No. 20-0729

In the Supreme Court of Texas

THE STATE OF TEXAS,
Petitioner,

v.

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

On Petition for Review
from the 14th Court of Appeals, Houston

REPLY BRIEF ON THE MERITS

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As in the combined Petition and Brief on the Merits, this Reply will use "CR" to refer to the clerk's record, and "RR" to the reporter's record. Hollins has submitted an appendix that is largely duplicative of that submitted by the State. To avoid confusion, this Reply will continue to use "App." to refer to the appendix submitted with its opening brief. "Hollins App." will refer to his appendix.

To the Honorable Supreme Court of Texas:

Hollins's response underscores why the State is entitled to an injunction. He admits that, in his view, he has a "broad charge" that permits him to act beyond the "certain specific duties related to voting by mail" that the "Election Code assigns" him. Resp. at 15. As the State has explained, this view is directly contrary to this Court's case law, which for a century has "strictly construe[d] general-law municipal authority" and resolved "'[a]ny fair, reasonable, substantial doubt concerning the existence of power'" against the municipality. *Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527, 536 (Tex. 2016) (second alteration in original) (quoting *Foster v. City of Waco*, 255 S.W.1104, 1106 (Tex. 1923)). Hollins offers no contrary authority. The State thus is likely to prevail in its cause of action.

Hollins further fails to rebut the State's showing of irreparable harm. Like the court of appeals before him, Hollins concedes (at 38-39) that the State has standing to bring an action to prevent the abuse of power by a municipal official. Yet he maintains that the State cannot obtain a temporary injunction because such an abuse of power does not necessarily harm the State. That argument misunderstands settled law and the record in this case. As a matter of law, any *ultra vires* action by a county official irreparably harms the sovereignty of the State. And in any event, the record below confirms that Hollins's planned action would undermine confidence in and the integrity of a national election.

The State is entitled to injunctive relief. The Court should reverse the decision below.

Standard of Review

This Court has long held that while a trial court's decision to deny a temporary injunction is generally reviewed for abuse of discretion, *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002), a trial court "has no 'discretion' in determining what the law is or applying the law to the facts," *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). Accordingly, where a party's entitlement to an injunction turns on a question of law, a failure "to analyze or apply the law correctly will constitute an abuse of discretion." *Id.*; *see also, e.g.*, *In re Geomet Recycling LLC*, 578 S.W.3d 82, 91-92 (Tex. 2019) (orig. proceeding).

Hollins overlooks (at 14) this settled law, focusing instead on *Butnaru*'s pronouncement that reversal is warranted when the "trial court's action was so arbitrary that it exceeded the bounds of reasonable discretion." 84 S.W.3d at 204. But that formulation applies only when the denial of a temporary injunction turns on the balance of the equities. *See id.* Here, neither the trial court nor the court of appeals engaged in any such balancing, as Hollins concedes (at 2). Instead, the decisions below turn entirely on legal questions. *See* CR.291-92; App. B at 6. This Court thus may reverse simply by finding that the lower courts failed "to analyze or apply the law correctly." *Walker*, 827 S.W.2d at 840.

Argument

I. The State Is Likely to Succeed on the Merits Because Hollins Cannot Identify Any Law Authorizing His Conduct.

Hollins now agrees with the State that county clerks have only those powers "specifically granted or necessarily implied by the Election Code." Resp. at 15

(quotation marks omitted). Hollins's concession is well-founded: For a century, this court has consistently held that a county "is a subordinate and derivative branch of state government," *Avery v. Midland County*, 406 S.W.2d 422, 426 (Tex. 1966), which "possess[es] only such powers and privileges" as the State confers upon it, *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430 (Tex. 2016). Such power is "strictly constru[ed]." *Bizios*, 493 S.W.3d at 536. Powers not expressly granted by the Legislature will be implied only if the absence of such power will leave the express power "nugatory." *Id.* For example, this Court "has held that authority to borrow money, create a debt, or issue bonds, was not necessarily incident to the power to build courthouses," schoolhouses, or cemeteries because it was *possible* to fund those projects through authorized means. *Foster*, 255 S.W. at 1106.[1]

Hollins's response brief identifies several statutes that he believes support his authority to expend resources mailing millions of unsolicited applications to vote by mail to Harris County voters, most of whom are not eligible to vote by mail. But none supports his view. And the Attorney General's enforcement decision not to seek to enjoin other unrelated abuses of power does not authorize Hollins to act *ultra vires*.

