No. 14-20-00627-CV

In the Court of Appeals for the Fourteenth Judicial District Houston, Texas

THE STATE OF TEXAS,

Appellant,

v.

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

Appellee.

On Appeal from the
127th Judicial District Court, Harris County

REPLY BRIEF FOR APPELLANT

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Table of Contents

Index of Authorities

Page(s)

Cases:

Constitutional Provisions and Statutes:

Other Authorities:

Introduction

Yesterday, the Supreme Court recognized that the State will suffer irreparable harm if Hollins's mass mailing is permitted to go out. In granting the State emergency relief, it ordered Hollins "not to send or cause to be sent any unsolicited mail-in ballot applications pending disposition of the State's appeal to the Court of Appeals and any proceedings in this Court, and until further order of this Court." No. 20-0715, Order (Sept. 16, 2020). This Court, too, should respect the State's sovereign injury and the irreparable harm that would be caused by Hollins's proposed mass mailing. A temporary injunction should issue while this case remains pending for trial.

Summary of the Argument

A Texas county is an agent of the State of Texas. It has no authority or power of its own. As such, counties and their officials can act only as permitted by the State. Yet Hollins's mantra is that a county early-voting clerk has "broad authority." *See, e.g.*, Appellee's Br. 4, 7, 10, 11, 20. Accepting Hollins's mistaken understanding of Texas law, the trial court's decision rests on the faulty premise that a county official can take any action so long as it is not *prohibited* by statute. That is precisely the opposite of the law. *See* Appellant's Br. at 10-11. And the trial court's misapplication of the law is a clear abuse of discretion that requires reversal by this Court.

Because the Legislature has not authorized county early-voting clerks to furnish vote-by-mail applications except upon request, Hollins's plan to send unsolicited applications is *ultra vires*. His conduct must be enjoined to prevent the irreparable harm that will result from flooding Harris County with millions of unsolicited applications.

The Legislature has not authorized early-voting clerks to mail out unsolicited mail-in-ballot applications. Statutory authority to "make [applications] available" and "furnish" applications to those who request them allows just that—it does not extend to flooding the mail with applications directed at voters who have never requested them. And Hollins is not an "individual" or "organization" who can distribute applications freely—those terms refer to persons with First Amendment rights, and the Harris County Clerk has none. Moreover, the State does not change the meaning of the Election Code when it exercises its discretion to initiate—or not to initiate—enforcement actions. *See infra* Part I.

The State will suffer irreparable harm without injunctive relief. The State is fundamentally injured when one of its agents—here, Harris County acting through Hollins—acts without authority. The Legislature carefully granted county early-voting clerks' specific powers and duties, but Hollins is acting outside that grant. The injury the State suffers when its agents act *ultra vires* and its laws are not enforced is far more than the minimum necessary for standing to sue—it extends to injunctive relief as well. And even setting that sovereign injury aside, the unrebutted evidence shows that Hollins' mass mailing will create confusion and distrust of the electoral system and could facilitate fraud. *See infra* Part II.

ARGUMENT

I. The State's *Ultra Vires* Claim is Likely to Succeed.

None of Hollins's arguments justify the trial court's denial of temporary injunctive relief. County officials like Hollins do not have broad authority—they have only such authority as is granted by the Legislature. And Hollins cannot rely on private persons' right to participate in the political process when he acts, as here, in his official capacity as Harris County Clerk. The State's claims are likely to succeed on the merits.

A. County officials do not have "broad authority."

Hollins concedes (at Part I.A) that there is no provision specifically allowing him to send unsolicited mail-in ballots. He relies instead on penumbras of power supposedly created by other provisions. In particular, he points to his general power to "manage" and "conduct" elections under Election Code sections 32.071 and 83, and his obligation to make applications "available" under section 1.010(a).[1] As in the trial court, Hollins's argument fails "to consider the entire text in view of its structure and of the physical and logical relation of its many parts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012); *see also In re State of Texas*, 602 S.W.3d 549, 559-60 (Tex. 2020) (reiterating the importance of reading statutory text in context); *id. at* 564 & n.1 (Boyd, J. concurring) (citing *Ritchie v. Rupe*, 443 S.W.3d 856, 867 (Tex. 2014) ("[O]ur text-based approach to statutory construction requires us to study the language of the specific provision

[1] Hollins also refers to section 83.002, but that provision merely specifies for what elections a County Clerk serves as early-voting clerk. It is not material here.

at issue, within the context of the statute as a whole, endeavoring to give effect to every word, clause, and sentence."); *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014) (plurality op.) ("We thus begin our analysis with the statute's words and then consider the apparent meaning of those words within their context.")).

