
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

**AMICUS CURIAE BRIEF
OF HONEST ELECTIONS PROJECT
IN SUPPORT OF RELATOR**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
IDENTITY AND INTEREST OF AMICUS CURIAE	1
ARGUMENT	2
I. ALLOWING COUNTY ADMINISTRATORS TO PROCEED UNCHECKED IMPLICATES THE EQUAL PROTECTION RIGHTS OF TEXAS VOTERS.....	2
A. Respondents’ Violations of Texas Law Place Disproportionate Burdens on Certain County Election Administrators.	5
II. RESPONDENTS’ ACTIONS, UNLESS STOPPED, WILL RESULT IN ELECTORAL CHAOS AND ABRIDGE THE RIGHT TO VOTE FOR ALL TEXANS.	7
III. THE STATE OF TEXAS, NOT ITS COUNTIES, IS GRANTED SPECIFIC AUTHORITY OVER ELECTIONS REGULATIONS.....	8
PRAYER	10
CERTIFICATE OF COMPLIANCE	12
CERTIFICATE OF SERVICE.....	12

TABLE OF AUTHORITIES

CASES

<i>Bush v. Gore</i> , 531 U.S. 98 (2000)	3, 4
<i>Doe v. Reed</i> , 561 U.S. 186 (2010).....	7
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972).....	3
<i>Erie R.R. v. Tompkins</i> , 304 U.S. 64 (1938)	2
<i>Gloria v. Hughs</i> , No. 5:20-cv-00527 (W.D. Tex. filed Apr. 29, 2020).....	2
<i>Gray v. Sanders</i> , 372 U.S. 368 (1963)	3
<i>Hunter v. City of Pittsburgh</i> , 207 U.S. 161 (1907).....	9
<i>Lewis v. Hughs</i> , No. 5:20-cv-00577 (W.D. Tex. filed May 11, 2020).....	2
<i>Moore v. Ogilvie</i> , 394 U.S. 814 (1969)	3
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006).....	7
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	3, 4, 9
<i>Storer v. Brown</i> , 415 U.S. 724 (1974).....	8
<i>Texas Democratic Party v. Abbott</i> , No. 5:20-cv-00438 (W.D. Tex. filed Apr. 7, 2020).....	2
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964)	3

STATUTES AND RULES

U.S. Const. amend. XIV, § 1	2
U.S. Const. art. I, § 4, cl. 1	2, 8
U.S. Const. art. II, § 1, cl. 2.....	8

Tex. Const. art. 9, § 1	9
Tex. Const. art. VI, § 2	2, 4, 7
Tex. Const. art. VI, § 4	7
Tex. Elec. Code § 82.002	3
Tex. Elec. Code § 82.003	3
Tex. Elec. Code § 82.004	3
Tex. Gov't Code § 418.016.....	9
Tex. Gov't Code § 418.011	9
Tex. Gov't Code § 418.012	9
Tex. R. of App. P. 11	1

OTHER AUTHORITIES

Dallas County, Office of Budget and Evaluation, <i>Dallas County Approved Budget: FY2020</i> (Sept. 17, 2019).....	5
Kenedy County, <i>2020 Budget</i> (Sept. 23, 2019).....	6
Roberts County, <i>Fiscal Year 2019-2020 Budget</i> (Sept. 9, 2019).....	6
Tarrant County, <i>FY 2020 Approved Budget</i> (Sept. 10, 2019)	6

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Honest Elections Project respectfully submits this *amicus curiae* brief in support of Relator the State of Texas' Petition for Writ of Mandamus, pursuant to Texas Rule of Appellate Procedure 11.

IDENTITY AND INTEREST OF AMICUS CURIAE¹

Amicus Curiae, the Honest Elections Project, is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Honest Elections Project defends fair, reasonable, common sense measures to protect the integrity of the voting process.

As part of its mission in this challenging time, the Honest Elections Project seeks to ensure that elections are carried out using lawful methods while, at the same time, accounting for the current public health emergency. Challenging or ignoring duly-enacted election procedures, as epitomized by the county election officials here, has the potential to damage the integrity and perceived legitimacy of the election results. The Honest Elections Project thus has a significant interest in this important case.

