FILED
20-0729
9/28/2020 8:10 PM
tex-46649039
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

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, *State v. Hollins*, No. 14-20-00358-CV, *affirming*, District Court of Harris County, 127th District, Cause No. 2020-52383, the Honorable Ravi K. Sandill, Presiding

BRIEF OF *AMICI CURIAE* FORT BEND COUNTY, TEXAS, AND THE CITY OF HOUSTON, TEXAS, IN SUPPORT OF RESPONDENT AND SUMMARY AFFIRMANCE

ROY L. CORDES, JR.
FORT BEND COUNTY ATTORNEY

JUSTIN CARL PFEIFFER (SBN 24091473)
Counsel of Record
ASSISTANT COUNTY ATTORNEY
Fort Bend County Attorney's Office
401 Jackson Street, 3rd Floor
Richmond, Texas 77469
[Tel.] (281) 341-4555
[Fax] (281) 341-4557
justin.pfeiffer@fortbendcountytx.gov
COUNSEL FOR *AMICUS CURIAE*
FORT BEND COUNTY, TEXAS

(*Additional counsel listed on subsequent page*.)

RONALD LEWIS
HOUSTON CITY ATTORNEY

COLLYN A. PEDDIE (SBN 15707300)
Counsel of Record
SENIOR ASSISTANT CITY ATTORNEY
OFFICE OF THE CITY ATTORNEY
CITY OF HOUSTON
900 Bagby Street, 4th Floor
Houston, Texas 77002
[Tel.] (832) 393-6463
[Fax] (832) 393-6259
collyn.peddie@houstontx.gov

COUNSEL FOR *AMICUS CURIAE*
CITY OF HOUSTON, TEXAS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE**

CONSTITUTIONS & CONSTITUTIONAL PROVISIONS

Statutes

REGULATIONS

LEGISLATIVE MATERIALS

BRIEFS AND COURT FILINGS

RULES

OTHER AUTHORITIES

STATEMENT OF INTEREST OF *AMICI CURIAE*[1] FORT BEND COUNTY, TEXAS, AND THE CITY OF HOUSTON, TEXAS

Fort Bend County, Texas, is the second-largest County by population in the Houston-metropolitan region, the ninth largest in Texas, and one of the most diverse and fastest-growing counties in the country. The County's population has nearly tripled since 2000 while the ratio of its Anglo population has decreased to 31%, the remainder is almost evenly divided among Latinos, African-Americans, and East and South Asians.

Fort Bend County has not always been at the forefront of voting rights. In 2009, the United States sued the County, principally asserting Voting Rights Act violations, and the County entered into a consent decree agreeing to federal monitoring, increased training, and electoral reporting to the Department of Justice. *See United States v. Fort Bend Cnty.*, No. 4:09-cv-01058 (S.D. Tex. Apr. 9, 2009). Fort Bend County, therefore, files as an *Amicus* to advocate for the widest and easiest participation of its electorate possible under the law.

The City of Houston is the fourth-largest city in the United States with a population of 2.3 million people. While primarily located in Harris County, Texas,

---

[1] Pursuant to Texas Rule of Appellate Procedure 11(c), undersigned counsels of record certify that they authored this brief in whole in the scope of their official duties as Assistant County or City Attorneys, that they have endeavored to add novel arguments rather than merely recite those already advanced, that no party or any

portions of Houston are located in Fort Bend County, Texas. Like Fort Bend County, Houston is exceedingly diverse. Indeed, Houston is often referred to as the most diverse city in the nation. Forty-five percent of Houstonians are Hispanic, 25% Anglo, 23% African American, and the remainder are Asian, Native American, or two or more races.[2] Houston is also quite young with nearly 90% of the population under 65 years old, and 65% between the ages of 18 and 64. Like the rest of Texas, Houston has struggled with the COVID-19 pandemic, and consequently has an intense interest in the ability of local government to quickly adapt to the challenges of the pandemic's waves of infection as well as in seeing its citizens have an effective opportunity to exercise their right to vote given the conditions in the community. The City contracts with the Harris County Clerk to manage and conduct its municipal elections, and thus has a keen interest in the County Clerk's power, as early voting clerk, to be able to do so with maximum efficiency and fairness to Houston's voters.

party's counsel authored any part of this brief, and that no other person or entity made a monetary contribution to the preparation of any portion of this brief aside from Fort Bend County, Texas, and the City of Houston, Texas.

[2] *See* U.S. Census Bureau, Quick Facts, Houston, Texas, *available at*, https://www.census.gov/quickfacts/fact/table/houstoncitytexas,houstoncountytexas/PST045219 (last visited Sep. 27, 2020).

STATEMENT OF FACTS

Chris Hollins is the County Clerk of Harris County ("Respondent"). *Amici* adopt respondent's statement of facts. For purposes of this brief, *Amici* briefly summarize.

One month ago, Hollins announced his intent to send vote-by-mail applications to all registered voters in Harris County. [CR.232.] Ruth Hughs, the Secretary of State of Texas ("Secretary of State"), requested Ken Paxton, the Attorney General of Texas ("Attorney General" or "AG"), to seek injunctive relief against respondent in his official capacity. The trial court denied injunctive relief and the court of appeals affirmed that disposition. This Court ordered expedited briefing as the election is fast approaching.

SUMMARY OF ARGUMENT

The Attorney General asserts that the relief sought is to assist the voters. The trial court called the Attorney General's arguments inconsistent and ironic. *State v. Hollins*, No. 2020-52383 at 7 (Harris Cnty. 127th Dist. Ct. Sept. 11, 2020). *Amici* agree. In this process, the Attorney General seeks to misappropriate, for himself and the Secretary of State, long-standing local election authority aimed at making voting more accessible and, even more generally, the discretionary acts of local officials. To this end, the Attorney General asserts that county officials have no discretion to act beyond that "*specifically granted*" or "*necessarily implied*" by those powers the

Legislature has conferred. [Pet. for Review at xiv (emphasis in the original).][3] Here, the Attorney General contends that Respondent Chris Hollins—the Clerk of Harris County—has no authority to carry out his contemplated vote-by-mail ***application***-mailing plan because the Election Code does not expressly authorize him so to do. Consequently and conveniently, the Secretary of State could simply countermand any action he or any other local election official might take to make voting more accessible. This Court should not assist in such a naked power grab.

First, the Attorney General is simply wrong in his construction of the Texas Constitution and common law. These laws and the jurisprudence surrounding them make clear that local enforcement is crucial to ensuring smooth and fair elections. By contrast, the Attorney General's interpretation of the Election Code, if adopted, would make administering elections exceedingly difficult, if not impossible.

