

No. 14-20-00627-CV

**IN THE COURT OF APPEALS
FOR THE FOURTEENTH JUDICIAL DISTRICT
HOUSTON, TEXAS**

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
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CHRISTOPHER A. PRINE
Clerk

THE STATE OF TEXAS,
Appellant,

v.

CHRIS HOLLINS,
IN HIS OFFICIAL CAPACITY AS HARRIS COUNTY CLERK,
Appellee.

**On Appeal from
the 127th Judicial District, Harris County
Trial Cause No. 2020-52383**

BRIEF OF APPELLEE CHRIS HOLLINS

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STATEMENT OF THE CASE

- Nature of the Case:* On August 31, 2020, the State of Texas brought this action in the district court seeking to block Chris Hollins, the Harris County Clerk, from sending vote-by-mail applications to registered voters absent a request on the theory that doing so is *ultra vires*. CR.4.
- Course of Proceedings:* The State sought a TRO and a temporary injunction. In lieu of a TRO hearing, the parties entered a Rule 11 agreement that Hollins would not send applications to voters under age 65 until five days after the district court's ruling on a temporary injunction. CR.24. Hollins filed a response brief. The district court held a full evidentiary hearing on September 9. Before the hearing, the parties submitted joint stipulations of fact. CR.232.
- Trial Court:* 127th Judicial District Court, Harris County
The Honorable R.K. Sandill
- Trial Court's Ruling:* On September 11, the district court denied the State's request for a temporary injunction, holding that Hollins has authority under the Election Code to send unsolicited vote-by-mail applications to all registered voters in Harris County, including those under age 65. CR.289.

ISSUE PRESENTED

The Texas Election Code broadly authorizes Chris Hollins, as early voting clerk for Harris County, to “manage” and “conduct” the election with respect to voting by mail and specifically requires Hollins to make “printed” vote-by-mail applications “readily and timely available” to voters.

The issue presented is whether the district court abused its discretion in denying the State’s request for a temporary injunction on the ground that Hollins has the authority and discretion under the Election Code to send vote-by-mail applications to registered voters in Harris County absent a request, and where the State cannot establish any imminent, irreparable harm.

STATEMENT OF FACTS

A. Voting By Mail

To vote by mail, a Texas voter must first submit an application; a voter who does not submit an application cannot receive a mail ballot. Tex. Elec. Code § 84.001(a), (f). The Election Code permits voters to vote by mail if they meet one of several criteria. Those criteria include (1) if the voter is age 65 or older, or (2) if the voter is under age 65 and (a) will be out of the county throughout the election period, (b) is in jail but otherwise eligible to vote, or (c) has a “disability,” defined broadly as a “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.” *Id.* §§ 82.001-82.004.

The Texas Supreme Court has held that “[t]he decision to apply to vote by mail based on a disability is the voter’s, subject to a correct understanding of the statutory definition of ‘disability.’” *In re State*, 602 S.W.3d 549, 550, 560-61 (Tex. 2020). On the definition of “disability,” the Court held that while “a voter’s lack of immunity to COVID-19, without more, is not a ‘disability’ as defined by the Election Code,” “a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of a disability.” *Id.* at 550, 561.

Once a voter submits an application to vote by mail, the early voting clerk must review the application, and if it is properly filled out and the voter's signature matches the one on file, the early voting clerk must send the voter a mail ballot. Tex. Elec. Code § 86.001(b). The early voting clerk must mail the ballot within seven days after the application is accepted. *Id.* § 86.004(a). After receiving the ballot in the mail, the voter makes her selections and then returns the ballot either by mail, common carrier, or hand delivery. *Id.* § 86.006.

B. Hollins's Plan to Send Vote-by-Mail Applications to Voters

As the Harris County Clerk, Hollins serves as Harris County's "early voting clerk." Tex. Elec. Code § 83.002(1). In this role, Hollins is broadly "in charge of and responsible for the management and conduct of" early voting in Harris County, which includes voting by mail. *Id.* § 32.071; *see also id.* §§ 83.001(a), 83.001(c), 83.002(1). Within this broad charge, the Election Code assigns Hollins certain specific duties related to voting by mail, including that Hollins "shall make printed [vote-by-mail applications] readily and timely available." *Id.* § 1.010(a).

On August 25, 2020, Hollins announced that he would send vote-by-mail applications to all registered voters in Harris County. CR.232 ¶ 2. Hollins's proposed mailer contains detailed and accurate educational information about the eligibility criteria for voting by mail and an application. CR.233 ¶ 16. The mailer, which will be printed on 10.5" x 17" paper, is reproduced on the following page:

Para recibir esta información o la Solicitud de Voto por Correo en Español, comuníquese con:

Để nhận được thông tin này hoặc Đơn Xin Bầu Cử Bằng Thư bằng Tiếng Việt, xin liên lạc:

要接收此信息或中英文的郵遞投票申請表格, 請聯繫:

QUESTIONS? CONTACT:
vbm@harrisvotes.com
713-755-6965



DO YOU QUALIFY TO VOTE BY MAIL?



READ THIS BEFORE APPLYING FOR A MAIL BALLOT
The Harris County Clerk's Office is sending you this application as a service to all registered voters.
However, NOT ALL VOTERS ARE ELIGIBLE TO VOTE BY MAIL.
READ THIS ADVISORY TO DETERMINE IF YOU ARE ELIGIBLE BEFORE APPLYING.