¹ Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, *Amicus* and its counsel state that none of the parties to this case, including the intervening parties, nor their counsel authored this brief in whole or in part, nor made any monetary contribution for the preparation or submission of this brief. This brief was wholly funded by the Honest Elections Project.

ARGUMENT

Simply put, this is a case about how certain Texas counties are enacting electoral policy by fiat in contravention of well-established law. Respondents seek to assert their own policy choices over that of the Texas legislature, which is the body tasked by the United States and Texas Constitutions to enact election regulations. *See* U.S. Const. art. I, § 4, cl. 1. *See also, e.g.*, Tex. Const. art. VI, § 2(b). Respondents’ unlawful actions (1) raise serious concerns under the Equal Protection Clause of the Fourteenth Amendment; (2) invite electoral chaos; and (3) are in derogation of their powers under the U.S. and Texas Constitutions. Therefore, a writ should issue immediately prohibiting Respondents unlawful actions.²

I. ALLOWING COUNTY ADMINISTRATORS TO PROCEED UNCHECKED IMPLICATES THE EQUAL PROTECTION RIGHTS OF TEXAS VOTERS.

The Fourteenth Amendment to the U.S. Constitution mandates, in relevant part, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The Equal Protection Clause has long been held to protect against the unequal treatment of voters in elections.

² Separately, there are three pending cases in the United States District Court for the Western District of Texas seeking determinations about the meanings of various sections of Texas’ election law in light of COVID-19—and focusing on the State’s absentee ballot rules. *See Texas Democratic Party v. Abbott*, No. 5:20-cv-00438 (W.D. Tex. filed Apr. 7, 2020); *Gloria v. Hughs*, No. 5:20-cv-00527 (W.D. Tex. filed Apr. 29, 2020); *Lewis v. Hughs*, No. 5:20-cv-00577 (W.D. Tex. filed May 11, 2020). This Court’s interpretation of Texas’ statutes would provide those courts with a definitive resolution of the State’s interpretation of its own statutes. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

See, e.g., Bush v. Gore, 531 U.S. 98, 104 (2000) (*per curiam*) (“The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.”); *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969) (invalidating on equal protection grounds a law that “discriminates against the residents of the populous counties of the State in favor of rural sections.”); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (applying the concept of “one-person, one-vote” to congressional elections); *Reynolds v. Sims*, 377 U.S. 533 (1964) (applying the concept of “one-person, one-vote” to state legislative elections); *Gray v. Sanders*, 372 U.S. 368 (1963) (finding Georgia violated the Fourteenth Amendment because it afforded disparate treatment of voters in different counties). In any event, it is well accepted that “a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

Texas, like every state, has an absolute “obligation to avoid arbitrary and disparate treatment of the members of its electorate.” *Bush v. Gore*, 531 U.S. at 105. For its part, the Texas Legislature created a set of uniform and generally applicable laws to govern absentee early voting in Texas. *See* Tex. Elec. Code §§ 82.002-82.004. The U.S. Constitution has long recognized the basic principle that voters are “no more nor no less so” based on where they live. *Reynolds*, 377 U.S. at 568. That is to say, “[a] citizen, a qualified voter, is no more nor no less so because he lives

in” Travis County, Harris County, or in Williamson County or Armstrong County. *Id.* The Texas Constitution recognizes the same principle. *See, e.g.*, Tex. Const. art. VI, § 2 (“The privilege of free suffrage shall be protected by laws regulating elections and prohibiting under adequate penalties all undue influence in elections from power, bribery, tumult, or other improper practice.”).