Second, the Attorney General's interpretation of the Election Code is unduly narrow. In the trial court, the Attorney General complained that § 84.012 of the Election Code prohibits Hollins's contemplated mailing. *See Hollins*, No. 2020-52383 at 3. The Legislature, however, enacted that provision when such grants of authority reflected the ***minimum*** required rather than the ***maximum*** permitted.

---

[3] In the petition, the Attorney General asserts extraordinarily broad authority of the State over its counties and cities, to which this brief refers to as the "unitary theory" of State governance.

Third, the Attorney General is ***currently arguing*** the opposite position in trying to extricate the Secretary of State from lawsuits filed by the Texas Democratic Party and other organizations. ***There***, the Attorney General claims that the Secretary of State has no special relationship or connection with the election statutes the Attorney General claims ***here*** provide the Secretary of State with virtually exclusive authority over elections. [*See* DX15.][4] The Fifth Circuit rejected this argument, holding instead that the Secretary of State has "some connection" to such statutes. *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917 at **6-7, — F.3d — (5th Cir. Sept. 10, 2020), *cert. pending*, No. 19-1389.[5] Nevertheless, the Attorney General ***is still making the same argument now*** and has requested more time to file a petition for rehearing *en banc* of this discrete point of law, which the panel also granted. Mot. to Extend Time for *En Banc* Consideration, Tex.

[4] As explained, *supra* III, the Attorney General attempts to deny the Secretary of State's "connection to" enforcement of the Election Code using sovereign-immunity principles from *Ex parte Young*, 209 U.S. 123 (1908), which conveniently foists the defense of such policies to the counties and localities. *See Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

[5] On September 22, 2020, the Supreme Court called for a response from the Attorney General on a petition for writ of certiorari before judgment arising from the district court's decision in the U.S. District Court for the Western District of Texas on the issue of whether the Twenty-Sixth Amendment of the U.S. Constitution renders Texas's requirement that voters under 65 years old have an excuse to vote by mail. *Id.*, No. 19-1389 (U.S. Sept. 22, 2020). The Attorney General filed a motion to extend time on September 24; otherwise, his response would be due on October 22. *See* Mot. to Extend Time, Tex. Democratic Party v. Abbott, No. 19-1389 (U.S. Sept. 24, 2020).

Democratic Party v. Abbott, No. 2020 WL 5422917, — F.3d — (5th Cir. Sept. 10, 2020) (No. 20-50407) (5th Cir. Sept. 17, 2020).[6]

Fourth, the State of Texas is not harmed where a court interprets a statute that allegedly "no one has ever thought to violate the law in the same way before." [Pet. for Review at 45-46.] The Attorney General's contrary argument is particularly problematic in the context of penal statutes because "[t]he prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Johnson v. United States*, 576 U.S. 591, 595-96 (2015) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).[7]

---

[6] The Fifth Circuit panel concluded that the Attorney General "lacks a requisite connection to the challenged law." *Tex. Democratic Party*, 2020 WL 5422917 at *7. Just last week, however, the Attorney General announced the prosecution (in conjunction with the Gregg County district attorney) of a fraudulent mail-in ballot scheme. Press Release, Office of the Attorney General, AG Paxton Announces Joint Prosecution of Gregg County Organized Election Fraud in Mail-In Balloting Scheme (Sept. 24, 2020), *available at*, https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-joint-prosecution-gregg-county-organized-election-fraud-mail-balloting-scheme (last visited Sept. 26, 2020).

[7] *Amici* support a summary affirmance of the courts below. *Amici*, however, counsel against using this case as a vehicle to alter the rights and privileges of the counties and cities vis-à-vis the State in this necessarily expedited posture.

ARGUMENT

I. THE ATTORNEY GENERAL MISCONSTRUES THE TEXAS CONSTITUTION AND COMMON-LAW HISTORY OF THE STATE BY ASSERTING THAT ANY POWER NOT *EXPRESSLY* DELEGATED TO A MUNICIPALITY IS RESERVED TO THE STATE

In seeking almost complete state power over elections, the Attorney General barely references the Texas Constitution and completely omits the constitutionally recognized office of county clerk. Tex. Const. art. 5, § 20. This is not surprising since the Constitution framework set out by the Framers of the 1876 Constitution and its common-law background undercut the Attorney General's arguments.

A. The Limitations the Attorney General Seeks on a County Clerk's Authority Are Contradicted by the Plain Text of the Texas Constitution.

The Attorney General argues, incorrectly, that Hollins is a mere "agent" of Harris County, Texas, which is, in turn, an arm of the State. [Pet. for Review at 15.] That is demonstrably incorrect. Hollins instead holds an office of independent constitutional dignity. Tex. Const. art. 5, § 20. The position of a locally elected clerk has existed in Texas since the founding of the Republic. Repub. Tex. Const. of 1836 art. IV, § 6[8] ("The clerks of the district courts shall be elected by the qualified voters for members of Congress in the counties where the courts are established, and shall hold their offices for four years, subject to removal by

[8] The proper citation for this article of the Constitution of the Republic of Texas is as follows: Repub. Tex. Const. of 1836, art. IV, § 6, *reprinted in* H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1069, 1074 (Austin, Gammel Book Co. 1898). Undersigned counsel of record use a truncated citation in the interest of clarity.

presentment of a grand jury, and convictions of a petit jury."). Indeed, some form of this office has been authorized by *all* of the Texas Constitutions. Tex. Const. of 1845 art. 4, § 11, Tex. Const. of 1861 art. 4, § 11, Tex. Const. of 1866 art. 4, § 7, Tex. Const. of 1869 art. 5, § 9, and Tex. Const. of 1876 art. 5, § 20. The position of County Clerk first appeared in the 1876 Constitution in the Judiciary Department. Tex. Const. of 1876 art. 5, § 20.[9]

By contrast, the Attorney General has no constitutional or other legal authority to tell local election authorities what the law is. The Office of the Attorney General first appeared in the unpopular 1869 Constitution with far greater authority over local officials than exists today. *See* Tex. Const. art. 4, § 23.[10] Just ***seven years*** later, the 1869 Constitution's explicit (but still substantially limited) authority to instruct

---

[9] As ratified, the 1876 Constitution provided that "[t]here shall be elected for each county, by the qualified voters, a county clerk, who shall hold his office for two years, who shall be clerk of the County and Commissioners' Courts and recorder of the county, whose duties, perquisites and fees of office shall be prescribed by the Legislature, and a vacancy in whose office shall be filled by the Commissioners' Court, until the next general election for county and State officers; provided, that in counties having a population of less than eight thousand persons there may be an election of a single clerk, who shall perform the duties of district and county clerks." The only change since 1876 occurred in 1954 when the term of office was extended to four from two years. Tex. Const. art. 5, § 20 (amended Nov. 2, 1954).

