No. 20-0394

In the Supreme Court of Texas

IN RE STATE OF TEXAS,
Relator.

INTERVENORS' JOINT RESPONSE TO PETITION FOR MANDAMUS

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** Pro hac vice application forthcoming

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Texas Statutes

Other Authorities

Reasons to Deny the Mandamus

There is an ongoing and important discussion in our society and government about the need to ensure that Texas voters may exercise their right to vote without being exposed to a deadly and highly contagious virus, balanced against the State's expressed concerns about a potential increased risk of voter fraud.

This Court may eventually be presented with a case that appropriately raises that question.

But this mandamus proceeding is not the right vehicle for resolving that fact-intensive question. This Court's mandamus jurisdiction under the Election Code is limited to "compel[ling] the performance of any duty imposed by law in the holding of an election." Tex. Elec. Code §273.061. The "dut[ies] imposed by law" that the State relies on are articulated in Section 86.001(a-c) of the Election Code. They are limited to: reviewing applications for mail ballots, providing a ballot to those who qualify, and rejecting those who do not. No county clerk has refused to comply with those duties imposed by law; none have announced that they do not intend to comply with those duties. That should end the mandamus inquiry.

The State's real complaint is not with the clerks' refusal to perform duties imposed by law, but with some clerks and other officials' reliance on a Texas court's factual findings and subsequent interpretation of language in the Election Code that allows voting by mail if a "physical condition prevents the voter from

appearing at the polling place on election day without a likelihood … of injuring the voter's health." *Id.* at §82.002.

That matter was litigated in a Travis County District Court, litigation in which the State intervened. When the guidance of that court was contrary to the State's interpretation, it appropriately filed an interlocutory appeal, which is proceeding on an accelerated basis. The proper place to litigate competing interpretations of Section 82.002 is that interlocutory appeal which followed a full evidentiary hearing. This mandamus proceeding is a collateral attack on that ruling, under the guise of compelling clerks to comply with statutory duties that no one has indicated a refusal to comply with. It should be denied.

Record References

MR refers to Mandamus Record. I.APP. refers to Intervenors' Appendix.

Statement of the Case

This mandamus proceeding relates to the temporary injunction issued by 201st District Court in Travis County in *Texas Democratic Party v. DeBeauvoir*, No. D-1-GN-20-001610. Intervenors are Plaintiffs and Intervenor-Plaintiffs from that case. As Real Parties in Interest to this proceeding, they have moved to intervene. If the Court denies their intervention, they request that the Court consider this brief an amicus brief.

Statement of Jurisdiction

This Court lacks mandamus jurisdiction in this proceeding because the State has failed to show the actual or threatened failure to perform a "duty imposed by law in connection with the holding of an election," as required by Section §273.061 of the Texas Election Code.

Issues Presented

1. Is an original writ of mandamus proceeding proper where county officials have not refused to perform any statutory duty and where the State seeks an injunction to compel future performance?

2. Is an original mandamus proceeding proper when the proceeding collaterally attacks a district court injunction that the State is already appealing on an accelerated schedule?

3. Is an original writ of mandamus proceeding proper to resolve the fact-intensive question of whether eligible voters without COVID-19 immunity qualify under Section 82.002 to vote by mail during the COVID-19 pandemic?

Statement of Facts

On March 20, 2020, several plaintiffs (*TDP* Intervenors here) sued the Travis County Clerk seeking injunctive relief, and a declaratory judgment that they and others without COVID-19 immunity could vote by mail due to "disability," as defined in Section 82.002 of the Election Code.

The State of Texas intervened and filed a Plea to the Jurisdiction challenging standing, ripeness, and governmental immunity. The State also argued that county officials were responsible for making the determination on applications for a mail ballot. Intervenor-Plaintiffs (*Price* Intervenors here) also intervened and sought a temporary injunction.

The trial court conducted an evidentiary hearing on the motions. It heard expert medical and epidemiological testimony that: (a) COVID-19 poses a threat to everyone, not just particular vulnerable groups, I.APP:78; I.APP:282-283; (b) polling places pose an especially significant threat of the spreading the virus, I.APP:84-85, I.APP:283; and (c) there will be neither a COVID-19 vaccine nor herd immunity for at least a year, so the high risk of contracting COVID-19 will likely continue through the summer and fall. I.APP:79-80, 83, 113-14, 123-24; I.APP:284-286.

