Supreme Court of Texas

No. 22-1119

In re Stetson Renewables Holdings, LLC and
Ogallala Renewable Project, LLC,

Relators

On Petition for Writ of Mandamus

JUSTICE YOUNG delivered the opinion of the Court.

Relators bring a petition for writ of mandamus and a motion for temporary relief directed against the Comptroller. At issue are relators' timely applications for participation in a statutory program that allows ten years of considerable property-tax incentives.[1] Under the statute, the

[1] Multiple other similarly situated entities have filed petitions and motions that present the same legal issue. Those cases are Nos. 22-1120, *In re Monte Alto Windpower, LLC*; 22-1125, *In re Austin Bayou Solar, LLC*; 22-1131, *In re Equistar Chems, LP.*; 22-1132, *In re Horseshoe Bend Solar, LLC*; 22-1133, *In re Monarch Energy Development, LLC*; 22-1136, *In re Hecate Energy Dovetail Solar 1, LLC*; 22-1146, *In re Naturgy Candela Devco, LLC*; 22-1151, *In re Starr Solar Ranch 1, LLC*; 22-1152, *In re Rowdy Creek Solar, LLC*; 22-1156, *In re Zeus Renewable Energy Dev., LLC*; 22-1158, *In re Olympus Solar, LLC*; 22-1161, *In re Seadrift Solar, LLC*; 22-1163, *In re BNB Tennyson Solar, LLC*; 22-1168, *In re Leeward Renewable Energy, LLC*; and 22-1169, *In re Catalyst Energy, Inc*. The Court denies these petitions in separate orders issued today.

Comptroller must evaluate these applications within 90 days. But the statute also contains another relevant mandate: that no new applications may be approved after December 31, 2022. The Comptroller anticipated and planned for a surge in filings because of the coming expiration. Nonetheless, he tells us, the volume of applications so greatly exceeded his projections that he cannot fulfill his part in the process before the dawn of New Year's Day. Because of this administrative bottleneck, relators will be barred from pursuing the program, to their detriment and that of the many school districts eager for relators' investments.

Relators now ask this Court for temporary and mandamus relief in light of the Comptroller's failure to complete his ostensibly ministerial and non-discretionary duties. We cannot grant that relief, however, because the dispute reduces to a policy question. The legislature imposed, but is not itself constrained by, the current deadline. Even after December 31 passes, the legislature, if it chooses, could require that all timely filed applications be deemed approved. Or it could retroactively waive the December 31 deadline for any application that was otherwise timely filed and direct the Comptroller to continue processing those applications. Or the legislature could revive access to the program for everyone, either for a set period or permanently. Relators identify several variations of these options and ask this Court to impose them. Under the statute as it stands, however, any such relief would trespass beyond the judicial realm and into the policy decisions that are proper for the other branches.

I

We begin with some background. The Texas Economic

Development Act, a statute first enacted in 2001,[2] allows school districts to offer property-tax incentives to businesses willing to make eligible investments within the districts' boundaries. Access to the statutory program—often called "Chapter 313" because of its location within the Texas Tax Code—expires on December 31, 2022. *See* Tex. Tax Code § 313.007. This hard deadline, when combined with the complex nature of the application process, has created a race against time.

The Comptroller recently told relators that they will lose that race. The single biggest hurdle is the mandatory "economic impact evaluation," which the Comptroller must complete before the rest of the process can continue. *See id.* § 313.025(b) (requiring preparation of an economic-impact evaluation); *id.* § 313.026 (describing contents of an economic-impact evaluation). According to the Comptroller, a lack of available resources means that December 31 will pass before he can complete the economic-impact evaluation for relators' applications. Such an evaluation, to be clear, is neither the first step nor the last. There is no guarantee of ultimate success *even if* the Comptroller's evaluation is favorable.[3] But what is guaranteed is that any application lacking the certification that can only follow from a completed economic-impact

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[2] Act of June 17, 2001, 77th Leg., R.S., ch. 1505, 2001 Tex. Gen. Laws 1505 (codified at Tex. Tax. Code § 313.001–.171).

