IN THE SUPREME COURT OF TEXAS

NO. 15-0632

IN RE SHANNON DORN ET AL., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE BROWN, joined by JUSTICE GREEN, concurring in the denial of the petition for writ of mandamus.

On August 28, 2015, the Court issued an order denying the relators' petition for writ of mandamus in this case. I write to provide some explanation for that denial and to distinguish this case from a seemingly similar matter on which we recently ruled.

This case concerns the relators' effort to amend the city charter of San Marcos to prohibit the city from using fluoridated water. On April 2, 2015, the relators submitted a petition seeking that the proposed amendment be included on the city's general-election ballot for November 3, 2015. Under section 3.005(c)(2) of the Election Code, the latest date any proposed city charter amendments could be added to the November ballot was August 24, 2015.

On May 5, 2015, the city clerk informed the relators that the petition was invalid because it did not include an oath or affirmation that "the statements were true, that each signature . . . is the genuine signature of the person whose name purports to be signed thereto, and that such signatures

were placed thereon in the person's presence." The parties dispute whether the city charter requires such an oath or affirmation in this instance.

The relators sent letters to the city on May 18 and June 16 insisting that city officials had improperly refused to perform ministerial duties regarding the petition and demanding that they do so immediately. But the relators took no legal action to force the city's hand. Instead, on June 18 the city filed a declaratory-judgment action in district court in Hays County. Despite the looming deadline, the relators waited until July 17 to answer the city's lawsuit and counterclaim for declaratory, injunctive, and mandamus relief—more than ten weeks after the city had refused the petition.

On August 14, the trial court ruled for the relators and ordered the city to review their petition without requiring any affirmation or verification of the signatures. The city filed a notice of appeal the next day, staying any further action by the trial court. On August 21, six days after the city filed its notice of appeal, the relators sought mandamus relief in this Court.

We deploy mandamus as an extraordinary and discretionary remedy, not as a matter of right. *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (citing *Callahan v. Giles*, 137 Tex. 571, 575, 155 S.W.2d 793, 795 (1941)). And though mandamus is not an equitable remedy, equitable principles govern its issuance. *Id.* (citations omitted). "One such principle is that '[e]quity aids the diligent and not those who slumber on their rights.'" *Id*. (quoting *Callahan*, 137 Tex. at 576, 155 S.W.2d at 795).

The relators knew on May 5 that the city had refused to consider their petition. Yet with the August 24 statutory deadline less than 16 weeks away, the relators waited more than ten weeks

before seeking mandamus relief from the district court. Even then, the relators sought mandamus only in response to the city's request for declaratory relief, and only after the city's lawsuit had been on file for nearly a month. To top it off, it took the relators almost a week to ask for a mandamus from this Court once the city had appealed the trial court's ruling. By then the statutory deadline was just three days away.

The relators have offered no explanation for their failure to diligently pursue the remedies available to them. Instead, they blame the city for employing "procedural maneuvers" and "doing nothing to resolve its claims in a timely manner" once it had filed its lawsuit. But nothing the city did or did not do absolves the relators from their duty to diligently pursue their rights. We will not grant extraordinary remedies to litigants who "slumber on their rights" and then demand expedited relief. *Callahan*, 137 Tex. at 576, 155 S.W.2d at 795; *see also In re Int'l Profit Assocs.*, 274 S.W.3d 672, 676 (Tex. 2009) (per curiam) ("delaying the filing of a petition for mandamus relief may waive the right to mandamus unless the relator can justify the delay").

The relators' failure to diligently pursue relief likewise belies their justification for not first seeking mandamus in the court of appeals. The rules provide that "[i]f [a] petition is filed in the Supreme Court without first being presented to the court of appeals, the petition must state the compelling reason why the petition was not first presented to the court of appeals." Tex. R. App. P. 52.3(e). In this case, the relators assert that because of the impending statutory deadline, they "have a compelling reason to submit this petition to the Supreme Court to secure finality now rather than first going to the Austin Court of Appeals." Yet as the urgency the relators face is of their own making, it is no excuse for skipping past the court of appeals. Moreover, the fourteen courts of

appeals have mandamus jurisdiction for a reason. This Court cannot be the sole arbiter of expedited extraordinary relief in a state of nearly 30 million people spread out across 254 counties.

The dissent draws some comparisons between this case and *In re Woodfill*, ___ S.W.3d ___, 2015 WL 4498229 (Tex. July 24, 2015) (per curiam). In *Woodfill*, we granted mandamus relief to order the City of Houston to either repeal an ordinance or submit it to the voters for approval in the next general election. *Id*. at *7. But *Woodfill* is easily distinguished from this case. For instance, the petition organizers in *Woodfill* gathered their signatures and submitted their petition over a year before the statutory deadline—not less than six months before as the relators in this case. *Id*. at *2. The *Woodfill* petition organizers also sued the city in district court for declaratory and injunctive relief immediately upon its rejection of their petition. *Id*. at *3. In addition, within a week of the city rejecting the petition, the petition organizers filed an original mandamus proceeding in the court of appeals. *Id*. The same day the court of appeals denied that mandamus, the petition organizers filed a supplemental petition in district court, requesting a writ of mandamus from that court. *Id.* These early attempts at extraordinary relief were denied in light of the appellate remedy the petition organizers could pursue once they had obtained a final judgment in their action for declaratory and injunctive relief. *See id*. It was only after that appellate remedy later proved inadequate, and—unlike this case—after we had received full briefing from the petition organizers and the city, that this Court granted mandamus on July 24, 2015. *Id.* at *6–7. The relatively short-lived and sporadic activity in the case at bar bears little resemblance to the protracted and relentless litigation that finally resulted in a mandamus in *Woodfill*.

Process matters. Regardless of the merits of their claims, the relators in this case have failed to show, under this Court's well-established rules, principles, and expectations, that they are entitled to the extraordinary relief they seek.

_____
Jeffrey V. Brown
Justice

OPINION DELIVERED: September 4, 2015