Based on this evidence, the trial court entered a temporary injunction and denied the State's plea. The court specifically found that "COVID-19 is a global

respiratory virus that poses an imminent threat of disaster, to which anyone is susceptible and which has a high risk of death to a large number of people and creates substantial risk of public exposure because of the disease's method of transmission." MR.1219. It also found that absent injunctive relief, Plaintiffs and Intervenor-Plaintiffs "will be forced to either vote in-person and risk transmission of a deadly illness or lose their ability to vote entirely." *Id.* "The harm caused by transmission of COVID-19 during in-person voting on the one hand and not being able to cast a ballot that is counted on the other," the court found, "is imminent, irreparable, and seriously damaging." *Id*.

Accordingly, the court enjoined the State from taking actions that would prevent counties from accepting mail ballots cast under the disability category by voters without COVID-19 immunity.

The State perfected an appeal to the Third Court of Appeals. The case was later transferred to the Fourteenth Court of Appeals. After the trial court's ruling, Attorney General Paxton published communications that contradicted the court's ruling, attempting to create confusion among voters and counties. Nevertheless, counties continued to follow the judicial branch's interpretation, awaiting further court proceedings. With the confusion sowed by the Attorney General, Plaintiffs and Intervenor-Plaintiffs sought emergency relief in the court of appeals to clarify the effect of the trial court order and preserve the rights of the parties to the litigation.

On May 13, 2020, the State collaterally attacked the trial court's order by initiating this mandamus proceeding. The next day the court of appeals ordered that the trial court's injunction remains in effect through the duration of the appeal, an order which this Court subsequently stayed.

Argument

I. This case does not meet the requirements for a mandamus proceeding.

Mandamus is an "extraordinary" remedy that is "available only in limited circumstances." *In re The Dallas Morning News, Inc.*, 10 S.W.3d 298, 307 (Tex. 1999) (*citing Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)). The State has failed to meet its burden of establishing the right to mandamus.

A. The State has not shown a violation of a ministerial duty.

Section 273.061 of the Texas Election Code grants this Court limited jurisdiction to issue a writ of mandamus to "compel the performance of any duty imposed by law in connection with holding an election." This Court may grant mandamus only if the relators have a clear legal right to performance of the act they seek to compel, and the duty of the officer sought to be compelled is ministerial. *Walker*, 827 S.W.2d at 839; *In re Walker*, 595 S.W.3d 841, 842 (Tex. App.—Houston [14th Dist.] 2020, no pet.); *In re Cercone*, 323 S.W.3d 293, 295 (Tex. App.—Dallas 2010, no pet.). "An act is ministerial when the law clearly spells out

the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion." *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). Under the Election Code, this Court may not grant mandamus relief ordering performance of a duty "not precisely identified as a duty by statute." *Cercone*, 323 S.W.3d at 298.

The State seeks to compel clerks to deny mail-ballot applications for certain voters who check the "disability" box. Pet. 15-16. This action is not precisely identified as a duty by statute. The only statute the State cites as identifying duties by election clerks is Section 86.001(a-c) of the Election Code. Pet. 1. It imposes three duties on voting clerks:

(1) review each mail-ballot application, Tex. Elec. Code §86.001(a).

(2) mail a ballot to applicants who are entitled to vote by mail, *id.* at §86.001(b).

(3) reject the ballot application if an applicant is not qualified to vote by mail, *id.* at §86.001(c).

The Election Code does not permit, much less demand that election administrators look beyond the four corners of the application when determining an applicant's eligibility.

The State has not identified any refusal by a county clerk to comply with those duties, and no county clerk has announced that they do not intend to comply with

them. Many of the statements identified by the State were not made by the respondent county clerks, Pet. 7-11 (identifying statements by non-party county commissioners), and others concern actions unrelated to the county clerk's ministerial duties and not subject to mandamus, *id.* (filing or authorizing the filing of amicus briefs).

The State points to clerk statements that they do not investigate the reasons individuals check the disability box on mail ballot applications. However, this is an accurate statement, not a violation of ministerial duty.

In fact, the Legislature specifically amended the prior equivalent of Section 82.002, so that a voter's self-attestation on an application is all that is required for the application to be valid. *See* Act of May 27, 1981, 67th Leg., R.S., ch. 301, §1, 1981 Tex. Gen. Laws 854. Accordingly, election clerks' statements that they will not investigate whether an individual qualifies for a mail ballot is a permissible exercise of their duties under the Election Code and not a violation of a ministerial duty subject to mandamus.