[3] Chapter 313's multi-step process is complicated, but it both begins and ends with a school district. It is not necessary to comprehensively describe the process except to note that it is purposefully detailed, relies heavily on the Comptroller as a gatekeeper, and can be found in the provisions of Chapter 313 of the Tax Code and the Comptroller's corresponding regulations. *See* 34 Tex. Admin. Code § 9.1051–.1060.

evaluation is doomed. The Comptroller's refusal to further act on relators' applications, which were timely filed many months ago,[4] amounts to denying them participation in the program no matter how meritorious each proposed investment is or how much the local school districts desire those investments.[5]

Nothing suggests that the Comptroller refused to proceed out of a desire to harm relators or because he opposes Chapter 313. Instead, he contends, he has done and is doing all that can be done under the circumstances.[6] He had anticipated an influx of Chapter 313 applications before the program's termination and substantially increased the number of employees and contractors who were trained and available to work on them. But the actual volume of applications greatly surpassed even those expectations and has overwhelmed his staff's ability to complete the

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[4] Earlier this year, the Comptroller provided this informal advice to applicants, which remains on the Comptroller's website: "There is not a formal submission deadline; however[,] to be safe, we recommend that all applications be submitted to the Comptroller's office by June 1, 2022[,] to ensure there is ample time for processing and approvals." Glenn Hegar, Texas Comptroller of Public Accounts, https://comptroller.texas.gov/economy/local/ch313/faq.php (last visited Dec. 28, 2022). The applications at issue in this petition, as in other petitions filed by other relators, *see supra* note 1, were filed before the Comptroller's apparent safe-harbor date of June 1.

[5] Several amicus briefs filed by school districts in this and similar cases have explained in great detail the serious consequences to them that will follow if the applications are unsuccessful.

[6] Relators express skepticism. They note that, although the Comptroller has had their applications for several months—even half a year—they did not hear until December, as the clock was running out, that his prior guidance was mistaken. That is, not until this month did relators learn that the Comptroller will not process their applications despite their having followed his recommendation on when to apply.

evaluations. Simply reallocating staff would not solve the problem either, he says, because completing an economic-impact evaluation is unusually complex and only those with substantial training can do the work. Accordingly, he says, it would simply be futile to further process these applications given the looming deadline. Moreover, he claims that it is up to him to allocate his scarce resources where they are most needed and effective. Unfortunately for relators, he has concluded that their applications do not warrant the expenditure of limited resources as much as other applications.

II

All of this remains merely the background of the legal problem for this Court, which is whether relators have a judicially enforceable right to compel the Comptroller to act on their applications and to extend the statutory deadline to account for the processing delays. That legal problem, in turn, has two basic components. First, relators have done everything required of them to reach this step in the Chapter 313 process. They were not "late" in filing their applications. Second, for applicants who reach this step, the statute states that the economic-impact evaluation "*shall* be completed . . . as soon as practicable *but not later than the 90th day* after the date the comptroller receives . . . the application." Tex. Tax Code § 313.025(b) (emphases added); *see also id.* § 313.025(d) ("Not later than the 90th day after the comptroller receives . . . the application, the comptroller *shall*" either issue a certificate or explain why he will not issue one. (emphasis added)).

We readily agree, at least for argument's sake, that the Comptroller's duties to conduct economic-impact evaluations and to do

so within 90 days are ministerial and non-discretionary. Our law contains many such commands for agencies to undertake ministerial actions within a stated time, without any further statutory guidance on what happens if the command is broken.[7] Such commands are part of *the law*; whether they prescribe a consequence, and whether they are characterized as "mandatory" or "directory," they are not mere suggestions to be disregarded.

At the same time, as the legislature is fully aware, resource constraints are common in both the public and private sectors. Sometimes there are insufficient funds to hire enough workers to get the job done; sometimes there are plenty of funds but an insufficient pool of qualified workers for the job. Circumstances occasionally prevent even the most conscientious public servant from achieving all that the

