

No. 20-0394
IN THE SUPREME COURT OF TEXAS

In re State of Texas

On Petition for Writ of Mandamus (Original Proceeding)

**EL PASO COUNTY ELECTIONS ADMINISTRATOR LISA WISE'S
RESPONSE TO PETITION FOR WRIT OF MANDAMUS**

Respectfully submitted,

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Submitted: May 18, 2020

ORAL ARGUMENT
SET FOR MAY 20, 2020

By: **/s/ Kevin McCary**

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STATEMENT OF JURISDICTION

The State asserts that the Court has original jurisdiction under Texas Elections Code § 273.061. However, because the State has not shown any actual injury that only mandamus will remedy, jurisdiction is not present and Respondent Wise requests that this matter be dismissed for want of jurisdiction. In addition, Wise does not have the authority to take the action the State urges the Court to order. Finally, the State’s Petition raises several “doubtful question[s] of fact”¹ precluding the exercise of the Court’s original jurisdiction. *See In re Corpus Christi Liquefaction, LLC*, 588 S.W.3d 275 (Tex. 2019) (per curiam) (dismissing that mandamus action in part because of a factual dispute between the parties).

¹ For example, the State says Wise “plans to provide mail-in ballots to any voter who requests one due to the COVID-19 pandemic[.]” In fact, she stated that she plans to provide mail-in ballots to any voter that provides a complete application—as the law has always required. See Statement of Facts, *infra*.

ISSUE PRESENTED

Issue 1 (Restated): Texas law constrains the powers and duties of county officials to those explicitly authorized by the Legislature.² Wise has a statutory duty to accept vote by mail applications and “review them.”³ But the statute provides her no authority to police the veracity of an applicant’s assertion of disability—as both the Attorney General and the Secretary of State have previously noted.⁴ Is mandamus appropriate to order her to do so?

² See *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Tex. 2003) (stating the rule that, “[a] commissioners court may exercise only those powers expressly given by either the Texas Constitution or the Legislature”); TEX. ELEC. CODE § 31.032 (stating that the elections administrator is appointed by the “County Election Commission” which consists of local elected officials including the County Judge (as chair); the County Clerk (as vice-chair); the County Tax Assessor-Collector (as secretary); and the chair of each political party in the County).

³ TEX. ELEC. CODE § 86.001(a).

⁴ See TEX. ELEC. CODE §§ 86.001, 86.008; Op. Tex. Att’y Gen. No. KP-0009 (2015).

STATEMENT OF FACTS

Lisa Wise knows a lot about administering elections.⁵ Her experience reaches back a decade and a half after first receiving a master's degree in public administration.⁶ Today, she oversees a full-time staff of 14, plus various vendors.⁷ Each year she administers multiple federal, state, and local elections for El Paso County.⁸ But she concedes that she is not qualified to diagnose who is disabled.⁹

And, until now, she has not needed to: The Attorney General has made it plain that she may not look to outside determinations of disability—such as the Social Security Administration—to confirm whether a voter is disabled.¹⁰ So her only guidance up to this moment as to the definition of “disability”—and who should make that determination—has come from the Elections Code, the Attorney General and the Secretary of State.¹¹ For mail-

⁵ See Declaration of Lisa R. Wise (May 16, 2020), Supp.MR 1-6 (“Wise Decl.”).

⁶ Wise Decl., Supp.MR 1, at ¶¶ 2-3.

⁷ *Id.* at ¶ 3.

⁸ *Id.*

⁹ See *id.* at 5, ¶ 14.

¹⁰ Op. Texas Att’y Gen. No. KP-0009 (2015) at 2.

¹¹ See *id.*

in voting based on disability, those officials have advised that “a *voter* should *believe* that they [*sic*] have a sickness or condition which prevents them [*sic*] from voting by personal appearance without assistance or without injuring their [*sic*] health.”¹² So, until now, it was *the voter* that determined whether he or she was disabled.

Wise has taken that advice. When a voter sends in a vote by mail application her staff verifies that all information on the application is complete.¹³ If a voter checks the disability box—and the application is otherwise complete—she sends out a ballot.¹⁴ Wise does not go beyond the ballot to investigate or adjudicate the voter’s “sickness or physical condition”—i.e. disability.¹⁵

And last week, that is exactly what the Secretary of State instructed her office to do: on Thursday, a lawyer from the Secretary of State’s office instructed Wise’s office that: “The issue is not whether you are allowed to mail [a] ballot, you must mail a ballot to a voter that checks disability. The question is whether the *voter* should really be checking disability. The

¹² *Id.* at 1 (quoting Keith Ingram, Dir. of Elections, Tex. Sec’y of State at 1 (Oct. 1, 2014)) (on file with the AG Op. Comm.) (internal quotation marks omitted and emphasis added).

¹³ Wise Decl., Supp.MR 1-2, at ¶ 4.

¹⁴ Wise Decl., Supp.MR 1-3, at ¶¶4-5.

¹⁵ *Id.*; *see also*, TEX. ELEC. CODE § 82.002.