You are eligible to vote by mail if:

1. You are age 65 or older by Election Day, November 3, 2020;
2. You will be outside of Harris County for all of the Early Voting period (October 13th - October 30th) and on Election Day (November 3rd);
3. You are confined in jail but otherwise eligible to vote;
4. You have a disability. Under Texas law, you qualify as disabled if you are sick, pregnant, or if voting in person will create a likelihood of injury to your health.
 - The Texas Supreme Court has ruled that lack of immunity to COVID-19 can be considered as a factor in your decision as to whether voting in person will create a likelihood of injury to your health, but it cannot be the only factor. You can take into consideration aspects of your health and health history that are physical conditions in deciding whether, under the circumstances, voting in person will cause a likelihood of injury to your health.
 - **YOU DO NOT QUALIFY TO VOTE BY MAIL AS "DISABLED" JUST BECAUSE YOU FEAR CONTRACTING COVID-19. YOU MUST HAVE AN ACCOMPANYING PHYSICAL CONDITION. IF YOU DO NOT QUALIFY AS "DISABLED," YOU MAY STILL QUALIFY IN CATEGORIES 1 - 3 ABOVE.**
 - It's up to you to determine your health status—the Harris County Clerk's Office does not have the authority or ability to question your judgment. If you properly apply to vote by mail under any of the categories of eligibility, the Harris County Clerk's Office must send you a mail ballot.
 - To read guidance from the U.S. Centers for Disease Control and Prevention (CDC) on which medical conditions put people at increased risk of severe illness from COVID-19, please visit: www.HarrisVotes.com/CDC

If you have read this advisory and determined that you are eligible to vote by mail, please complete the attached application and return it to the Harris County Clerk's Office! Voting by mail is a secure way to vote, and it is also the safest and most convenient way to vote.

To receive CRITICAL ELECTION UPDATES, sign up at: www.harrisvotes.com/text

For Official Use Only: VUID #/County Election Pct #
1230000000/906

APPLICATION FOR BALLOT BY MAIL

CHRIS HOLLINS



- ☐ Fill in (or verify) your name and address
- ☒ Select your reason for using Ballot By Mail
- ☒ Select your Election(s)
- ☒ Sign your application, affix a stamp, and place in the mail

PROTECTING YOUR RIGHT TO VOTE

1 APPLICANT'S VOTER REGISTRATION:

Name/Address/City/State/Zip Code

JOHN Q. PUBLIC
123 MAIN STREET
HOUSTON, TEXAS 77078-0044

PHONE NUMBER:
(Optional)

PREFERRED MAILING ADDRESS (REQUIRED FOR OUT OF COUNTY & IN JAIL):

Address/City/State/Zip Code



2 REASON FOR APPLYING FOR BALLOT BY MAIL:

- ☐ Age 65 or older
- ☐ Have a disability
- ☐ **Outside the county throughout Early Voting & Election Day (Oct. 13 - Oct. 30, 2020 & Nov. 3, 2020)
- ☐ Confined in jail

(**Dates You Will be Outside the County: / / - / / - / /)

3 ELECTIONS FOR WHICH YOU ARE APPLYING:

- ☐ ALL 2020 ELECTIONS
- ☐ November 3, 2020

SIGN YOUR APPLICATION: If you cannot sign, you must have a person witness your mark. If a person helped you fill out this application you must give the name of that person on the line immediately below your signature. In any single election, it is a Class A misdemeanor for any person to sign a ballot application as a witness for more than one applicant, unless the second and subsequent application are related to the witness as a parent, spouse, child, sibling, or grandparent. If you need additional information call the Texas Secretary of State at: 1-800-252-8683. COMMON CONTRACT CARRIER: You may submit via a common or contract carrier which is a bona fide, for-profit carrier.

4 I certify that the information given on this application is true, and I understand that giving false information on this application is a crime. SIGN HERE X

Signature of Applicant As Registered

5 OPTIONAL - FILL OUT THIS SECTION ONLY IF YOU ASSISTED A VOTER WITH THIS FORM

☐ Check this box if acting as an ASSISTANT

X Signature of Assistant

PRINT FULL NAME of Assistant

Assistant's Address of Residence or Title of Elections Official

Assistant's Relationship to Applicant

6 OPTIONAL - FILL OUT THIS SECTION ONLY IF YOU ARE A WITNESS FOR A VOTER WITH THIS FORM

☐ Check this box if acting as a WITNESS

X FOR WITNESS: Applicant, if unable to sign, shall make a mark in the presence of witness. If applicant is unable to make mark, the witness shall check here _____

X Signature of Witness

PRINT FULL NAME of Witness

Witness' Address of Residence or Title of Elections Official

Witness' Relationship to Applicant

In a letter dated August 27, Keith Ingram, the Secretary of State's Director of Elections, directed Hollins to "immediately halt any plan to send an application for ballot by mail to all registered voters." CR.232 ¶ 3. The letter asserted that Hollins's plan to send applications to registered voters would "confuse voters about their ability to vote by mail," "may cause voters to provide false information on the form," and would "clog[] up the vote by mail infrastructure." *Id.* Rather than conferring with Hollins, Ingram referred the matter to the Attorney General, who filed this lawsuit on behalf of the State mid-afternoon on August 31 seeking a temporary restraining order and a temporary injunction. CR.4.