Bush v. Gore is instructive to the issues presented in the Petition. At issue in *Bush v. Gore* was an order by the Florida Supreme Court to conduct a manual recount of votes in one county and to include certain recounted votes from two other counties in the vote totals. 531 U.S. at 102-103. In a 7-2 opinion, the U.S. Supreme Court reversed. *Id.* at 103. The Court placed special import on “the equal dignity owed to each voter.” *Id.* at 104. This is because “the right to vote *as the legislature has prescribed* is fundamental.” *Id.* (emphasis added). Especially problematic for the Court was the lack of standards governing the recount. The Court noted that the absence of “standards” that may “vary not only from county to county but indeed within a single county” was in contravention of the U.S. Constitution’s guarantee of equal protection. *See id.* at 106-07. Therefore, because “the recount [could not] be conducted in compliance with the requirements of equal protection” the Supreme Court reversed the Florida Supreme Court.

Respondent counties, by ignoring the plain language and historical interpretation of state law as it applies to qualifying for an early absentee ballot, are

manufacturing disparate treatment where there should be none. Five counties are violating the rights of all Texas voters by insisting they be granted special rules for themselves. This Court should issue a writ to prevent this unequal treatment.

A. Respondents' Violations of Texas Law Place Disproportionate Burdens on Certain County Election Administrators.

Respondents' actions fall harder on some election administrators and voters than others. In addition to the equal protection concerns discussed *supra*, allowing different election administrators to adopt different election rules will cause differing impacts on voters that are entirely dependent on that particular election administrator's office. Such an unequal impact, in the election administration context, could lead to confusion in some counties and not others, which will have electoral implications.

Election administrators in Texas do not receive equal resources across the state. The problem is exacerbated in Texas because Texas is a particularly large state with 254 counties. Certain county election offices enjoy far greater resources than others. For example, in Dallas County, the Elections Department enjoys a budget of over \$10 Million,³ while in Roberts County, the Elections Administrator had a

³ Dallas County, Office of Budget and Evaluation, *Dallas County Approved Budget: FY2020* at 6 (Sept. 17, 2019), <https://www.dallascounty.org/Assets/uploads/docs/budget/fy2020/FY2020-ApprovedBudgetBook-FINAL.pdf>.

budget of just \$29,350 in 2019.⁴ Similarly, in Tarrant County, the County Election Administrator has a budget of \$7.6 Million,⁵ while in Kenedy County, the Election Administrator's budget is only \$103,301.⁶ The counties with larger budgets tend to be those with more densely populated urban and suburban areas while those with smaller budgets and more part-time staff tend to be those in more rural areas.

The fact that resources are allocated so unevenly throughout Texas' election administrators means that it will be more difficult for some election officials to implement a dramatically expanded absentee early voting process than others. For instance, as a result of the Respondent counties' actions, smaller counties are likely to be inundated with confused voters who expect to be granted an absentee ballot based on guidance from Respondent counties. Also, those counties with larger budgets will enjoy more efficient and orderly administration of any last-minute election procedures forced upon them by court orders or by the action of other larger

⁴ Roberts County, *Fiscal Year 2019-2020 Budget* at 9 (Sept. 9, 2019), <http://www.co.roberts.tx.us/upload/page/9379/Budget%202019-2020.pdf>.

⁵ Tarrant County., *FY 2020 Approved Budget* at 22 (Sept. 10, 2019), <http://www.tarrantcounty.com/content/dam/main/OpenBooks/fy2020-documents/FY20ApprovedBudgetHierarchy.pdf>.

⁶ Kenedy County, *2020 Budget* at 8 (Sept. 23, 2019), <http://www.co.kenedy.tx.us/upload/page/4736/2019%20budget/Kenedy%20County%20Adopted%202020%20Budget.pdf>.

counties that are acting in direct contravention of established Texas law. This is something that, as a practical matter, the smaller counties cannot afford.

II. RESPONDENTS’ ACTIONS, UNLESS STOPPED, WILL RESULT IN ELECTORAL CHAOS AND ABRIDGE THE RIGHT TO VOTE FOR ALL TEXANS.

A “State’s interest in preserving the integrity of the electoral process is undoubtably important.” *Doe v. Reed*, 561 U.S. 186, 197 (2010). Texas’ “interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but . . . ‘drives honest citizens out of the democratic process and breeds distrust of government.’” *Id.* (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (*per curiam*)). Conflicting governmental mandates, therefore, can result in voter confusion and as an incentive for voters to not vote. *Cf. Purcell*, 549 U.S. at 4-5 (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.”).