Attorney General has issued an opinion saying they do not believe that being afraid of Covid is not [sic] a disability. However, **you do not have any authority to police that. If a voter checks disability, you must process the request and send them a ballot.** The Attorney General may decide to prosecute the voter for checking disability, but that is not something you are supposed to police in your office. The voter does have to check a grounds, so just writing Covid and not checking disability or some grounds is not a valid application.”¹⁶ And that is exactly how Wise handles disability claims: if the disability box is checked, and the application is complete, Wise’s office mails out a ballot. If the application is incomplete—for example, no “reason” box like “disability” is checked—then Wise’s office rejects the application.¹⁷

In April 2020, a Travis County district court issued an injunction that restrained the State from “...issuing guidance or otherwise taking actions that would prevent [c]ounties from accepting and tabulating any mail ballots received from voters who apply to vote by mail based on the disability

¹⁶ Email from Genevieve “Jean” Gill, Attorney – Elections Division, to Rosa O’Keefe (May 14, 2020), Supp.MR 7-9 (all emphasis added).

¹⁷ See Wise Decl., Supp.MR 3 at ¶ 7.

category of eligibility as a result of the COVID-19 pandemic.”¹⁸

Wise did not view that order as changing the process for applications for ballots by mail.¹⁹ And contrary to the allegations in the Petition for Mandamus, she did *not* begin encouraging voters to vote by mail due to COVID-19.²⁰

But she recognized a potential problem in carrying out her duties: the Travis County order might cause an increase in the number of applications for mail-in ballots, which would increase her office’s expenses, like postage, staffing, and supplies.²¹ And she began working with Commissioners Court to make budgetary adjustments to confront this problem.²²

The State has nevertheless hauled Wise before this Court because the state believes that Wise, “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

¹⁸ Order on Application for Temporary Injunctions and Pleas to the Jurisdiction, *Tex. Dem. Party et. al. v. Texas et al.*; Cause No. D-1-GN-20-001610 (201st Dist. Court).

¹⁹ Wise Decl., Supp.MR 3-4, at ¶ 9-10.

²⁰ *Id.* at ¶ 9.

²¹ *Id.* at ¶ 11.

²² See Commissioners Court quotations, *infra*.

reversed.”²³ She said no such thing. What she said was:

- 11:41:31: “So, the biggest change besides the things we’re doing at the polling site is this ballot by mail component that’s now come into play. And earlier last month, there was a temporary restraining order granted allowing a voter to qualify for ballot by mail under the disability category if the voter feels at risk for COVID-19. Now, I know they’re going to talk more about this in the executive session. I don’t know if there is anything else you want me to address on this right now, JoAnne²⁴,...or just basically that it’s been ordered and it’s working its way through the courts.”
- 11:42:42: “The critical question with COVID is, if people are afraid to go to the polls with COVID, does that qualify as a disability? And, if it does qualify as a disability, they would be entitled to use mail in ballots to exercise their right to vote. So that’s the pending litigation question.”
- 11:43:27: “What we’re uncertain about is what the law will be in Texas in November for the Presidential election and whether or not we’ll have a court ruling by then that gives some clarity on whether a person’s genuine fear of COVID could be used as a disability to qualify for a

²³ Pet. at 10.

²⁴ JoAnne Bernal is the County Attorney.

mail-in ballot.”

- 11:54:02: **“Currently on that ballot by mail application, you do not have to mark what your disability is. So right now, if you mark disability, that is what we take at face value. That policy has not changed. So, we’re continuing to accept ballot by mail requests.** We’re getting them every day. So, I don’t want people to think that we’re kind of at a standstill in the way of accepting applications. We’re still processing like I said every day. They still have until July 2 for the July run-off. So, the public still can submit the ballot by mail request. This is not affecting how we process those. The box simply states that you believe you have a disability. It’s at the voter’s discretion if they believe they qualify for that.”²⁵

So Wise summarized the issues in the Travis County litigation and stated that she would continue to do what the Attorney General and the Secretary of State have always told her to do: evaluate a ballot by mail application for completeness and issue a ballot if the application is complete.

It is unclear why Wise is before this Court.

²⁵ Wise Decl., Supp.MR 5-6, at ¶ 15 (emphasis added). (As the State notes, her remarks are available on YouTube: https://www.youtube.com/watch?v=B_NcmKFcpnM).

ARGUMENT

*“Section 82.002 sets out the appropriate standard for mail-in voting based on a disability, such that **a voter should believe** that they have a sickness or condition which prevents them from voting by personal appearance without assistance or without injuring their health.”*

-Brief of the Secretary of State’s Director of Elections as quoted in Attorney General Opinion No. KP-0009 at 1 (2015) (emphasis added; internal quotation marks omitted).

I. Introduction.

The State asks this Court to insert itself into the day to day operations of the El Paso County Elections Administrator’s Office. *See generally*, Pet. for Writ of Mandamus (“Pet.”). Some members of State government complain that some voters that may be checking a “disability box” on the vote by mail form in instances where these officials predict the voters will not have “a sickness or physical condition” that prevents them from voting at the polls on election day. *See* Pet.; TEX. ELEC. CODE § 82.002(a). These officials move the Court to mandamus local elections officials to do something the Legislature has never required of them: police voter disability claims for mail in balloting. *See* Pet.; TEX. ELEC. CODE § 82.002(a). This is not so much a case about the eligibility to vote by mail as it is a case about the limits of State power and when mandamus is appropriate to exercise it.

To be sure, freedoms and restrictions in the midst of the COVID-19 pandemic is a hot-button legal issue. *See* Pet. But to mandamus local

elections administrators (or clerks) to police voter disabilities is not the proper prescription.

