

No. _____

In the Supreme Court of Texas

IN RE STATE OF TEXAS,
Relator.

On Petition for Writ of Mandamus
to the Harris County Clerk, the Travis County Clerk,
the Dallas County Elections Administrator, the Cameron County Elections
Administrator, and the El Paso County Elections Administrator

PETITION FOR WRIT OF MANDAMUS

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RECORD REFERENCES

“App.” refers to the appendix to this petition. “MR” refers to the mandamus record.

STATEMENT OF THE CASE

Nature of the underlying proceeding: Pursuant to section 273.061 of the Texas Election Code [App. C], this is a petition for a writ of mandamus compelling the early voting clerks for Dallas, Cameron, El Paso, Harris, and Travis Counties to perform their statutory duties to review voters’ applications to vote by mail and issue mail-in ballots in accordance with the Texas Election Code. *See* Tex. Elec. Code § 86.001 [App. B].

Respondents: Remi Garza, Cameron County Elections Administrator
Toni Pippins-Poole, Dallas County Elections Administrator
Lisa Wise, El Paso County Elections Administrator
Diane Trautman, Harris County Clerk
Dana DeBeauvoir, Travis County Clerk

Respondents’ challenged actions: Under Texas law, voting by mail is lawful only under limited circumstances. *See id.* §§ 82.001-.004. One of those circumstances is disability, meaning “a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood . . . of injuring the voter’s health.” *Id.* § 82.002(a) [App. A].

Respondents have proclaimed publicly that a healthy voter is eligible to vote by mail under section 82.002 based solely on risk of exposure to the novel coronavirus while voting in person. That is not the law, yet Respondents have publicly stated their intent to apply this incorrect reading of the Texas Election Code in performing their duties to review and issue mail-in ballots for the upcoming elections. *See* MR.1456-1509. Because statewide voting is fast approaching, and more voters seek impermissible mail-in ballots every day, mandamus relief is necessary.

STATEMENT OF JURISDICTION

The Court has original jurisdiction to issue a writ of mandamus “to compel the performance of any duty imposed by law in connection with the holding of an election.” Tex. Elec. Code § 273.061.

The State has a compelling reason to request mandamus from this Court in the first instance. *See* Tex. R. App. P. 52.3. Preparations for the upcoming elections have already begun, and Respondents are urging voters to apply to vote by mail even when those voters do not meet the Legislature’s test for eligibility to do so. Every day that passes, more applications are submitted, and it becomes increasingly challenging to disentangle voters who meet the statutory definition of “disabled” from those who do not. The damage to election integrity increases with every day that Respondents misapply Texas law. When time is of the essence, this Court has not hesitated to exercise its mandamus authority. *See, e.g., In re Woodfill*, 470 S.W.3d 473, 481 (Tex. 2015) (per curiam); *In re Carlisle*, 209 S.W.3d 93, 95-96 (Tex. 2006) (per curiam); *In re Tex. Senate*, 36 S.W.3d 119, 121 (Tex. 2000); *Sears v. Bayoud*, 786 S.W.2d 248, 250 & n.1 (Tex. 1990). The Court should do so again.

Relator respectfully requests relief within 14 days of this filing. For the July 14 elections, the deadline for early-voting clerks to provide mail-in ballots to military and overseas applicants is May 30. *See* Tex. Elec. Code § 86.004(b). Many clerks provide ballots to other applicants at the same time or sooner. *See id.* § 86.004(a). An expeditious decision is needed to prevent irreparable harm.

ISSUE PRESENTED

Whether Respondents have a duty to reject applications for mail-in ballots that claim “disability” under Texas Election Code section 82.002(a) based solely on the generalized risk of contracting a virus.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Among the State's highest and most profound interests is protecting the integrity of its elections. To advance that interest, the Texas Legislature requires almost every voter to vote by personal appearance at a designated polling place, where trained poll workers confirm the voter's identity before issuing him a ballot. After all, in-person voting is the surest way to prevent voter fraud and guarantee that every voter is who he claims to be.

At the same time, the Legislature has recognized that a voter may suffer from a "disability"—that is, a "sickness or physical condition"—that "prevents" him "from appearing at the polling place on election day." Tex. Elec. Code § 82.002(a). Such a voter, the Legislature has determined, is "eligible for early voting by mail." *Id.* Other voters may be eligible for early voting by mail if they are over 65 years old, *id.* § 82.003, or incarcerated, *id.* § 82.004, or absent from their county, *id.* § 82.001. But outside these specific, limited groups of voters, mail-in ballots are unavailable.