In lieu of a TRO hearing, the parties entered into a Rule 11 agreement that Hollins would not mail applications to voters under age 65 until five days after the district court's ruling on a temporary injunction. CR.24. On the evening of August 31, Hollins and Ingram discussed by phone Hollins's plan and Ingram's objections. *Id.* ¶ 4. Ingram stated that the Secretary of State does not object to Hollins sending unsolicited vote-by-mail applications to all registered voters in Harris County age 65 and over. *Id.* ¶ 5. The Secretary of State also does not object to Hollins sending unsolicited educational information about the eligibility criteria for voting by mail to all registered voters, including those under age 65. *Id.* ¶ 7. There is no serious dispute that the educational information set forth in Hollins's mailer is accurate and would be helpful to Harris County voters in determining for

themselves whether they are entitled to vote by mail this November. RR.76:15-16; RR.93:14-15. The Secretary of State objects *only* to Hollins sending unsolicited vote-by-mail applications to voters under age 65. CR.232 ¶ 6.

C. Decision Below

On September 11, after a full evidentiary hearing at which both Hollins and Ingram testified, the district court denied the State’s motion for a temporary injunction. CR.291. The court rejected the State’s *ultra vires* claim, holding that Hollins has authority, as “early voting clerk,” to send vote-by-mail applications to all registered voters in Harris County absent a request. *Id.* The court explained that “the Election Code gives Mr. Hollins a broad grant of authority to conduct and manage mail-in voting, subject only to any express limitation on that power by the Legislature.” *Id.* And “[t]here is no code provision that limits an early voting clerk’s ability to send a vote by mail application to a registered voter.” CR.292. To the contrary, “there are a number of code provisions that demonstrate the Legislature’s desire for mail voting applications to be freely disseminated,” including § 1.010 which “mandates” that Hollins “make the applications ‘readily and timely available.’” *Id.* (quoting Tex. Elec. Code § 1.010).

The court rejected the State’s argument that § 84.012 prohibits Hollins from sending unsolicited applications, explaining that § 84.012 “contains no prohibitive language whatsoever” and “does not preclude the clerk from providing an

application absent a request.” *Id.* The State’s reading of § 84.012, the court concluded, “would read into the statute words that do not exist and would lead to the absurd result that any and every private individual or organization may without limit send unsolicited mail voting applications to registered voters, but that the early voting clerk, who possesses broad statutory authority to manage and conduct the election, cannot.” *Id.*

The court also rejected the State’s “invocation of section 31.005—a statute intended to *protect* Texans’ exercise of the right to vote.”¹ CR.293 (emphasis in original). In rejecting the State’s assertion that Hollins’s plan would “foster[] confusion over voter eligibility to vote by mail,” the court found that “[t]he State offered no evidence to support such a claim, and the document Mr. Hollins intends to send to voters ... accurately and thoroughly informs them of Texas law concerning mail-in voting.” *Id.* The court further explained that under the Texas Supreme Court’s decision in *In re State*, “the decision to apply for a ballot to vote by mail is within the purview of the voter,” and “Harris County voters are capable of reviewing and understanding the document Mr. Hollins proposes to send and exercising their voting rights in compliance with Texas law.” CR.295.

¹ While the State’s petition cited Texas Election Code § 31.005, the State has since abandoned any such claim. State Br. 7 n.3 (“Though the trial court also discussed a ‘Section 31.005 Claim,’ CR.293-95, that was in error. The State has brought a single claim based on *ultra vires* action.”); RR.25:2-14 (State’s counsel stating that “we have not filed suit under 31.005” and “we’re not suing under 31.005”).

Lastly, the district court noted the “irony and inconsistency of the State’s position in this case”—in particular, that the State objects to Hollins sending vote-by-mail applications to registered voters under age 65, but not to registered voters age 65 and over. *Id.* As the court explained, “[t]he State offers no evidence or compelling explanation for its arbitrary and selective objection to the mailing of vote by mail applications to registered voters under the age of 65.” *Id.*

SUMMARY OF THE ARGUMENT

The district court’s decision denying a temporary injunction is correct and should be affirmed.

First, the district court correctly held that the Hollins has authority and discretion under the Texas Election Code to send unsolicited applications to all registered voters in Harris County, including those under age 65. The Legislature has affirmatively conferred broad authority upon Hollins to “manage” and “conduct” mail voting under Election Code §§ 32.071, 83.001, 83.002. Within this broad charge, the Legislature has specifically required Hollins to make “printed” vote-by-mail applications “readily and timely available, but left to Hollins’s discretion how to carry out this mandate. Tex. Elec. Code § 1.010(a). The Election Code also authorizes any “individuals or organizations”—a term that includes Hollins and his office—to distribute vote-by-mail applications. The State is wrong that the district court relied solely on the absence of any provision

forbidding Hollins from sending unsolicited vote-by-mail applications. Multiple provisions of the Election Code affirmatively confer authority and discretion upon Hollins to send vote-by-mail applications to all registered voters.

Second, the State has failed to establish probable, imminent, or irreparable injury as a result of Hollins sending his proposed mailer to voters. The State conflates the requirements for standing with those for obtaining a temporary injunction. While the State need not show imminent, irreparable harm to have legal standing to assert an *ultra vires* claim, it certainly must show such harm to obtain a temporary injunction, the same as any other litigant. And the State has established no such imminent, irreparable injury. The State's claim that Hollins will cause confusion by sending his mailer to voters is rank speculation at best. And it is belied by the prominent warnings and detailed, accurate educational information in the mailer as well as Hollins's extensive testimony at the hearing. The State's purported concerns about "confusion" or "fraud" also cannot be reconciled with the fact that political campaigns and other organizations widely distribute unsolicited vote-by-mail applications to voters under age 65, without providing any educational information at all about the criteria for voting by mail. And the Secretary of State's own website links to a vote-by-mail application form without providing any information or guidance on the meaning of "disability." Hollins's educational mailer will eliminate, not cause, confusion among voters.