As the Attorney General and the Secretary of State have repeatedly pointed out, elections administrators and clerks have neither the authority nor the duty to police an individual voter's claimed disability.¹ Op. Texas Att'y Gen. No. KP-0009 (2015) at 2; Email from Genevieve "Jean" Gill, Attorney-Elections Division, to Rosa O'Keefe (May 14, 2020), Supp.MR 7-9 (all emphasis added); *see also* TEX. ELEC. CODE §§ 82.002, 86.001, 86.008. Instead, elections administrators simply check the application for completeness. *See id.* This is the only ministerial duty elections clerks have as to checking vote by mail applications. The State has not shown (or even alleged) that these elections clerks are failing in this narrow duty. *See* Pet. The facts and the law urge judicial restraint.

The Petition for Mandamus should be **denied**.

II. The Petition fails to meet the mandamus standard.

The State claims a sense of breathless urgency. *See* Pet. (claiming that "time is of the essence."). And it makes much of isolated cases of perceived voter "fraud and abuse" it cherry-picked over the last two decades. *See* Pet. at 3 (citing a Federal Election Reform report from 2005). But even assuming a dusty report, published in 2005, is competent evidence in an original

mandamus case, the State fails to meet the legal mandamus standard. *See* Pet. at 3-4.

Years ago, the Court laid out the general mandamus standard used in elections cases. A writ of mandamus is proper “to compel a public official to perform a ministerial act.” *Anderson v. Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). A ministerial act is one in which the “law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to discretion.” *Id.* And that is why the State’s petition really should not be let out of the barn: the State has identified no ministerial act that Wise has failed to perform.

All Wise has done is her ministerial duty: If applications for a mail-in ballot are complete, they are approved; otherwise they are rejected. Wise Decl., Supp.MR 5 at ¶ 14; 1-2 at ¶ 4; 3 at ¶¶ 6, 7. And there is no indication that by following the AG’s guidance, she has prompted “fraud and abuse”. *See* Op. Texas Att’y Gen. No. KP-0009 (2015) at 2; Email from Genevieve “Jean” Gill to Rosa O’Keefe (May 14, 2020), Supp.MR 7-9 (all emphasis added). None of this meets an action in mandamus’s principle standard: “to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law.” *In re Essex Ins. Co.*, 450 S.W.3d 524, 526 (Tex. 2014).

III. Mandamus is inappropriate because Wise is not authorized or required to police voter disability claims.

A. The statute empowers voters, not the Elections Administrator, to determine whether a disability or sickness prevents them from voting.

Chapter 82 of the Texas Elections Code permits four classes of people to vote by mail: those who are absent from their county of residence; those who are disabled; those who are 65 years of age or older on election day; and those who are confined to jail on election day. TEX. ELEC. CODE CH. 82. The controversy here, of course, concerns those who are disabled. Section 82.002 provides:

Sec. 82.002. DISABILITY. (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).

TEX. ELEC. CODE § 82.002 (LexisAdvance current through 2019 R.S., Reg. Session, 86th Leg.).

But the result of this lawsuit does not turn on the definition of “disability.” Instead, it turns on who has the power to decide who is disabled. And the Legislative history (and the State’s prior guidance) makes it plain that it is the voter.

In the past, a voter applying to vote by mail on the basis of disability or sickness was required to provide the “certificate of a duly licensed physician

or chiropractor or accredited Christian Science practitioner certifying to such sickness or physical disability shall accompany the application, which certification shall be in substantially the following form....” *See* Act of May 26, 1981, 67th Leg., R.S., ch. 301 (striking this requirement from Texas law) (Excerpts of the bill-file provided in appendix²⁶).

But those provisions were removed in 1981. *See id.* And the Senate Bill Analysis makes it clear why: “For the convenience of the voter[,] it has been suggested that the requirement of [physician’s certificate of disability] be removed. *See id.* (Committee on Elections Bill Analysis). If, after 1981, a physician was no longer required to police voter disabilities, it makes little sense for the Legislature to have intended that an untrained (as to medicine or disability) elections administrator take on that responsibility. Had the Legislature intended that such a requirement be read in, it could have just written it. *See id.* That leaves a brief examination of today’s statute.

B. Wise is only empowered to check vote by mail applications for completeness.

The modern Elections Code provides little mandatory direction as to Wise’s duties as to vote by mail applications by reason of disability. Section 86.001 merely says that “the early voting clerk shall review” each application

²⁶ As of 1981, a voter still had to certify his or her sickness or disability. Act of May 26, 1981, 67th Leg., R.S., ch. 301. Even this requirement was removed in 1985. *See* Act of May 13, 1985, 69th Leg., R.S., ch. 211, sec. 1.

for a mail-in ballot.

The much-litigated Section 82.002 merely states that a “qualified voter is eligible” for vote by mail if that voter “has a sickness or physical condition” that prevents the voter from appearing without a likelihood of injuring the voter's health. Nothing in Section 82.002 places a burden on Wise to verify the reason for the claim of disability.

This Chapter is as notable as much for what it does not say as for what it does. It does not say the early voting clerk (i.e. the elections administrator) shall “investigate,” “verify,” or “police” the claim of disability. *See* Tex. Elec. CODE § 86.001. So as the Attorney General and the Secretary of State have noted—repeatedly— Wise’s only duty as to “reviewing” the application is to make sure that is complete. Op. Texas Att’y Gen. No. KP-0009 (2015) at 2; Email from Genevieve “Jean” Gill to Rosa O’Keefe (May 14, 2020), Supp.MR 7-9.

