

**CAUSE NO.** \_\_\_\_\_

**HARLINGEN FAMILY DENTISTRY,  
P.C.,**

*Petitioner,*

**VS.**

**DR. KYLE JANEK, Executive  
Commissioner of Texas Health and Human  
Services Commission, and DOUG  
WILSON, Inspector General, for the Office  
of the Inspector General,**

**Respondents.**

**IN THE DISTRICT COURT**

**JUDICIAL DISTRICT**

**TRAVIS COUNTY, TEXAS**

# PETITION FOR WRIT OF MANDAMUS

NOW COMES Petitioner Harlingen Family Dentistry (HFD) and files this Petition for Writ of Mandamus and would show the Court as follows:

## NATURE OF THE CASE & DISCOVERY

1. This is a mandamus action to compel the release of funds withheld in violation of a HHSC final order. The OIG did not appeal the final order, but will not comply with its terms. Discovery should be conducted under Level 2 of Texas Rule of Civil Procedure 190.3.

## PARTIES

2. Plaintiff Harlingen Family Dentistry, P.C. (hereinafter “Plaintiff HFD”) is a Texas Professional Corporation formed and owned by Juan Villarreal, DDS. HFD is the subject of the HHSC final order.

3. Respondent Dr. Kyle Janek (hereinafter "Respondent Janek"), Executive Commissioner of the Texas Health and Human Services Commission (hereinafter "HHSC"), is sued in his official and individual capacity. Respondent Janek is the proper party to sue on an allegation of *ultra vires* actions and to obtain injunctive relief. Respondent Janek can be served with citation at 4900 North Lamar, Austin, Texas.

4. Respondent Doug Wilson (hereinafter "Respondent Wilson"), Inspector General for the Texas Health and Human Resources, Office of Inspector General, is sued in his official and individual capacity. Texas Health and Human Services Commission, Office of Inspector General (hereinafter "OIG") is an agency of the State of Texas that exercises authority over the Texas Medicaid program. Although the OIG is "part of" the HHSC, it is a distinct entity, one required by federal law, exercising power independent of HHSC control. Respondent Wilson is the proper party to sue on an allegation of *ultra vires* actions and to obtain injunctive relief. Respondent Wilson can be served at HHSC-Office of Inspector General at 11101 Metric Blvd.-Building I, Austin, Texas.

#### **JURISDICTION**

5. This court has jurisdiction under article III, section 8 of the Texas Constitution to issue writs of mandamus and to decide claims that a state agency and/or officials are exceeding their statutory authority and thereby violating statutory and constitutional rights under article I, section 13 (due process), section 17 (taking of property), and section 19 (due process) of the Texas Constitution. HFD has a property interest in funds wrongfully withheld for services actually rendered, and in the proper execution of the HHSC Final Order.

6. The vehicles for such relief are the Uniform Declaratory Judgments Act ("UDJA"), TEX. CIV. PRACTICE & REM. CODE ANN., § 37.001 et. seq., and the Civil Practice and Remedies Code Chapter on Injunctions, TEX. CIV. PRACTICE & REM. CODE ANN., § 65.001 et. seq.

#### **FACTS**

7. In 2011, the OIG conducted an analysis of payments to Texas Medicaid providers and determined that HFD was one of the top 25 providers in the state related to high utilization of

orthodontia billing. OIG opened fraud investigations against each of the top 25 providers, including HFD.

8. On or about September 2011, the OIG instituted a “payment hold” against HFD.<sup>1</sup> A payment hold temporarily freezes future Medicaid payments to a provider, despite the provider’s ongoing participation in the Medicaid program. The payment hold against HFD was issued pursuant to what the OIG called a “credible allegation of fraud” regarding HFD’s past Medicaid billings. The OIG placed a 100% payment hold on HFD’s orthodontic billings. Because the OIG estimated that 40% of HFD’s total Medicaid billing was for orthodontic services (as opposed to other general dentistry services), OIG placed a hold on 40% of HFD’s total Medicaid reimbursements.