STANDARD OF REVIEW

“Whether to grant or deny a temporary injunction rests within the trial court’s sound discretion,” and “[o]nly if the trial court abused that discretion should [this Court] reverse an order on injunctive relief.” *Tex. Black Iron, Inc. v. Arawak Energy Int’l Ltd.*, 527 S.W.3d 579, 584-85 (Tex. App. – Houston [14th Dist.] 2017, no pet.). This Court “cannot overrule the trial court’s decision unless the trial court acted unreasonably or in an arbitrary manner, without reference to guiding rules or principles.” *Ron v. Ron*, 604 S.W.3d 559 (Tex. App. – Houston [14th Dist.] 2020, no pet.).

To obtain a temporary injunction, the State needed to “prove: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *Tex. Black Iron, Inc.*, 527 S.W.3d at 584. “The applicant bears the burden of production to offer some evidence of each of these elements.” *Id.*

ARGUMENT

I. The District Court Correctly Concluded That Hollins Has Authority and Discretion Under the Election Code to Send Vote-By-Mail Applications to All Registered Voters Absent a Request

The district court’s decision rejecting the State’s *ultra vires* claim was not an abuse of discretion and indeed was manifestly correct. A government official acts *ultra vires* only if the official “acted without legal authority or failed to perform a ministerial act.” *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). In

determining whether the official acted in such a manner, courts must consider the statute as a whole. *Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 51 (Tex. 2014). And the State acknowledges that Hollins has all the powers “specifically granted or necessarily implied” by the Election Code. State Br. xi. The district court correctly concluded that the Election Code authorizes Hollins, as early voting clerk, to send vote-by-mail applications to all registered voters in Harris County.

A. Hollins Has Broad Authority as Early Voting Clerk to “Manage” and “Conduct” Voting by Mail and Must Make “Printed” Vote-by-Mail Applications “Readily and Timely Available” to Voters

The State repeatedly suggests that Hollins and the district court relied exclusively on the absence of any statute forbidding Hollins from sending vote-by-mail applications to voters under age 65 absent a request. *See, e.g.*, State Br. vi, 1. Those assertions fundamentally misrepresent the district court’s decision and Hollins’s position. The district court correctly concluded that several provisions of the Election Code *affirmatively* “give[] Mr. Hollins a broad grant of authority to conduct and manage mail-in voting,” and that other provisions specifically authorize Hollins, in managing and conducting the mail-voting process, to send unsolicited vote-by-mail applications to all registered voters. CR.291-92.

The provisions relied upon the district court plainly grant Hollins such authority. In his role as Harris County’s “early voting clerk,” Hollins has the authority and duty to “conduct the early voting,” which includes early voting in

person and by mail. Tex. Elec. Code §§ 83.001, 83.002. As early voting clerk, Hollins maintains “the same duties and authority with respect to early voting as a presiding election judge has with respect to regular voting.” *Id.* § 83.001(c). Thus, with respect to voting by mail, Hollins is “in charge of and responsible for the management and conduct of the election.” *Id.* § 32.071.

In empowering Hollins to “manage” and “conduct” early voting, the Texas Legislature has given Hollins broad authority and discretion to carry out the mail-voting process. The verb “conduct” means “to direct or take part in the operation or management of,” and to “manage” means “[t]o exercise executive, administrative, and supervisory direction of.” Merriam-Webster’s Dictionary. Accordingly, as the district court explained, “the Election Code gives Mr. Hollins a broad grant of authority to conduct and manage mail-in voting, subject only to any express limitation on that power by the Legislature.” CR.291. In other words, *the Legislature* gave Hollins broad authority over the mail-in voting process, and therefore restrictions on such authority must also come from the Legislature.

Hollins testified as to specific ways in which sending unsolicited vote-by-mail applications will help him manage and conduct early voting. For instance, Hollins testified that the applications he is sending each have a bar code unique to each registered voter. RR.117:10-25. If the voter returns the application, the bar code will enable Hollins’s staff to avoid having to manually input all of the voter’s

personal information, as must occur if the voter returns a standard application, saving the office substantial time and avoiding ministerial or typographical errors that invariably occur from such manual entries. *Id.*

Sending vote-by-mail applications also furthers specific duties that the Election Code assigns Hollins within his broad charge to manage and conduct the mail-voting process. In particular, because vote-by-mail applications must be “submitted or filed” with the County Clerk’s Office, Hollins “shall make *printed* [vote-by-mail applications] *readily and timely available*.” Tex. Elec. Code § 1.010(a) (emphases added). The Election Code does not specify how early voting clerks must make printed vote-by-mail applications “readily and timely available.” Rather, the Election Code leaves that determination to the discretion of each county clerk in exercising his or her statutory authority over the “management and conduct” of the mail-voting process. Tex. Elec. Code §§ 32.071, 83.001(a).

As Hollins testified, the pandemic has inhibited various methods of making printed vote-by-mail applications “readily and timely available.” For example, the Harris County Clerk’s Office building is largely closed to the public due to the pandemic. RR.127:17-128:13. In this context, Hollins has chosen to make vote-by-mail applications “readily and timely available” pursuant to § 1.010(a) by sending applications to all registered voters, accompanied by detailed and accurate educational information about the eligibility criteria for voting by mail. This

approach falls squarely within Hollins’s authority to manage and conduct early voting under §§ 32.071, 83.001, 83.002, including his discretion to determine how to make printed vote-by-mail applications “readily and timely available” to voters during the pandemic.