The Legislature has tasked local election officials with enforcing those policies. Section 86.001 of the Texas Election Code requires county officials to "review each application for a ballot to be voted by mail" and determine whether the applicant "is entitled to vote an early voting ballot by mail." *Id.* § 86.001(a)-(b). If the applicant is not entitled to vote by mail, the county official must reject the application. *Id.* § 86.001(c).

Yet some county election officials around the State are now refusing to discharge that duty. They have instead determined that the coronavirus pandemic allows them to unilaterally expand the Legislature's determination of who is eligible to vote by

mail. To the local election officials of Travis, Harris, Cameron, Dallas, and El Paso Counties—all Respondents here—a “disability” does not mean a “sickness or physical condition.” Instead, it means a generalized fear common to all voters of contracting disease. Respondents have publicly proclaimed that their definition of “disability” trumps the Legislature’s, and they have encouraged voters to apply to vote by mail regardless of whether they have any “disability,” as the Legislature defined that term. And rather than reject such improper applications, as section 86.001 requires, they are approving more and more each day.

Respondents’ actions are not only unlawful; they are also unnecessary. State officials are already taking steps to ensure the safety of voters. Just this week, the Governor of Texas expanded the period for early voting by personal appearance in the upcoming July 14 elections. MR.0249-52. And the Secretary of State has notified local officials that “early next week,” her office will issue “detailed recommendations for protecting the health and safety of voters and election workers at the polls.” MR.0259-60. State officials, in other words, are working diligently to preserve the integrity of elections by safeguarding in-person voting. Respondents seek to undermine those efforts.

This action asks the Court to order Respondents to cease their lawless conduct and execute the duties Texas law imposes on them as local election officials. The Legislature has reasonably determined that widespread mail-in balloting carries unacceptable risks of corruption and fraud. It has cabined mail-in voting to specific, narrow circumstances. And it has charged Respondents, as local election officials, with implementing that directive. Tex. Elec. Code § 86.001. Respondents instead

seek to mislead voters, impose their own policy preferences, and undermine the integrity of multiple upcoming elections. This Court should intervene. The petition for a writ of mandamus should be granted, and the Court should issue an order compelling Respondents to perform their duties in accordance with law.

STATEMENT OF FACTS

I. Texas Law Requires In-Person Voting Except in Narrow, Carefully Defined Circumstances.

Texas law has long required most voters to cast their ballots in person, either on Election Day, Tex. Elec. Code ch. 64, or during an early voting period prescribed by the Legislature, *id.* § 82.005. This is not merely a matter of tradition or an effort to mark the significance of voting. It represents a deliberate policy chosen by the Legislature to curb fraud and abuse. *See McGee v. Grissom*, 360 S.W.2d 893, 894 (Tex. App.—Fort Worth 1962, no writ) (per curiam).

Unfortunately, the potential for fraud and abuse with respect to mail-in ballots persists. In 2005, the Commission on Federal Election Reform found that “[a]bsentee ballots remain the largest source of potential election fraud.” MR.0054. “Blank ballots . . . might get intercepted,” “[c]itizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure . . . or to intimidation,” and “[v]ote buying schemes are far more difficult to detect when citizens vote by mail.” MR.0054. Texas is not immune. As the Austin American-Statesman recently reported:

Of the 91 Texas election fraud cases prosecuted from state investigations in the last decade, . . . [o]nly four of the 91 involved in-person voter

impersonation. Most cases involve abuse of mail-in ballots and of campaigns acting as voter assistants to help people mark their ballots.¹

Indeed, reports of voter fraud tied to mail-in balloting are all too common.²

The Texas Legislature has long balanced the risk of fraud against the unique hardships faced by certain voters who suffer from physical disabilities. In 1917, the Legislature passed the first absentee voting law to allow qualified voters to vote by mail if they expected to be away from their jurisdictions on election day. Act approved May 26, 1917, 35th Leg., 1st C.S., p. 62, ch. 40, 1917 Tex. Gen. Laws 62. Today, Texas law allows voters to vote by mail under four circumstances: (1) anticipated absence from the county; (2) a disability prevents the voter from appearing at the polling place; (3) the voter is 65 or older; or (4) the voter is confined in jail. Tex. Elec. Code §§ 82.001-.004.