9. HFD requested an expedited hearing concerning the 40% total payment hold as well as a separate hearing on the merits of whether any of HFD’s submitted charges were erroneous. The payment hold hearing was limited to determining whether there was a credible allegation of fraud, and if so, what level of payment hold was justified on the facts. The payment hold hearing was held at the State Office of Administrative Hearings on April 24-25, 2012.<sup>2</sup>

10. On August 15, 2012, Administrative Law Judge Kilgore made the following Findings of Fact and Conclusions of Law in her proposal for decision:<sup>3</sup>

VI. FINDINGS OF FACT	
1.	Harlingen Family Dentistry (HFD) is a dental clinic in Harlingen, Texas, owned by Juan Villarreal, D.D.S.
2.	HFD is a Texas Medicaid Provider, holding Provider No. 0096471. At the times relevant to this case, HFD did a large volume of orthodontia work billed to Medicaid.

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<sup>1</sup> See Appendix Exhibit1, Notice of Payment Hold.

<sup>2</sup> Apparently the payment hold hearing was the first one of its kind, ever, in the history of HHSC, so the expedited hearing took six months.

<sup>3</sup> See Appendix Exhibit 2, Proposal for Decision.

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35. There is no evidence that is credible, reliable, or verifying, or that has indicia of reliability, that HFD committed fraud or misrepresentation.

## VII. CONCLUSIONS OF LAW

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8. “Credible allegation of fraud” is “an allegation, which has been verified by the State, from any source,” including, for example, fraud hotline complaints, claims data mining, and provider audits. Allegations are considered credible when they have indicia of reliability and the State Medicaid agency has reviewed all allegations, facts, and evidence carefully and acts judiciously on a case-by-case basis. 42 C.F.R. § 455.2.
9. HHSC may impose a hold on payment of future claims submitted by a provider if there is reliable evidence that the provider has committed fraud or willful misrepresentation regarding a claim for reimbursement under the medical assistance program. Tex. Hum. Res. Code § 32.0291(b). In a SOAH hearing on a payment hold, HHSC must make a prima facie showing that the evidence relied on in imposing the hold is relevant, credible, and material to the issue of fraud or willful misrepresentation. Tex. Hum. Res. Code § 32.0291(c).
10. HHSC-OIG lacks authority to maintain the payment hold against HFD for alleged fraud or misrepresentation. Tex. Gov’t Code § 531.102(g)(2); 42 C.F.R. § 455.23; Tex. Hum. Res. Code § 32.091(c); 1 Tex. Admin. Code §§ 371.1703(b)(3) and (5), 371.1617(a)(1)(A)-(C).

11. While Administrative Law Judge Kilgore found no statutory authority to impose a payment hold against HFD, she found that HHSC had promulgated a rule that “broadly authorizes the OIG to impose a payment hold on payments of future claims submitted for reimbursement after it is determined that prima facie evidence exists of any of various non-fraudulent violations.” Judge Kilgore issued these applicable Findings and Conclusions:

## VI. FINDINGS OF FACT

39. Prima facie evidence exists that, as to approximately 9 percent of the HFD cases reviewed, HFD: billed or caused claims to be submitted to the Medicaid program for services or items that are not reimbursable by the Medicaid program; failed to comply with the terms of the Medicaid program provider agreement; and failed to comply with a Medicaid program procedure manual.

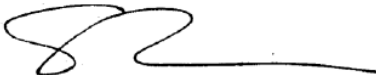
## VII. CONCLUSIONS OF LAW

11. HHSC-OIG has authority to maintain a payment hold against HFD based on prima facie evidence of: billing or causing claims to be submitted to the Medicaid program for services or items that are not reimbursable by the Medicaid program; failing to comply with the terms of the Medicaid program provider agreement; and failing to comply with a Medicaid program procedure manual. 1 Tex. Admin. Code §§ 371. 1703(b)(5), 371.1617(1)(K), (5)(A) and (G).

### **VIII. RECOMMENDATION**

The ALJ recommends that any payment hold against HFD be reduced to 9 percent of the 40 percent of HFD's total Medicaid reimbursement that is related to orthodontics, or 4 percent of HFD's total Medicaid reimbursement.

