

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 TEXAS PUBLIC POLICY FOUNDATION
AS AMICUS CURIAE**

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TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL ii

INDEX OF AUTHORITIES.....iv

INTEREST OF *AMICUS CURIAE*.....1

ARGUMENT3

 I. UNRESTRICTED VOTE BY MAIL THREATENS ELECTION
 VALIDITY AND INTEGRITY3

 II. TEXAS ELECTION CODE §82.002 HISTORY
 CONSISTENTLY HAS REQUIRED AN ACTIVE SICKNESS
 OR DISABILITY7

CONCLUSION9

CERTIFICATE OF COMPLIANCE.....11

CERTIFICATE OF SERVICE12

INDEX OF AUTHORITIES

<u>Case:</u>	<u>Page:</u>
<i>Fort Worth Transp. Auth. v. Rodriguez</i> , 547 S.W.3d 830 (Tex. 2018)	9
 <u>Other Authorities:</u>	
Tex. Elec. Code	
§ 82.002	7, 8, 9, 10
§ 82.002(a)	7
§ 86.103	5
§ 87.027	5
 New Oxford Am. Dictionary (3d ed. 2010)	9
 Act of May 13, 1985, 69 th Leg., ch. 211, 1985, Tex. Gen. Laws 802	8
 Act of Oct. 30, 1935, 44th Leg., 2nd C.S. p. 1700, Ch. 437, § 1, 1935 Tex. Gen. Laws 1700, 1700	8
 1987 Tex. ALS 472, 1987 Tex. Gen. Laws 472, 1987 Tex. HB 612	8
 1991 Tex. ALS 203, 1991 Tex. Gen. Laws 203, 1991 Tex. SB 1234	8
 1997 Tex. ALS 864, 1997 Tex. Gen. Laws 864, 1997 Tex. Ch. 864, 1997 Tex. HB 1603	8

INTEREST OF *AMICUS CURIAE*

The Texas Public Policy Foundation (the “Foundation”) is a non-profit, non-partisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach.¹

Since its inception in 1989, the Foundation has advanced its mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach. From that research, and in accordance with its central mission, the Foundation has hosted policy discussions, prepared advisory papers, presented legislative testimony, and even drafted proposed legislation.

More recently, the Foundation, through its Election Integrity Project, has placed a renewed emphasis on ensuring that each and every citizen is afforded their rights to legally vote and that public policy secures the reliability of our election system. The Project focuses on educating the public about ballot safety through these general principles: (1) voters should understand their rights and the rules of voting;

¹ This Brief reflects the opinion of the Foundation alone. No other party has contributed to the cost of this Brief.

(2) voters should be free to choose; (3) The voting system should preserve the integrity of each ballot.

It is with this experience that the Foundation submits the following brief in support of the State's mandamus to command local election administrators to adhere to the statutory requirements that limit eligibility for voting by mail and recognize that, 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 Election Code for purposes of receiving a ballot by mail.

TO THE HONORABLE TEXAS SUPREME COURT-

The Texas Public Policy Foundation (the “Foundation”) submits its brief in support of this Court granting the mandamus relief sought by the State of Texas and commanding that local election administrators adhere to the straightforward and unambiguous limitations on eligibility for voting absentee by mail.

ARGUMENT

I. UNRESTRICTED VOTE BY MAIL THREATENS ELECTION VALIDITY AND INTEGRITY

Universal, unrestricted vote by mail represents a threat to election validity and integrity because of documented problems including fraud, lost ballots, and potential for voter disenfranchisement and election legitimacy challenges. Because of documented risks, including inaccurate rolls, the vulnerability to fraud, and the sheer logistical challenges, a rush to expanding vote-by-mail would harm the rights of all Texans. Forcing a major state like Texas in the middle of an election cycle would result in disenfranchising all Texas voters.