[1] Hollins's current view is different from the one he advanced below. In trial court, Hollins argued that he has the power to distribute ballots because "no provision of Texas law forbids distributing unsolicited vote-by-mail applications to voters." CR.47 (cleaned up). The trial court agreed. CR.291-92 (holding Hollins has "authority to conduct and manage mail-in voting subject only to any express limitation on that power by the Legislature"). Hollins now opposes that view—but in doing so, he confirms that the trial court erred.

A. No Statute Authorizes Hollins's Conduct.

Hollins argues that five sections of the Texas Election Code authorize his conduct: sections 84.012, 32.071, 83.001, 1.010, and 84.013. None provides the support he seeks.

1. As Hollins concedes, section 84.012 does not empower him to distribute applications without a request.

Section 84.012 requires county clerks to "mail without charge an appropriate official application form for an early voting ballot to each applicant *requesting*" one (emphasis added). Hollins suggests that language allows him to send unsolicited applications absent a request, but he gives away the game when he admits that section 84.012 does not "address sending applications without request." Resp. at 33 (cleaned up). That concession is fatal because Hollins can act only under authority expressly or impliedly granted. *E.g.*, *Foster*, 255 S.W. at 1106. Section 84.012's silence grants nothing.

Instead, Hollins abandons statutory text in favor of subjective policy judgments the Legislature has rejected. He argues that it is good policy to "proactively send[] vote-by-mail applications." Resp. at 18. But policy arguments are not before this Court. *San Antonio Union Junior Coll. Dist. v. Daniel*, 206 S.W.2d 995, 1000 (Tex. 1947) (orig. proceeding) (holding that district lacked authority to issue a particular *type* of bond even where other, more expensive bonds have been authorized). What

matters is whether Hollins can point to explicit authorization, and section 84.012 provides none.[2]

2. Sections 32.071 and 83.001 do not confer broad unenumerated powers.

Hollins further offers (at 9 and 15) sections 32.071 and 83.001 as evidence of a "broad charge" to "manage and conduct the election" that sweeps in unenumerated discretionary powers over applications to vote by mail. Section 32.071 states that a "presiding judge is in charge of and responsible for the management and conduct of the election at the polling place of the election precinct that the judge serves." Section 83.001 extends those "same duties and authority" to early voting clerks. But for multiple reasons, those general charges to "manage" and "conduct" elections do not supply the sweeping, anything-goes power that Hollins now advocates.

First, Hollins's view runs afoul of this Court's long-established and oft-repeated rule that courts must "consider [a] statute as a whole, giving effect to each provision so that none is rendered meaningless or mere surplusage." *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016) (citing *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (2003); *Howard Oil Co. v. Davis*, 13 S.W. 665, 666 (Tex. 1890);

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[2] For that reason, the briefs presented by amici the NAACP, the League of Women Voters, and the District of Columbia, may be disregarded. They address nothing *but* policy reasons to allow Hollins's mass mailing. The District of Columbia's arguments also fail because the U.S. Constitution permits each State's legislature to regulate its own elections, subject only to limits imposed by the Constitution or Congress. U.S. Const. art. I, § 4, cl. 1. What other States have approved in response to the pandemic is irrelevant to what the Texas Legislature has permitted.

Lufkin v. City of Galveston, 63 Tex. 437, 439 (1885)). Over the past 103 years,[3] the Texas Legislature has developed, tweaked, and rewritten in painstaking detail seventeen chapters in the Election Code about the conduct of early voting, (chs. 81-87), special forms of early voting (chs. 101-06), and restricted ballots (chs. 111-14). Yet Hollins would demote all of these provisions to duties "within" his supposedly broad mandate. Resp. at 15; *see also id.* at 46-47. That is not how courts read statutes: They presume that a legislature "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). There would be no need to carefully enumerate the powers of county clerks if clerks were charged with sweeping authority to make whatever policy decisions they feel are wisest.

