

NO. 20-0394

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

**BRIEF OF McCAFFITY FOR CONGRESS
AS *AMICUS CURIAE***

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INTEREST OF *AMICUS CURIAE*

McCaffity for Congress is the political campaign organization for Sean McCaffity, Democratic candidate for Texas Congressional District 03. The organization has an interest in this litigation because the candidate and the campaign will be impacted in the July 14, 2020 runoff election and the November general election. McCaffity for Congress is deeply interested in full and fair elections and a full and fair process for determining critical issues impacting Texas elections. This brief is an effort to outline issues that warrant denial of the Petition for Mandamus in favor of the careful development of a factual record and appellate record and to ensure the rule of law is respected while protecting Texas election integrity.

This brief reflects the opinion of the campaign alone and no other party contributed to the work in this brief. There were no costs associated with the brief as the candidate prepared the brief himself. Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, Amicus states 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.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Armed with merely news reports, speculative concerns about misapplications of the law, and the mythology of voter fraud in Texas, the State of Texas has taken the unprecedented step of seeking direct extraordinary relief from the Supreme Court of Texas to engage in a direct and massive voter suppression effort in the 2020 runoff and general elections. The Court should decline to entertain the State's invitation to suppress the vote for at least three obvious reasons.

First, there is no factual predicate or basis to find that any county election administrator is misapplying the law sufficient to justify mandamus relief. The State's "record" consists of snippets of county election administrators indicating they would process sworn applications for ballots by mail just as they do in every election. This is not novel. Indeed, it is not evidence at all that any one ballot request is, in fact, false or fraudulent and it cannot be the factual basis justifying mandamus relief here. Yet, the State offers nothing else.

Second, any mandamus order that requires county election administrators to reject applications for a vote-by-mail ballot merely because the application uses the "disability" rationale would almost certainly have the effect of suppressing the vote of thousands of voters who requested a ballot because they suffer from a *non-COVID* disability. But that is precisely the import of the State's request for extraordinary relief. The Supreme Court of Texas should be in the business of fostering the right

to vote for individuals with disabilities, not ensuring it withers under the inartful and over-reaching requests of the Attorney General.

Third, a pending federal case challenging the constitutional impropriety of the Texas Election Code provides compelling reasons for the Court to tread extra carefully in considering the impact of interpreting the Election Code and weighs against expedited extraordinary mandamus relief. There are serious potential constitutional infirmities in the Texas Election Code, including potential equal protection violations premised on age discrimination and racially disparate impacts. The most prudent course of action for this Court would be to ensure that all of these issues are litigated with a full and fair trial and with a fully developed record for appellate review. Granting expedited mandamus relief, particularly on a scant and unsupported evidentiary basis, would do a disservice to these important issues and would not be in the interests of justice or the integrity of elections in Texas.

ARGUMENT

I. There Is No Factual Basis To Grant Expedited Relief That Justifies Extraordinary Mandamus Relief And Disruption Of The Pending Vote-By-Mail Litigation.

The State argues that “Respondents intend to issue mail-in ballots to voters who are *not* eligible to vote by mail.” Based on this premise, the State requests a writ

of mandamus to order the Targeted County Clerks¹ to refuse to mail ballots to voters upon receipt of an application requesting a ballot due to disability. But the State offers no evidence at all that (a) any county clerk intends to actually mail ballots to ineligible voters and (b) that any individual voter is, in fact, ineligible or does not suffer from a real disability. The only evidence the State purports to offer are statements from the Targeted County Clerks that they will actually comply with the ministerial duties the Texas Election Code requires. The State even acknowledges that the duty is “ministerial.” What the State glosses over in its zeal to halt mail-in voting is that no county election clerk actually has the capacity or means to investigate a ballot application before deciding to provide the registered voter with a mail-in ballot. Put simply, the ministerial review is to ensure that one of the pre-populated boxes that otherwise authorizes a voter to vote by mail is checked and that the application is signed, which certifies that the voter is entitled to vote. The clerks do not initiate an investigation into each applicant and they certainly do not have the time or resources necessary to do any such thing. The application with the voter

¹ The State has requested mandamus relief against only certain counties: Travis County, Harris County, Cameron County, Dallas County, and El Paso County. These counties happen to be presently governed by elected officials in the Democratic Party. Meanwhile, counties like Collin County, governed by Republican County Judge Chris Hill, is not the subject of the Petition, even though the County Election Administrator almost is in the identical position: subject to compliance with a valid order from Travis County and no procedures or resources to investigate mail-in ballot applications beyond review of the application itself.

signature and certification *is* the evidence the clerks review and ministerially approve.