[10] The ***appointive*** office of Attorney General provided him with the authority to "represent the interests of the State in all suits or pleas in the Supreme Court * * * ***instruct and direct*** the official action of the District Attorneys so as to secure all fines and forfeitures, all escheated estates, and all public moneys to be collected by suit; and * * * give legal advice in writing to ***all officers of the government***." *Id.* (emphasis added).

certain local officials disappeared. *Compare* Tex. Const. of 1876 art. 4, § 22 *with* Tex. Const. of 1869 art. 4, § 23.[11] The 1876 Constitution restricted the Attorney General's legal interpretative authority to giving "legal advice in writing to the ***Governor and other executive officers***, when requested by ***them***." Tex. Const. of 1876 art. 4, § 22. The 1876 Constitution confined the executive department to "the Governor, a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, Attorney General and Superintendent of Public Instruction." Tex. Const. of 1876 art. 4, § 1.[12]

Missing from that list is the "County Clerk." "When interpreting our state Constitution, we rely heavily on its literal text and are to give effect to its plain language." *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997) (Abbott, J.). The 1876 Constitution allows him to "give legal advice in writing to the ***Governor and other executive officers***, when requested by ***them***." Tex. Const. art. 4, § 22. The Attorney General's actions in this matter—asserting that the Secretary of State's and his interpretations of the law against a county election official—are untethered to the plain text of the Texas Constitution.

---

[11] The position also henceforth became ***elective***. Tex. Const. of 1876 art. 4, § 2.

[12] From then to now, the "Treasurer" and "Superintendent of Public Instruction" have been removed from the list of "Officers Constituting the Executive Department." *Compare* Tex. Const. art. 4, § 1 *with* Tex. Const. of 1876 art. 4, § 1.

Historically and structurally, the Attorney General's "unitary" theory of governance—that the framers of the 1876 Constitution intended that the executive officers of the State may unilaterally interpret a statutory provision and seek its enforcement through the courts of this State is to silence them—is incorrect and insupportable. The historical record strongly supports the opposite. And Texas courts have consistently noted that "[t]he framers of [the 1876] constitution, influenced by the political philosophy of the Jacksonian era and the despotic control of the reconstruction governor, deliberately chose to ***decentralize executive authority***." *Saldano v. State*, 70 S.W.3d 873, 877 (Tex. Crim. App. 2002) (*en banc*) (emphasis added) (quoting *State v. Brabson*, 976 S.W.2d 182, 186 (Tex. Crim. App. 1998) (Womack, J., concurring), *adopted by the court*, *Reynolds v. State*, 4 S.W.3d 13, 15 (Tex. Crim. App. 1999) (*en banc*)). In fact, the framers deliberately "fractured" authority both vertically and horizontally. *Id*.[13] Recognizing this historical context is critical because constitutional interpretation requires consideration of "the historical context in which it was written [and] the collective intent * * * of the framers and the people who adopted it." *Dietz*, 940 S.W.2d at 89.

[13] "The constitution, outlook, and philosophies of 1876 brought Texas into the modern world with very much the viewpoints of 1836, because in Texas these did not substantially change." T.R. Fehrenbach, Lone Star A History of Texas and the Texans 437 (2d ed. 2000).

Further, constitutional interpretation requires consideration of "the historical context in which it was written [and] the relation of the provision to the law as a whole, the understanding of other branches of government." *Davenport v. Garcia*, 834 S.W.2d 4, 30 (Tex. 1992) (Hecht J., concurring, joined by Cook and Cornyn, JJ.). The 1876 Constitution's stark changes from the constitution of seven years' prior logically denies what Attorney General asserts—that he is a roving lawgiver freely able to "give legal advice in writing to ***all officers of the government***." Tex. Const. of 1869 art. 4, § 23 (emphasis added). Even more important, the 1876 Constitution provided an essentially one-direction method of the creation of counties. Tex. Const. of 1876 art. 9. While true that the Legislature creates counties, Tex. Const. of 1876 art. 9, § 1, it has never had the unilateral power to destroy them or appropriate their constitutional authority. *Compare* Tex. Const. art. 9, § 1, cl. 2 (requiring voters to ratify any proposed changes to attaching or detaching parts of counties) *with* Tex. Const. of 1876 art. 9, § 1, cl. 3 (same).[14]

---

[14] The Attorney General cites inapplicable case law. [Pet. 14-16.] *Avery v. Midland Cnty., Tex.*, 406 S.W.2d 422, 426 (Tex. 1966) involved county precincts of unequal population. The Supreme Court of the United States reversed this Court because "units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population." *Avery v. Midland Cnty., Tex.*, 390 U.S. 474, 485-86 (1968). The citation to this case, therefore, supports respondent.

Wasson Interests, Ltd. v. City of Jacksonville, Tex., 489 S.W.3d 427, 430 (Tex. 2016), stands for the uncontroversial proposition that a political subdivision can be sued for breach of contract in executing proprietary functions. The others involve disputes between county-level officials as to their sphere of authority. *Guynes v.*

B. For Nearly Two Hundred Years, Texas Law Has Recognized Locally Selected Officials Broad Discretion Over Their Duties.

The 1876 Constitution's fragmentation of authority vertically and horizontally reflects the history of this State. The story of Texas is a continuous struggle of its citizenry jealously guarding their liberties from usurpation by more remote authorities. During the reign of Spanish King Ferdinand VII,[15] Mexico, of which Texas was then a part, threw off government by Madrid. Fifteen years later, Texas did the same to Mexico City.[16] The Attorney General's position that a local official acts "*ultra vires*" simply because that official takes an action not expressly authorized by the Legislature, [Pet. for Review 12], and that there cannot be any "implied powers for the subdivisions of the State," [*id*. at 28], has no validity under common law.[17]

Galveston Cnty., Tex., 861 S.W.2d 861, 863 (Tex. 1993); *Anderson v. Wood*, 152 S.W.2d 1084, 1085 (Tex. 1941). The citation of *Quincy Lee Co. v. Lodal & Bain Eng'rs, Inc.*, 602 S.W.2d 262, 264 (Tex. 1980), is mystifying since the suit was between two private companies.

15 Ferdinand VII is often referred to as *el rey felon* even in Spain.

16 Mexican General Antonio López de Santa Ana signed the surrender Treaties of Velasco (May 14, 1836) before Spain even recognized Mexico's independence in the Treaty of Santa María–Calatrava (December 28, 1836).