It’s not that Wise’s duty is “discretionary.” It’s that she has no duty at all once she has determined that the ballot by mail application is complete. If it is, the voter is entitled to vote by mail. *See* TEX. ELEC. CODE § 86.001(b).

If it is not, the application is rejected. TEX. ELEC. CODE § 86.001(c).²⁷ The State makes much of the risk of “fraud and abuse” where voters are permitted to vote by mail. *See* Pet. at 3. But the State seems confused as to what the definition of “fraud” is and what the appropriate remedy might be. It is not mandamus.

IV. Checking the “disability” box on the vote by mail application is not fraud per se nor is it necessarily an “illegal vote.”

Nowhere in its winded discussion of “fraud and abuse” does the State acknowledge what “fraud and abuse” is. *See* Pet at 3-5. Part of the problem with a mushy term like “fraud and abuse” is that it does not seem to be one that is used in the Elections Code or Texas cases.²⁸ Instead, the Elections Code addresses “illegal vote[s].” *See* TEX. ELEC. CODE § 221.001. An “illegal vote” is one “that is not legally countable.” TEX. ELEC. CODE § 221.003(b). And an “illegal vote” is a criminal offense *only if* a person:

- (1) votes or attempts to vote **in an election** in which the person knows the person is not eligible to vote;
- (2) knowingly votes or attempts to vote more than once in an

²⁷ *See also, Weatherly v. Fulgham*, 271 S.W.2d 938, 940 (Tex. 1954) (ruling that the Secretary of State "is authorized to review the records, to check the signer's name against the poll tax or certificate of exemption lists and to ascertain if the signer is disqualified from having voted in the primary and other irregularities or defects that may be shown upon the face of the petition and the records. **The Secretary of State is in no position to conduct an independent factual investigation nor would time permit.**") (emphasis added).

²⁸ The Elections Code does refer to “other fraud” as to an “election officer” in the context of an elections contest. TEX. ELEC. CODE § 221.003(a)(2)(C).

election;

(3) knowingly votes or attempts to vote a ballot belonging to another person, or by impersonating another person; or

(4) knowingly marks or attempts to mark any portion of another person's ballot without the consent of that person, or without specific direction from that person how to mark the ballot.

TEX. ELEC. CODE § 64.012(a) (LexisAdvance current through 2019 R.S., Reg. Session, 86th Leg.).

There are two points here. First, a “qualified voter” is “eligible to vote by mail” if the voter is “disabled.” TEX. ELEC. CODE § 82.002(a). But the fact that a voter may not be eligible to vote by mail does not necessarily make the voter ineligible to vote at all. *See* TEX. ELEC. CODE § 64.012(a).

Section 221.003, dealing with election contests, does not make a vote “illegal” unless a person voted *in an election* in which the person was not eligible to vote. In other words, the *manner* (e.g. by mail) in which the person voted does not make the “vote” “illegal” for contest-purposes even if the *manner* was less than kosher. A vote may not be counted where: a voter votes twice; outside of his or her jurisdiction; where the voter is underage; or marks another person's ballot. *See* TEX. ELEC. CODE § 64.012(a). In other words, under Election Code Chapters 64, 82, and 221, voting by mail where a person's “disability” might be questioned is no more election “fraud” than

“speeding” is “driving without a license.”²⁹ The upshot is that a quarrel over whether a voter meets the definition of “disabled” for early voting purposes does not make the vote “illegal” or void per se.³⁰

V. The State conflates the Commissioners’ policy goals with the undisputed duties of the elections administrator.

It is true that the El Paso County Commissioners Court—not Lisa Wise—voted to file an amicus brief in the Travis County lawsuit. But the State cites to no law that prohibits such an amicus brief. That may be because the Texas Bill of Rights, The U.S. Bill of Rights, and this Court’s own rules protect the County’s right to do so. *See* U.S. CONST. amend 1; TEX. CONST. art. 1, sec. 8; TEX. R. APP. P. 11. And attacking Wise because the Commissioners Court decided to file an amicus brief does not just violate free speech (and due process) principles, it also misrepresents what Commissioners Court sought to advocate.

The State makes much of the May 4, 2010 Commissioners Court

²⁹ Section 276.013 does make “Election Fraud” a crime. And Section 84.0041 makes it a crime to provide false information on an application for ballot by mail.

³⁰ This mandamus action is a solution to a problem that already has a solution. Should a vote by mail fraud scheme illegally affect the outcome of an election, there are remedies—both more effective than asking the Court to craft one from its mandamus authority—for that as well. Where illegal voting affects the outcome of an election, the proper remedy is an election contest. *See* TEX. ELEC. CODE Title 14; *see also O’Caña v. Salinas*, No. 13-18-00563-CV, 2019 Tex. App. LEXIS 2546 (Tex. App.—Corpus Christi Mar. 29, 2019). And in some instances, a writ of quo warranto may also be available. *See State ex rel. Lukovich v. Johnston*, 238 S.W.2d 957 (Tex. 1951) (comparing a quo warranto proceeding to a suit in trespass to try title because the plaintiff may show that “he was duly chosen to the office by the people.”).

meeting. *See* Pet. at 10. Yet the State fails to acknowledge what was actually said and advocated. The Court focused its community advocacy on encouraging *voters over the age of 65* to vote by mail. As the County Judge put it:

We've discussed the importance that if you can at 65, there's no, nothing that keeps you, if we just get that vulnerable population, and maybe our goal and our opportunity as a County would be to promote as much as we can, Betsy talked about getting organizations that might help us promote and encourage, we know that most of the poll helpers there are people that are retired and so that might be a challenge for us there if we don't have enough poll workers and so there's some, a lot of moving parts that we need to consider, but I think one of them, if most of the 65 and older, independent of whether they have some existing illness, that would be a huge, we'd carve out a huge number of people not going out in the case that we can't do anything about the physical component...