B. The State seeks an injunction from this Court, not a mandamus.

The Court should deny this petition because the State requests that clerks be prohibited from accepting certain mail ballot applications. That constitutes the prohibition of the commission of a future act, which is more appropriately the subject of a writ of prohibition (injunctive relief), not a mandamus. A writ of mandamus

"operates solely to nullify an act that has already been performed." *Shelvin v. Lykos*, 741 S.W.2d 178, 182 (Tex. App.—Houston [1st Dist.] 1987) (orig. proceeding); *see also Faherty v. Knize*, 764 S.W.2d 922, 924 (Tex. App.—Waco 1989) (orig. proceeding) (citing *State ex rel. Wade v. Mays*, 689 S.W.2d 893, 897 (Tex. Crim. App. 1985)).

This Court does not have original jurisdiction to grant writs of prohibition or injunction under the Election Code. Tex. Elec. Code §273.061 (authorizing only mandamus relief to compel performance of a duty); *cf., LaRouche v. Hannah*, 822 S.W.2d 632, 634 (Tex. 1992) (orig. proceeding) (refusing to prospectively order Secretary of State to accept candidate's certification when party chair had not yet certified candidate). Therefore, the Court lacks jurisdiction to award the State's requested relief.

C. The Petition is an impermissible collateral attack on the district court's temporary injunction.

The State's requested relief includes ordering Travis County, a defendant in the collateral action, to cease complying with the trial court injunction; more broadly, the State asks this Court to overrule that court's holding concerning Section 82.002. Pet. 8, 12-15. This an impermissible collateral attack; Travis County cannot be subject to a mandamus for complying with a district court order.

"A collateral attack is an attempt to avoid the binding force of a judgment in a proceeding not instituted for the purpose of correcting, modifying, or vacating the

judgment, but in order to obtain some specific relief which the judgment currently stands as a bar against." *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005) (citation omitted). Collateral attacks, including on temporary injunctions, are only permissible if the underlying judgments are void. *Morgan v. Williams*, 610 S.W.2d 467, 468 (Tex. 1980) (where temporary injunction was not void, collateral attack impermissible); *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990) (orig. proceeding).

Here, the State makes no argument that the temporary injunction is void. Instead, it argues that the temporary injunction violates the Election Code. Even if that were true, the temporary injunction would be merely voidable, not void. *Mapco*, 795 S.W.2d at 703. The Court should reject this collateral attack on the district court's temporary injunction.

D. Mandamus is inappropriate because the State has an adequate remedy on appeal.

A party is prohibited from obtaining mandamus relief where there is "a clear and adequate remedy at law, such as a normal appeal." *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984) (orig. proceeding). Here, the State already has invoked the interlocutory appellate process, which by rule proceeds on an accelerated schedule. Tex. R. App. P. 28.1. On appeal, the State seeks to vacate the temporary injunction and dismiss plaintiffs' claims, Pet. 6-7; MR.1400, effectively what the State is

seeking here, Pet. 2-3. Because the State has an adequate remedy on appeal, a mandamus should not issue.

The State's counter-arguments are meritless. First, the State claims that prevailing in the court of appeals will not give it the relief it seeks against Respondent DeBeauvoir because it will not result in an order to enforce Texas law. Pet. 17. However, DeBeauvoir is complying with state law, as interpreted by the judicial branch. The State complains of her reference to the temporary injunction on a website, Pet. 8, MR.1456; if that injunction is not in place, it stands to reason it will no longer be referenced.

Second, the State claims that because not all county clerks that are Respondents here are parties to the related case, a resolution of that case will not bind all Respondents. But there is no allegation that county clerks will disregard an authoritative opinion from the court of appeals. Further, even here, the State has not made all clerks in every county parties to this proceeding. Consequently, any mandamus issued here will not apply to all the clerks that were following the district court order until this Court issued its stay.

Third, the State argues the resolution of the related case will come too late. However, the court of appeals has acknowledged the time-sensitive nature of this matter by twice accelerating the interlocutory appeal; it is currently set for submission on June 12, 2020. MR.1288-89, MR.1445-55. Had the State felt an

earlier court of appeals decision was necessary, it could have sought further acceleration. Instead, the State waited over three weeks between noticing its appeal and filing its opening brief, and never sought to shorten Appellees' time to respond.