17 The Attorney General's argument might have had valdity under the Mexican Constitution of 1824. *See Constitución Federal de los Estados Unidos Mexicanos de 1824*, *reprinted in* Gammel, at 72-93. On the one hand, the division of Supreme Power of the Government of the Nation expressly included "States and Territories" as constituent parts. *See* Mex. Const. 1824 tit. II, *reprinted in* Gammel, at 73 ("*De la forma de Gobierno de la Nación, de sus partes integrantes y división de su Poder Supremo*" ["The Formation of the Government of the Nation, its integral parts, and division of Power"]) & *id*. at tit. II, art. 5, *reprinted in* Gammel, at 73 ("*Las partes*

The Republic of Texas adopted common law over the civil law of the Mexican and Spanish antecedents. *See* Repub. Tex. Const. of 1836 art. IV, § 13, *reprinted in* Gammel, at 1074 & Act approved Jan. 20, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 3-4, *reprinted in* 2 Gammel, at 177-80 (Republic of Texas adopting the common law of England as its rules of decision). The evolution of common law additionally mandates *Amici*'s conclusion that a local official exercises powers of the State as an independent decentralized figure vertically separated from and independent of the Executive Officers of the State.

The Attorney General's analogy of a county clerk to a sheriff demonstrates the lack of support or historical precedent for his arguments. [Pet. for Review at 15.] The Supreme Court of the United States concluded that common law compels a conclusion that the county sheriff is independent from the State's executive officers

---

*de esta federación son los estados y territories siguientes * * * Coahuila y Tejas*." ["The constituent parts of the [Mexican] Federation are the following states and territories * * * Coahuila and Texas."]).

On the other hand, the 1824 Mexican Constitution contained strong countervailing separation-of-powers principles. *Id*. tit. VI art. 157, *reprinted in* Gammel, at ("*El gobierno de cada estado se dividirá para su ejercicio en los tres poderes, legislativo, ejecutivo, y judicial; y nunca podrán unirse dos o más de ellos en una corporación o persona, ni el legislativo depositarse en un solo individuo.*" ["The exercise of the powers of the government of each state will be divided into three powers: the legislative, executive, and judicial, and never may two or more of those powers be combined in one organization or person, nor may the legislative power be entrusted to a singular person."]).

N.B. Undersigned counsel of record for Fort Bend County, who is bilingual in Castilian Spanish, drafted the translations.

but nevertheless exercises the powers of the State. *McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 784-96 (1997). Thus it held that the Monroe County, Alabama, sheriff executed the powers of the State of Alabama when acting in his law enforcement capacity while also being a locally accountable official. *Id*. "As the basic forms of English government were transplanted in our country, it also became the common understanding here that the sheriff, though limited in jurisdiction to his county and generally elected by county voters, was in reality an officer of the State, and ultimately represented the State in fulfilling his duty to keep the peace." *Id*. at 794 (footnote omitted).[18]

The Texas Constitution likewise establishes county sheriffs under the state's power of the judiciary, Tex. Const. art. 5, § 23, right after enumerating the powers of county clerk, Tex. Const. art. 5, § 20. Article 2.13 of the Texas Code of Criminal Procedure provides that a sheriff has "the duty * * * to preserve peace within the officer's jurisdiction." *See also Minor v. State*, 219 S.W.2d 467, 468 (Tex. Crim.

[18] The Supreme Court noted that since at least the Norman Conquest in 1066, English sheriffs (or "shire-reeves") were the King's officer in the English counties ("shires"). *Id*. at 793. "Although chosen locally by the shire's inhabitants, the sheriff did all the king's business in the county and was the keeper of the king's peace." *Id*. (internal citations and quotation marks omitted). The present office of the sheriff represents "an unbroken lineage from the Anglo-Saxon shire-reeve [and] pertain chiefly to the affairs of state in the county." *Id*. at 794 (citation omitted).

App. 1949). Elected locally, both the sheriff and clerk may only be removed by the local electorate or by local judicial action. *Cf. McMillian*, 520 U.S. at 788.[19]

Like the relevant constitutional and statutory provisions, the common law in light of the State's history all support Hollins's position that for an act within a county clerk's purview to be *ultra vires*, *the Legislature must have specifically proscribed the act.* Since the Legislature has provided the county clerk with responsibilities for early voting, a county clerk commits an *ultra vires* act only where the Legislature has prohibited the act and then only where the action is necessary "protect the voting rights of the citizens of this state from abuse by the authorities administrating the state's electoral processes." Tex. Elec. Code § 31.005(a).[20] This interpretation naturally follows from the principle that decentralized and locally accountable authority is a cornerstone of the liberty of Texans.[21]

II. THE ATTORNEY GENERAL'S RIGID INTERPRETATION OF THE ELECTION CODE DOES NOT REFLECT THE BACKGROUND LEGAL REALITIES THEN IN PLACE

Here, the Attorney General seeks injunctive relief, not mandamus. "[A]n *ultra vires* claim is available if the officer 'acted without legal authority or failed to

---

19 County sheriffs and county clerks are removable by the judges of that county's district courts with the verdict of a jury. TEX. CONST. art. 5, § 24.

20 In such circumstances, the Secretary of State may request that the Attorney General obtain injunctive or mandamus relief. Tex. Elec. Code § 31.005(b)

21 The trial court concluded that the Attorney General "offered no evidence to support" the Attorney General's contention that Hollins's contemplated actions would impede "the free exercise of citizens." *Hollins*, No. 2020-52383 at 5.

perform a purely ministerial act.'" *Chambers-Liberty Cntys. Navigation Dist. v. State*, 575 S.W.3d 339, 349 (Tex. 2019) (quoting *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009)).[22]

In the trial court, the Attorney General complained that § 84.012 of the Election Code prohibits Hollins's contemplated mailing. *See Hollins*, No. 2020-52383 at 3. Now, the Attorney General asserts that the statutory scheme as a whole prohibits Hollins's plans, [Pet. for Review at 16-30], which respondent ably refutes, [Respondent's Br. 14-37]. *Amici* adopt respondent's arguments of statutory interpretation for the reasons respondent stated. Additionally, the Legislature's enactment of § 84.012 in 1977,[23] occurred during a period in which the background presumption was liberalization of voting practices.

In 1975, for example, Congress amended the Voting Rights Act to extend protections to certain linguistic minorities. Voting Rights Act Amendments of 1975, Pub. L. 94-73, tit. III, § 301, 89 Stat. 400, 403 (1965) (codified at 42 U.S.C. § 1973aa–1a, later transferred and presently codified, 52 U.S.C. § 10503). Section

---

[22] *Chambers-Liberty* analyzes allegations against a reclamation district, *see* Tex. Const. art. 16 § 59, exceeding its authority by entering into a lease with a private entity on state land. *Chambers-Liberty*, 575 S.W.3d at 341-43. The parties agree that the Attorney General proceeds on Hollins's purported lack of authority to act rather than his failure to perform a ministerial act.

[23] Act of May 28, 1977, 65th Leg. R.S., ch. 668, 1977 Tex. Gen. Laws. 1687 (H.B. 1845) ("Each clerk for absentee voting shall obtain and keep on hand a supply of the application forms to furnish to voters who request them.").