Hollins's exposition on the meaning of his authority to "conduct" and "manage" early voting (at 10-11) merely begs the question: *What* does the early-voting clerk conduct and manage? The answer to that question is the specific early voting processes authorized by the Election Code. That includes making applications available, Tex. Elec. Code § 1.010(a), and providing them to voters upon request, *id.* §1.010(b); *id.* § 84.012. So Hollins is charged with conducting and managing those processes. But the early voting process does not include sending out unsolicited applications, so Hollins is not empowered to do so. His authority to conduct and manage the processes created by law does not allow him to create new processes.

Take Hollins's reliance on sections 32.071, 83.001 and 83.002. These provisions are not, as Hollins suggests, some general grant of discretion to conduct elections; rather, they charge particular officials with administering particular pieces of the Election Code. For example, chapter 32 of the Election Code creates specific duties for election judges and election clerks. Section 32.071 is the first section of subchapter 32(d), which provides the *presiding* election judge with specific duties such as setting working hours for election clerks, *id.* § 32.072; administering oaths, *id.* § 32.074; and taking action to prevent breaches of the peace at the polls, *id.* § 32.075. Section 32.071 does *not* allow the presiding election judge, for example, to increase

the number of election clerks, *id.* § 32.033, even though he is given the power to appoint such clerks, *id.* § 32.02. Sections 83.001 and 83.002 similarly empower Hollins to administer the rules set by the Legislature, but it does not allow him to go "above and beyond" those rules. RR.141, 171.

Equally without merit is Hollins's continued reliance on section 1.010(a). He maintains (at 12-13) that because the Legislature does not say how he is to make forms available, he may do so by furnishing them without request. Courts presume that the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). If making forms available could include sending both solicited and unsolicited forms, then the requirement that they be furnished on request would be surplusage. And as Hollins himself admits (at 14), "[w]hen interpreting a statue, [courts] presume the Legislature intended the entire statute to be effective and none of its language to be surplusage." *Tafel v. State*, 536 S.W.3d 517, 521 (Tex. 2017).[2]

B. Hollins's official-capacity powers are limited by law.

Hollins misses the point when (at I.B) he argues that he may distribute vote-by-mail applications because section 84.013 requires the Secretary of State to maintain copies for distribution by individuals and organizations. In particular, he suggests (at 19) that the State is trying to read the word "private" into the statute. The State

[2] Hollins is incorrect to assert that the State's view would render the requirement in subsection (a) to make forms available surplusage. For example, a county clerk makes forms "available" when he keeps a stack of those forms at his office for a voter to collect (or when he posts the document on his website). A voter can use those forms if he wishes, but he has not been affirmatively provided a copy without a request.

does no such thing. It simply distinguishes between what Hollins may do in his private capacity and what he may do as Harris County Clerk.

Under our laws, private individuals may generally act in any way they choose unless prohibited. It is questionable whether the First Amendment would even permit the State to regulate private distribution of applications in the way that Hollins contemplates. Hollins does not dispute, however, that he is in a different category than private individuals for First Amendment purposes. *See Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006); RR.15-16 (conceding that the mass mailing will be sent in Hollins's official capacity as Harris County Clerk). (As the State explained in its opening brief (at 25), the State *does* regulate private individuals' distribution of election related information when that distribution leads to the submission of fraudulent mail-in ballot applications. Tex. Elec. Code §§ 84.0041, 276.013.)

By contrast—and as Hollins also conspicuously does not dispute—a county official cannot act unless he is granted the power to do so. *Town of Lakewood v. Bizios*, 493 S.W.3d 527, 536 (Tex. 2016); *accord* Appellee's Br. 11 (denying that his claim to power is based on absence of an express prohibition). Instead, Hollins asserts (at 20) that applying that rule would lead to an absurd result. Not so. As the Secretary of State's Director of Elections testified at length, the type of private mailings highlighted by Hollins do not carry the weight—and therefore are not likely to cause the same risk of confusion—as a mailing with the imprimatur of Harris County. RR.55-56. Even more fundamentally, there is no inconsistency in respecting both the limits of county authority and the background principle that private citizens may act as they please unless prohibited by law.