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[7] We have repeatedly addressed such statutory provisions. *See, e.g.*, *City of DeSoto v. White*, 288 S.W.3d 389, 392–93 (Tex. 2009) (addressing statute that required the head of a police department to file a written statement giving the reasons for suspending an officer within 120 hours of the suspension); *Suburban Util. Corp. v. PUC*, 652 S.W.2d 358, 361–62 (Tex. 1983) (holding that PUC's failure to render a decision within the statutory 60-day deadline did not void the order); *see also Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 311 (Tex. 1976) (holding that Savings and Loan Commissioner's failure to render a decision within a 45-day application deadline did not render his approval order void). The Administrative Procedure Act and many other statutes that direct how state agencies conduct the public's business include requirements without prescribing a particular outcome if the requirement is not met. *See, e.g.*, Tex. Gov't Code § 2001.143 (requiring that an ALJ sign a final order in a contested case hearing within 60 days after the hearing concludes); *id.* § 552.231(c) (requiring a governmental body, after receiving a public information request that it determines would require programming or manipulation of data, to provide a written statement to that effect within 20 days); Tex. Health & Safety Code § 12.0146 (providing that the Department of State Health Services "shall publish" each year an analysis of its enforcement actions).

legislature requires within the timeframe provided. When doing *everything* becomes impossible, the government—like the private sector—must engage in triage. At least as a general matter, that triage process is for the relevant government official, here the Comptroller, who must assess how to deploy his limited resources most effectively. This decision generally *does* entail an exercise of discretion. *Cf. Tarrant Reg'l Water Dist. v. Johnson*, 572 S.W.3d 658, 670 (Tex. 2019) (noting that "judgments . . . about the proper allocation of taxpayer resources [are] the kind of policy decision[s] committed to the other branches of government" (internal quotations and alterations omitted)); *Kassen v. Hatley*, 887 S.W.2d 4, 10 (Tex. 1994) (explaining that "how to allocate a scarce pool of state resources" presented a discretionary decision that was ill-suited for "second-guessing in the courtroom"); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761–62 (2005) (noting that statute's use of "shall" did not eliminate discretion in how to use limited resources).

The legislature, of course, has ways to channel the proper exercise of such discretion. It can expressly elevate priority levels, perhaps by mandating that one category of tasks may not be undertaken if a more important category is disregarded. Or it can articulate the consequences of failing to meet a deadline or to otherwise comply with a command.[8] For example, Chapter 313 states that the economic-impact evaluation "shall" be completed within 90 days, but it could have added that the failure to

[8] One example that is easy to take for granted: under the Administrative Procedure Act, "[a] rule is voidable unless a state agency adopts it in substantial compliance" with the procedural requirements delineated in "Sections 2001.0225 through 2001.034." Tex. Gov't Code § 2001.035.

act within 90 days would constitute an approval by operation of law.[9] Or, to avoid risking unintended approvals of meritless applications, other tools (like access to an administrative hearing) could likewise signal the importance of timeliness.

The mere existence of so many different potential consequences of the failure to abide by a statutory requirement—particularly given that the legislature can freely choose among them—should generate judicial caution. After all, an "express statutory deadline," like the 90-day period here, does not necessarily mean that the legislature "intended for *courts* to enforce the deadline." *Nielsen v. Preap*, 139 S. Ct. 954, 969 n.6 (2019) (emphasis added). Before rushing to act as enforcer, courts must be confident that they are not inadvertently *undermining* a legislative choice. That risk is particularly acute if a judicial remedy that seeks to vindicate a violated deadline (or something similar) might itself compel violating some other statutory command, like the termination of a statutory program. Here, the 90-day deadline is unaccompanied by any textual indication that the Comptroller's failure to act could in any way suspend the legislature's unambiguous command that program eligibility must end on December 31. Tex. Tax Code § 313.007.

To be clear, no government official should ever feel free to

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[9] *See, e.g.*, Tex. Local Gov't Code § 232.0025(i)(2) (providing that "an application is granted by operation of law" if the "commissioners court or the court's designee fails to approve, approve with conditions, or disapprove a plat application as required by this subchapter"); 47 U.S.C. § 160(c) (providing that forbearance petitions submitted to the Federal Communications Commission "shall be deemed granted if the Commission does not deny the petition . . . within one year after the Commission receives it").