El Paso County Judge Ricardo Samaniego, Commissioners Court Meeting (May 4, 2020) at 11:50:14 available at https://www.youtube.com/watch?v=B_NcmKFcpnM. (“Youtube”)

Encouraging voters over the age of 65 is not just legal, it makes sound policy sense in an era where those of an advanced age may be more susceptible to contracting a communicable disease. *See* TEX. ELEC. CODE § 82.003. But age has nothing to do with disability. And that was the only area of focus on May 4. *See* YouTube. It was improper for the State to suggest otherwise.

Further, County Commissioners—who are not parties here—do not

dispute that encouraging disabled voters to vote by mail makes for sound policy if voting by mail can be done legally. And, County Commissioners do not dispute that some voters, with underlying health conditions or compromised immune systems, might be better off voting by mail, where the statute permits them to do so.

Finally, there are sound textual reasons to view Section 82.002 in a more flexible way than the State does. For this reason, Wise joins the textual analysis contained in Harris County's brief.

CONCLUSION AND PRAYER

The question in this case is not whether the Court thinks a lack of immunity to COVID-19 is a legitimate reason to request a ballot by mail by reason of disability.³¹ That is a separate lawsuit. The question before the Court in this mandamus action is whether Respondent Lisa Wise may properly be forced to police and reject complete voter applications that claim a disability because the State imagines that such applications may be submitted due to COVID-19. She may not.

Under the statute, and the Attorney General and Secretary of State's own guidance, Wise's only role is to review a vote by mail application for

³¹ Cf. *In re Lester*, No. 18-1041, 2020 Tex. LEXIS 422 (Tex. May 15, 2020) (Boyd, J., dissenting) (stating that the issue before the Court was not whether a "wrongfully convicted" prisoner should be compensated but rather whether the Act *authorized* such compensation.)

completeness. That is all she has done; that is all she will do. The fact that Commissioners Court—which is not a party here—wishes to file an amicus brief in outside litigation does not counsel a writ here.

Respondent Lisa Wise therefore prays that the mandamus be **denied**. In the alternative, she prays that she be **dismissed** from this matter.

Respectfully submitted,

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FACTUAL CERTIFICATION

I certify that I have reviewed the Response to Petition for Writ of Mandamus and concluded that every factual statement in the Response is supported by competent evidence included in the appendix or record. I further certify that every document contained in the Appendix is true and correct.

/s/ Kevin P. McCary
KEVIN P. McCary

CERTIFICATE OF COMPLIANCE

I certify that this Response Brief contains **4,109** words as calculated per Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure.

/s/ Kevin P. McCary
KEVIN P. McCary

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Response to Petition for Writ of Mandamus was served on the following counsel of record via electronic transmission on May 18, 2020:

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APPENDIX

- A. Tex. Elec. Code § 82.002
- B. Op. Tex. Att’y Gen. No. KP-0009 (2015)
- C. Act of May 27, 1981, 67th Leg., R.S., ch. 301
- D. Sen. Comm. on Elections, Bill Analysis, Tex. S.B. 531, 67th Leg., R.S. (1981)
- E. Act of May 13, 1985, 69th Leg., R.S., ch. 211, sec. 1

APPENDIX A

Tex. Elec. Code § 82.002

Tex. Elec. Code § 82.002

This document is current through the 2019 Regular Session, 86th Legislature, and 2019 election results.

Texas Statutes & Codes Annotated by LexisNexis® > Election Code > Title 7 Early Voting (Subts. A — C) > Subtitle A Early Voting (Chs. 81 — 88) > Chapter 82 Eligibility for Early Voting (§§ 82.001 — 82.007)

Sec. 82.002. Disability.

(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).

History

Enacted by Acts 1985, 69th Leg., ch. 211 (S.B. 616), § 1, effective January 1, 1986; am. Acts 1987, 70th Leg., ch. 472 (H.B. 612), § 19, effective September 1, 1987; am. Acts 1991, 72nd Leg., ch. 203 (S.B. 1234), § 2.05, effective September 1, 1991; am. Acts 1991, 72nd Leg., ch. 554 (S.B. 1186), § 1, effective September 1, 1991; am. Acts 1997, 75th Leg., ch. 864 (H.B. 1603), § 69, effective September 1, 1997.

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APPENDIX B

Op. Tex. Att’y Gen. No. KP-0009 (2015)



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 9, 2015

The Honorable W. Coty Siegert
Robertson County and District Attorney
Post Office Box 409
Franklin, Texas 77856

Opinion No. KP-0009

Re: Qualification for early voting by mail
under section 82.002 of the Election Code
(RQ-1221-GA)

Dear Mr. Siegert:

You ask about the disability requirements for voting early by mail pursuant to section 82.002 of the Election Code.¹ Section 82.002 allows qualified voters to cast a mail-in ballot in an election prior to the official election day "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." TEX. ELEC. CODE ANN. § 82.002(a) (West 2010). You state that "[o]n the application for ballot by mail, there is a box voters can check for 'Disability' which allows them to vote early by mail." Request Letter; *see* TEX. ELEC. CODE ANN. § 84.011(a)(4)(D) (West 2010) (requiring certain information on an early voting ballot application for "an applicant applying on the ground of age or disability"). You question whether the term "disability" as used on the mail-in ballot application means only the "sickness or physical condition" in subsection 82.002(a), or whether it also includes definitions of disability from other statutes. Request Letter.