**SIGNED August 15, 2012.**

  
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**SHANNON KILGORE**

12. On October 10, 2012, acting as the delegate of HHSC Executive Commissioner Janek, HHSC Administrative Law Judge Susan Fekety issued a Final Order.<sup>4</sup> The Final Order adopted the Administrative Law Judge's Proposal for Decision in full, without making any changes. Judge Fekety overruled the OIG's Motion for Rehearing on January 7, 2013.<sup>5</sup> The Order became final on February 6, 2013. Neither party appealed.

13. From the institution of the payment hold on September 30, 2011 through the effective date of HHSC's Final Order in late January 2013, the OIG withheld 40% of HFD's total Medicaid billings. During that time, the 40% payment hold amounted to \$1,379,195.05 withheld from HFD by HHSC.<sup>6</sup> On January 16<sup>th</sup>, 2013, the OIG reduced the future payment hold to 4% of HFD's total Medicaid reimbursement, but the OIG has refused to return the amount determined to have been withheld without authority.

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<sup>4</sup> See Appendix Exhibit 3, October 10, 2012 Final Order of Judge Fekety

<sup>5</sup> See Appendix Exhibit 4, January 7, 2013 Order of Judge Fekety

<sup>6</sup> See Appendix Exhibit 5, affidavit of Dr. Villarreal.

14. On October 12, 2012, and again on January 16, 2013, HFD formally requested that the OIG return the payment hold funds to HFD.<sup>7</sup> The OIG has refused to comply with the written demand.

15. At the onset of this matter, the OIG notified HFD that the OIG had identified \$7.8 million in potential overpayment for HFD's Medicaid orthodontia services. In the Final Order on the temporary hold, the ALJ found that the state had only shown a prima facie basis (akin to "probable cause") to withhold 9% of the reimbursement for orthodontia services.<sup>8</sup> The ALJ also recommended that, since orthodontia services accounted for only 40% of all Medicaid services provided by HFD, the total withheld from the total reimbursement should not exceed 9% of HFD's orthodontic claims, which translated to 4% of HFD's total Medicaid claims.<sup>9</sup> 4% of the total potential overpayment identified by the OIG (\$7.8 million) equals \$ 311,995.52. Yet the HHSC (through Respondent Janek) and OIG (through Respondent Wilson) have already withheld over 4½ times that amount, and continue withholding additional funds every month.<sup>10</sup>

16. HFD has not yet had its hearing on the ultimate issue of whether HFD was actually overpaid for any Medicaid claims from January 2007 to May 2011. That hearing is not set, and is not expected to occur until late 2013 or early 2014. HFD believes that the HHSC and OIG are abusing the payment hold mechanism to cripple Medicaid providers to gain unfair advantage and avoid having to provide hearings on the merits.

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<sup>7</sup> See Appendix Exhibit 6, requests for release of overpayment.

<sup>8</sup> HFD no longer performs any Medicaid orthodontic work. However, HFD accepts that the HHSC final order allowed the HHSC and OIG to withhold either 9% of HFD's orthodontic work, or an estimated 4% of the total HFD Medicaid reimbursement. See Appendix Exhibit 5, affidavit of Dr. Villarreal.

<sup>9</sup> We assume that the ALJ multiplied 9% times 40 to get 3.6%, which she then rounded up to 4%.

<sup>10</sup> As of April 27, 2013, the total amount withheld is \$1,436,359.86. See Appendix Exhibit 5, affidavit of Dr. Villarreal.

## **ARGUMENT AND AUTHORITIES**

**Mandamus is appropriate because Human Resources Code § 32.0291(c) requires HHSC to discontinue the hold.**

17. Respondent Janek and Respondent Wilson have a legal duty to release the entire amount of the payment hold funds to HFD per Human Resources Code § 32.0291(c) which provides that, in a SOAH payment hold hearing, “the department shall discontinue the hold unless the department makes a prima facie showing at the hearing that the evidence relied on by the department in imposing the hold is relevant, credible, and material to the issue of fraud or willful misrepresentation.” Although § 32.0291(c) does not expressly state that the previously withheld funds must be released, that result is necessary because withholding funds absent the evidentiary basis to do so would be an unconstitutional taking. It would be absurd to permit a hearing on the propriety and justification for a pre-hearing deprivation of property, yet prevent the owner of the property from recovering any improperly sequestered funds. Lifting the payment hold, then, logically requires the release of the funds withheld.