To obtain a mail-in ballot, an eligible voter applies to his county's early voting clerk. *Id.* § 86.001. Respondents are the early voting clerks for Cameron, Dallas, El Paso, Harris, and Travis Counties. *See id.* §§ 31.043(2), 83.002.

The Election Code sets out the early voting clerk's duties: She must "review each application for a ballot to be voted by mail" and determine whether the applicant is "is entitled to vote an early voting ballot by mail." *Id.* § 86.001(a)-(c).

¹ Elizabeth Findell, *In election season in the Rio Grande Valley, watchful eyes at the polls* (Austin American-Statesman June 11, 2018), <https://www.statesman.com/news/20180611/in-election-season-in-rio-grande-valley-watchful-eyes-at-polls>.

² *See, e.g.,* Anna M. Tinsley and Deanna Boyd, *Four women in 'voter fraud ring' arrested. They targeted seniors on city's north side* (Fort Worth Star-Telegram Oct. 12, 2018), <https://www.star-telegram.com/news/local/fort-worth/article219920740.html>.

That review leads to one of two outcomes: “If the applicant is entitled to vote an early voting ballot by mail, the clerk shall provide an official ballot to the applicant.” *Id.* § 86.001(b). But “if the applicant is *not* entitled to vote by mail, the clerk shall reject the application, enter on the application ‘rejected’ and the reason for and date of rejection, and deliver written notice of the reason for the rejection to the applicant.” *Id.* § 86.001(c) (emphasis added). If the defect is technical (*e.g.*, failure to provide necessary information), the applicant is given an opportunity to cure it. If the voter is not eligible, this notice informs the voter that he may vote only by personal appearance.

II. State Officials Are Working Diligently to Protect the Safety of In-Person Voting.

The Governor is “responsible for meeting . . . the dangers to the state and people presented by disasters.” Tex. Gov’t Code § 418.011(1). To that end, the Governor has issued numerous proclamations and executive orders to safeguard Texas from the dangers of the coronavirus pandemic. *See* MR.0114-0252.

The Governor’s efforts to safeguard Texans include protections for in-person voting. There are two significant elections scheduled in Texas later this year. The first, slated for July 14, includes runoffs from the March primary and certain local and special elections. *See* MR.0118-19, MR.0124-25, MR.0138-40, MR.0246-48. The second, slated for November 3, is the general election. State officials are currently developing procedures to protect voters. On May 11, the Governor expanded the period of in-person early voting for all July 14 elections so “election officials can implement appropriate social distancing and safe hygiene practices.”

MR.0250-51. His order doubles the number of days for early voting, expanding it from ten days to twenty. *Id.*; *see* Tex. Elec. Code §§ 85.001(a)-(b).

That same day, the Secretary of State formally advised local election officials of the Governor’s proclamation. MR.0259-60. The Secretary reminded local officials that they can also extend hours of operation for the polls during the now-extended early voting period. MR.0259. And she advised that her office will shortly provide “guidance [regarding] proper conduct of in-person voting during the ongoing public health disaster,” including “detailed recommendations for protecting the health and safety of voters and election workers at the polls.” MR.0259-60.

III. A Travis County District Court Has Injected Widespread Uncertainty.

In late March, several organizations and voters filed a lawsuit against Travis County Clerk DeBeauvoir aimed at expanding voting by mail to all Texans. *See* MR.0264-75. They asked the court to declare that “any eligible voter, *regardless of age and physical condition*” may vote by mail “if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease.” MR.0270 (emphasis added). DeBeauvoir did not oppose the plaintiffs’ request for a temporary injunction.

The trial court obliged. On April 17, it issued a temporary injunction declaring:

[V]oting in person while the virus that causes COVID-19 is still in general circulation presents a likelihood of injuring [a voter’s] health, and any voters without established immunity meet the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code § 82.002.

MR.1217-22. It purported to prohibit DeBeauvoir from “rejecting any mail ballot applications received from registered voters who use the disability category of eligibility as a result of the COVID-19 pandemic.” MR.1220.

The State—which had intervened to protect the integrity of Texas law, MR.0276-86, MR.0878-88—immediately filed a notice of interlocutory appeal, MR.1223-28, which superseded the temporary injunction. *See* Tex. R. App. P. 29.1(b). On appeal, the State seeks vacatur of the temporary injunction and dismissal of the plaintiffs’ claims. *See* MR.1400. The appeal has been transferred to the Fourteenth Court of Appeals. *See* MR.1288-89.

