

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

**TEXAS DEMOCRATIC PARTY'S
OPPOSED MOTION TO INTERVENE**

Pursuant to Texas Rule of Civil Procedure 60 and Rule 52.2 of the Texas Rules of Appellate Procedure, Texas Democratic Party, its Chair, Gilberto Hinojosa, Shanda Marie Sansing and Joseph Daniel Cascino (“TDP”) respectfully move to intervene in this cause. The TDP is a real party in interest in this cause, because the relief Relator seeks would directly affect TDP by effectively reversing a trial court injunction, upheld by the Fourteenth Court of Appeals, which TDP sought and to which both TDP and the Relator.

Counsel for TDP contacted counsel for the Relator and informed them that TDP was a real party in interest and requested that the Petition be amended to include

TDP. Counsel for the Relator did not agree to amend and opposes this Motion. The instant motion follows.

INTRODUCTION

The Relator brought this Petition to invalidate the valid order of a Travis County District Court that has been enforced by order of the Fourteenth Court of Appeals. The Relator argued against an injunction at the trial court, but that court issued an injunction to TDP and other Plaintiffs enjoining the conduct (*i.e.*, rejecting mail ballot applications) that the Relator seeks permission from this Court to do. MR.1217-22. Then, the Relator argued to the Fourteenth Court of Appeals that the injunction should be superseded or otherwise stayed while its appeal was pending but, before, the court could rule, but after it entered a briefing order and identified the Justices on the panel, Relator filed this proceeding. The next day, the Fourteenth Court of Appeals ruled against Relator as well. *See* Order, *State of Texas v. Texas Democratic Party et. al.*, No. 14-20-00358-CV (Tex. App.—Houston 2020). Now, apparently unwilling to accept the valid ruling of two Texas courts to which the TDP was party, the Relator filed this Petition without acknowledging TDP as a real party in interest. As explained herein, however, TDP is a real party in interest, and its motion to intervene should be granted.

The Court should be aware that the invocation of this Court’s jurisdiction with this Petition is but one of many acts the state’s executive branch has taken in opposite to the rules, procedures and rulings of the judicial branch.

FACTUAL BACKGROUND

On March 20, 2020, TDP, its Chairman Gilberto Hinojosa, and two individual plaintiffs filed suit against the Secretary of State Ruth Hughs and the Clerk of Travis County Dana Debeauvoir in their official capacities. *See Texas Democratic Party, et al. v. DeBeauvoir, et al.*, No. D-1-GN-20-001610 (201st Dist. Ct., Travis Cnty., Tex. filed March 20, 2020). In that case, TDP and the other plaintiffs contend that existing state law allows voters to elect to cast their ballots by mail under the circumstances of this pandemic by utilizing the long existing “disability exception.” MR.0268-69. Specifically, they asserted that under Texas Election Code § 82.002, which provides that 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” (emphasis added), lack of immunity to COVID-19 is a physical condition making the participating voter eligible to vote by mail. *Id.*

The Relator intervened and asserted a plea to the jurisdiction based on standing, ripeness, and sovereign immunity. MR.0340-72. Ironically, the Relator argued in its Plea to the Jurisdiction that vote by mail administration is a county-

level decision. MR.0365. On April 15, the state court heard the plaintiffs' temporary injunction motion and the Relator's plea to the jurisdiction. MR.0376. The state court verbally announced the denial of the plea to the jurisdiction and the granting of the temporary injunction. On April 17, the trial court issued a written order granting a temporary injunction and finding that "voting in person while the virus that causes COVID-19 is still in general circulation presents a likelihood of injuring [a voter's] health, and any voters without established immunity meet the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code § 82.002." MR.1217-22.

The trial court enjoined the Travis County Clerk from "rejecting any mail ballot applications received from registered voters who use the disability category of eligibility as a result of the COVID-19 pandemic" and from "refusing to accept and tabulate any mail ballots received from voters who apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic." MR.1220. The trial court further enjoined the Travis County Clerk and the State of Texas from "issuing guidance or otherwise taking actions that would prevent Counties from accepting and tabulating any mail ballots received from voters who apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic . . . [or] that would prohibit individuals from submitting mail

ballots based on the disability category of eligibility or that would suggest that individuals may be subject to penalty solely for doing so.” MR.1221.

The Relator filed a notice of interlocutory appeal but did not seek to supersede the injunction under Rule of Appellate Procedure 24. See MR.1223-24.

On May 1, 2020, in a striking assertion of unbridled executive power, Attorney General Ken Paxton, the State of Texas’s chief legal officer, issued a letter announcing his contrary interpretation of the disability category, which the district court already rejected, is law of the land, and threatening prosecution of parties who encourage individuals to vote by mail due to COVID-19. MR.0256-58.