It is undisputed that OIG failed to provide evidence that meets the standard in §32.0291(b).<sup>11</sup> Thus, §32.0291(c) expresses a legal duty to perform a non-discretionary act, regardless of any intervening HHSC rule. Respondent Janek’s and Respondent Wilson’s refusal is grounds for mandamus.

**Mandamus is appropriate because the final order states that HHSC only provided evidence to support a 4% total payment hold.**

18. The only issues to be determined at the payment hold hearing were whether there was prima facie evidence to support a payment hold, and if so, at what level. Like the statute at § 32.0291(c), above, the HHSC rules regarding payment hold hearings do not expressly require

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<sup>11</sup> See Appendix Exhibit 2, Proposal for Decision, Page 34, Finding of Fact 35.

the HHSC to release funds following a hearing. But to interpret the result of a payment hold hearing otherwise leads to an absurd and unconstitutional result.

19. Certainly the intent of a payment hold hearing is to provide a forum through which the OIG can justify both its past and future withholding action, pending a final hearing on the merits. If the result of a payment hold hearing is that a final order can furnish only prospective relief, then all monies sequestered prior to a payment hold hearing are unrecoverable, even though there may never have been credible evidence to withhold a dime from a provider. Stated differently, if the HHSC is entitled, regardless of the outcome of the payment hold hearing, to retain all of the funds that it can amass prior to the payment hold hearing, then those pre-hearing funds are unmistakably being withheld without legal justification. There should be no dispute that a pre-hearing deprivation of property unsupported by evidence and legal authority is an unconstitutional taking.

20. The final order clearly states that the OIG's evidence at the hearing only justified withholding 4% of HFD's Medicaid payments, as opposed to the 40% hold instituted by the OIG. In the PFD, the ALJ stated:

The hold in place is a 40 percent hold because it is estimated that about 40 percent of HFD's Medicaid work is related to orthodontic care. It would be reasonable for any continued payment hold to be proportional to the magnitude of the problem indicated by the reliable evidence. Therefore, the ALJ recommends that the payment hold be reduced to 9 percent of the 40 percent of HFD's total Medicaid reimbursement that is related to orthodontics, or 4 percent of HFD's total Medicaid reimbursement.

(emphasis added).<sup>12</sup> The "magnitude of the problem" was justified retaining only 4% of HFD's total Medicaid reimbursement. If the OIG would have originally imposed the hold at the rate it could legally justify through the evidence (4%), the OIG would have withheld only \$56,567.22.

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<sup>12</sup> See Appendix Exhibit 2, Proposal for Decision, Page 31.



\$1,414,180.54 has already been sequestered to date.<sup>13</sup> As a result, the OIG has a clear, ministerial duty to release the other 96% of the \$1.414 million that it did not (and does not) have the evidence and authority to retain. Therefore, even if the court finds that § 32.0291(c) does not require the release of all pre-hearing retained funds, the Court should order Respondent Janek (on behalf of HHSC) and Respondent Wilson (on behalf of OIG) to immediately release \$1,357,613.30; this number represents everything withheld above the 4% rate approved by the ALJ. Respondent Janek and Respondent Wilson are not free to ignore the ministerial directive of the Final Order.