IV. Early Voting Clerks for Five Texas Counties Broadcast their Intent to Approve Requests for Mail-In Ballots Based on Their Own Definition of “Disability.”

In response to the “public confusion” caused by the Travis County lawsuit, the Attorney General provided guidance to county election officials on May 1, 2020. MR.0256-58. “Based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code,” he explained. MR.0256. “Accordingly, public officials shall not advise voters who lack a qualifying sickness or physical condition to vote by mail in response to COVID-19.” MR.0256. And he explained that the Travis County lawsuit “does not change or suspend these requirements.” MR.0257-58; *see also* MR.0253-55.

But Respondents continue to maintain their own definition of “disability”:

Travis County. DeBeauvoir declares she will provide a mail-in ballot to any voter who claims “disability” because of fear of exposure to the novel coronavirus: “Based on the Travis County Trial Court’s recent order, mail-in-ballots are a legal alternative to in-person voting for many voters while COVID-19 is in general circulation.” MR.1456.³ DeBeauvoir, who neither opposed nor appealed the Travis County District Court’s temporary injunction, advocates the Travis County plaintiffs’ misreading of section 82.002. Her office had received 14,000 applications as of May 8, and DeBeauvoir has affirmed that “[i]f the voter swears [to be disabled], I believe the voter.”⁴

Harris County. In an amicus brief in the Travis County lawsuit, Harris County’s early voting clerk Diane Trautman (along with other Harris County officials) advocated treating “a healthy person who fears infection if he or she were to appear in person to vote” as disabled under section 82.002(a), MR.0545, and argued that

³ DeBeauvoir has a duty to correctly apply Texas law despite the erroneous ruling of the Travis County District Court. The Travis County temporary injunction is superseded by the State’s interlocutory appeal, so it is no barrier to DeBeauvoir performing her duties in compliance with law. *See* MR.1224; MR.1295-1310. If the court of appeals concludes that the temporary injunction remains in effect despite the interlocutory appeal—though it should not—this Court should order the Travis County District Court to vacate the order, Tex. Gov’t Code. § 22.002(a), for all the reasons set forth in the State’s brief on appeal, *see* MR.1290-1326. *See In re Francis*, 186 S.W.3d 534, 538 (Tex. 2006).

⁴ Chuck Lindell, *Legal fight: Is vote by mail a coronavirus option in Texas?* (Austin American-Statesman May 8, 2020), <https://www.statesman.com/news/20200508/legal-fight-is-vote-by-mail-coronavirus-option-in-texas>.

“all voters should be free to vote by mail in the July 14 run-off and the November election,” MR.0546-47; *see also* MR.1406-19. Trautman is further reported to have declared that “her office would not challenge any voter’s request for a mail ballot” — “effectively opening the [disability] accommodation to anyone.”⁵

On April 28, 2020, Trautman asked the Harris County Commissioners Court for \$12 million in funding to expand Harris County’s vote-by-mail program—a budget big enough to provide an absentee ballot to every voter in Harris County.⁶ Trautman promised to conduct a widespread voter information campaign promoting voting by mail.⁷ The Commissioner’s Court granted her request.⁸

Cameron County. The Cameron County Elections Administrator’s public website presently declares the following:

COVID-19 Voting by mail update: Texas District Judge Tim Sulak issued a temporary injunction on April 17, 2020 allowing registered voters to use the coronavirus as a reason to request a mail-in ballot. In light of this temporary judgement and its underlying reasoning, the Cameron County Elections Department will not reject any voter’s request for a mail-in ballot based on the eligibility category of disability. Our office has no legal authority to

⁵ *See* Zach Despart, *Harris County OKs up to \$12M for mail ballots amid coronavirus concerns* (Houston Chron. April 28, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-OKs-up-to-12M-for-mail-ballots-15232775.php>.

⁶ A recording of the April 28, 2020, Harris County Commissioner’s Court hearing is available at <https://harriscountytexas.newswagit.com/videos/56616>. Trautman’s budget request is discussed at 3:53:33-5:50:17.

⁷ *See id.* 5:29:45-5:30:55.

⁸ *Id.* 5:50:10-17; *see also* MR.1488.

administratively require voters to substantiate their disability at the time the application is submitted.

MR.1497.