The State argues that making forms “readily and timely available” can never encompass actually *providing* forms to people. State Br. 16-17. For that bizarre proposition, the State points to a different provision, § 1.010(b), which states: “The authority shall furnish forms in a reasonable quantity to a person requesting them for the purpose of submitting or filing the document or paper.” *Id.* The State argues that making a form “available” under § 1.010(a) cannot include providing a person that form, because § 1.010(b) dictates that an official “shall” furnish a form upon request. *See id.* In other words, in the State’s view, § 1.010(b) precludes an official from *ever* providing any form unless a person requests it. *See id.*

The State’s interpretation is divorced from the text of § 1.010(a) and is simply untenable. Sections 1.010(a) and 1.010(b) are separate provisions that each impose their own requirements. Section 1.010(a) requires an official to make forms “readily and timely available” while giving the official discretion in how to do so. Section 1.010(b) applies only in a situation where a person requests a form, and requires an official to furnish the form if requested. Nothing in § 1.010(b) limits the scope or meaning of § 1.010(a). Indeed, if the State’s interpretation were

correct, § 1.010(a) would be surplusage, contrary to settled principles of statutory interpretation. *See Tafel v. State*, 536 S.W.3d 517, 521 (Tex. 2017) (“When interpreting a statute, we presume the Legislature intended the entire statute to be effective and none of its language to be surplusage.”).

Nor can the State reconcile its theory with its concession that, like many other county clerks, Hollins lawfully makes a vote-by-mail application form available on the County Clerk’s Office website, where any person may download and print in any quantity.² Even though no provision of the Election Code specifically deals with posting vote-by-mail applications on county clerk websites, the State has never objected to this routine practice.³ The State tries to square this fact with its theory by arguing that “[t]he application is not ‘furnished’—that is, provided—until the website user clicks on the link—that is, makes an electronic request.” State Br. 17. This is “interpretive jiggery-pokery.” *ETC Mktg., Ltd. v. Harris Cty. Appraisal Dist.*, 528 S.W.3d 70, 92 (Tex. 2017) (Brown, J., concurring) (quoting *King v. Burwell*, 576 U.S. 473, 506 (2015) (Scalia, J.,

² Harris County Clerk, Voting Information, Application for Ballot by Mail, <https://www.harrisvotes.com/Docs/VotingInfo/Ballot%20By%20Mail%20Application%20-%20English.pdf>; Carson County Clerk, Application for Ballot by Mail, <http://www.co.carson.tx.us/upload/page/1423/APPLICATION%20FOR%20BALLOT%20BY%20MAIL%201.pdf>.

³ Indeed, the Election Code requires local election authorities who maintain a website to include polling place location and hours on it. Tex. Elec. Code § 31.125. But the SOS does not claim that provision implicitly prohibits the addition of the vote-by-mail application.

dissenting)). County clerks (and the Secretary of State) obviously are “providing” the application to people by posting it on their public websites for anyone with Internet access to download and print in any quantity.

Hollins’s plan also comports with both the letter and spirit of the Texas Supreme Court’s recent decision in *In re State*. There, the Supreme Court held that Texas law “place[s] in the hands of the voter the determination” of whether the voter is entitled to vote by mail “due to a physical condition,” *i.e.*, a “disability,” “subject to a correct understanding of the statutory definition.” 602 S.W.3d at 550, 561. The U.S. Court of Appeals for the Fifth Circuit recently confirmed that, “[a]lthough lack of immunity [to COVID-19] alone is not a Section 82.002 disability, *In re [State]* shows that voters with an underlying physical condition ... may apply to vote by mail under that section,” and thus “at-risk voters *of any age* can utilize the Texas Election Code’s disability provision to mitigate the risk of COVID-19.” *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5433917, at *16 (5th Cir. Sept. 10, 2020) (emphasis added).

Hollins’s plan does precisely what the Texas Supreme Court held is appropriate—it “place[s] in the hands of the voter” detailed information that enables the voter to determine whether she is entitled to vote by mail along with the application to complete if the voter determines that she meets the eligibility criteria. The State questions whether the warning and other information in the

mailer “accurate[ly] reflect the relevant legal provisions and caselaw,” *see* State Br. 24, but the State points to no aspect of the mailer that is inaccurate in any way. There are none. Even the State’s own witness, Mr. Ingram, testified that “I’ve read the mailer and it’s very good.” RR.76:15-16. In distributing such educational information and applications to voters in a single packet, Hollins is providing helpful and accurate information that will empower Harris County voters to make their own determinations of whether they can and will apply to vote by mail, just as the Texas Supreme Court and the Legislature intended.

Many voters under age 65 may determine that they do in fact meet the statutory definition of disability. According to the Centers for Disease Control and Prevention, “people of any age” with certain medical conditions are at increased risk for severe illness from COVID-19. CR.233 ¶ 11. Based on the Health of Houston Survey, substantial numbers of Harris County residents ages 18 and 64 have one or more of these underlying medical conditions identified by the CDC. *Id.* ¶ 12. While the State asserts that only “6.4%” of Harris County residents under age 65 “has a disability,” State Br. 4, this 6.4% statistic is from federal census data that uses an entirely different—and much narrower—definition of “disability” than Texas Election Code § 82.002. *See* <https://tinyurl.com/vwvencf>. The Attorney General of Texas has long recognized that different definitions of “disability” in

other contexts do not limit whether a Texas voter is entitled to vote by mail based on a “disability” under § 82.002. Op. of Att’y Gen., No. KP-0009 (Mar. 9, 2015).