203 requires bilingual election practices and procedures for covered jurisdictions and all election-related changes required pre-clearance by the United States Department of Justice.[24]

In 1985, after years of negotiation and study a bipartisan Election Code Study Committee comprised of senators, representatives, the Secretary of State and the state chairs of the Republican and Democratic parties, and advised by county clerks, city secretaries, tax-assessors, election attorneys, public interest organizations like the League of Women Voters, and civil rights organizations such as the NAACP, the League of United Latin American Citizens, and the American G.I. Forum, published a detailed draft bill which became S.B. 616. *See* Report of the Election Code Study Committee, Vol. I, at i-iv (Feb. 1985), *available at*, https://lrl.texas.gov/legis/revisorsNotes.cfm?code=Election (last visited Sept. 28, 2020); Act of May 13, 1985, 69th Leg., R.S., ch. 211, 1985 Tex. Gen. Laws 802-1077 (S.B. 616).[25]

The context in which the Legislature enacted the statutes relevant to this dispute supports respondent. In this context, § 84.012's requirements reflect the

---

[24] Texas has been a covered jurisdiction for Hispanics since September 23, 1975. Voting Rights Act Amendments of 1975 Partial List of Determinations, 40 Fed. Reg. 43,746 (Sept. 23, 1975).

[25] The Legislature did not materially alter § 84.012. *Id*. at 902 ("The absentee voting clerk shall mail without charge an appropriate official application form for an absentee ballot to each person requesting the clerk to send him an application form.")

minimum required rather than the ***maximum*** permitted. Accordingly, the legislative background favors respondent's broader interpretation.

III. THE ATTORNEY GENERAL SHOULD NOT BENEFIT FROM THE INCONSISTENT POSITIONS HE HAS TAKEN AS TO THE SECRETARY OF STATE'S "CONNECTION TO" ENFORCEMENT OF THE TEXAS ELECTION CODE

In federal court, the Attorney General asserts that the Secretary of State and Attorney General lack a connection with the enforcement of Texas's Election Code. In state court, the Secretary of State apparently sets the law. The Attorney General admits that on August 27, 2020, Election Director Keith Ingram sent a letter to Hollins stating that because Hollins's contemplated mailing "would be contrary to our office's guidance on this issue," such would constitute "an abuse of voter's rights" justifying enforcement action by the Attorney General. [RR.202 (citing Tex. Elec. Code § 31.005).][26] This Court should additionally affirm the courts below on the ground of judicial estoppel.

The State of Texas enjoys sovereign immunity in federal court. *See* U.S. Const. amend. XI. Nevertheless, "when a federal court commands a state official to do nothing more than refrain from violating a federal law, he is not the State for

[26] Ingram's letter also states that Hollins's action "raises serious concerns under Texas Election Code Section 84.041(a)(1), (2)." [RR.202.] Because violation of those provisions constitute at least State Jail felony and the Attorney General purports to have independent prosecutorial authority under § 273.021(a) of the Election Code, it seems like the Secretary of State and Attorney General have "some connection" to enforcement of the Election Code. The myriad problems with this interpretation of penal law is discussed at length, *supra* IV.

sovereign-immunity purposes." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). This "authority-stripping theory of *Young* is a fiction that has been narrowly construed." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 114 n. 25 (1984). "That doctrine excepts from the Eleventh Amendment bar suits against officers acting in their official capacities but without any statutory authority, even though the relief would operate against the State." *Id*.[27]

The inquiry under *Ex parte Young* has "significant overlap" with that required to ascertain Article III jurisdiction. *Air Evac EMS, Inc. v. Texas, Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 520 (5th Cir. 2017). And in his zealous advocacy, the Attorney General challenges the federal voting-rights suits on the causation and redressability prongs of Article III standing.[28] A plurality of the Fifth Circuit *en banc* concluded that legally sufficient causation and redressability exists when the state official has "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) (*en banc*) (plurality op.).

---

[27] Under *Pennhurst*, a county official may not sue to enjoin a state official in federal court for an *ultra vires* act arising out of state law, *id*. at 106-12, because such suits "would make the constitutional doctrine of sovereign immunity a nullity," *id*. at 112.

[28] "To have standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (internal quotation marks omitted).

Most recently, a merits panel of the Fifth Circuit concluded, "[t]his circuit has not spoken with conviction about all relevant details of the 'some connection' requirement." *Tex. Democratic Party*, 2020 WL 5422917 at *5 ("the officers [must] have 'some connection with the enforcement of the act' in question or be 'specially charged with the duty to enforce the statute' and be threatening to exercise that duty." (quoting *Okpalobi*, 244 F.3d 414-15)). The panel majority and dissenter agreed that the Secretary of State "has both a sufficient connection and special relationship to the Election Code" such that she is a proper defendant. *Id*. & at *19. Nonetheless, the Attorney General has requested more time to determine whether to file a petition for rehearing *en banc* on this determination. Mot. to Extend Time for *En Banc* Consideration, Tex. Democratic Party v. Abbott, No. 2020 WL 5422917, — F.3d — (5th Cir. Sept. 10, 2020) (No. 20-50407) (5th Cir. Sept. 17, 2020).

The Fifth Circuit motions panels have split on the substantiality of this "connection-to" issue. One motions panel unanimously concluded "that no substantial question exists as to whether the Texas Secretary of State bears a sufficient connection to the enforcement of the Texas Election Code's vote-by-mail provisions to satisfy *Ex parte Young*'s 'some connection' requirement." *Lewis v. Hughs*, No. 20-50654, 2020 WL 5511881, at *1 (5th Cir. Sept. 4, 2020) (per curiam) (granting summary affirmance of the district court's denial of the Secretary's motion to dismiss on sovereign-immunity grounds). Another motions panel divided 2-1 to

deny summary affirmance in the exact posture, concluding that the issue was "far from frivolous." *Tex. Democratic Party v. Hughs*, No. 20-50667, 2020 WL 5406369, at *1, — F.3d — (5th Cir. Sept. 9, 2020) (per curiam).[29] The Attorney General filed a petition for rehearing *en banc* in *Lewis*, which the two-judge majority from the second panel did not want "to prejudge."

Such presents a classic case of a litigant taking inconsistent positions. If the Attorney General is presumed to file his petition for *en banc* rehearing in good faith, then judicial estoppel compels the conclusion that Hollins has discretion to conduct the contemplated mailings because no provision of the Election Code prohibits it. In *Lewis*, the Attorney General asserts as an open question whether *Ex parte Young* "applies to suits seeking affirmative action by a state official." Pet. for Rehearing *En Banc*, at 8, Lewis v. Hughs, 2020 WL 5511881 (5th Cir. Sept. 4, 2020) (No. 20-50654) (5th Cir. Sept. 8, 2020). The Attorney General may not simultaneously assert the Secretary's authority to promulgate a particular interpretation of the Election Code while maintaining her insufficient connection to promulgating such interpretations. That the same vote-by-mail provisions underlie these matters leads to the inescapable conclusion that the Attorney General is wasting either the time of this Court or that of the Fifth Circuit.