II. This Court should not determine that voters without COVID-19 immunity are ineligible to vote by mail pursuant to Section 82.002.

A. There is not a sufficient record before this Court to make this fact-intensive determination.

The Petition's linchpin is its assertion that, as a matter of law, Section 82.002 does not permit voters without COVID-19 immunity to vote by mail during the pandemic. However, this is fundamentally a mixed question of law and fact, with a heavy emphasis on fact. Not only are those facts not before the Court, but the Court cannot issue writs of mandamus that are "dependent upon the determination of any doubtful question of fact." *Love v. Wilcox*, 28 S.W.2d 515, 519 (1930) (orig. proceeding) (citation omitted); *see also Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 484 (Tex. 1964) (orig. proceeding) ("At most, a fact issue is raised which this Court cannot decide [on mandamus] ... ."). This is especially so for disputed facts. *In re Angelini*, 186 S.W.3d 558, 560 (Tex. 2006) (orig. proceeding) ("It is well established Texas law that an appellate court may not deal with disputed areas of fact in an original mandamus proceeding.") (citation omitted). Accordingly, the petition should be denied as an improper invitation to determine disputed facts.

Section 82.002(a) states: "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." Compliance with this standard raises a number of factual questions: how COVID-19 attacks the human body, whether all individuals—even healthy and young individuals—are susceptible, how COVID-19 transmits, how COVID-19 differs from the ordinary flu, and whether appearing in person at polling places during the COVID-19 pandemic risks "injuring" voters' health.

Although the State has cherry-picked articles in its briefing, it has not presented an evidentiary record concerning COVID-19 and its intersection with in-person voting. Further, the State relies on factual assertions, such as the adequacy of other governmental steps to make in-person voting safer, Pet. 5-6, that are contested, have not been subject to evidentiary scrutiny, and cannot be resolved on mandamus.

B. After a full evidentiary hearing, the Travis County District Court determined that voters without COVID-19 immunity meet Section 82.002's standard.

In *State v. TDP*, on April 15, 2020, in a full evidentiary hearing with participation by all parties, including the State, the trial court heard declarations, documentary evidence, and live testimony, including expert witnesses, that due to

the COVID-19 pandemic, entering polling places in the upcoming elections threatens to injure the health of voters without COVID-19 immunity.

The trial court heard expert testimony that:

- COVID-19 threatens everyone, not just particularly vulnerable groups. I.APP:282-283; I.APP:78;
- COVID-19 spreads through droplets that can enter a person through mucous membranes in the eyes, mouth, and nose, I.APP:77;
- Once there, COVID-19 begins attacking lungs, respiratory pathways, and the throat, which are all susceptible to the virus, even in young, healthy people, I.APP:78-79; I.APP:282-283.

The trial court heard expert testimony that polling places pose a particularly significant threat of spreading the virus because hundreds of people gather in close proximity and interact with poll workers, who then interact with other voters. I.APP:84-85; I.APP:283-284. Voters also touch the same voting equipment, providing another potential opportunity to spread COVID-19. *Id.*

The trial court heard testimony that it was reasonable for people to believe that entering polling places in the upcoming elections will pose a threat to their health. There will not be a vaccine or heard immunity to COVID-19 for at least a year. I.APP:79-80; I.APP:284-285. COVID-19 is unlikely to be seasonal, I.APP:79-

80 I.APP:286, and likely will remain a threat throughout the summer and fall. I.APP:80-81, 83-84, 113-114, 123-124.

The detailed medical evidence heard by the district court is that although some voters may have developed immunities or antibodies that allow them to be exposed to COVID-19 without risk, voters without these have a physical condition—non-immune respiratory pathways—that render them susceptible to COVID-19 and the resulting grave injuries to their health. Thus, appearing at the polling place threatens injury to non-COVID-immune voters' health under Section 82.002.

Based on the evidence and arguments presented, the trial court found that COVID-19 presents "an imminent threat of disaster to which anyone is susceptible" and "any voters without established immunity meets the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code § 82.002." MR1219-1220; *see* Statement of Facts, *supra* 6-7.

Those determinations are not properly the subject of this mandamus. However, they illustrate the fact-intensive nature of the inquiry into whether non-COVID-immune voters meet Section 82.002's standard.