Finally, the State’s arguments that Hollins lacks authority to send unsolicited vote-by-mail applications to voters is undermined by its acquiescence to Hollins sending unsolicited vote-by-mail applications to voters age 65 and over. As the parties stipulated in the court below, “[t]he Secretary of State does not object to the sending of unsolicited vote-by-mail applications to voters aged 65.” CR.232 ¶ 5. The State does not explain how, under its interpretation of the Election Code, Hollins may lawfully send such unsolicited applications.

Instead, the State contends that its acquiescence to sending unsolicited applications to voters age 65 and over is of no moment because Hollins cannot raise “selective enforcement” as a “defense.” State Br. 19-25. But Hollins is not raising selective enforcement as a “defense.” Rather, the State’s approach to sending applications to voters age 65 and over undercuts the State’s *statutory interpretation*. The State asks this Court to hold that the Election Code prohibits Hollins from sending unsolicited vote-by-mail applications, but if this Court were to adopt such an interpretation of the Code, it would mean the Attorney General of Texas has openly consented to unlawful conduct by government officials in this very case. That simply cannot be. *See* CR.295 (district court noting the “irony and inconsistency” of the State’s position as to voters of different ages).

B. The Texas Election Code Permits Any Individual or Organization to Distribute Unsolicited Vote-by-Mail Applications to Voters

In addition to the Election Code’s conferral of authority upon Hollins broadly to “manage” and “conduct” mail voting and to make printed vote-by-mail applications “readily and timely available,” other provisions of the Election Code further “demonstrate the Legislature’s desire for mail voting applications to be freely disseminated.” CR.292. Notably, § 84.013 broadly authorizes *any* individual or organization to distribute vote-by-mail applications to voters, without limitation. *See id.* Specifically, Section 84.013 provides:

The secretary of state shall maintain a supply of the official application forms for ballots to be voted by mail and shall furnish the forms in reasonable quantities without charge to individuals or organizations requesting them for distribution to voters.

This provision expressly permits any “individuals or organizations” to “distribut[e]” vote-by-mail applications to “voters,” full stop. Section 84.013 in fact facilitates widespread distribution of vote-by-mail applications to voters by requiring the Secretary of State to make application forms available “without charge.” And neither § 84.013 nor any other provision of the Election Code restricts this “distribution” only to voters who are entitled to vote by mail, or who requested an application, or who are age 65 and over.

The Election Code does not define “individual” or “organization.” “When, as here, a statute does not define a term, we typically apply the term’s common,

ordinary meaning, derived first from applicable dictionary definitions, unless a contrary meaning is apparent from the statute’s language.” *City of Fort Worth v. Rylie*, 602 S.W.3d 459, 466 (Tex. 2020). Hollins is an “individual” in any ordinary sense, and the County Clerk’s Office is an “organization.” The State suggests that §84.013 authorizes only “private” individuals and organizations to distribute unsolicited vote-by-mail applications, *see* State Br. 14, but neither the word “private” nor any reference to such a distinction appears in the statutory text.

Even setting aside whether § 84.013 applies directly to Hollins or the County Clerk’s Office, the fact that the Election Code permits any private individual, political campaign, or other organization to send unsolicited vote-by-mail applications to voters under age 65 strongly undercuts the State’s position that the Code *prohibits* Hollins from doing so. Political organizations like the Republican Party of Texas have been broadly distributing vote-by-mail applications to voters this election cycle. CR.74-78. The Republican Party of Texas’s mailer instructs voters to “[m]ake a plan today to fill out one of the attached Absentee Ballot Request forms,” but contains no guidance or information for voters about the legal definition of “disability.” *See id.* Numerous third-party organizations also participate in vote-by-mail application programs, with the encouragement of federal, state and local organizations such as non-profits or political campaigns. *See* CR.108-13.

As the district court explained, the State’s position “would lead to the absurd result that any and every private individual or organization may without limit send unsolicited mail voting applications to registered voters, but that the early voting clerk, who possesses broad statutory authority to manage and conduct the election, cannot.” CR.293. That would make no sense and cannot be correct. *See El Paso Educ. Initiative, Inc. v. Amex Properties, LLC*, 602 S.W.3d 521, 531 (Tex. 2020) (courts should avoid “absurd or nonsensical results”).

C. Section 84.012 of the Election Code Requires Hollins to Send Applications to All Who Request Them But Does Not Address Sending Unsolicited Applications to Voters Under Age 65

As the district court correctly found after identifying the provisions of the Election Code that affirmatively confer broad authority upon Hollins to send vote-by mail-applications, “[t]here is no code provision that limits an early voting clerk’s ability to send a vote by mail application to a registered voter.” CR.292. Indeed, the State itself has admitted that no such provision exists. RR.81:1-9.

In the court below, the State argued that Election Code § 84.012 implicitly prohibits Hollins from sending unsolicited applications to voters under age 65. Section 84.012 provides: “The early voting clerk shall mail without charge an appropriate official application form for an early voting ballot to each applicant requesting the clerk to send the applicant an application form.”

In this Court, however, the State backs away from its reliance on § 84.012. The State asserts that it does “not ... suggest section 84.012 ... contains a prohibition on unsolicited mailing.” State Br. 13. That is the opposite of what the State argued to the district court. The State’s counsel specifically affirmed to the district court that “the argument that the State is making today is ... 84.012 *proscribes* the discretion in 1.010” to send unsolicited vote-by-mail applications. RR.152:24-153:1; *see also* RR.156:19-20 (State’s counsel asserting that “Section 84.012 has a limitation within the provision itself”). Indeed, despite now saying that the State is not asserting § 84.012 “contains a prohibition,” State Br. 12, the State’s brief goes on to argue just that again. The State asserts later in its brief that “section 84.012 ... governs over section 1.010” and prohibits Hollins from sending unsolicited applications even if § 1.010 authorizes him to do so. State Br. 18. The State’s inability to settle on a theory of the case highlights the State’s strained efforts to find some theory for how Hollins is purportedly violating Texas law.