Dallas County. On May 5, 2020, the Dallas County Commissioner’s Court issued a resolution stating that, in light of the COVID-19 threat, “a Dallas County voter who wants to vote by mail can send an application for ballot by mail to Dallas County Elections, check the box on the application indicating ‘Disability’ as the reason for voting by mail, and the elections division will process that application as normal.” MR.1509; MR.1500-01.⁹ Pippins-Poole provided the Attorney General’s May 1 opinion to the Commissioner’s Court while stating, “however . . . we do not investigate the reason or require further explanation for the disability if the application is marked disability.”¹⁰

El Paso County. Lisa Wise, El Paso County’s Election Administrator, told the El Paso County Commissioner’s Court that she plans to provide mail-in ballots to any voter who requests one due to the COVID-19 pandemic unless the Travis County temporary injunction is reversed.¹¹ El Paso County’s Commissioner’s Court

⁹ A recording of the Dallas County Commissioner’s Court’s May 5, 2020, meeting is available at <https://dallascounty.civicweb.net/document/643591?splitscreen=true&media=true>. Discussion of the resolution is at 0:20:40-1:38:00.

¹⁰ *Id.* at 36:12-37:13.

¹¹ A recording of the May 4, 2020, El Paso County Commissioner’s Court hearing is available at https://youtu.be/B_NcmKFcpnM. Voting by mail is discussed from 11:31 AM to 12:30 PM and 1:35 to 1:46 PM.

voted to file an amicus brief in the Travis County lawsuit supporting the plaintiffs' interpretation of section 82.002.¹²

V. Respondents' Actions are Creating Widespread Confusion and Prompting Increasing Applications to Vote by Mail.

Respondents' public interpretation of the Election Code has contributed to confusion and disarray as state and local officials prepare for the July 14 elections. On May 11, two individuals accused the Attorney General of felony election fraud because his May 1, 2020, guidance letter disagrees with the Travis County District Court's interpretation of "disability," MR.1510-28, even though the temporary injunction is stayed during the State's appeal. The Texas Democratic Party and others filed a lawsuit in federal court alleging that Election Code chapter 82 violates the Fourteenth Amendment, the Twenty-Sixth Amendment, and the Voting Rights Act, among other federal causes of action, and accusing the Attorney General of voter intimidation. *See Tex. Democratic Party v. Abbott*, No. 5:20-cv-00438-FB (W.D. Tex.).

ARGUMENT

I. Respondents Refuse to Perform their Ministerial Duties in Compliance with Texas Law.

Voting by mail is a privilege granted by the Legislature in rare and narrow circumstances. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807

¹² *Id.* 1:35-45; MR.1505; see Aaron Martinez, *El Paso commissioners vote to support mail-in ballots to protect voters from COVID-19* (El Paso Times May 4, 2020), <https://www.elpasotimes.com/story/news/politics/2020/05/04/coronavirus-el-paso-commissioners-support-vote-mail-covid-19/3081120001/>.

(1969). The Texas Legislature has extended eligibility to vote by mail where “the voter has a sickness or physical condition that prevents the voter” from voting in person “without a likelihood of . . . injuring the voter’s health.” Tex. Elec. Code. § 82.002(a). The bare possibility of exposure to a virus is not a “sickness or physical condition.” But Respondents take the position that fear of exposure to the novel coronavirus—even where the voter is healthy—makes a voter eligible to vote by mail. This Court’s intervention is needed to correct this ongoing misapplication of Texas law.

A. Fear of exposure to a virus does not make a healthy voter eligible to vote by mail based on “disability.”

Texas statutes are to be interpreted based on their plain language. *See Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008). The Court presumes the Legislature included each word for a purpose and that words not included were purposefully omitted. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). It also presumes the Legislature understood and followed the rules of English grammar. Tex. Gov’t Code § 311.011; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 140 (2012) (describing the presumption as “unshakeable”).

Properly construed, section 82.002 does not permit an otherwise healthy person to vote by mail merely because going to the polls carries some risk to public health. The clause that does the primary work of the sentence is “voter has a sickness or physical condition.” Sidney Greenbaum, *The Oxford English Grammar* § 6.3 (1996). The remainder of the sentence (beginning with the word “that”) is a dependent clause defining sickness and condition. *See id.* § 5.10; *Spradlin v. Jim Walter Homes*,

Inc., 34 S.W.3d 578, 580-81 (Tex. 2000). This clause does not become relevant unless a voter satisfies the clause “has a sickness or physical condition.” Greenbaum, *supra*, § 6.5.