**Mandamus is appropriate to correct and abuse of discretion, because the HHSC has already withheld 4 ½ times more funds than it has shown it is entitled to recover.**

21. In the alternative, it would be an abuse of discretion to allow the OIG to withhold more than it has evidence to support withholding. The fact that OIG withheld HFD's funds at a rate 10 times higher than it was legally authorized, and for a period of 16 months, has created a situation whereby the sequestered funds already far exceed the amount that OIG would be entitled to after a final overpayment hearing. In its Notice of Potential Overpayment, the OIG claimed that HFD had potentially received almost \$7.8 million dollars<sup>14</sup> in overpayment. 4% of that amount is \$311,995.52. Nevertheless, the HHSC and OIG have already withheld \$1.414 million from HFD—more than 4½ times the total Medicaid reimbursement that the OIG has shown an ability to recover in the final overpayment hearing. It is an abuse of discretion to withhold funds at a level that exceeds the amount to which the OIG has proven even a prima facie entitlement; mandamus is appropriate to correct an abuse of discretion. As a result, the court should find that the act of withholding more than OIG has shown an ability to recover is an abuse of discretion. Any other interpretation of the HHSC final order creates an absurd result. If the OIG could only

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<sup>13</sup> See Appendix Exhibit 5, affidavit of Dr. Villarreal.

provide evidence to support a prima facie case to recover \$311,995.52 at a final hearing on the merits, what legal justification would allow the OIG to withhold 4½ times that amount? Therefore, even if the court finds that HHSC is not required to return 96% of the funds retained before the payment hold hearing, the court should still order Respondent Janek and Respondent Wilson to release all funds held in excess of what it showed a prima facie ability to recover \$311,995.52.

**The legal authority for mandamus is clear.**

22. A party is entitled to mandamus relief to compel a public official to perform a ministerial act or to correct a clear abuse of discretion. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex.1991); *Houston Chronicle Pub. Co. v. Mattox*, 767 S.W.2d 695 (Tex. 1989). For mandamus relief to be available due to failure to perform a ministerial act, there must be a legal duty to perform a non-discretionary act, a demand for performance, and a refusal to perform. *Doctors' Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177, 178 (Tex. 1988). All of those elements are present here.

23. “An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion.” *Cnty. Health Choice, Inc. v. Hawkins*, 328 S.W.3d 10, 13 (Tex. App.—Austin 2010, pet. denied) *citing Anderson*, 806 S.W.2d at 793. Ministerial acts involve mere obedience to orders or performance of duties requiring non-governmental choices, while discretionary acts require personal deliberation, decision, and judgment involving the government. *City of Wichita Falls v. Norman*, 963 S.W.2d 211, 215 (Tex. App.—Fort Worth 1998, pet. dism’d w.o.j.).

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<sup>14</sup> The total potential overpayment amount was stated to be \$7,799,888.00.

24. Mandamus will lie even when a court is required, as a prerequisite to issuing a mandamus, to analyze a statute, rule, or order to determine whether there is a ministerial duty. *See generally Cmty. Health Choice, Inc. v. Hawkins*, 328 S.W.3d 10, 13 (Tex. App.—Austin 2010, pet. denied) (interpreting statutes and concluding HHSC had a ministerial duty to pay funds pursuant to the terms of an administrative order).

25. HHSC and the OIG have taken a position that creates an absurd result; they claim that the final order provides only prospective relief to HFD regarding the payment hold. That reading requires HHSC and the OIG to ignore the purpose of the payment hold hearing in the first place—namely, to require the OIG to provide prima facie evidence to support an action that it had taken 16 months before! When the OIG failed to provide proof of the validity of its prior actions, the only reasonable reading of the final order would be that the OIG’s actions taken 16 months prior were unjustified. Certainly the OIG’s evidence did not get worse between September 2011 and January 2013; if the OIG couldn’t prove a prima facie ability to recover at the SOAH hearing some six months after the payment hold was levied, it never had evidence to support its payment hold. If the OIG never had the authority to impose a 40% payment hold on HFD, it is unconstitutional to permit the HHSC or the OIG to continue to sequester those funds. Similarly, even if the OIG could retain unjustified retained funds, it would still be unconstitutional to permit the HHSC and OIG to sequester more than 4½ times what it showed a prima facie ability to recover.