The Texas Secretary of State ("SOS") is the entity tasked with administering and applying section 82.002. *See* TEX. ELEC. CODE ANN. § 31.003 (West 2010) (requiring SOS to "obtain and maintain uniformity in the application, operation, and interpretation of" state election laws). In briefing submitted in response to your request, SOS states that "section 82.002 sets out the appropriate standard" for mail-in voting based on a disability, such that "a voter should believe that they have a sickness or condition which prevents them from voting by personal appearance without assistance or without injuring their health."²

¹Letter from Honorable W. Coty Siegert, Robertson Cnty. & Dist. Att'y, to Honorable Greg Abbott, Tex. Att'y Gen. (Sept. 11, 2014), <https://www.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> ("Request Letter").

²Brief from Keith Ingram, Dir. of Elections, Tex. Sec'y of State at 1 (Oct. 1, 2014) (on file with Op. Comm.). A person's qualification to cast a vote by mail in an election may be subject to challenge. *Tiller*, 974 S.W.2d at 775

The manner and procedure of casting absentee ballots, which includes mail-in ballots, “is mandatory and directed by statutory requirements.” *Tiller v. Martinez*, 974 S.W.2d 769, 775 (Tex. App.—San Antonio 1998, pet. dismissed w.o.j.). When construing a statute, a court will focus on the statute’s plain language, which is the best indicator of legislative intent. *Zanchi v. Lane*, 408 S.W.3d 373, 376 (Tex. 2013). A reviewing court will defer to an agency’s interpretation of a statute only if the statute is ambiguous, provided that the agency’s interpretation is reasonable and does not conflict with the plain language of the statute. *TracFone Wireless, Inc. v. Comm’n on State Emergency Commc’ns*, 397 S.W.3d 173, 182 (Tex. 2013).

The plain language of section 82.002 does not require that a person satisfy any specific definition or standard of “disability” outside of the Election Code in order to qualify to vote by mail. The statute does, however, provide a clarifying but non-limiting example of a condition that satisfies the expressed standard. See TEX. ELEC. CODE ANN. § 82.002(b) (West 2010) (providing that “[e]xpected or likely confinement for childbirth on election day” would qualify one to vote under subsection 82.002(a)).

You refer to definitions of disability used by the Social Security Administration (“SSA”) and the United States Department of Veterans Affairs (“DVA”), two federal agencies that provide services to disabled citizens. Request Letter. SSA and DVA use their own standards for determining a person’s disability for purposes of establishing eligibility for services.³ Election Code section 82.002 makes no reference to a determination of disability made by any state governmental entity or federal agency. See TEX. ELEC. CODE ANN. § 82.002 (West 2010); cf. 42 U.S.C.A. § 12102 (West 2013) (defining “disability” for purposes of the Americans with Disabilities Act). Nor does it condition or limit eligibility based on any such determination. Further, while the disability standards used by SSA and DVA may differ from the standard described under section 82.002, nothing indicates that the two are mutually exclusive for purposes of mail-in voting eligibility. A person determined to be disabled by SSA, for example, would be eligible to vote in an election by mail if the SSA disability constituted a “sickness or physical condition that prevents the voter from appearing at the polling place on election day” as provided under section 82.002. *Id.* § 82.002(a). In accordance with the plain language of section 82.002, to be eligible for early voting by mail, a qualified voter need only satisfy the disability standard established under section 82.002. Consistent with SOS’s construction of the statute, a determination of disability under a different standard or definition of “disability,” standing alone, is not determinative of a person’s qualification for early mail-in voting under section 82.002.

(“Votes are void and should not be counted if the evidence shows that procedural statutory requirements were not followed in the casting of absentee ballots[.]”). Consequently, while proof of disability may not be necessary to apply for a mail-in ballot, its production may be compelled if a voter’s qualification for voting by mail is challenged in court.

³The SSA uses the following definition of disability: “the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 20 C.F.R. § 404.1505 (2014). The DVA, by contrast, uses a specific disability rating schedule governed by 38 C.F.R. §§ 4.1–4.150 (2014).

S U M M A R Y

To be eligible to vote early by mail based on a disability, a qualified voter must satisfy the standard established under section 82.002 of the Election Code. A disability determination under a different standard or definition of "disability," standing alone, is not necessarily determinative of a person's qualification for early mail-in voting under section 82.002.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

BRANTLEY STARR
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee
Assistant Attorney General

APPENDIX C

Act of May 27, 1981, 67th Leg., R.S., ch. 301

**ABSENTEE VOTING—SICKNESS OR
DISABILITY—CERTIFICATION****CHAPTER 301****S. B. No. 531**

An Act relating to the certification of sickness or disability for absentee voting; amending Section 37, Texas Election Code, as amended (Article 5.05, Vernon's Texas Election Code), by amending Paragraphs (b) and (c) of Subdivision 2 and by repealing Subdivision 2d.