To whatever extent the State relies on § 84.012, its reliance is badly misplaced. On its face, § 84.012 imposes a duty on Hollins to take an affirmative act—namely, if a voter requests a vote-by-mail application, Hollins “shall” mail them one. This interpretation is clear from both the plain text of § 84.012 and the Code Construction Act, which governs the meaning of terms in the Election Code. *See* Tex. Elec. Code § 1.003. Under the Code Construction Act, the word

“‘[s]hall’ imposes a duty.” Tex. Gov’t Code § 311.016(2). By using the word “shall” in § 84.012, the Legislature imposed a duty on Hollins to send an application to any voter who requests one. But that duty in no way constitutes an implicit prohibition on Hollins sending applications to voters who have not requested them. If the Legislature had wanted to impose such a prohibition, it could easily have done so, but it did not. *See, e.g., id.* § 311.016(5) (“‘May not’ imposes a prohibition and is synonymous with ‘shall not.’”); Tex. Elec. Code § 13.046(c) (“A high school deputy registrar may distribute registration application forms to ... students and employees of the school *only*.” (emphasis added)).

The State’s interpretation of “shall” in § 84.012 as imposing an implicit prohibition also would lead to bizarre results under other provisions of the Election Code. For instance, § 85.067 provides that, if a county clerk maintains a website, the branch voting schedule “shall be posted on” the clerk’s website. This provision surely does not prohibit a county clerk from also posting public notice elsewhere, such as in newspapers. But under the State’s view that a duty also constitutes an implicit prohibition, § 85.067 would oddly bar county clerks from publicizing the branch voting schedule anywhere other than their websites. Additional examples abound. *See, e.g.,* Tex. Elec. Code §§ 86.001(c), 86.0015, 86.002, 86.006.

In sum, as the district court explained, “Section 84.012 contains no prohibitive language whatsoever, but rather, requires the early voting clerk to take

affirmative action in the instance a voter does request an application to vote by mail.” CR.292. “That the clerk must provide an application upon request does not preclude the clerk from providing an application absent a request.” *Id.* Contrary to settled principles of statutory interpretation, “the State’s interpretation of section 84.012 ... would read into the statute words that do not exist.” *Id.* at 5; *see ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017) (“[W]ords not included were purposefully omitted.”)

II. The State Cannot Establish Probable, Imminent, or Irreparable Injury

A temporary injunction independently was not warranted because the State has not established any irreparable harm that would result if Hollins sends vote-by-mail applications—along with detailed and accurate educational information on the eligibility criteria for voting by mail—to registered voters. The district court’s decision should be affirmed for this reason as well.

The State falsely asserts that, in the court below, “Hollins did not contest that if the State is right on the law, it will suffer an irreparable injury absent immediate relief.” State Br. 6, 7. The issue of irreparable harm was hotly contested at the hearing. RR.185:14-187:5. And Hollins’s post-hearing submission included an entire section titled, “The State Has Not Established Probable, Imminent, and Irreparable Injury.” CR.281-82. Over five paragraphs, that section thoroughly explained why the State cannot show irreparable harm. *Id.*

The State asserts that it “need only establish that Hollins’s plan would be *ultra vires* to establish an ‘injury,’” and that the State is therefore entitled to a temporary injunction “without the need to show an ‘injury.’” State Br. 26, 29. That is incorrect and improperly conflates the State’s standing to bring an *ultra vires* claim with the normal requirement that any litigant seeking a temporary injunction must establish imminent, irreparable harm. None of the cases cited by the State support a theory that the State is exempt from needing to show irreparable harm for a temporary injunction. *Yett v. Cook*, 281 S.W. 837 (Tex. 1926), did not involve a temporary injunction at all; at most it shows that the State has standing to assert an *ultra vires* claim, nothing more. 281 S.W. at 842-43. *Texas Association of Business v. City of Austin*, 565 S.W.3d 425 (Tex. 2018), held only that the State suffered irreparable harm where the challenged municipal ordinance violated the Texas Constitution because it was preempted by the Texas Minimum Wage Act. 565 S.W.3d at 441. Neither of these cases nor any other relieves the State of its obligation to show imminent, irreparable harm for a temporary injunction.

Beyond that, the State repeatedly asserts that Hollins will cause “confusion” among voters by sending them vote-by-mail applications. *See, e.g.*, State Br. 1. But the district court correctly found that “[t]he State offered no evidence to support such a claim.” CR.293. The State’s own witness candidly admitted that the State relies entirely on “speculation” that Hollins’s mailer will lead to

confusion. RR.85:11. Such unsubstantiated speculation cannot suffice to meet the State's burden in seeking an injunction pending appeal.

