals; and that every factual statement is supported by competent evidence included in the record.



Lynne Liberato

SWORN TO AND SUBSCRIBED before me on this 20th day of October 2014, to certify which witness my hand and seal of office.





Notary Public in and for
the State of Texas

CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of the *Respondents' Response to Petition for Writ of Mandamus* was served on the following on this 20th day of October, 2014:

Counsel for Relators Jared Woodfill, Steven F. Hotze, MD, F.N. Williams, Sr., and Max Miller:

Andy Taylor
Amanda Peterson
ANDY TAYLOR & ASSOCIATES, P.C.
2668 Highway 36S, #288
Brenham, Texas 77833

Via E-Service

Trial Court Judge:

Honorable Robert Schaffer
152nd District Court
Harris County Civil Courthouse
201 Caroline, 11th Floor
Houston, Texas 77002

Via Hand Delivery

/s/ Lynne Liberato
Lynne Liberato