The State's entire argument is premised on the supposition that the Targeted County Clerks are not complying with the existing Texas Election Code and, thus, must be ordered to not mail out ballots to those requesting vote-by-mail ballots. But the only evidence – provided by the State itself no less – is that the Targeted County Clerks are actually complying precisely with Texas Election Code § 86.001(a)-(b). Because there is such a scant – indeed, non-existent – factual record justifying extraordinary mandamus relief, this Court should decline to exercise its discretion to grant mandamus. *See In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 138 (Tex. 2004) (“Appellate courts must be mindful, however, that the benefits of mandamus review are easily lost by overuse.”).

To make up for its lack of evidence concerning any failure to comply with the law, the State emphasizes that mail-in balloting “carries unacceptable risks of corruption and fraud” and trots out a dated Commission on Federal Election Reform decrying the risks of absentee ballot fraud. *See* Petition at 2-3. But the concerns about voter fraud in absentee ballots are both misplaced and largely irrelevant to what is before the Court, which is a specific statutory ministerial duty that is being complied with now.

Despite the State’s statements about election integrity, voter fraud is rare. “Despite [a] dramatic increase in mail voting over time, fraud rates remain *infinitesimally small*. None of the five states that hold their elections primarily by mail has had any voter fraud scandals since making that change.” See Wendy R. Weiser and Harold Ekeh, *The False Narrative of Vote-By-Mail Fraud*, April 10, 2020 (Brennan Center for Justice), <https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-by-mail-fraud> (emphasis added). As the Brennan Center for Justice, a non-partisan law and policy institute, notes in its recent vote-by-mail fraud analysis, “[r]ounded to the seventh decimal point, that’s 0.0000001 percent of all votes cast...While mail ballots are more susceptible to fraud than in-person voting, *it is still more likely for an American to be struck by lightning than to commit mail voting fraud.*” (emphasis in original). In fact, the total number of absentee ballot voter fraud cases from 2000 to 2012 was reported *as only 491*, during four election cycles that included billions of voters. See Richard L. Hasen, *Trump’s Latest Voted Fraud Misinformation*, April 10, 2020 (FactCheck.org), <https://www.factcheck.org/2020/04/trumps-latest-voter-fraud-misinformation>. States that do offer mail-in ballots utilize multiple metrics of identity verification, including signature matching and driver’s license identification, while flagging IP addresses that generate high absentee requests and comparing voting records across jurisdictions to catch double-voting. See Justin

Levitt, *Trump's Latest Voted Fraud Misinformation*, April 10, 2020 (FactCheck.org), <https://www.factcheck.org/2020/04/trumps-latest-voter-fraud-misinformation>.

Although the State's Attorney General has made a point of attempting to create a recent empirical record of voter fraud with an uptick in election fraud investigations (with mixed results), the reality is that mail ballot voter fraud is nevertheless exceedingly rare and fully capable of being combatted with existing verification schemes and enforcement mechanisms. *See* Alex Ura, "Someone did not do their due diligence": How an attempt to review Texas' voter rolls turned into a debacle, February 1, 2019 (Texas Tribune), <https://www.texastribune.org/2019/02/01/texas-citizenship-voter-roll-review-how-it-turned-boondoggle/>.

II. The Purpose and Effect Of The State's Mandamus Request Is To Reduce The Availability Of Vote-By-Mail During The Pandemic and Would Likely Eliminate Eligible Voters Suffering From Non-COVID Disabilities.

Individuals with disabilities are often an overlooked and silenced class. *See* Matt Vasilogambros, *How Voters With Disabilities Are Blocked From The Ballot Box*, February 1, 2018 (Pew Charitable Trusts), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/02/01/how-voters-with-disabilities-are-blocked-from-the-ballot-box> (noting that voters with disabilities at times feel like "second-class

citizens”). Despite society’s all-too-often marginalization and minimization of people with disabilities, so many of these individuals are capable, smart, and engaged members of our democracy. They work hard to ensure they can participate in every election and to ensure their voices are heard. Despite difficulties, so many of these engaged individuals with disabilities work extra diligently to ensure their votes are counted in every election. By surveying national voter turnout in the 2012 election, the Research Alliance for Accessible Voting found the voter turnout rate for those with disabilities was nearly 6 percentage points behind the average voter, thus suggesting 3 million more voters with disabilities would cast a ballot if their demographics matched the average American. *See Disability, Voter Turnout, and Voting Difficulties*, July 18, 2013, <https://smlr.rutgers.edu/sites/default/files/images/Disability%20and%20voting%20survey%20report%20for%202012%20elections.pdf>. The Texas Election Code accommodates these voters by ensuring that individuals with a disability can request a ballot to vote by mail. *See* Tex. Elec. Code § 82.002(a).