On May 5, TDP and the other plaintiffs-appellees filed a motion for emergency relief on May 5 in the Third Court of Appeals, pursuant to Texas Rule of Appellate Procedure 29.3 and TRAP 29.4 to enforce the district court’s temporary injunction or, in the alternative, for an order that the lower court’s injunction remains in effect to preserve the parties’ rights until the disposition of the appeal. MR.1239-87. The appeal was transferred to the Fourteenth Court of Appeals. MR.1288-89.

On May 14, the Fourteenth Court of Appeals ruled in the plaintiffs-appellees’ favor, “concluding that under the circumstances presented here, where appellees allege irreparable harm, under the binding authority of the Austin Court, we must exercise our inherent authority under Rule 29.3 and order that the trial court’s temporary injunction remains in effect until disposition of this appeal.” Order, *State*

of Texas v. Texas Democratic Party et. al., No. 14-20-00358-CV (Tex. App.—Houston 2020).

The Relator then filed the instant Petition for Writ of Mandamus but failed to include the TDP as a real party in interest. Petition for Writ of Mandamus, *In Re. State of Texas* (Tex. 2020) (orig. proceeding).

LEGAL STANDARDS

“[A]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.” Tex. R. of Civ. Proc. 60. “[U]nder Rule 60, a person or entity has the right to intervene if the intervenor could have brought the same action, or any part thereof, in his own name, or, if the action had been brought against him, he would be able to defeat recovery, or some part thereof.” *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990). In other words, a “party has a justiciable interest in a lawsuit, and thus a right to intervene, when his interests will be affected by the litigation.” *Jabri v. Alsayyed*, 145 S.W.3d 660, 672 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

It “is an abuse of discretion to strike a plea in intervention if (1) the intervenor meets the above test, (2) the intervention will not complicate the case by an excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the intervenor’s interest.” *Id.*

A party “whose interest would be directly affected by the relief sought is a real party in interest and a party to the case.” Tex. R. of App. Proc. 52.2.

ARGUMENT

I. TDP Has the Right to Intervene under Texas Rule of Civil

Procedure 60

TDP has the right to intervene because they could have brought this cause (seeking a substantively different writ, of course). A person or entity “has the right to intervene if the intervenor could have brought the same action, or any part thereof, in his own name, or, if the action had been brought against him, he would be able to defeat recovery, or some part thereof.” 793 S.W.2d at 658. Put another way, a “party has a justiciable interest in a lawsuit, and thus a right to intervene, when his interests will be affected by the litigation.” *Jabri v. Alsayyed*, 145 S.W.3d 660, 672 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *see also Jenkins v. Entergy Corp.*, 187 S.W.3d 785, 797 (Tex. App. 2006) (affirming trial court’s refusal to strike plea for intervention, and noting that while “that interest must be greater than a mere contingent or remote interest,” the court in *Jabri*’s standard that intervention is proper where a party “has a justiciable interest in a lawsuit” controls). Here, not only could the TDP have brought this same action, the TDP did bring an action mirroring this one in the Travis County District Court in which the State itself

intervened. *See Texas Democratic Party, et al. v. DeBeauvoir, et al.*, No. D-1-GN-20-001610 (201st Dist. Ct., Travis Cnty., Tex. filed March 20, 2020).

Additionally, the TDP has a “justiciable interest” in this case (and certainly one that is more than “contingent or remote”), as its interests will be impacted by this cause. As explained above, the TDP has already sought and obtained an injunction against Travis County and the Relator. As the trial court in the Travis County Action held, “the TDP must have clarity . . . so that election preparations can be made,” and as such issued an injunction providing that clarity. Order at 3. Now, the State seeks a writ of mandamus which would effectively negate the injunction in the Travis County Action, an injunction which not only is in the TDP’s interests on the merits, but which has also provided the clarity the TDP needs in order to prepare for its upcoming runoff election.

While not essential to permit intervention, the other factors set forth in *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990) for reviewing a trial court’s decisions on intervention also counsel in favor of permitting intervention.¹

First, TDP’s intervention will not multiply the issues in this cause or otherwise complicate the case. Intervention should be permitted where, *inter alia*, it “will not

¹ *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652 (Tex. 1990) involved this Court’s review, employing an abuse of discretion standard, of a trial court’s decision to strike a plea for intervention, *id.* at 653, not, as in this case, a motion to intervene in an original proceeding before this Court.

complicate the case by an excessive multiplication of the issues.” *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657. In this cause, the TDP’s intervention will not cause an excessive multiplication of the issues because the relief sought by the Relator concerns the exact same issue that the TDP and the Relator have already been litigating, and continue to litigate, in the case filed in the Travis County District Court.² Compare Relator’s Petition for Writ of Mandamus at x (stating that the issue presented is whether “Respondents have a duty to reject applications for mail-in ballots that claim ‘disability’ under Texas Election Code section 82.002(a) based solely on the generalized risk of contracting a virus”) with Plaintiffs’ Original Petition and Application for Temporary Injunction, Permanent Injunction, and Declaratory Judgment in *Texas Democratic Party, et al. v. DeBeauvoir, et al.*, No. D-1-GN-20-001610 (201st Dist. Ct., Travis Cnty., Tex. filed March 20, 2020) (seeking an injunction “declaring that TEX. ELEC. CODE 82.002 allows any eligible voter, regardless of age and physical condition, to request, receive and have counted, a mailing ballot, if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease”).