Since its creation this year, the Foundation’s Election Integrity Project has been gathering election data from all 254 Texas counties for the election cycles of 2016 and 2018. The data has been analyzed revealing evidence that suggests current abuse of voting by mail under the disability exception in at least six major counties. For example, TPPF’s analysis of voters under age 65 who applied for mail-in ballots and voted from their home address, which requires they marked the “disability”

category on the application form, shows that approximately 55,000 persons claimed a disability to vote from home in 2018, up from about 8,600 in 2014. A further analysis of these under-65 alleged “disability” mail voters shows that many are college age, with about half being first-time voters. In other words — it is statistically improbable that most of them are disabled. This means about 1.3 percent of the vote cast in Texas in 2020 could be by people who are not eligible to vote by mail according to Texas law – and that was before the onset of COVID-19 and calls to dramatically expand vote by mail.²

Mail in ballots are vulnerable to fraud simply due to a broken chain of custody, lack of supervision and no requirement for the same type of identification that is required to vote in person. Election scholars Barry Burden, Robert Stein and Charles Steward noted that vote by mail has multiple leaks vulnerabilities due to the simple logistics of requesting, mailing and verifying a ballot have hazards.³ In 18 states, a photo identification is needed to vote on Election Day, with another 17 states requiring at least a non-photo ID. Texas is a “Voter ID” state. In the 2016 General Election, about a quarter of all the votes cast were by mail. But unlike when voting

² <https://www.foxnews.com/opinion/chuck-devore-will-illegal-voting-tip-texas-blue-in-2020>

³ <https://www.washingtonpost.com/politics/2020/04/06/more-voting-by-mail-would-make-2020-election-safer-our-health-it-comes-with-risks-its-own/>

in person, voting by mail in Texas does not requires proof of identification at the time the ballot is cast.

Texas law does require a Signature Verification Committee process, but mail in ballot signatures are imprecise, easily duplicated, and have an imperfect challenge and cure process in comparing them. *See* Tex. Elec. Code §86.013, 87.027. The Signature Verification Committee, designated by the Early Voting Ballot Board, compares the signatures from ballots with any two or more signatures of the voter made within the preceding six years and on file with the county clerk or voter registrar to determine whether the signatures are those of the voter. As opponents of signature verification process such as the Texas Civil Rights Project have noted, this can be a subjective task and most members are not handwriting experts which can lead to mistakes.⁴ As was shown in Harris county, handwriting can be forged, and several alleged harvesters had convictions for forgery.⁵ Unique identifiers such as a passport or driver’s license number cannot. These factors combine to make signature verification a weak check on fraud at best.

Because of minimal verification, it is well known that the mail in ballots are “the tool of choice” of vote thieves and those willing to compromise the election process. The Texas Attorney General is currently prosecuting 38 cases of voter

⁴ <https://texascivilrightsproject.org/fixing-texas-mail-in-ballot-process/>

⁵ <http://www.texastrashtalk.com/2020/04/vote-harvesting-in-harris-county-beyond.html>

fraud. The Washington DC based Heritage Foundation keeps a database of voter fraud cases, including 1,277 cases of election fraud, with cases in Washington, Colorado, and Oregon (states that have adopted all-mail in balloting).⁶ In Texas alone they list over 80 cases of voter fraud dating back to 2006. Every fraudulent vote cancels out a legitimate vote, and, thus, disenfranchises a legitimate voter.

The lack of supervision, as with in person voting, also creates potential for illegal action. Was there intimidation, coercion, or fraud associated with the completion of the ballot? Was the ballot mis-mailed, lost, and then found? Was it completed with the knowledge of the voter on the ballot? Since all mail in ballots are reviewed behind closed doors beyond oversight of election official, answering these questions are difficult if not impossible. The significant task of simply counting all ballots by election day is complicated by potentially lengthy delays in certifying questionable results. As the U.S. Election Assistance Commission has pointed out, millions of mailed ballots have been misdirected or gone missing in prior elections.⁷ Further in 2012, the Pew Charitable Trusts found that one in eight voter registrations are no longer valid or have significant inaccuracies, contributing

⁶ <https://www.heritage.org/voterfraud>

⁷ https://www.realclearpolitics.com/articles/2020/04/24/28_million_mail-in_ballots_went_missing_in_last_four_elections_143033.html

to lost ballots and opportunities for fraud.⁸ Recently, the Public Interest Legal Foundation noted that 28 million ballots went missing in the last four elections⁹

In short, for local election administrators to *sua sponte* expand the Texas Election Code without the necessary precautions to protect the integrity of the ballot is to hand an election over to bad actors who may exploit the mail in ballot process and deny the vote to its rightful citizens.