Second, Hollins's sweeping "conduct" and "manage" theory, if adopted, would give 254 county clerks free rein to fundamentally alter the conduct of state elections from one county to the next. After all, both terms carry broad meaning: "conduct" is "to direct or take part in the operation or management of." Resp. at 18 (quoting *Merriam-Webster's Dictionary* (edition unspecified)). And "manage" is "[t]o exercise executive, administrative and supervisory direction of." *Id.* (alteration in original) (quoting same). The better reading of "conduct" and "manage" cabins their application to the exercise of powers already explicitly granted—not a new font of

[3] Act of May 26, 1917, 35th Leg., 1st C.S., ch. 40, 1917 Tex. Gen. Laws 62 (establishing first absentee voting law).

unbounded discretion. Any contrary reading could lead to dramatic differences in election protocols from county to county; Hollins points to no evidence that the Legislature wanted such a result.

3. Sections 1.010 and 84.013 do not empower early-voting clerks to provide unsolicited applications simply by requiring copies to be maintained or made available.

Section 1.010 requires local election officials to "make printed forms," including an "application," "readily and timely available." Tex. Elec. Code § 1.010(a). It further requires local officials to "furnish forms . . . to a person *requesting them.*" *Id.* § 1.010(b) (emphasis added). Similarly, section 84.013 requires the Secretary of State to "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." Tex. Elec. Code § 84.013 (emphasis added). Sections 1.010 and 84.013 are both keyed to a "request," and neither authorizes the mailing of unrequested applications.

Hollins offers five arguments in support of his view that the obligation to make applications "available" empowers him to "furnish" unsolicited applications without request. None has merit.

First, Hollins asserts (at 21) that one way of making forms available is to furnish them. But that disregards the bedrock principle that "[t]he meaning of words read in isolation is frequently contrary to the meaning of words read contextually in light of what surrounds them." *In re Office of the Attorney Gen. of Tex.*, 456 S.W.3d 153, 155 (Tex. 2015) (orig. proceeding) (per curiam). Courts read statutory terms in

context. *Id.*; Tex. Gov't Code § 311.011(a). Because the Legislature used the term "make available" in one subsection and "furnish" in the very next subsection, this Court presumes that it chose to use those words deliberately. *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 563 (Tex. 2016) (quoting *DeWitt v. Harris County*, 904 S.W.2d 650, 654 (Tex. 1995)). That presumption is reinforced here because the Legislature imposed a condition on the county's exercise of its power to "furnish" applications—namely the existence of a request—that it did not place on its power to make the applications "available." *Willacy County Appraisal Dist. v. Sebastian Cotton & Grain, Ltd.*, 555 S.W.3d 29, 39 (Tex. 2018), *opinion corrected on reh'g* (Sept. 28, 2018) (citing *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011)). Hollins cannot evade the Legislature's condition on his specific power to "furnish" applications by relying on a broad interpretation of his power to make them "available."

Second, Hollins asserts (at 20) that the State is writing section 1.010(a) out of the Election Code because COVID-19 has "inhibited traditional methods of making printed vote-by-mail applications" available. As even the trial court recognized, however, this case does not turn on the existence of COVID-19—only on the powers granted by the Legislature. RR.45 ("[I]t doesn't matter if he's acting ultra vires because he thinks it's going to rain on that day or it's going to snow or, you know—or if paper on November 3rd is automatically going to combust in fire. I mean, those aren't—those aren't my issues today. Covid is not my issue."). Moreover, Hollins appears to misunderstand the rule against surplusage. Resp. at 21 (citing *Tafel v. State*, 536 S.W.3d 517, 521 (Tex. 2017) (per curiam)). That rule requires that courts

give a statutory provision some practical meaning, not that the provision be put into practice in every case. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012). Hollins does not assert that the State's reading would fail to give meaning to section 1.010(a) outside pandemic circumstances.

By contrast, Hollins's reading *would* leave the requirements in sections 1.010(b) and 84.013 that forms be provided on request devoid of any practical meaning. Hollins insists (at 22) that this is not so because these provisions "serve as backstops," as nothing in section 1.010(a) *requires* that a clerk provide the forms on request. But Hollins never explains how he could remain in compliance if he *refused* to provide an application upon request.