The Relator cannot seriously contend that the issues at issue in this cause and the Travis County District Court Action are the same, nor does it. In explaining why

² TDP has also filed a case in the United States District Court for the Western Division of Texas, arguing that the state’s Executive Branch interpretation of vote by mail rules violates federal constitutional and statutory rights. See *Tex. Dem. Party, et al. v. Abbott, et al.* Cause No. 5:20-cv-00438-FB.

the Relator purportedly needed to file this Petition for the Writ of Mandamus, the State argued that (a) prevailing in the Travis County Action will only vacate the injunction already in place, and not affirmatively enjoin Respondents to follow the State's (incorrect) interpretation of the Texas Election Code, (b) four of the Respondents in this cause are not parties to the Travis County Action, and (c) the Travis County Action will supposedly "come too late." Petition at 17. So while the State argues that the extent of the relief provided, the exact parties to be bound, and the timing of a decision differ between this cause and the Travis County Action, nowhere does the State argue that the issue or issues to be decided are different. Nor could it, because they are not.

Second, intervention is proper because intervention is essential to protect the TDP's interest. It is an abuse of discretion to deny intervention, where the other elements are met, "the intervention is almost essential to effectively protect the intervenor's interest." *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657. Here, the TDP's intervention is not only "almost essential" to protect its interest – it is absolutely essential. As explained above, the TDP has already sought and obtained an injunction against Travis County and the Relator, and the writ of mandamus the State seeks will deny the TDP the clarity that injunction has provided.

Thus, because the TDP has satisfied the standard for intervention under Rule 60 and the Court's own precedent, the TDP's Motion to Intervene should be granted.

II. TDP's Intervention Is Proper under Texas Rule of Appellate Procedure 52.2

Additionally, the TDP's intervention is proper under Texas Rule of Appellate Procedure 52.2 because its interest would directly impact if the Court grants the relief the State seeks in this cause. A party "whose interest would be directly affected by the relief sought is a real party in interest and a party to the case." *In re Port of Corpus Christi, L.P.*, 579 S.W.3d 129, 130 (Tex. App. 2019) (citing Rule 52.2 in ordering that "the real parties in interest . . . or any others whose interest would be directly affected by the relief sought, file a response to the petition for writ of mandamus") (emphasis added).

Here, the TDP's interest would be directly affected if the Court grants the State's writ of mandamus ordering the county election officials of Harris, Travis, Dallas, Cameron, and El Paso to reject mail-in ballots from registered voters who use the disability category of eligibility as a result of the COVID-19 pandemic, because the TDP's preparations for the upcoming July and November elections would be severely disrupted. There is already a valid injunction against the Travis County Clerk and the Relator on which the TDP has relied, and a writ of mandamus conflicting with that judgment would injure the TDP by potentially altering those preparations.

Thus, because the TDP's interest would be directly affected if the Court issues this writ, the Court should grant the TDP's motion to intervene.³

CONCLUSION AND PRAYER

For the above reasons, the TDP asks the Court to grant its Motion to Intervene in this cause.

Respectfully submitted,

TEXAS DEMOCRATIC PARTY

By: /s/ Chad W. Dunn

Chad W. Dunn
General Counsel
State Bar No. 24036507
Brazil & Dunn, LLP
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
Telephone: (512) 717-9822
Facsimile: (512) 515-9355
chad@brazilanddunn.com

K. Scott Brazil
State Bar No. 02934050
Brazil & Dunn, LLP
13231 Champion Forest Dr., Ste. 406
Houston, Texas 77069
Telephone: (281) 580-6310
Facsimile: (281) 580-6362
scott@brazilanddunn.com

³ The TDP's intervention can and should also be granted pursuant to Texas Civil Practice and Remedies Code Section 37.006(a) because the State effectively seeks a form of declaratory relief that would affect the TDP. "When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties." Texas Civil Practice and Remedies Code Section 37.006 (a); *see also In re Thompson*, 330 S.W.3d 411, 415 (Tex. App. 2010) (finding that the "prayer for declaratory relief" brought "this case within our mandamus jurisdiction over a judge of a district court in our appellate district").