26. The terms of the final order, when considered alongside the statutory and Constitutional protections against unjustified takings, require that the OIG release the over-assessment that has been wrongfully held by the OIG. The OIG has a ministerial duty to do so, and its failure to abide by the result of the HHSC final order justifies mandamus. *See generally Cmty. Health*

*Choice, Inc. v. Hawkins*, 328 S.W.3d at 13. In the alternative, the OIG's actions in withholding more funds than it has shown a prima facie basis for recovering is a clear abuse of discretion for which mandamus is appropriate. *Id.*; see also *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991); *Dykes v. City of Houston*, 406 S.W.2d 176, 183 (Tex. 1966); *Womack v. Berry*, 156 Tex. 44, 291 S.W.2d 677, 682 (1956).

### **Request for Relief**

#### **Writ of Mandamus**

27. HFD adopts and incorporate the preceding paragraphs 1-26 above and the attached Exhibits and Affidavits, which affidavits are incorporated herein by reference as if set out fully herein, in support of its request for the issuance of a writ of mandamus stating that the OIG has a ministerial duty to discontinue a payment hold against HFD pursuant to Human Resources Code § 32.0291(c). If the court issues such a finding, the mandamus order should require Respondent Janek and Respondent Wilson to release all HFD funds withheld pursuant to the OIG's September 2011 hold. That total amount withheld is in excess of \$1,436,359.86.

28. In the alternative, HFD requests for the issuance of a writ of mandamus stating that Respondent Janek and Respondent Wilson have a ministerial duty to refund to HFD all funds withheld at a rate above 4%, dating back to September 2011. If the court issues such a finding, the mandamus order should compel Respondent Janek and Respondent Wilson to release \$1,378,905.50; this number represents everything withheld above the 4%.

29. In the alternative, HFD requests for the issuance of a writ of mandamus stating that the Respondent Janek and Respondent Wilson have abused their discretion by withholding more funds than the OIG has shown a prima facie case upon which to recover. If the court issues such a finding, the mandamus order should compel Respondent Janek and Respondent Wilson to

release all HFD funds beyond the \$311,995.52, which is the full amount that the OIG has proven a prima facie claim to recover. The amount to be released would be \$1,124,364.34.

### **Ancillary Injunctive Relief**

30. HFD adopts and incorporate the preceding paragraphs 1-29 above and the attached Exhibits and Affidavits, which affidavits are incorporated herein by reference as if set out fully herein, in support of its request for ancillary injunctive relief under Chapter 65 of the Civil Practice & Remedies Code, in specific, an affirmative injunction to compel Respondent Janek and Respondent Wilson to abide by the court's mandamus and to abide by its own final order.

### **ATTORNEYS' FEES**

31. Petitioner has retained the firm of Riggs Aleshire & Ray, P.C., to represent Petitioner in this action and has agreed to pay the firm reasonable and necessary attorney's fees. Plaintiff seeks reasonable and necessary attorneys' fees as are equitable and just under section 37.009 of the Civil Practice & Remedies Code.

### **PRAYER**

For these reasons, Petitioner Harlingen Family Dentistry prays that this Court:

- a) Issue for a writ of mandamus requiring Respondents to release funds improperly withheld from Petitioner, and
- b) for such other relief, at law and in equity, including reasonable and necessary attorneys' fees, to which Petitioner shows itself to be entitled.

Respectfully submitted,

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VERIFICATION

STATE OF TEXAS           §  
CAMERON COUNTY       §

Before me, the undersigned notary, on this day personally appeared Dr. Juan Villarreal, DDS, the affiant, a person whose identity is known to me. After I administered an oath to affiant, affiant testified:

“My name is Juan Villarreal. I am capable of making this verification. I have read the Petition for Writ of Mandamus, above. The facts stated in it are within my personal knowledge and are true and correct.”

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Dr. Juan Villarreal, DDS

### **Certificate of Compliance with TRCP 694**

Because the request for relief sought here is mandamus relief, I hereby certify that I provided a copy of the attached petition to Mr. Eugene Clayborne, Assistant Attorney General and counsel for the Texas Health and Human Services Commission, on May \_\_\_, 2013, by electronic mail, and let him know that we would be seeking a hearing on the petition for mandamus on the afternoon of \_\_\_\_\_, 2013.

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Jason Ray