Be it enacted by the Legislature of the State of Texas:

Section 1. Paragraphs (b) and (c), Subdivision 2, Section 37, Texas Election Code, as amended (Article 5.05, Vernon's Texas Election Code), are amended⁵⁸ to read as follows:

"(b) The application shall state the voter's voter registration certificate number or, in case the voter does not have his certificate in his possession at the time of making the application, to indicate whether the certificate has been lost or mislaid, has been left at the voter's home (where he is applying from a temporary address), or has been used for applying for an absentee ballot in another election (stating the nature and date of the election) and has not been returned to him. Before furnishing a ballot to a voter, the clerk shall verify the voter's registration certificate number, or in case the number is not stated on the application, the clerk shall enter it from the list of registered voters. If the ground of application is sickness or physical disability by reason of which the voter cannot appear at the polling place on election day, a certificate of the applicant certifying to such sickness or physical disability shall accompany the application, which certificate shall be in substantially the following form:

"This is to certify that because of sickness or physical disability I will be unable to appear at the polling place for an election to be held on the _____ day of _____, 19____.

"Witness my hand at _____, Texas, this _____ day of _____, 19____.

(Signature of Applicant)

"The officially prescribed certificate form shall include a statement to the following effect: 'I understand that giving false information in this certificate is a crime.'

"(c) Expected or likely confinement for childbirth on election day shall be sufficient to entitle a voter to vote absentee on the ground of sickness or physical disability."

Sec. 2. Subdivision 2d, Section 37, Texas Election Code, as amended (Article 5.05, Vernon's Texas Election Code), is repealed.⁵⁹

Sec. 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on

⁵⁸. V.A.T.S. Election Code, art. 5.05, subd. 2, para. (b), (c).

⁵⁹. V.A.T.S. Election Code, art. 5.05, subd. 2d, repealed.

three several days in each house be suspended, and this rule is hereby suspended.

Passed the Senate on May 7, 1981: Yeas 27, Nays 0; Senate concurred in House amendment on May 26, 1981, by a viva-voce vote; passed the House, with amendment, on May 15, 1981, by a non-record vote.

Approved June 8, 1981.

Effective Aug. 31, 1981, 90 days after date of adjournment.

**BOARD OF LICENSURE FOR NURSING HOME
ADMINISTRATORS—EXECUTIVE DIRECTOR
AND LICENSE AND EXAMINATION FEES**

CHAPTER 302

S. B. No. 541

An Act relating to the name of the chief executive officer to the Texas Board of Licensure for Nursing Home Administrators and to license and examination fees; amending the Texas Nursing Home Administrators Licensure Act, as amended (Article 4442d, Vernon's Texas Civil Statutes), by amending Subsections (1) and (2), Section 4; Subsections (2) and (3), Section 10; and Subsection (2), Section 11.

Be it enacted by the Legislature of the State of Texas:

Section 1. Subsections (1) and (2), Section 4, Texas Nursing Home Administrators Licensure Act; as amended (Article 4442d, Vernon's Texas Civil Statutes), are amended⁶⁰ to read as follows:

"(1) As soon as practicable after appointment, appointive members of the board shall be certified by the Governor's office and shall take the constitutional oath of office for officers of the State of Texas. The board shall elect from its appointive members a chairman and vice chairman and these officers shall be elected to serve for one (1) year or so much thereof as shall remain, and elections for these offices shall be held annually thereafter for the term of a year. Elections to fill vacancies shall be held in the same manner for the balance of any unexpired term. The board shall appoint a person to be executive director to the board who shall serve at the pleasure of the board and who shall be the chief executive officer to the board but not a member thereof. The executive director shall have such powers and shall perform such duties as may be prescribed by law or delegated to him by the board under its rules and regulations. Suitable office space, equipment and supplies and additional agents or employees as may be required for discharging the functions of the board shall be provided within the limits of the funds available to the board as hereinafter provided for. The board shall adopt an official seal which shall be affixed to licenses, certificates and other official documents of the board.

⁶⁰. Vernon's Ann.Civ.St. art. 4442d, § 4, subsecs. (1), (2).

APPENDIX D

Sen. Comm. on Elections, Bill Analysis, Tex. S.B.
531, 67th Leg., R.S. (1981)

SB 531

By: Glasgow, Brown

Committee on Elections

BILL ANALYSIS

BACKGROUND INFORMATION

Under current law, one of the grounds for voting absentee by mail is illness or physical disability. Expected confinement for childbirth on election day is also included in this category. Currently, a physician's certificate as to the illness, disability or likely confinement for childbirth is required to accompany the application for a ballot. The Texas Election Code also provides that a certificate of physical disability signed by a physician be submitted unless a certificate of permanent disability is filed with the registrar of voters.

These circumstances are the only ones which require a certificate from any person other than the voter in order for absentee voting materials to be used. For the convenience of the voter it has been suggested that the requirement of certificates be eliminated.

PURPOSE

S.B. 531 seeks to eliminate the requirement of a physician's certificate to be attached to the application for an absentee ballot.

SECTION BY SECTION ANALYSIS

SECTION 1: Amends Paragraphs (b) and (c), Subdivision 2, Section 37, Texas Election Code (Article 5.05, Vernon's Texas Election Code) as follows:

Paragraph (b): Deletes language referring to a situation in which the voter has used his certificate for applying for an absentee ballot in another election, when the certificate has not been returned to him at the time he is applying for an absentee ballot.

Deletes language referring to the requirement for certificates of illness or disability.