A healthy person does not have a “sickness or physical condition” within the meaning of section 82.002. The common understanding of “sickness” is the “state of being ill” or “having a particular type of illness or disease.” New Oxford Am. Dictionary 1623 (3d ed. 2010). A person *currently infected with* COVID-19 would certainly qualify as having a sickness. But fear of contracting a sickness is not the same thing as “ha[ving] a sickness.” Tex. Elec. Code § 82.002.

Nor does a fear of contracting COVID-19 qualify as a “physical condition.” The term “physical” means “of or relating to the body as opposed to the mind.” New Oxford Am. Dictionary 1341. “Condition” is defined as “an illness or other medical problem.” *Id.* at 362. Combining the two words, a “physical condition” is an illness or medical problem relating to the body. By contrast, to the extent that a fear of contracting COVID-19, without more, could be described as a “condition,” it is a mental or emotional condition, not a “physical condition.”

B. Respondents’ characterization of “disability” is contrary to the plain text of the Election Code.

Respondents’ position is without foundation. To begin with, it ignores that the relevant statutory term requires a “likelihood” of injury to the particular “voter’s health.” Tex. Elec. Code § 82.002. The terms “likely” and “likelihood” “[m]ost often indicate[] a degree of probability greater than five on a scale of one to ten.” Bryan A. Garner, *Modern Legal Usage* 530 (2d ed. 1995); *accord* New Oxford Am.

Dictionary 1012. There is no indication that COVID-19 makes it probable that any voter will become ill by voting in person.

But even if some lesser degree of probability sufficed, this reading inverts the terms of section 82.002. Indeed, the Travis County plaintiffs asked for a declaration that Texans are disabled “*regardless of age and physical condition.*” MR.0271 (emphasis added). The ordinary rules of grammar disallow this reading; “without a likelihood . . . of injuring the voter’s health” is an adverbial clause twice subordinated to the requirement that a voter have a “sickness or physical condition.” Greenbaum, *supra*, § 6.11, Figure 6.4.4. It cannot be elevated over the independent clause without rewriting the sentence. That would violate the Court’s duty to take “statutes as [it] find[s] them.” *Shinogle v. Whitlock*, 596 S.W.3d 772, 776 (Tex. 2020) (per curiam) (quotation marks omitted); see *Cadena Comercial USA Corp. v. TABC*, 518 S.W.3d 318, 326 (Tex. 2017).

And lack of immunity to the novel coronavirus similarly does not qualify as a “physical condition.” Reading lack of immunity as a disability would render every voter “disabled,” and thus the carefully balanced rules created by the Legislature over the last century surplusage. No one can be immune to all possible diseases. Take the seasonal flu. Influenza viruses mutate each year (and even in the course of the flu season), so not even regular vaccination can provide complete immunity. The flu

vaccine is based on predictions of which influenza viruses are likely to be circulated in the coming season.¹³ Sometimes those predictions are wrong.¹⁴

And that is just one disease. In the last few years, there have been reports in this country of outbreaks of measles, typhus, and tuberculosis.¹⁵ Any one of those diseases is potentially deadly. The argument that “physical condition” is so broad as to encompass “lack of immunity” thus proves too much.

Protecting the public health is without doubt a noble goal—which is why state officials are working diligently to safeguard the health of Texas voters. *See supra* pp. 5-6. But the Legislature has not defined “disability” by reference to such generalized policy goals. Instead, the “disability” category is limited to voters suffering a “sickness or physical condition” on election day. Tex. Elec. Code § 82.002(a).

* * *

As early voting clerks, Respondents have a duty to review and approve applications to vote by mail in accordance with state law. *Id.* § 86.001. This duty is

¹³ See CDC, *Selecting Viruses for the Seasonal Influenza Vaccine* [MR.1528-29]; CDC, *How the Flu Virus Can Change: “Drift” and “Shift”* [MR.1531].

¹⁴ See, e.g., Mike Stobbe, *Vaccine no match against flu bug that popped up near end* (Associated Press June 27, 2019), <https://apnews.com/343b72f67a8d4ad29bd3b69a052dcd39>.