[29] Judge Higginbotham would have granted the motion for summary affirmance.

IV. THE ATTORNEY GENERAL'S SUPPOSITION THAT ONE CAN ACT ILLEGALLY WITHOUT A CLEARLY DEFINED STATUTE RUNS CONTRARY TO 800 YEARS OF ANGLO-AMERICAN LEGAL HISTORY

The Attorney General asserts that Hollins's actions are an illegal usurpation of authority in violation of § 84.012 of the Election Code. [Pet. for Review at 19-21.] That, however, is not the provision at issue. Neither Hollins nor the Attorney General assert non-compliance with this provision. It is just that Hollins wants to do something extra. Because this Court must "give effect to all the words of a statute and not treat any statutory language as surplusage if possible," *Chevron Corp. v. Redmon,* 745 S.W.2d 314, 316 (Tex.1987), the remainder of the chapter must also be given effect.

The Attorney General takes the position that the Hollins's contemplated actions are an "unlawful mailing." [Pet. for Review at 7 (quoting RR.202-03).] Endorsing the testimony of Election Director Keith Ingram, the Attorney General contends that Hollins's action would "clog up the vote by mail infrastructure with potentially millions of application from persons who do not qualify to vote by mail." [*Id*. (quoting RR.202).] Because the Attorney General's stated concern is voter fraud, the section of this chapter dispute is actually 84.0041, "Fraudulent Use of

Application for Ballot by Mail," as applied to Hollins or any other county-level official defying the Secretary of State in this manner.[30]

In 2017, the Legislature significantly amended § 84.0041. Act of Aug. 11, 2017, 85th Leg., 1st C.S., ch. 1 § 4, 2017 Tex. Gen. Laws 4493, 4494 (codified Tex. Elec. Code § 84.0041) ("2017 Act"). Most relevant here, the Legislature added predicate conduct to the offense of "Fraudulent Use of Application for Ballot by Mail," by criminalizing "intentionally caus[ing] false information to be provided on an application for ballot by mail," *id*. (codified Tex. Elec. Code § 84.0041(a)(2)).[31] Because the pre-2017 statute applied to a person who "knowingly provides false information on [such] an application, *see id*., the 2017 Act necessarily broadens who may be prosecuted under the statute and criminalized for the first time making false statements on the application instead of fraudulently submitting an application for a voter without their consent or knowledge or altering a voter's application.

According to the Attorney General, Hollins's mailing purportedly would constitute an "abuse of power by public officers." [*Id*. at 42 (quoting *Yett v. Cook*, 281 S.W.2d 837, 842 (Tex. 1926)).][32] Further, the Attorney General states that the

---

30 There is no dispute that to vote by mail, the voter must make an application. Tex. Elec. Code § 84.001(f).

31 The Legislature also increased the penalty from a Class A misdemeanor to a State Jail felony. *Id*. (codified Tex. Elec. Code § 84.0041(b)).

32 *Cf.* Tex. Penal Code § 39.015 (allowing the Attorney General to prosecute "[w]ith the consent of the appropriate local country or district attorney").

State ***does*** "prosecute private individuals who provide information that is false and leads individuals to submit false applications to vote by mail. [Pet. for Review at 35 (citing Tex. Elec. Code §§ 84.0041, 276.013).][33] The Attorney General seems to believe that Hollins (or any other county-level official acting similarly) would commit a knowing violation of the law—*i.e.*, have the requisite *scienter* for a criminal offense.

A. The Criminal Offense of Intentionally Causing False Information to be Provided on an Application for Ballot by Mail is an Unconstitutionally Vague Penal Statute as Applied to the Facts of this Case.

A penal statute must define the criminal offense "'with sufficient definiteness that ordinary people can understand what conduct is prohibited' [and] 'in a manner that does not encourage arbitrary and discriminatory enforcement.'" *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (quoting *Skilling v. United States*, 561 U.S. 358, 402-03 (2010)). Any prosecution thereunder violates the Due Process Clause because the court did not articulate a standard such that "ordinary people

[33] The Legislative grant to the Attorney General of independent authority to prosecute election-related offenses may be found at § 273.021(a) of the Election Code. Several district attorneys of high-population counties have asserted that the statute transcends the Texas Constitution. *See* Brief for Brian M. Middleton, District Attorney of Fort Bend County (268th Judicial District of Texas); Joe D. Gonzales, Criminal District Attorney of Bexar County; John Coleman Creuzot, Criminal District Attorney of Dallas County; Mark A. González, District Attorney of Nueces County (105th Judicial District); and Margaret M. Moore, District Attorney of Travis County (53d Judicial District) as *Amici Curiae* Supporting Stephens, Ex parte Stephens, Nos. 01-19-00209-CR & 01-19-00243-CR (Tex. App.—Houston [1st Dist.] Sept. 8, 2020).

could can understand what conduct is prohibited." *Id*.; *see also* Tex. Code Crim. Proc. art. 8.03(b)(2) (mistake-of-law defense).

In addition to Due Process concerns, this new prohibition—potentially invoked when election officials or civic organizations answer voters' vote-by-mail questions—"raises special First Amendment concerns." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997). Criminal sanctions chill free speech because such "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Id.* at 872. "Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression." *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965).

The Attorney General rejects the First Amendment implications of Hollins's actions while acknowledging that a similar prohibition on non-state organizations and persons would be an impermissible prior restraint. [Pet. For Review 34-35.] But when a federal district judge concluded in May that the Attorney General likely engaged in voter suppression by threatening criminal charges, the Attorney General asserted to the Fifth Circuit that the district court violated *his* First Amendment rights. Principal Brief for Defendants-Appellants, Tex. Democratic Party v. Abbott, 2020 WL 5422917, — F.3d — (5th Cir. Sept. 10, 2020) (No. 20-50407) 2020 WL 3846780, at *46 (5th Cir. Jun. 29, 2020) (asserting that "[t]he district court violated [the Attorney General's freedom of speech] by purporting to enjoin Texas's

Attorney General from giving accurate advice regarding the content of state law that was not tied to any tangible enforcement action."). *Amici* agree with the Attorney General that the First Amendment "safeguards the rights of individuals to 'speak as they think on matters vital to them,' relying on 'processes of education and discussion' to root out falsehood," *id*. (quoting *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940)), and that such protects public officials as well as private individuals, *id*. (citing *Bond v. Floyd*, 385 U.S. 116, 133-35 (1966)).[34] Nevertheless, First Amendment rights for me but not for thee exemplifies an unconstitutional criminal statute.