Third, Hollins again compares his decision to mail unsolicited applications to voters with posting the application online. Resp. at 22-23. As the State explains (at 26), that ignores that the posted application is only "furnished" when the user makes a request by clicking on a link. Hollins counters (at 23) by equating that request with the voter's act of opening a piece of mail. This argument ignores both the ordinary meaning of "request" and the rules of grammar. When used as a verb, "request" means "to ask (as a person or an organization) to do something." *Webster's Third New International Dictionary* 1929 (2002). Moreover, it is a *transitive* verb, meaning that it requires a direct object: You have to request something from someone. Sidney Greenbaum, *The Oxford English Grammar* § 3:16 (1996). The Legislature is presumed to have known this when it chose that term. Tex. Gov't Code § 311.011(a). The response to an electronic request—whether made by submitting a complicated form or clicking on a simple link—is frequently automated. But there is

still a request as the voter is "asking for something" he has not yet received. *Webster's Third*, *supra* at 1929. The voter who opens his mail already has the application, and there is no request for anything that is either made of or granted by a third-party when unfolding a pamphlet.

Fourth, Hollins asserts (at 30-32) that because section 84.013 permits individuals and organizations to distribute mail-in ballot applications, he is permitted to do so because he is an individual. This too violates the "unshakeable" presumption that the Legislature understands grammar. Scalia & Garner, *supra* at 140. The subject of section 84.013—that is, the person being empowered—is the Secretary of State. Greenbaum, *supra* at § 3.15. The verbs—that is, the actions the Secretary is empowered to take—are "maintain" and "furnish." *Id.* at § 3.14. The verb "distribute" does not appear in section 84.013. *Contra* Resp. at 31. Instead, the statute uses the term "distribution" as part of an adverbial phrase describing the purpose for which the applications are being maintained or furnished. Greenbaum, *supra* at § 6.14. Put another way, section 84.013 does not empower anyone to distribute anything. It empowers—and requires—the Secretary to maintain copies of an application in the event of a distribution and to furnish copies on request made for the purpose of distribution by the requestor.

Even if section 84.013 contemplates some distribution by private individuals, that does not mean that Hollins may do so. As the State explained (at 23-24), and Hollins nowhere refutes, private individuals have First Amendment rights to distribute information relating to a political campaign. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011); *Citizens United v. FEC*, 558 U.S. 310, 365-

66 (2010). Hollins, by contrast, does not have the power to distribute this information in his official capacity absent authorization. *Willis v. Potts*, 377 S.W.2d 622, 625 (Tex. 1964) (stating that the "powers conferred upon [counties] are rather duties imposed than privileges granted"). Therefore, the fact that the State does not forbid private individuals from distributing applications says nothing about whether it empowers county clerks to do so.

Fifth, Hollins asserts that this Court's recent decision in *In re State*, 602 S.W.3d 549 (Tex. 2020) (orig. proceeding), somehow changes the scope of his authority to transmit applications. But he does not explain why that might be so. This Court in *In re State* rejected Hollins's predecessor's argument that a generalized fear or lack of immunity to disease entitles a voter to vote by mail. *See* Oral Argument at 39:37-41:21, *In re State*, 602 S.W.3d 549 (Tex. 2020). Instead, this Court held only that the meaning of disability—or specifically "physical condition"—"cannot be interpreted so broadly" as to be inconsistent "with the Legislature's historical and textual intent to limit mail-in voting." *In re State*, 602 S.W.3d at 559. Any preexisting condition must—when combined with COVID-19 or otherwise—create a "'likelihood' that voting in person would injure the voter's health" and that "'likelihood' means a probability." *Id.* at 560. Nothing in Hollins's brief acknowledges that aspect of the Court's ruling, and his proposed mailer does not explain it to voters. RR.299 (referencing a "likelihood" of injury but omitting any definition of "likelihood" or reference to probability).

More fundamentally, whether county officials may send unsolicited mail-in ballot applications was not at issue in *In re State*; so nothing in this Court's holding empowers Hollins to do so.