disregard a statutory deadline or any other statutory command. Quite the opposite. All law should be followed, and the legislature has ample authority to examine the failure to comply. After its analysis, the legislature can determine whether such a failure was (1) a lawful exercise of discretion in light of a lack of resources, emergency conditions, or other acceptable reasons or (2) a lawless act in derogation of statutory authority. *Either* conclusion could justify legislative responses: that more resources are needed; that the relevant deadlines or requirements should be modified; that consequences like automatic approval upon an agency default are warranted; that the existing statutory requirement should altogether be eliminated; that the administrative duty or authority should be transferred to a different agency; that remedies should be available for courts to impose; or that accountability should be achieved in any of a myriad of other ways. Such choices are the proper domain of the *legislature.*

Said differently, even when there is no judicially enforceable consequence of a broken deadline, a mandatory deadline can still be both *mandatory* and far from pointless.[10] Deadlines or similar directives can be part of the other two branches' joint administration of the policy of the State without inviting the judiciary's participation. For all the reasons stated above, it is still valuable for the law to signal legislative

[10] To further emphasize the point, even when there is no judicially enforceable consequence of a broken deadline, that says nothing about *whether it is in fact mandatory*. *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 115 (2012) ("What is the effect of failing to honor a mandatory provision's terms? That is an issue for a treatise on remedies, not interpretation.").

expectations in the form of commands. They are no less *commands* even when the legislature does not provide a judicial remedy for their violation. Like all citizens, government officials should follow the law *because it is the law*, not merely for fear of consequences that courts might exact upon a proven violation of the law.

Fashioning an extratextual judicial remedy against the executive branch—particularly in a delicate field like tax policy—creates a serious risk that the courts will intrude into the prerogatives of *both* other branches. Most obviously, courts should not interfere in the executive's administration of the state government by mandamus unless the law shows that an official's conduct (or lack of conduct) is unlawful and not an exercise of discretion. But the legislature's authority is at stake, too. In the present context, any judicial remedy risks undermining the legislature's authority to declare the end of Chapter 313. Even if that were not so, though, devising ways to judicially "enforce" a duty can risk supplanting the legislature because it is primarily for the legislature to determine how far it is worth pressing to achieve compliance with its own statutory directives. *See, e.g.*, *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 570 (Tex. 2014) (citing *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987)).

To justify the judiciary's authority to extend the statute's availability beyond its expiration date, relators point to inapposite contexts. They lead with election cases, but that proves too much. True, in such cases, courts sometimes—though even there with extreme caution—may play a more active part. But there is ample and express *statutory* authority for a judicial role. *See, e.g.*, Tex. Elec. Code § 273.061

(expressly authorizing appellate courts to grant mandamus relief in the election context). Perhaps more importantly, the judicial duty to remedy election-law violations reflects the fundamental principle that our citizens each have a "*right* to vote," which is what "makes self-government possible and undergirds the premise that the government has the consent of the governed." *In re Khanoyan*, 637 S.W.3d 762, 763 (Tex. 2022) (emphasis added). Tax incentives, by contrast, do not implicate such rights in and of themselves. The legislature never had to create Chapter 313 or anything like it. Having enacted the program, any decision about whether to continue it, expand it, or stop new applications from being considered under it is purely a matter of legislative discretion.[11]

Relators also argue that the Court can suspend Chapter 313's termination because of the Comptroller's earlier guidance that applicants should file by June 1. Their point is not merely the Comptroller's inability to process the applications, which we addressed above. Instead, they say, the Comptroller voluntarily offered June 1 as a safe harbor. Relators note that many applicants followed his lead and thus rushed to file earlier than the law required, only for the Comptroller to run out the clock and essentially tell a group of them that it was all for nothing and

[11] Likewise unavailing are cases involving judicial administration of the litigation process. The courts have inherent responsibility and authority over that process, which often implicates due-process concerns. But even there, some inflexible rules—like the need for a timely notice of appeal—provide no opportunity for relief regardless of how sympathetic a claim may be. *See, e.g.*, *Mitschke v. Borromeo*, 645 S.W.3d 251, 260 (Tex. 2022) ("[T]he lack of a timely notice of appeal is the most fundamental procedural error that *can* lead to a total loss—and that is because the absence of a timely notice of appeal prevents the appellate court from ever exercising jurisdiction in the first place.").

that they were out of luck. Applicants may have spent substantial time and money just to prepare the applications on an accelerated schedule and believed that they could rely on the Comptroller's representations. Many such applicants, like relators here, argue that the guidance was treacherous, constituting the sort of government misconduct that requires judicial review. They point to *Mosley v. Texas Health & Human Services Commission*, 593 S.W.3d 250 (Tex. 2019), as a case that justifies a strong response from the courts. *Mosley*, however, points the other way because it redressed a fundamentally different kind of problem.