¹⁵ E.g., Manisha Patel, et al., *National Update on Measles Cases and Outbreaks — United States, January 1–October 1, 2019* (CDC Oct. 11, 2019) [MR.1532-35]; Anna Gorman, *Medieval Diseases Are Infecting California’s Homeless* (The Atlantic, Mar. 8, 2019), <https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosis-medieval-diseases-spreading-homeless/584380/>.

ministerial; Respondents have no discretion to do anything but determine whether the voter is entitled to vote by mail and process the application accordingly. *Id.* §§ 86.001(a)-(b). Yet Respondents intend to issue mail-in ballots to voters who are *not* eligible to vote by mail. *See supra* pp.7-11. Each of them swore an oath to “preserve, protect, and defend . . . the laws of” the State of Texas and “faithfully execute [her] duties” accordingly. Tex. Const. art. XVI, § 1(a). Their persistence in misleading voters about eligibility to vote by mail threatens the integrity of the upcoming elections. Mandamus is necessary to compel Respondents to comply with the law.

II. The State Has No Other Adequate Remedy, and Time Is of the Essence.

The State seeks a writ of mandamus because it has no other means of ensuring that Respondents comply with Texas law in the fast-approaching elections. Despite guidance from the Attorney General, Respondents have persisted in their mistaken application of the Election Code.

Respondents’ mistake of law is particularly pernicious because it misleads voters. By encouraging voters who are not eligible to claim that they are, Respondents undermine the presumption of good faith underlying the Election Code. Respondents recognize that they do not investigate applicants’ veracity. *See supra* pp.8-11. But that is no justification for willful blindness. If an early voting clerk knows the applicant is ineligible to vote by mail, her duty is to reject the application. Tex. Elec. Code § 86.001(c); *see id.* § 86.008(a). And if Respondents persist in

issuing mail-in ballots to ineligible voters, the State will have no practical way to restore the integrity of the upcoming elections.

The pending appeal in the Travis County lawsuit is no substitute for a writ of mandamus compelling Respondents to comply with Texas law for three reasons.

First, prevailing in that lawsuit will not give the State the relief it seeks here. Judgment for the State in the Travis County lawsuit will result in vacatur of the temporary injunction and dismissal of the Travis County plaintiffs' claims, not an order requiring Respondents to comply with Texas law. *See* MR.1400. An order from this Court is necessary to protect the integrity of Texas's upcoming elections.

Second, Respondents' misapplication of Texas law is independent of the Travis County District Court's order. Because four of the Respondents are not parties to the Travis County lawsuit, its resolution, regardless of outcome, will not bind them. And DeBeauvoir, too, intends to misapply Texas law without regard to the temporary injunction. *See supra* n.3.

Third, resolution of the Travis County lawsuit will come too late. To maintain the status quo, the State filed an immediate interlocutory appeal. The State's notice of appeal suspended the temporary injunction in its entirety, yet Respondents have disregarded that supersedeas. *See, e.g.*, MR.1456, MR.1497, MR.1509. Even the accelerated appellate process will not result in a decision by the court of appeals in time for it to matter. Though the State filed ahead of even the accelerated schedule set by the Fourteenth Court, MR.1288-89, MR.1454-55, briefing is not scheduled to be completed until June 11, MR.1455. By that time, it will be too late to prevent

Respondents from improperly issuing scores of mail-in ballots to ineligible voters based on their unlawful application of section 82.002(a).

In short, final resolution of the Travis County lawsuit will come too late to correct the damage caused if Respondents persist in misleading the public and providing absentee ballots to unqualified voters. When the ordinary appellate process cannot afford timely relief, mandamus is proper. *See Woodfill*, 470 S.W.3d at 480-81; *In re Francis*, 186 S.W.3d 534, 538 (Tex. 2006).

PRAYER

The Court should issue a writ of mandamus compelling Respondents to perform their duties as early voting clerks in accordance with law.

Respectfully submitted.

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CERTIFICATION

Under Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this petition and that every factual statement in the petition is supported by competent evidence included in the appendix or record. I further certify that, under Rule 52.3(k)(1)(A), every document contained in the appendix is a true and correct copy.

/s/ Kyle D. Hawkins
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CERTIFICATE OF SERVICE

On May 13, 2020, this document was served electronically on Leslie Dippel, counsel for Respondent Dana DeBeauvoir, via Leslie.Dippel@traviscountytexas.gov; Luis V. Saenz, counsel for Respondent Remi Garza, via district.attorney@co.cameron.tx.us; Russel H. Roden, counsel for Respondent Toni Pippins-Poole, via russell.roden@dallascounty.org; Douglas P. Ray and Susan Hays, counsel for Respondent Diane Trautman, via hayslaw@me.com and Douglas.Ray@cao.hctx.net; and Jo Ann Bernal, counsel for Lisa Wise, via jbernal@epcounty.com.