C. Hollins's focus on section 84.012 is misplaced.

The trial court incorrectly started by rejecting Election Code section 84.012 as the source of a prohibition on unsolicited mailings, then proceeded to look at a purported legislative "desire for mail voting applications to be freely disseminated." CR.292-93. That ignores the background principles of Texas law: A county official like the early-voting clerk can take only those actions *authorized* by the Legislature. *See* Appellant's Br. 10-11; RR.81:1-18. Section 84.012 does not need to prohibit Hollins's actions because, without some provision authorizing them, his actions are *ultra vires*.

A penumbra from other provisions cannot create county authority. Any implied authority must be "indispensable," meaning that without it the power explicitly granted would be "nugatory." *Foster v. City of Waco*, 255 S.W. 1104, 1105-06 (Tex. 1926). Hollins has never contended that he will be utterly unable to perform a statutory duty without also being allowed to send an unsolicited mass mailing. That is fatal to his claimed authority. Any "doubt concerning the existence of power is resolved by the courts against the [county], and the power is denied." *Id.* at 1106.

Nor does the State confer additional authority through the executive branch's enforcement decisions. Hollins does not dispute that the State has discretion regarding when to initiate enforcement proceedings. He nonetheless maintains (at 17) that the State's decision not to bring an *ultra vires* suit when he mailed applications to those voters over 65 years of age suggests that the statute means something other than it says. He notably cites no authority for the proposition that the State's enforcement decisions expand his powers. The Legislature made its choices about what

power to provide early-voting clerks and what power not to provide early vo-ing clerks. The district court abused its discretion when it refused to enforce the limits of those powers.

II. The State Will Suffer Irreparable Harm Absent Injunctive Relief.

The State inherently suffers a sovereign injury when the State's subdivisions (and their agents) act beyond the scope of the powers explicitly granted to them by the Legislature. Appellant's Brief at 26-29 (citing, *inter alia*, *Yett v. Cook*, 281 S.W. 837, 842 (Tex. 1926)). Hollins tries to distinguish this issue away by claiming that *Yett* merely establishes that the State has a justiciable interest in preventing *ultra vires* action, but not an "imminent, irreparable harm." *See* Appellee's Brief at 24 (citing *Yett*, 281 S.W. at 842-43).

To the contrary, a violation of the State's legal code harms "Texas's concrete interest, as a sovereign state, in maintaining compliance with its laws." *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019). Courts routinely recognize that a State's "inability to enforce its duly enacted [laws] clearly inflicts irreparable harm." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *see also Valentine v. Collier*, 956 F.3d 797, 803 (5th Cir. 2020) (per curiam). The State suffers irreparable harm here, where Hollins plans to violate Texas law by purporting to act in his official capacity without authority to do so—in other words, by acting *ultra vires*.

Moreover, if the State has a "justiciable interest," as *Yett* held and Hollins apparently concedes, it has necessarily suffered an injury. *See Heckman v. Williamson County*, 369 S.W.3d 137, 154 (Tex. 2012) ("In Texas, the standing doctrine requires a concrete injury to the plaintiff."). *Yett* explains that this justiciable interest flows

from the State's interest in "prevent[ing] an abuse of power by public officers" and to "protect[ing] the interest of the people at large." *Yett*, 281 S.W. at 842. Hollins fails to explain how, if there is an injury (because there is a justiciable interest), that injury is anything but irreparable. There is no dispute that once Hollins commits his unlawful *ultra vires* action, it cannot be undone or otherwise redressed. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) ("An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard."). Thus, when the State brings an *ultra vires* action to prevent public officials' abuse of power and to protect the peoples' interest at large, the injury is inherently irreparable.

Even if that were not enough, the State also has an indisputable interest in preserving the integrity of its elections, especially those that affect state- or nation-wide office. *See* Appellant's Br. at 26 (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808 (1995)). The unrebutted testimony from the Secretary of State's Director of Elections, Kevin Ingram, showed that Hollins's actions would cause voter confusion and a depletion of the State's resources, both of which lead to voters staying home on Election Day. *Id.* at 29-30 (citing Ingram's testimony at RR.60-62, 64-65, 84-85). Hollins contends throughout his brief that these injuries are "speculative" and "unfounded." Hollins's App. Brief at 25-29. But the fact that Hollins's *ultra vires* actions are unprecedented should not allow him to act first and ask questions later, especially with the gravity of the potential harm to the voters and to the State.

Prayer

The State respectfully requests that the Court reverse the trial court's order and render a temporary injunction prohibiting Hollins from sending (or causing to be sent) unsolicited mail-in-ballot applications pending final trial on the merits.

Respectfully submitted.

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