B. The State's enforcement choices do not change the meaning of the Election Code.

As set out above, the Legislature has not authorized county clerks to expend precious resources and funds mailing unsolicited applications to vote by mail to millions of registered voters, most of whom are not eligible to vote by mail. Hollins cannot point to any such authority, so he instead claims that the Attorney General's enforcement practices give him a free pass to act *ultra vires*. Specifically, he claims that because the Attorney General has not brought an action to prevent county clerks from sending unsolicited applications to vote by mail to registered voters over 65 years old, the Attorney General is somehow estopped from pursuing this action against Hollins as to voters under age 65. Hollins is wrong for at least two reasons.

First, Hollins misstates the Attorney General's enforcement practices. Contrary to Hollins's brief, at no point has the Attorney General given "affirmative consent" to the mailing of unsolicited applications to vote by mail. Resp. at 29 (emphasis omitted). To be sure, the Attorney General made the tactical decision in *this* lawsuit not to *object* to Hollins's past practice of mailing such applications to elderly voters. CR.232; Hollins App. J. Indeed, the State *could not* have brought a claim based on the decision by Hollins's office to send applications to those over the age of 65 because that mailing was complete in early June—more than two months before this lawsuit was filed. Shelley Childers, *Nearly 400K Vote-by-Mail Applications Sent to*

Harris Co. Seniors Ahead of Election, ABC (June 11, 2020), https://tinyurl.com/y8b59mds. It is black-letter law that a completed action is not properly the subject of an *ultra vires* suit. *Garcia v. City of Willis*, 593 S.W.3d 201, 207 (Tex. 2019) (citing *inter alia City of Dallas v. Albert*, 354 S.W.3d 368, 378–79 (Tex. 2011) (stating that *ultra vires* claims work for "only prospective, not retrospective, relief")); *accord Freedom from Religion Found. v. Abbott*, 955 F. 3d 417, 425 (5th Cir. 2020) (holding that purely retrospective declaration is improper under parallel *Ex parte Young* doctrine). And in any event, the targeted mailing of unsolicited applications to vote by mail to those over the age of 65—who are indisputably qualified to vote by mail—raises different policy concerns than the across-the-board mass mailing to ineligible voters Hollins seeks to accomplish here.

Second, the Attorney General's enforcement practices neither override nor replace the Legislature's careful policy decisions. *See* Tex. Const. art. III, § 1. The Attorney General can decide whether and how to enforce laws. *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 727 (Tex. 1924). He can even fill in gaps in the rules where delegated the power to resolve ambiguities in a statute. *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 465 (Tex. 1997), *as supplemented on denial of reh'g* (Oct. 9, 1997). But only the Legislature can empower counties, *Bizios*, 493 S.W.3d at 536, and any ambiguity is resolved against the existence of that power, *Foster*, 255 S.W. at 1106. Because there is no statute unambiguously empowering Hollins to send unsolicited mail-in ballot applications, the trial court committed reversible error when it refused the State a temporary injunction on the ground that the State is not likely to show that Hollins's intended action is *ultra vires*.

II. The State Has Established a Likelihood of Irreparable Harm Absent Relief.

The court of appeals erred when—without addressing the validity of the State's claim—it affirmed the trial court's order on the ground that the State has not shown a likelihood of irreparable harm. But the State satisfies the irreparable harm prong for two reasons. First, as Hollins implicitly concedes (at 38), any *ultra vires* action by a county official inflicts an irreparable sovereign injury on the State. Second, the State put on evidence in this case that Hollins's behavior will disrupt the conduct of the general election. Each of these injuries is an independent basis to grant the State injunctive relief. In arguing otherwise, Hollins misunderstands both the nature of the State's injury and the record below.

A. The State's undisputed sovereign injury entitles it to an injunction.

"As a sovereign entity, the State has an intrinsic right to enact, interpret, and enforce its own laws." *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015) (citing *Printz v. United States*, 521 U.S. 898, 912 n.5 (1997)). Courts protect this interest because it "secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992). That is, legislation is passed for a purpose and in the general interest of the populace. When that legislation is disobeyed—particularly by public officials—both that purpose and respect for the rule of law itself is harmed. *E.g.*, *Maryland v. King*, 567 U.S. 1301, at *3 (2012) (Roberts, C.J.) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist,

J. in chambers))). The *ultra vires* doctrine permits actions to "reassert the control of the state," "enforce[s] existing policy" as declared by the Legislature, and generally to cure that harm. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