The State argues that Hollins's mailer will cause confusion because "the receipt of an application from his office implies that the recipient is allowed to use it." State Br. 24. But Hollins's mailer on its face refutes this notion. As the district court found, "the document Mr. Hollins intends to send to voters ... accurately and thoroughly informs them of Texas law concerning mail-in voting." CR.293. And as noted, Ingram testified that "I've read the mailer and it's very good." RR.76:15-16. In between large images of flashing red sirens, the mailer displays prominent warnings in bold, red typeface to "**READ THIS BEFORE APPLYING FOR A MAIL BALLOT,**" and that "**NOT ALL VOTERS ARE ELIGIBLE TO VOTE BY MAIL.**" CR.57. The mailer then sets forth extensive information on the eligibility criteria for voting by mail, including warning voters in bold, red typeface: "**YOU DO NOT QUALIFY TO VOTE BY MAIL AS 'DISABLED' JUST BECAUSE YOU FEAR CONTRACTING COVID-19. YOU MUST HAVE AN ACCOMPANYING PHYSICAL CONDITION.**" *Id.* These specific warnings and the mailer as a whole thus will reduce, not cause, confusion among voters about the eligibility criteria for voting by mail.

The State falsely asserts that "Hollins offered no testimony rebutting Ingram's account" that Hollins's mailer would cause "confusion" or "voter fraud."

State Br. 6-7; see also *id.* at 8-9 (falsely claiming that the State’s witness provided “unrebutted testimony” as to voter confusion). The State’s own counsel asked Hollins if he “disagree[d]” with Ingram’s testimony about confusion, and Hollins responded, “Yes.” RR.148:5-9. Hollins elaborated that “there’s no basis in fact or evidence that in any way demonstrates that claim or that concern.” RR.148:10-20. Hollins explained that “when you get this [mailer] and you open it you don’t even know that there’s an application in there,” because “[w]hat you first see before you open it fully is advisory guidance” and “you actually have to, like, take interest in what’s in here before you even notice that there was an application at the bottom.” RR.148:22-149:2. As Hollins testified, “it would be a very bizarre outcome and a highly unlikely outcome that somehow someone would unfold this fully, go to the very bottom, rip it off and think I need to fill this out without having ever looked up here [at the advisory guidance].” RR.149:3-8. In other words, Hollins testified, “it is impossible to see what’s down here and get to this application without first seeing the advisory with big red sirens and bold red capitalized ink that’s informing the voter about his or her rights and eligibility.” RR.149:9-18.

In addition, Hollins testified, extensively and unequivocally, that the educational information in the mailer would be helpful to Harris County voters in making an informed decision of whether they are entitled to vote by mail. RR.136:4-139:15. He described in detail precisely how the “red sirens” and

accompanying bold warnings make clear to voters the eligibility criteria, including the meaning of “disability.” RR.115:13-116:12. Hollins testified that the information in the mailer along with the application will enable some people to vote by mail who otherwise would not vote at all. RR.139:16-140:5. And he testified that sending the mailer will make in-person voting safer by enabling more people who are entitled to vote by mail to choose that option. RR.140:6-23.

The State’s purported concerns about “confusion” and “voter fraud” are also undermined by the fact that private individuals and organizations can and do distribute unsolicited vote-by-mail applications to voters under age 65. The State offers no explanation as to why Hollins’s distribution of vote-by-mail applications will purportedly cause confusion or fraud, but the mass distribution of such applications by private individuals and organizations would not. The opposite is true: unlike political campaigns, *see* CR.74-78, Hollins’s mailer includes a prominent and rigorous explanation of the eligibility criteria for voting by mail.

In fact, under the State’s theory, the Secretary of State’s own website would lead to far more “confusion” than Hollins’s mailer. A vote-by-mail application form is on the Secretary of State’s website for any member of the public to access and download. CR.71-72. The Secretary of State’s website, however, provides no information about the meaning of “disability” for purposes of voting by mail. Thus, while the State contends that Hollins’s mailer will have the “imprimatur” of

a government official, the Secretary of State's website and form certainly has that imprimatur, CR.11, and Hollins's mailer is far less likely to sow confusion compared to the Secretary's distribution of applications via the Internet.

The State asserts that Hollins's mailer "will invite potential voter fraud." State Br. 7. That assertion follows numerous statements by the State and its witness at the hearing below suggesting that voters could and would commit felony voter fraud by indicating that they have a disability on the applications that Hollins mails to them. RR.52:7-22; 53:21-54:16, 69:1-2, 70:13-17, 158:1-159:10, 163:11-12, 167:21-168:17, 181:9-10. The State even suggested at the hearing that the State or others could obtain vote-by-mail applications of citizens to investigate whether they falsely claimed a disability. RR.70:3-21.

These naked attempts at voter intimidation flout the Texas Supreme Court's decision and the plain text of the criminal statutes at issue. The Supreme Court held that "the decision to apply to vote by mail based on a disability is the voter's, subject to a correct understanding of the statutory definition of "disability." *In re State*, 602 S.W.3d at 559. And the criminal statute cited by the State applies only if a voter "*knowingly* provides false information on an application." Tex. Elec. Code § 84.0041(a)(1) (emphasis added). A voter could not possibly violate this prohibition by reviewing the educational information in Hollins's mailer and determining that he or she is entitled to vote by mail under the Texas Election

Code as construed by the Texas Supreme Court. The State's claims of "voter fraud" are wholly unsupported by either the relevant facts or the plain text of the Election Code. The district court's decision should be promptly affirmed so that Hollins can "manage" and "conduct" voting by mail during the pandemic by making vote-by-mail application "readily and time available" to voters who may be entitled to vote by mail to preserve their health or for any other valid reason.

PRAYER

The district court's decision denying a temporary injunction should be affirmed.

Respectfully submitted,

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* *Pro hac vice* motion pending.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing instrument was served on all parties below via eFiling on September 16, 2020.

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This brief complies with Rule 9.4(i)(2)(B) because Microsoft Word reports that it contains 6,676 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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