Texas has identified that free and fair elections are of the utmost importance. *See* Tex. Const. art. VI, § 4 (“In all elections by the people, the vote shall be by ballot, and the Legislature shall provide . . . such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box”); Tex. Const. art. VI, § 2 (“The privilege of free suffrage shall be protected by laws regulating elections and prohibiting under adequate penalties all undue influence in

elections from power, bribery, tumult, or other improper practice.”). Because of Respondents’ actions, it is not hard to imagine that voters in neighboring counties, and counties throughout Texas, will be seeking the same treatment disallowed by state law as that granted by Respondents. The actions of Respondent election administrators are contrary to the process of orderly elections and will undoubtedly result in electoral confusion, fraud, and chaos. Texas has an overwhelming interest in avoiding this outcome. *See Storer v. Brown*, 415 U.S. 724, 730 (1974). This Court should act now to affirm the plain reading of the challenged election code.

III. THE STATE OF TEXAS, NOT ITS COUNTIES, IS GRANTED SPECIFIC AUTHORITY OVER ELECTIONS REGULATIONS.

At least one county has stated that its judgment of who gets an absentee ballot will be in effect for the November election. *See Relator Br.* at 9. While the remaining counties are silent as to whether the upcoming November election is implicated by their guidance, the fact that Respondents’ guidance may extend to November is extremely troubling. *See id.* at 8-11. Authority to regulate federal elections flows from the U.S. Constitution to the Texas Legislature.⁷ *See* U.S. Const. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and

⁷ The role of the Texas Legislature is of even greater importance in presidential election years. *See* U.S. Const. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”).

Representatives, shall be prescribed in each State by the *Legislature thereof . . .*” (emphasis added)).

A political subdivision of a state has no authority over the “Times, Places and Manner” of federal elections when no authority has been specifically granted to it by the legislature of that state. By contrast, the Legislature specifically tasked the Governor with responding to disasters and emergencies. *See* Tex. Gov’t Code § 418.016; *see also* Tex. Gov’t Code §§ 418.011-012.

Furthermore, Texas counties are not sovereign and have no authority under State or Federal law to ignore an express direction from the State in the conduct or execution of elections. *See Reynolds*, 377 U.S. at 575 (“Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.”). Texas counties exist as “convenient agen[ts] for exercising” powers delegated from the State. *Id.* The “nature . . . of the powers conferred upon [counties] . . . rest[s] in the absolute discretion of the State.” *Id.* (internal alterations modified) (emphasis added) (internal quotation marks omitted) (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907)). This idea is reflected in the Texas Constitution itself. *See* Tex. Const. art. 9, § 1 (“The Legislature shall have the power to create counties for the convenience of the people . . .”).

Therefore, because Respondents have overstepped their bounds, this Court should immediately issue a writ compelling compliance with Texas law.

PRAYER

As jurisdictions around the country struggle with how best to address the pandemic in which we currently find ourselves, it is important that they do so with clarity and not *ad hoc* confusion. Now more than ever, it is vital that the uncertainty surrounding the current pandemic not taint or interfere with elections. Respondents here have undermined the enacted policies of the State of Texas—as expressed through their duly elected representatives in the Legislature. This is something that Texas law and the U.S. Constitution cannot countenance.

For these reasons, *Amicus Curiae* respectfully requests the Court immediately issue a writ of mandamus compelling Respondents to stop their *ultra vires* actions and to comply with Texas law.

RESPECTFULLY SUBMITTED this 15th day of May, 2020,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word count limitations of Tex. R. App. P. 9.4(i), because it contains 2,346 words, excluding the portions of the brief exempted by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that on May 15, 2020, I caused a true and correct copy of the foregoing Amicus Curiae Brief of the Honest Elections Project in Support of Relator the State of Texas' Petition for Writ of Mandamus to be served electronically to the following counsel of record:

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