Dicky Grigg
State Bar No. 08487500
Law Office of Dicky Grigg, P.C.
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
Telephone: 512-474-6061
Facsimile: 512-582-8560
dicky@grigg-law.com

Martin Golando
The Law Office of Martin Golando,
PLLC
SBN #: 24059153
405 N. Saint Mary's, Ste. 700
San Antonio, Texas 78205
(210) 892-8543
martin.golando@gmail.com

ATTORNEYS FOR PLAINTIFFS

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 2,738 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/Chad W. Dunn

CHAD W. DUNN

CERTIFICATE OF SERVICE

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:

Leslie Dippel
Office of the County Attorney,
Travis County
P.O. Box 1748
Austin, Texas 78767
leslie.dippel@traviscountytx.gov
Attorney for Respondent
Dana DeBeauvoir

Luis V. Saenz
County & District Attorney,
Cameron County
964 E. Harrison Street
Brownsville, Texas 78520
district.attorney@co.cameron.tx.us
Counsel for Respondent
Remi Garza

Russell H. Roden
Dallas County District Attorney's
Office, Civil Division
411 Elm Street, 5th Floor
Dallas, Texas 75202
russell.roden@dallascounty.org
Counsel for Respondent
Toni Pippins-Poole

Jo Ann Bernal
El Paso County Attorney
500 E. San Antonio
5th Floor, Suite 503
El Paso, Texas 79901
jbernal@epcounty.com
Counsel for Lisa Wise

Douglas P. Ray
Office of the Harris County Attorney
1019 Congress St., 15th Floor
Houston, Texas 77002
douglas.ray@cao.hctx.net

Kyle D. Hawkins
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov
Counsel for the State of Texas

Susan Hays
Law Office of Susan Hays, P.C.
P.O. Box 41647
Austin, Texas 78704
hayslaw@me.com
Counsel for Respondent
Diane Trautman

/s/ Chad W. Dunn
CHAD W. DUNN

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Bar No. 24036507
gwen@brazilanddunn.com
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Susan Lea Hays	24002249	hayslaw@me.com	5/15/2020 4:39:36 PM	SENT
Bill Davis	24028280	Bill.Davis@oag.texas.gov	5/15/2020 4:39:36 PM	SENT
Cynthia Wilson Veidt	24028092	cynthia.veidt@traviscountytexas.gov	5/15/2020 4:39:36 PM	SENT
Sherine Elizabeth Thomas	794734	sherine.thomas@traviscountytexas.gov	5/15/2020 4:39:36 PM	SENT
Natalie Thompson	24088529	natalie.thompson@oag.texas.gov	5/15/2020 4:39:36 PM	SENT
Kyle Hawkins	24094710	kyle.hawkins@oag.texas.gov	5/15/2020 4:39:36 PM	SENT
Jo Anne Bernal	2208720	Joanne.bernal@epcounty.com	5/15/2020 4:39:36 PM	SENT
David A. Escamilla	6662300	david.escamilla@traviscountytexas.gov	5/15/2020 4:39:36 PM	SENT
Douglas P. Ray	16599300	douglas.ray@cao.hctx.net	5/15/2020 4:39:36 PM	SENT
Russell H. Roden	17132070	russell.roden@dallascounty.org	5/15/2020 4:39:36 PM	SENT
Sharon Kay Talley	19627575	sharon.talley@traviscountytexas.gov	5/15/2020 4:39:36 PM	SENT
Luis V. Saenz	17514880	district.attorney@co.cameron.tx.us	5/15/2020 4:39:36 PM	SENT
Leslie Wood Dippel	796472	leslie.dippel@traviscountytexas.gov	5/15/2020 4:39:36 PM	SENT
Lanora Pettit	24115221	lanora.pettit@oag.texas.gov	5/15/2020 4:39:36 PM	SENT
Gwen Kelly		gwen@brazilanddunn.com	5/15/2020 4:39:36 PM	SENT
Rob Meyerhoff		rmeyerhoff@txdemocrats.org	5/15/2020 4:39:36 PM	SENT
Dicky Grigg		dicky@grigg-law.com	5/15/2020 4:39:36 PM	SENT
Scott Brazil		scott@brazilanddunn.com	5/15/2020 4:39:36 PM	ERROR
Martin Golando		martin.golando@gmail.com	5/15/2020 4:39:36 PM	SENT
Mel Noyola		Mel@grigg-law.com	5/15/2020 4:39:36 PM	SENT

Associated Case Party: Texas Public Policy Foundation

Name	BarNumber	Email	TimestampSubmitted	Status
Yvonne Simental		ysimental@texaspolicy.com	5/15/2020 4:39:36 PM	SENT
Robert Henneke		rhenneke@texaspolicy.com	5/15/2020 4:39:36 PM	SENT