Most importantly, however, stating that an action simultaneously constitutes a "significant violation of [Texas] law" for which "no one has ever thought to violate * * * in the same way before," [Pet. For Review 45-46], typifies vagueness in violation of common-law legal presumptions that started with common law itself. The Barons at Runnymede put to paper this ancient legal norm in 1215. Magna Carta, ch. 39 ("No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.").[35]

---

[34] Freedom of speech also applies to governmental entities. *See, e.g., Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1936 (2019), *Van Orden v. Perry*, 545 U.S. 677, 695 (2005) (Thomas, J., concurring).

[35] As signed by King John and the Barons in Latin, "*Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo*

This provision of English law, as slightly but inconsequentially modified in 1297, is ***still*** in effect in the United Kingdom.[36] Its unbroken lineage continues to this day in Texas. *See* Repub. Tex. Const. art. IX, cl. 11th, *reprinted in* Gammel at 1083; Tex. Const. art. 1, § 19. Both §§ 13 and 19 of the Texas Bill of Rights, "have their origins in the Magna Carta." *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983).

B. The Attorney General Advancing His Interpretation of a Penal Statute Constitutes the Wrong State Official in the Wrong State Court of Last Resort.

The 1876 Texas Constitution bifurcated the state's judicial power by vesting such into one Supreme Court and one Court of Criminal Appeals. Tex. Const. of 1876 art. 5, § 1 (named Court of Appeals therein). As written, the 1876 Constitution grants "[t]he Supreme Court * * * appellate jurisdiction only, which shall be coextensive with the limits of the state; but shall only extend to civil cases of which the district courts have original or appellate jurisdiction." Tex. Const. of 1876 art. 5, § 3. By contrast, the "[t]he Court of [Criminal] Appeals [has] final appellate

---

destruatur, nec super cum ibimus, nec super cum mittemus, nisi per legale judicium parium suorum vel per legem terre."

[36] *See* The Great Charter of the Liberties of England, and of the Liberties of the Forrest, Confirmed by King Edward (First of His Name), in the Twenty-Fifth Year of His Reign, 1297, Regnal 25 Edw. c. 9, § 29 (Eng.) ("No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn nor deal with him, but by lawful judgment of his Peers, or by the Law of the Land.")

jurisdiction co-extensive with the limits of the State in all criminal cases of whatever grade * * *. Tex. Const. of 1876 art. 5, § 6.[37]

The 1876 Constitution empowered the Attorney General to "represent the State in all suits and pleas in the ***Supreme Court of the State*** in which the State may be a party." TEX. CONST. of 1876 art. 4, § 22 (emphasis added). The 1876 Constitution's creation of the Court of Criminal Appeals without a corresponding grant of authority to the Attorney General is dispositive of his independent authority to advance a particular meaning of a penal statute within the courts of this State. *See Saldano*, 70 S.W.3d at 880. Rather, this is the purview of the local prosecuting attorney or the "State Prosecuting Attorney," which is completely distinct from the Attorney General. *See*, *generally*, Tex. Gov't Code Ch. 42.

Eleven years after 1876 Constitution, this Court framed the Attorney General's proper constitutional role in actions before it. *Day Land & Cattle Co. v. State*, 4 S.W. 865, 867 (Tex. 1887). "The state doubtless has the right, by suit, to protect any ***property right*** vested in it ***as fully as has any person***; and this suit was brought in its name, and on its behalf, by persons claiming to act as its officers or

---

[37] Advisory opinions are prohibited in Texas. *Morrow v. Corbin*, 62 S.W.2d 641, 643-44 (Tex. 1933). "[T]he rule against advisory opinions also recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.'" *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968) (quoting *United States v. Fruehauf*, 365 U.S. 146, 147 (1961)).

agents." *Id*. at 867 (emphasis added); *accord Brady v. Brooks*, 89 S.W. 1052, 1055 (Tex. 1905). And the Texas Constitution obliges. It provides that the Attorney General "shall especially inquire into the charter rights of all private corporations, and, from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage, not authorized by law." Tex. Const. of 1876 art 4, § 22.

The Attorney General spills a great deal of ink on its special "standing" to vindicate Texas's "sovereign injury." [Pet. for Review at 38-43.] What is needed and what is missing is a suit of a State against one of its counties or cities.[38] A matter in which an activist plaintiff sues a county entity and the secretary of state for alleged violations of federal voting laws, *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 187 (2008), is simply not relevant here. Nor are matters in which a secretary of state sues a political party. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). In *Eu*, the Supreme Court did not doubt the State's interest in preserving the integrity of its elections, but invalidated the regulation of a party's internal affairs

---

[38] *Amici* and the Attorney General agree that the federal "Constitution divides authority between federal and state governments for the protection of ***individuals***." *New York v. United States*, 505 U.S. 144, 181 (1992) (emphasis added). But to be persuasive, the federal case law must concern a state whose constitution is analogous to that of Texas and the controversy concerns that State and a political subdivision thereof that. Such a case would be rare as the theoretical federal question is hardly apparent.

for lack of a showing "such regulation is necessary to ensure an election that is orderly and fair." *Id*. at 233.

This is far afield from this matter where the parties agree that the regulation is necessary but disagree as to the regulation's scope. Moreover, that a State has an interest in the integrity of its elections is hardly a convincing argument where the clerk of a county with a population larger than 26 states has the same interest. The Attorney General does not point to any record evidence that Hollins has demonstrated a contrary interest. And frankly, disputing such does little to serve the interests of Texans whom all the signers of this *amici* brief along with the protagonists in this action all serve.

Last, the Attorney General relies heavily on *Yett v. Cook*, 281 S.W. 837 (Tex. 1926), where this Court denied an individual taxpayer standing to force Austin officials to call an election as set out in its charter. The Attorney General repeatedly cites to this case, but fails to explore the two salient questions left unanswered in that matter because the actual plaintiff there lacked standing. First, was act complained of mandatory or discretionary? From what one may glean from the case, the charter required a general election for five "councilman" on the first Monday in February A.D. 1925. *Id*. at 838. Because Monday, February, and A.D. 1925 do not leave a lot of room for discretion, the action is the former. Second, because a taxpayer lacked standing are the people of the city without a remedy? *Id*. at 842.

The *Yett* court ***opines*** that the county attorney or the Attorney General have standing to vindicate such a right. *Id*. at 842-43.

However, the discrete statute that the Attorney General places at issue here, § 84.012 of the Election Code, is only ministerial. It is not particularly relevant to the principal dispute—*i.e.*, both the Attorney General and Hollins agree that the statute requires Hollins to send out an application to vote by mail to a voter requesting such an application and neither dispute that Hollins is carrying out this duty. Rather, the Attorney General's theory rests on something more troubling: facilitating voter fraud. And it is for this that *Amici* criticize the Attorney General as reaching beyond his authority. The governmental official to whom such an action would fall would be the ***local*** prosecutor,[39] who remedies actions "[a]gainst the peace and dignity of the State," Tex. Code of Crim. P. art. 21.02(8).