The State’s request for mandamus relief, however, threatens the right to vote for individuals with disabilities. The requested relief is impossible to narrowly tailor to ensure that legitimate voting rights are not trampled, irrespective of the statutory construction arguments for what “disability” means under the Texas Election Code. The State requests a writ of mandamus to compel the Targeted County Clerks to

“perform their duties in accordance with the law.” Petition at 3. But there is no legal authority under the Texas Election Code by which an election administrator can conduct an investigation or review of an individual’s vote-by-mail application beyond confirming that the application was correctly filled out and signed by the requesting voter. No state agency is currently constituted or authorized to investigate individual ballot applications in a timely manner before the election. No county administrator has the resources or policies in place to conduct an investigation or review into mail-in ballot applications.

So while the State requests a writ of mandamus that simply requires “compliance with the law,” the practical effect of any order this Court issues will be to force the Targeted County Clerks to reject applications for ballots by mail if the sole reason for the application was “disability.” In requesting this relief, the State is effectively disenfranchising or massively suppressing the vote of individuals with disabilities that are *not* COVID-related. The State must know this, yet it persists in ensuring that Texas’s vote-by-mail election scheme is construed as narrowly as possible – even if it suppresses the fundamental rights of individuals with disabilities.

The Court should be wary of over-reaching requests that will do more harm to the voter franchise than they seek to prevent.

III. Serious Constitutional Infirmities Are Being Litigated In Federal Court and This Court Should Tread Extra Carefully In Fashioning Expedited Relief Without A Full and Fair Trial and Fully Developed Appellate Record.

The Court should see the Petition for what it is: an end-run around both the pending appeal of the Travis County and the pending federal lawsuit in the United States District Court for the Western District of Texas. The State attempts to leapfrog those pending lawsuits and the due process associated with those proceedings in the hopes of convincing this Court to rule that the Texas Election Code should not be interpreted to include susceptibility to COVID-19 as a basis for claiming disability. Based on the scant, *i.e.*, non-existent, factual record here the Court should decline to entertain the State's bypass, particularly when there are serious potential constitutional violations at stake.

The Texas Democratic Party has raised significant constitutional issues based on the 14th and 26th Amendment of the United States Constitution. Given what appears to be a growing and serious trend in how COVID-19 transmission and infection rates are actually impacting communities of color more significantly, it is even more important that the courts take extra care with evaluating claims of racial disparity under the Texas Election Code. The Centers for Disease Control and Prevention has recently noted the disparate effects of COVID-19:

The effects of COVID-19 on the health of racial and ethnic minority groups is still emerging; however, current data suggest a disproportionate burden of illness and death among racial and ethnic

minority groups. A recent [CDC MMWR report](#) included race and ethnicity data from 580 patients hospitalized with lab-confirmed COVID-19 found that 45% of individuals for whom race or ethnicity data was available were white, compared to 55% of individuals in the surrounding community. However, 33% of hospitalized patients were black compared to 18% in the community and 8% were Hispanic, compared to 14% in the community.

Centers for Disease Control and Prevention, *Covid-19 in Racial and Ethnic Minority Groups*, April 22, 2020 (CDC), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>. These differences in how the disease impacts racial and ethnic minority groups likely creates a racially disparate application of the Texas Election Code if the State’s interpretation of “disability” is adopted. Of course, such constructions should be avoided if at all possible. *See In re Green*, 221 S.W.3d 645, 649 (Tex. 2007) (“We must of course avoid a construction of a statute that renders it unconstitutional.”); TEX. GOV’T CODE § 311.021(1) (2020). In this case, the Court should decline to exercise jurisdiction and issue extraordinary mandamus relief so that these serious issues can be fully and fairly litigated in the already pending state and federal lawsuits.

CONCLUSION

These are unique and unprecedented times. Given the tragedy and disaster unfolding in the State of Texas over the last several months, it is more imperative now than ever to ensure that individuals’ right to vote is protected and that actual voting is facilitated, not suppressed. Unfortunately, the impact of the State’s

extraordinary request to this Court not only threatens to confuse the existing state of election law before a July 14, 2020 runoff election and the November general election, but it threatens to do so in an expedited, short-circuited manner that tarnishes the full and fair application of the rule of law in Texas. There is a valid state district court order that permits individuals to vote by mail if they are disabled because of COVID-19 or the fear of infection from COVID-19. There is already pending litigation in state and federal court testing the parameters of that order and the constitutionality of the Texas Election Code. This Court should permit the civil justice system to shine and take a careful measured approach to evaluating these sober issues. Granting mandamus relief here, in these circumstances, would not serve the interests of justice. The Court should deny the Petition.

Respectfully submitted,

/s/ Sean J. McCaffity

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/s/ Sean J. McCaffity

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The undersigned certifies that a true and correct copy of this instrument was served by electronic service pursuant to the Texas Rules of Appellate Procedure upon the following counsel of record on May 15, 2020:

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