In *Mosley*, the government itself affirmatively misled a *pro se* litigant who was fighting to prevent a state agency from adding her name to a registry. The registry was a kind of blacklist, functionally equivalent to withdrawing a needed license for Mosley to work in her chosen field. *Id.* at 254. The agency that ruled against her in administrative proceedings told her that she would lose her right to judicial review of that decision unless she immediately filed suit in district court. *Id.* at 255. She did so—and the government turned around and said that it had been wrong all along, and that because Mosley followed its direction to file suit (rather than seek rehearing in the agency), she had lost any chance of obtaining review of the agency's decision. *Id.* at 256. This Court agreed with the government's position (not the one that Mosley relied upon, but the one that it switched to after her reliance) that the Administrative Procedure Act indeed conditioned jurisdiction on the filing of a motion for rehearing before the agency. *Id.* at 258–62. But we also held that the government's misrepresentations had "deprived Mosley of her right to judicial review and violated her

right to due process." *Id.* at 263. As a remedy for this constitutional deprivation, the Court directed the agency to reopen its case against Mosley so that she could comply with the proper procedure and then, if necessary, seek judicial review. *Id.* at 269.

There are several important distinctions between this case and *Mosley*. First, the relief in *Mosley* was typical of that case's due-process context—the vacatur of a governmental decision that had been tainted by the constitutional violation. Reopening a case so that it could proceed unimpaired by constitutional infirmity is far different from a request to extend the life of a statute when the legislature itself has determined that the statute should end.

Second, the guidance offered by the Comptroller was materially different from what the government did in *Mosley*. Far from concealing the central issue and misdirecting parties, as in *Mosley*, the Comptroller's guidance affirmatively notified the public that the 90-day requirement was *not* practicable. The whole point of the notice was not that the Comptroller would follow the statute and process applications if applicants filed by June 1—the point was that they should file early because the resource constraints made it *impossible* for him to adhere to that 90-day mandate. Conditions turned out to be even more arduous than he expected, but that is merely a difference of degree, not of kind. Unlike the affirmatively false and prejudicial guidance that *caused* the loss of Mosley's substantial rights, the Comptroller's guidance did not *cause* such a loss. If anything, the guidance signaled the need for unusual dispatch and made it more likely that any given application could be processed in time. It would have been more analogous to *Mosley*

if the Comptroller had told parties that they could proceed only if they filed *later* in the year—with less than 90 days left—rather than earlier.

Finally, unlike the federal and state due-process and due-course deprivations in *Mosley*, no constitutional right appears to be at stake here. Courts obviously must ensure compliance with due-process principles when judicial review is at stake in the context of litigation. But whether to authorize tax incentives is generally a matter of legislative discretion. *Cf. Commissioner v. Sullivan*, 356 U.S. 27, 28 (1958) (describing tax deductions as a "matter of grace"). Nothing suggests that the Comptroller affirmatively violated a freestanding constitutional requirement (to take an extreme example, if he had agreed to process applications of only one racial or religious group). Such a separate *constitutional* violation would be more akin to the circumstance in *Mosley*. But the most that we have is the assertion that, *in extremis*, the Comptroller prioritized the most promising applications. The results of such triage may be mistaken or misguided, but that does not plausibly state a constitutional problem.

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In the end, the real problem for relators is the expiration of Chapter 313. But for that deadline, it would not much matter if the Comptroller's resources were insufficient to process the applications in 90 days or far longer. The reason that the coach turns into a pumpkin at midnight on New Year's Eve, however, is because the legislature so willed that result long ago. If the pumpkin is again to be a coach, that too must follow from the legislature's will. We are by no means unsympathetic to relators' plight, but the constitutional separation of

powers requires that they direct their claims to the one body that can address them. This Court is not that body. We possess only judicial and not legislative power.

Relators' petition for writ of mandamus and their accompanying motion for temporary relief are accordingly denied.

Evan A. Young
Justice

OPINION DELIVERED: December 30, 2022