Hollins admits (at 38) that the State has a sufficient interest in the enforcement of its laws to establish standing to bring an *ultra vires* claim. That concession is well taken. This Court recognized long ago that the State has a protectable interest in the applicability of its duly enacted laws so that it may stand as a "guardian and protector of all public rights." *Yett v. Cook*, 281 S.W. 837, 842 (Tex. 1926). Other courts have done the same. *E.g.*, *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) ("Because the State is the appealing party, its interest and harm merge with that of the public." (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009))). Hollins nonetheless maintains (at 38-40) that the State's interest does not amount to an irreparable or immediate injury sufficient to support a temporary injunction. This argument misunderstands the requirements of standing, misapplies the definition of "irreparable," and fails to take into account the record of this case.

"[S]tanding is a constitutional prerequisite to maintaining a suit" in Texas courts. *Tex. Ass'n. of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). It requires "a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Heckman v. Williamson County*, 369 S.W.3d 137, 154 (Tex. 2012). This Court has instructed Texas courts to look to federal jurisprudence as a guide to analyzing standing. *See, e.g.*, *Pike v. Tex. EMC Mgmt.*, LLC, No. 17-0557, 2020 WL 3405812, at *7 (Tex. June 19, 2020); *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018). Due to its sovereign status, the State

gets "'special solicitude' in [the] standing analysis." *Texas v. United States*, 809 F.3d 134, 151 (5th Cir. 2015), *affirmed by an equally divided Court*, 136 S. Ct. 2271 (2016) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007)). But the State still must meet the basic requirements, including an "injury in fact" that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Heckman*, 369 S.W.3d at 154–55 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). And Hollins concedes that the State's sovereign injury satisfies those requirements here.

The necessary implication of the fact that the State has standing to enforce its law—which Hollins does not dispute—is that it has an injury that the Court can redress. (Hollins also does not dispute that the injury caused by his violation is traceable to him or redressable by an order prohibiting him from continuing his violation.) To the extent Hollins is arguing that the State is not entitled to an injunction because its injury is not irreparable or immediate, the position is without merit.

The State's injury meets the definition of "irreparable harm." As this Court has explained, a harm is considered irreparable if monetary damages are either not calculable or will not provide adequate recompense. *Pike*, 2020 WL 3405812, at *23 (citing *Dresser-Rand Co. v. Virtual Automation Inc.*, 361 F.3d 831, 848 (5th Cir. 2004)). Leaving aside the impossibility of calculating damages resulting from a disrupted presidential election, monetary damages simply are not available. As a result of sovereign immunity, the *only* redress available in an *ultra vires* suit is an injunction or declaration. *Heinrich*, 284 S.W.3d at 376, 380. Indeed, this is another reason that conceding that the State has standing resolves whether it is entitled to an injunction:

To support standing to bring an *ultra vires* suit, the injury to the State's sovereignty must be redressable in an *ultra vires* suit. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) ("Our standing decisions make clear that standing is not dispensed in gross. To the contrary, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." (quotation marks omitted) (quoting *Davis v. FEC,* 554 U.S. 724, 734 (2008))). Because the only remedy available in an *ultra vires* suit is an injunction, the State's injury must be redressable by an injunction—that is, prospective and irreparable by monetary damages.

Nor can Hollins seriously dispute that this irreparable harm would manifest before trial. The only reason that Hollins has not sent the applications *already* is that this Court has ordered him not to do so. And his brief asks this Court to "issue its decision as soon as possible, but no later than October 5, with opinion to follow" precisely because he wants to mail the applications before the trial court holds a trial on the State's claims. Resp. at 3.

B. Hollins's policy preferences do not rebut that his actions will likely cause significant harm in the upcoming election.

Even if its sovereign injury were not sufficient (and it is), the State has offered proof to meet this element of the preliminary injunction test. Ingram testified that Hollins's actions are likely to lead to: (1) a depletion of the Secretary of State's resources, in responding to questions; (2) voters making decisions without assistance and potentially opening themselves up to liability; and (3) decreased turnout. *See* RR.55-59, 60-62, 64-65. Moreover, it will clog up the vote-by-mail infrastructure that

has been designed to accommodate only limited numbers of mail-in voters. *Cf. In re State*, 602 S.W.3d at 559 (recognizing that, in Texas, mail-in voting is the exception, not the rule). Ingram explained that Hollins's plan will cause such harm *despite* the instructions and information sent to voters along with the application. RR.50-55, 82-83. That is because "it's been [Ingram's] experience that voters don't read the instructions." RR.63.