II. TEXAS ELECTION CODE §82.002 HISTORY CONSISTENTLY HAS REQUIRED AN ACTIVE SICKNESS OR DISABILITY.

Properly construed, Tex. Elec. Code 82.002 does not permit an otherwise healthy individual to vote by mail merely because going to poll carries a risk to the public health. It did not during ebola, swine flu, bird flu, mad cow disease, nor does it now during COVID-19. Instead, it permits a qualified voter to vote by mail “if the voter has a sickness of physical condition that prevents the voter” from voting in person “without a likelihood of . . . injuring the voter’s health.” Texas law does not allow a person to vote by mail under §82.002(a) if that person is not at that time disabled or sick.

Tex. Elec. Code § 82.002(a). Texas Election Code §82.002(a) provides:

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

⁸ <https://www.pewtrusts.org/en/about/news-room/press-releases-and-statements/2012/02/14/pew-one-in-eight-voter-registrations-inaccurate-51-million-citizens-unregistered>

⁹ https://publicinterestlegal.org/files/Mail-Voting-2012_2018-1P.pdf

at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health. (emphasis added)

The rule allowing sick or disabled voters to vote by mail has itself existed since 1935. Act of Oct. 30, 1935, 44th Leg., 2nd C.S., p. 1700, ch. 437, § 1, 1935 Tex. Gen. Laws 1700, 1700. Section 82.002 took its current form during the 1985 recodification of the Election Code. Act of May 13, 1985, 69th Leg., ch. 211, 1985 Tex. Gen. Laws 802, which originally provided:

(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.

Section 82.002 was then amended in 1987 to delete reference to voting by personal appearance. 1987 Tex. ALS 472, 1987 Tex. Gen. Laws 472, 1987 Tex. HB 612, 1987 Tex. ALS 472, 1987 Tex. Gen. Laws 472, 1987 Tex. HB 612. Finally, non-substantive amendments occurred in 1991 and 1997 that changed the term "to vote absentee" to "for early voting" and changed the gender specific "his" to "the voter's." 1991 Tex. ALS 203, 1991 Tex. Gen. Laws 203, 1991 Tex. SB 1234, 1991 Tex. ALS 203, 1991 Tex. Gen. Laws 203, 1991 Tex. SB 1234; 1997 Tex. ALS 864, 1997 Tex. Gen. Laws 864, 1997 Tex. Ch 864, 1997 Tex. HB 1603, 1997 Tex. ALS 864, 1997 Tex. Gen. Laws 864, 1997 Tex. Ch 864, 1997 Tex. HB 1603. Section 82.002 has remained unchanged since 1997.

An otherwise healthy person does not have a “sickness or physical condition” within the meaning of section 82.002 merely because he subjectively fears contracting COVID-19. Because the Election Code does not define these operative terms, courts consult common usage. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018). 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 ill with COVID-19 would certainly qualify as having a sickness. However, a fear of contracting a sickness does not fall within the terms selected by the Legislature—namely, that a voter “has a sickness.” Tex. Elec. Code § 82.002. Nor does a fear of contracting COVID-19 qualify as a “physical condition.” The common understanding of the term “physical” is “of or relating to the body as opposed to the mind.” New Oxford Am. Dictionary 1321. “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.

Therefore, the text and statutory history of section 82.002 is clear that the exception to vote by mail only applies to a person who then is sick or then has a physical condition, not a person who may have concern regarding contracting either.

CONCLUSION

Like voting and the right of citizens, food and nutrition are also vital necessities to human survival. Thus, grocery stores and other providers of necessary

provisions have employed a safe and successful method of providing food and nutrition to every Texan during this virus panic. They have employed distancing, limited occupancy of their facilities, face masks and gloves, and they use plexiglass at the checkout counter to protect both the customer and the clerk. With certainty, most Texas voters have recently gone to a grocery store or other business under these safety standards.

Rather than a rush to expand vote by mail and presenting voters with a false dichotomy of their health or a right to vote, the State should act prudently as it has by following proper personal protective equipment and sanitization guidelines, use and expand early voting and proper communication as to the law regarding vote by mail as it has done. As state elections are administered by local election officials, this Court must mandamus that those election administrators that seek to expand mail voting beyond the limits of Texas law must conform their actions to the plain, historic text of Tex. Elec. Code §82.002.

Respectfully submitted,

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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 2,087 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/Robert Henneke

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