C. The State's interpretation of Section 82.002 is flawed.

In asking the Court to conclude that voting by mail is not permissible for non-COVID-immune voters, the State offers a flawed, overly restrictive interpretation of Section 82.002, refuted by the plain language of the statute and prior

Attorney General opinions, and buttressed only by refutation of straw man arguments. Were the Court to interpret Section 82.002 in this proceeding—which it should not—it should reject the State's reading.

Section 82.002 must be construed to maximize Texans' ability to exercise their right to vote. As this Court has held, "[a]ll statutes tending to limit the citizen in his exercise of [the right of suffrage] should be liberally construed in his favor." *Owens v. State*, 64 Tex. 500, 509 (1885); *see also Sanchez v. Bravo*, 251 S.W.2d 935, 938 (Tex. Civ. App.—San Antonio 1952, no writ).

The State's overly restrictive interpretation of Section 82.002 not only violates this canon, but also violates the statute's plain meaning. The State relies solely on one *tertiary* dictionary definition of "condition" to mean an illness or other medical problem. Pet. 13. The Oxford American Dictionary's two preferred definitions of "condition" are "the state of something, especially with regard to its appearance, quality, or working order" and "a person's or animal's state of health or physical fitness." New Oxford Am. Dictionary (3d ed. 2010). Other dictionaries confirm that standard usage is not so limited. Cambridge Dictionary defines "condition" as "the particular state that something or someone is in;"[1] MacMillan as "the physical state

[1] *Condition*, Cambridge Online Dictionary, *available at*: https://dictionary.cambridge.org/us/dictionary/english/condition.

of something."[2] The State's chosen definition would also render "physical condition" the same as the term "illness" in Section 82.002, in violation of the rule against surplusage.

Moreover, Section 82.002's use of the full phrase "physical condition" demonstrates that it expansively encompasses physical states, common or uncommon, health or unhealthy. The Texas Rules of Civil Procedure specify that "physical condition" includes attributes such as the blood group of a party. Tex. R. Civ. P. 204.1(c)(1) (noting that court may issue an order for examination "when the ... physical condition (including the blood group) of a party ... is in controversy"). In the context of life insurance, physical condition means general state of health. *Life Ins. Co. of Sw. v. Nims*, 512 S.W.2d 712, 716 (Tex. Civ. App.—San Antonio 1974, no writ) ("Few persons are in perfect physical condition; and, therefore, certain standards have been established for every conceivable physical condition.").

Similarly, the Texas Penal Code uses the phrase "physical condition" broadly. "'Bodily injury' means physical pain, illness, or any impairment of physical condition." Tex. Pen. Code §1.07(a)(8); *see also Reyes v. State*, 03-15-00233-CR, 2017 WL 1130373, at *7 (Tex. App.—Austin Mar. 23, 2017, no pet.) (mem. op.)

[2] *Condition*, MacMillan Online Dictionary, *available at* https://www.macmillandictionary.com/us/dictionary/american/condition_1.

("Problems breathing, hearing, seeing, or eating constitute 'any impairment of physical condition' included in the definition of 'bodily injury.'").

The State also suggests that "likelihood" means over 50% and that COVID-19 does not pose over a 50% likelihood of injuring a voter. Pet. 13. This falsely conflates "likelihood" with "likely." *Id*. Likelihood means "the chance that something will happen,"[3] not an over 50% chance, and courts have construed it accordingly. *See e.g.*, *Boyde v. California,* 494 U.S. 370, 371 (1990) ("We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction ... [a]lthough a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction ... ."); *Aslam v. Attorney Gen. of U.S.*, 404 F. App'x 599, 607 (3d Cir. 2010) ("'reasonable likelihood' means merely showing a realistic chance that the petitioner can at a later time establish that asylum should be granted") (citation omitted). Further, no previous Attorney General opinion on Section 82.002 has suggested this 50% threshold. *See* Ken Paxton, Attorney General Opinion No. KP-0149 (May 18, 2017); Ken Paxton, Attorney General Opinion No. KP-0009 (Mar. 9, 2015).

[3] *Likelihood*, CAMBRIDGE ONLINE DICTIONARY, *available at*: https://dictionary.cambridge.org/dictionary/english/likelihood.