[39] "The State of Texas has given its authority to prosecute criminal cases to more than three hundred independently elected prosecutors, each of whom exercises authority in an area of the state no larger than a judicial district." *Saldano,* 70 S.W.3d at 878 (quoting *Brabson*, 976 S.W.2d at 187) (cleaned up).

CONCLUSION AND PRAYER

Amici Fort Bend County and the City of Houston urge this Court to affirm the judgment of the Fourteenth Court of Appeals. A contrary conclusion would not only have a chilling effect on any future local governmental initiatives, such would be contrary to the Texas Constitution, Texas history, and common-law devolutionary principles.

DATED: SEPTEMBER 28, 2020

RESPECTFULLY SUBMITTED,

/s/ Justin C. Pfeiffer

JUSTIN CARL PFEIFFER (SBN 24091473)
Counsel of Record
ASSISTANT COUNTY ATTORNEY
Fort Bend County Attorney's Office
401 Jackson Street, 3rd Floor
Richmond, Texas 77469
[Tel.] (281) 341-4555
[Fax] (281) 341-4557
justin.pfeiffer@fortbendcountytx.gov

ROY L. CORDES, JR.
FORT BEND COUNTY ATTORNEY

COUNSEL FOR *AMICUS CURIAE*
FORT BEND COUNTY, TEXAS

/s/ Collyn A. Peddie

COLLYN A. PEDDIE (SBN 15707300)
Counsel of Record
SENIOR ASSISTANT CITY ATTORNEY
OFFICE OF THE CITY ATTORNEY
CITY OF HOUSTON
900 Bagby Street, 4th Floor
Houston, Texas 77002
[Tel.] (832) 393-6463
[Fax] (832) 393-6259
collyn.peddie@houstontx.gov

RONALD LEWIS
HOUSTON CITY ATTORNEY

COUNSEL FOR *AMICUS CURIAE*
CITY OF HOUSTON, TEXAS

CERTIFICATE OF SERVICE

Pursuant to Texas Rule of Appellate Procedure 9.5(b) (d) & (e), I hereby certify that on September 28, 2020, I electronically filed the foregoing document Clerk of Court, using the efile.TXcourts.gov electronic filing system. In accordance with Rule 9.5(b)(1), I served all counsel by their email address listed on the following page. My email address of justin.pfeiffer@fortbendcountytx.gov.

DATED: SEPTEMBER 28, 2020

/s/ Justin C. Pfeiffer
JUSTIN C. PFEIFFER

Ken Paxton
ATTORNEY GENERAL OF TEXAS
Jeffrey C. Mateer
FIRST ASSISTANT ATTORNEY GENERAL
Ryan L. Bangert
DEPUTY FIRST ASSISTANT ATTORNEY
ATTORNEY GENERAL
Kyle Hawkins
SOLICITOR GENERAL
&
COUNSEL OF RECORD
Beth Klusmann
ASSISTANT SOLICITOR GENERAL
Natalie D. Thompson
ASSISTANT SOLICITOR GENERAL
Beau Carter
ASSISTANT ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
ken.paxton@oag.texas.gov
jeffrey.mateer@oag.texas.gov
ryan.bangert@oag.texas.gov
kyle.hawkins@oag.texas.gov
beth.klusmann@oag.texas.gov
natalie.thompson@oag.texas.gov
beau.carter@oag.texas.gov
Counsel for Petitioner

Vince Ryan
HARRIS COUNTY ATTORNEY
Cameron A. Hatzel
ASSISTANT COUNTY ATTORNEY
Douglas Ray
SPECIAL ASSISTANT COUNTY
1019 Congress, 15th Floor
Houston, Texas 77002
vince.ryan@cao.hctx.net
cameron.hatzel@cao.hctx.net
douglas.ray@cao.hctx.net

Susan Hays
COUNSEL OF RECORD
LAW OFFICE OF SUSAN HAYS, PC
P.O. Box 41647
hayslaw@me.com

Christopher M. Odell
ARNOLD & PORTER KAYE SCHOLER LLP
700 Louisiana St., Ste. 4000
Houston, TX 77002
christopher.odell@arnoldporter.com

R. Stanton Jones*
Daniel F. Jacobson*
John B. Swanson, Jr.*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
stanton.jones@arnoldporter.com
daniel.jacobson@arnoldporter.com
john.swanson@arnoldpolter.com
Counsel for Respondent

* Denotes pending *pro hac vice* motion

CC: All Signatories by Email

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 9.4 because it contains 8,291 words, excluded the parts of the brief exempted by Rule 9.4(i)(1).

DATED: SEPTEMBER 28, 2020

/s/ Justin C. Pfeiffer
JUSTIN C. PFEIFFER

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below:

Justin Pfeiffer on behalf of Justin Pfeiffer
Bar No. 24091473
Justin.Pfeiffer@fortbendcountytx.gov
Envelope ID: 46649039
Status as of 9/29/2020 8:04 AM CST

Associated Case Party: Texas State Conference of the NAACP

Name	BarNumber	Email	TimestampSubmitted	Status
Lindsey Cohan		lindsey.cohan@dechert.com	9/28/2020 8:10:50 PM	SENT

Associated Case Party: Anti-Defamation League Southwest Region

Name	BarNumber	Email	TimestampSubmitted	Status
Lindsey Cohan		lindsey.cohan@dechert.com	9/28/2020 8:10:50 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Christopher Hollins	24090168	info@hollinslawgroup.com	9/28/2020 8:10:50 PM	SENT
Hollis Duncan		hollis.duncan@oag.texas.gov	9/28/2020 8:10:50 PM	SENT
Kyle Hawkins		kyle.hawkins@oag.texas.gov	9/28/2020 8:10:50 PM	SENT
Maria Williamson		maria.williamson@oag.texas.gov	9/28/2020 8:10:50 PM	SENT
Cecilia Hertel		cecilia.hertel@oag.texas.gov	9/28/2020 8:10:50 PM	SENT
Natalie Thompson		natalie.thompson@oag.texas.gov	9/28/2020 8:10:50 PM	SENT
Wolfgang PHirczy de Mino		wphdmphd@gmail.com	9/28/2020 8:10:50 PM	SENT
Susan Hayes		hayslaw@me.com	9/28/2020 8:10:50 PM	SENT
Lanora Pettit		lanora.pettit@oag.texas.gov	9/28/2020 8:10:50 PM	SENT
Beau Carter		Beau.Carter@oag.texas.gov	9/28/2020 8:10:50 PM	SENT

Associated Case Party: League of Women Voters of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Thomas Buser-Clancy		tbuser-clancy@aclutx.org	9/28/2020 8:10:50 PM	SENT