/s/ Kyle D. Hawkins
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CERTIFICATE OF COMPLIANCE

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/s/ Kyle D. Hawkins
KYLE D. HAWKINS

No. _____

In the Supreme Court of Texas

IN RE STATE OF TEXAS,
Relator.

On Petition for Writ of Mandamus
to the Harris County Clerk, the Travis County Clerk,
the Dallas County Elections Administrator, the Cameron County Elections
Administrator, and the El Paso County Elections Administrator

APPENDIX

	Tab
1. Texas Government Code § 82.002	A
2. Texas Government Code § 86.001.....	B
3. Texas Government Code § 273.061	C

TAB A: TEXAS GOVERNMENT CODE § 82.002

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 7. Early Voting
Subtitle A. Early Voting
Chapter 82. Eligibility for Early Voting (Refs & Annos)

V.T.C.A., Election Code § 82.002

§ 82.002. Disability

Currentness

(a) A qualified voter is eligible for early voting by mail if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health.

(b) Expected or likely confinement for childbirth on election day is sufficient cause to entitle a voter to vote under Subsection (a).

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 1987, 70th Leg., ch. 472, § 19, eff. Sept. 1, 1987; Acts 1991, 72nd Leg., ch. 203, § 2.05; Acts 1991, 72nd Leg., ch. 554, § 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 864, § 69, eff. Sept. 1, 1997.

V. T. C. A., Election Code § 82.002, TX ELECTION § 82.002
Current through the end of the 2019 Regular Session of the 86th Legislature

TAB B: TEXAS GOVERNMENT CODE § 86.001

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 7. Early Voting
Subtitle A. Early Voting
Chapter 86. Conduct of Voting by Mail (Refs & Annos)

V.T.C.A., Election Code § 86.001

§ 86.001. Reviewing Application and Providing Ballot

Effective: September 1, 2013

Currentness

- (a) The early voting clerk shall review each application for a ballot to be voted by mail.
- (b) If the applicant is entitled to vote an early voting ballot by mail, the clerk shall provide an official ballot to the applicant as provided by this chapter.
- (c) Except as provided by Section 86.008, if the applicant is not entitled to vote by mail, the clerk shall reject the application, enter on the application “rejected” and the reason for and date of rejection, and deliver written notice of the reason for the rejection to the applicant at both the residence address and mailing address on the application. A ballot may not be provided to an applicant whose application is rejected.
- (d) If the application does not include the applicant's correct voter registration number or county election precinct of residence, the clerk shall enter the appropriate information on the application before providing a ballot to the applicant.
- (e) If the applicant does not have an effective voter registration for the election, the clerk shall reject the application unless the clerk can determine from the voter registrar that the applicant has submitted a voter registration application and the registration will be effective on election day.
- (f) Repealed by Acts 2013, 83rd Leg., ch. 1178 (S.B. 910), § 23.
- (g) If a ballot is provided to the applicant, the clerk shall indicate beside the applicant's name on the list of registered voters that a ballot to be voted by mail was provided to the applicant and the date of providing the ballot unless the form of the list makes it impracticable to do so.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 1987, 70th Leg., ch. 472, § 26, eff. Sept. 1, 1987; Acts 1991, 72nd Leg., ch. 203, § 2.12; Acts 1991, 72nd Leg., ch. 554, § 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 1381, § 13, eff. Sept. 1, 1997; Acts 2013, 83rd Leg., ch. 1178 (S.B. 910), § 23, eff. Sept. 1, 2013.

V. T. C. A., Election Code § 86.001, TX ELECTION § 86.001
Current through the end of the 2019 Regular Session of the 86th Legislature

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TAB C: TEXAS GOVERNMENT CODE § 273.061

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 16. Miscellaneous Provisions
Chapter 273. Criminal Investigation and Other Enforcement Proceedings
Subchapter D. Mandamus by Appellate Court (Refs & Annos)

V.T.C.A., Election Code § 273.061

§ 273.061. Jurisdiction

Currentness

The supreme court or a court of appeals may issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986.

V. T. C. A., Election Code § 273.061, TX ELECTION § 273.061
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