In this Court, Hollins makes two contradictory responses: (1) that the State has admitted that its evidence is improper speculation, Resp. at 41; and (2) that Hollins rebutted Ingram's testimony by opining that his mailer will prevent the harm to which Ingram testified, *id.* at 43-44. The Court should reject these arguments for at least three reasons.[4]

First, Hollins takes Ingram's supposed admission that he was speculating, Resp. at 41, out of context. As the State explained (at 44-45), Ingram acknowledged that he was offering testimony of what is likely to happen because Hollins's behavior is entirely "unprecedented," RR.85—and Hollins does not disagree. Ingram explained that his testimony, however, was *not* mere conjecture but "[b]ased on similar occurrences from government mailings" other than unsolicited ballot applications. RR.62.

[4] Hollins maintains (at 39 n.9) that he has preserved his objection to the State's proffer in the trial court. Tellingly, however, he cites only his counsel's arguments made after the close of evidence as well as conclusions of law submitted after the hearing. Resp. at 39 n.9. (citing RR.185:14-187:5; CR.281-82). Those are not timely objections to the State's evidence. Moreover, it is well-established that unsworn statements by counsel are not evidence. *E.g.*, *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) (per curiam).

Ingram explained that "it's been my experience that voters don't read the instructions." RR.63.

Second, the testimony to which the response points as rebuttal is anything but. The response relies entirely on pages 148 and 149 of the transcript of the preliminary injunction hearing. Resp. 43-44. In those pages, however, Hollins merely asserts his opinions that (1) "there's no basis in fact or evidence that in any way demonstrates that claim or [Ingram's] concern"; and (2) "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.148-49. This testimony does not respond to (among other things) Ingram's concerns about the time that the Secretary of State will have to devote to addressing Hollins's conduct, RR.62-63, to Ingram's experience that voters do *not* read instructions, RR.63, or that flooding Harris County with potentially millions of applications will clog the system, RR.202.

Elsewhere in his response, Hollins brushes off the last, logistical concerns because the applications have a barcode that will allow ease of data entry. Resp. at 5. This argument, however, reflects a lack of awareness of all that is involved in processing mail-in ballots and applications therefore. For example, contrary to Hollins's apparent view, while his staff is not required to look behind the voter's assertions of disability, it is required to review the applications and reject them if the voter is not eligible. Tex. Elec. Code § 86.001; *accord In re State*, 602 S.W.3d at 561. *Contra* Resp. 27-28 (complaining that "[t]he Attorney General falsely tells the public that 'Election officials have a duty to reject mail-in ballot applications from voters who are not

eligible to vote by mail.'"). His staff must also comply with other obligations of the Election Code. For example, the applications must be processed and ballots sent to voters within only a few days. Tex. Elec. Code § 86.004. The printing and storage capacity that obligation would necessitate is alone staggering given that Harris County uses many different ballots to accommodate the difference races in which different voters may vote as well as to comply with federal requirements that ballots be printed in multiple languages. 52 U.S.C. § 10503(c). Hollins's proposed barcoding also does not account for the additional resources that would be necessary to process the influx of ballots that Hollins *hopes* will result.

Third, this lack of awareness highlights the internal inconsistency in Hollins's position: He asks—and the lower courts agreed—that Ingram's testimony should be dismissed as improper speculation when Ingram has served in his current position for nine years—not counting his prior experience running elections. RR.61. Hollins, however, insists that though this is his first time administering an election, *his* testimony about how voters are likely to respond to getting his mailer must be accepted without question.[5] Hollins does not get to have it both ways.

[5] *See* Zach Despart, *Texas Democratic Party Official Appointed Interim Harris County Clerk*, Hous. Chron. (May 19, 2020), https://tinyurl.com/y3ukjmkm.

Prayer

The Court should reverse the courts below and order that Hollins may not send unsolicited mail-in ballot applications. In the alternative, it should reverse and remand for entry of an appropriate injunction.

Respectfully submitted.

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