The State's suggestion also leads to absurd consequences, such as forcing individuals with severe, permanent physical conditions to vote in person if the odds of suffering physical injury while voting fall just shy of 50%. For example, individuals with epilepsy whose symptoms might be exacerbated by polling places would be forced to vote in person unless they determine their likelihood of having a seizure while voting is over 50%.

In sum, physical condition does not mean a pre-existing medical ailment, and likelihood does not mean over 50%. Instead, Section 82.002 requires that there be an objectively reasonable basis for a voter to believe that appearing at a polling place to vote presents a realistic chance of injuring their health due to some physical state of their body. Whether the state of non-COVID-immune voters' bodies means that in-person voting presents a realistic chance of injuring their health is a fact question not proper for determination in this proceeding.

The implication of the State's contrary interpretation of Section 82.002 is that no matter how dangerous it is to go to a polling place, all otherwise healthy people under the age of 65 would be forced to risk injury and death to vote in person. This is not supported by the plain language, cannot be what the Legislature intended, and fails to interpret the statute in favor of exercising suffrage. Moreover, there are also many people with chronic diseases like asthma and diabetes who, in normal times, would not be at risk of injury from appearing at a polling place, but now face acutely

fatal risks to their health from doing so during the pandemic. The State's interpretation leaves the eligibility of these individuals to vote by mail unresolved.

The remainder of the State's arguments are flawed straw man arguments. The State repeatedly argues that *fear* of catching COVID-19 does not qualify as a physical condition. *See* Pet. 12. However, neither Intervenor-Respondents nor the trial court make that argument. The trial court determined that voters qualified to vote by mail, not based on subjective fear or public health concerns, but based on an objectively reasonable belief informed by scientific evidence that COVID-19 attacks physical conditions (states of the body) common to all humans without immunity, non-immune respiratory pathways that are susceptible to the virus, and that polling places pose a heightened risk of COVID-19 infection.

The State also argues that lacking immunity cannot be a physical condition, Pet. 14, but that would mean that immunocompromised individuals also do not have a physical condition entitling them to vote by mail. Further, the fact that most individuals lack immunity to COVID-19 only underscores the devastating nature of the virus; it does not show a lack of physical condition.

Finally, the State's comparison of the virus to the flu or other virus outbreaks, Pet. 14-15, again raises factual questions regarding the severity of COVID-19 compared to other viruses that are not appropriate for this Court to resolve on mandamus without an evidentiary record.

D. The State's reference to voter fraud is a fact-intensive red herring.

This Court also should disregard the State's extraneous argument concerning voter fraud. Pet. 3. This is a fact-intensive issue and inappropriate for this Court to consider. The relationship, if any, between allowing individuals to vote by mail during the COVID-19 pandemic and speculation of an increase in voter fraud, despite existing safeguards and deterrents, lacks any evidentiary basis.

The State's only evidence of voter fraud comes from a solitary newspaper article, with no cited support. Pet. 3. This is not competent evidence. But even were the Court to credit this article, it shows 91 *allegations* of voter fraud (not convictions, and not solely absentee ballot fraud) in Texas over a decade during which tens of millions of ballots were cast.[4] In contrast, in approximately two months, over 1,300 Texans have died from COVID-19. I.APP:603.

More fundamentally, if voters who meet Section 82.002's standard are entitled to cast a mail ballot—again, a question not properly before this Court—the State's vague allusions to voter fraud cannot change that. As the State has pointed out, the Legislature has already chosen to allow individuals who might injure their health by appearing at a polling place to vote by mail. The Attorney General cannot override that legislative mandate.

[4] Texas Secretary of State, *Turnout and Registration Figures (1970-current)*, https://www.sos.state.tx.us/elections/historical/70-92.shtml

Prayer

The Court should deny the petition.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the May 18, 2020, a true and correct copy of the foregoing *Response to Petition for Mandamus* was served upon counsel of record in this proceeding via e-service.

/s/ Thomas Buser-Clancy
Thomas Buser-Clancy

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this document contains 4,414 words, excluding the portions of the document exempted by Rule 9.4(i)(1).

/s/ Thomas Buser-Clancy
Thomas Buser-Clancy

Certification

Under Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this petition and that every factual statement in the petition is supported by competent evidence included in the appendix or record. I further certify that, under Rule 52.3(k)(1)(A), every document contained in the appendix is a true and correct copy.

/s/ Thomas Buser-Clancy
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