Paragraph (c): Deletes language referring to the requirement of a physician's certificate in the case of expected confinement for childbirth and language referring to the penalty provisions for a false certification.

SECTION 2: Repeals Subdivision 2d, Section 37, Texas Election Code (Article 5.05, Vernon's Texas Election Code) which refers to the certificate of permanent disability.

SECTION 3: Emergency Clause

RULEMAKING AUTHORITY

This bill delegates no additional rulemaking authority to any state officer, agency, department or institution.

SB 531

Bill Analysis Page 2

By: Glasgow, Brown

Committee on Elections

SUMMARY OF COMMITTEE ACTION

Pursuant to an announcement from the floor of the House, the House Committee on Elections met in a formal meeting on May 13, 1981, to consider S.B. 531.

The committee voted to report S.B. 531 to the full House with the recommendation that it do pass as amended, and be printed and placed on the Consent Calendar by a record vote of nine ayes, no nays, no present not voting and two absent.

There were no witnesses to testify in favor of or in opposition to the bill.

Committee Amendment number one seeks to reinstate the requirement that a certification of illness or physical disability be presented at the time of the application for an absentee ballot, and that certificate be completed by the voter.

S.B. 531 is a companion bill to H.B. 1630, passed by the committee on April 28, 1981.

APPENDIX E

Act of May 13, 1985, 69th Leg., R.S., ch. 211, sec. 1

Sec. 82.006. SERVING IN ELECTION

CHAPTER 82. ELIGIBILITY TO VOTE ABSENTEE

Sec. 82.001. ABSENCE FROM COUNTY OF RESIDENCE. (a) A qualified voter is eligible to vote absentee by personal appearance if the voter expects to be absent from the county of the voter's residence on election day.

(b) Subject to Subsection (c), a qualified voter is eligible to vote absentee by mail if the voter expects to be absent from the county of the voter's residence on election day and during the regular hours for conducting absentee voting at the main absentee polling place for that part of the period for voting absentee by personal appearance remaining after the voter's absentee ballot application is submitted to the absentee voting clerk.

(c) If a voter's absentee ballot application is submitted on or after the first day of the period for voting absentee by personal appearance, the voter is ineligible to vote absentee by mail unless the voter is absent from the county when the application is submitted and satisfies the requirements prescribed by Subsection (b). (V.T.E.C. Art. 5.05, Subdivs. 1(a), 1(c)(ii), 1(c)(iii).)

Sec. 82.002. DISABILITY. (a) A qualified voter is eligible to vote absentee by personal appearance or 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 his health.

(b) Expected or likely confinement for childbirth on election day is sufficient cause to entitle a voter to vote absentee under Subsection (a). (V.T.E.C. Art. 5.05, Subdivs. 1(a), 1(c)(i), 2(b), 2(c); New.)

Sec. 82.003. AGE. A qualified voter is eligible to vote absentee by personal appearance or by mail if the voter is 65 years of age or older on election day. (V.T.E.C. Art. 5.05, Subdivs. 1(a), 1(c)(i).)

Sec. 82.004. RELIGION. A qualified voter is eligible to vote absentee by personal appearance or by mail if the voter is forbidden by religious conviction to vote during all or part of the time the polls are open on election day. (V.T.E.C. Art. 5.05, Subdivs. 1(a), 1(c)(i).)

Sec. 82.005. CONFINEMENT IN JAIL. (a) A qualified voter is eligible to vote absentee by personal appearance or by mail if, at the time the voter's absentee ballot application is submitted, the voter is confined in jail:

- (1) serving a misdemeanor sentence for a term that ends on or after election day;
- (2) pending trial after denial of bail;
- (3) without bail pending an appeal of a felony conviction; or
- (4) pending trial or appeal on a bailable offense for which release on bail before election day is unlikely.

(b) A voter confined in jail who is eligible to vote absentee is not entitled to vote absentee by personal appearance unless the authority in charge of the jail, in his discretion, permits the voter to do so. (V.T.E.C. Art. 5.05, Subdivs. 1(a), 1(b).)

Sec. 82.006. SERVING IN ELECTION. (a) A qualified voter is eligible to vote absentee by personal appearance if:

- (1) the voter expects to serve on election day as an election officer or watcher in the election or in another election held on the same day; and
- (2) the location at which the voter expects to serve is not the polling place at which he would vote in the election in which he desires to vote absentee.

(b) A qualified voter is eligible to vote absentee by personal appearance if the voter expects, by reason of his employment, to perform official functions in the administration of an election during all or part of the voting hours on election day. (V.T.E.C. Art. 5.05, Subdiv. 1(a); New.)

CHAPTER 83. OFFICER CONDUCTING ABSENTEE VOTING

SUBCHAPTER A. ABSENTEE VOTING CLERK

Sec. 83.001. ABSENTEE VOTING CLERK GENERALLY

Sec. 83.002. COUNTY CLERK AS ABSENTEE VOTING CLERK

Sec. 83.003. CLERK FOR LESS-THAN-COUNTYWIDE ELECTIONS HELD AT COUNTY EXPENSE

Sec. 83.004. CLERK FOR ELECTIONS ORDERED BY COUNTY AUTHORITY NOT HELD AT COUNTY EXPENSE

Sec. 83.005. CLERK FOR CITY ELECTIONS

Sec. 83.006. CLERK FOR ELECTIONS OF OTHER POLITICAL SUBDIVISIONS

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