

Cause No. 2020-52383

THE STATE OF TEXAS,
Plaintiff,

v.

CHRIS HOLLINS, in his official capacity
as Harris County Clerk
Defendant.

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In the District Court of

Harris County, Texas

127th Judicial District

**DEFENDANT CHRIS HOLLINS'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Defendant Christopher Hollins, in his official capacity as the Harris County Clerk, respectfully submits the following proposed findings of fact and conclusions of law:

PROPOSED FINDINGS OF FACT

1. Defendant Chris Hollins is the Harris County Clerk. He serves as Harris County's chief elections officer and its "early voting clerk" under Texas Election Code § 83.002(1). See Joint Stip. of Facts ("JSOF") ¶ 1.
2. On August 25, 2020, Hollins announced that he would send vote-by-mail applications to all registered voters in Harris County. JSOF ¶ 2.
3. Hollins's proposed mailer, which will be printed on 10.5" x 17" paper, is reproduced in full on the following page, see JSOF ¶ 16:

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

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

要接收此信息或中英文的郵遞投票申請表格, 請聯繫:

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



DO YOU QUALIFY TO VOTE BY MAIL?



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



You are eligible to vote by mail if:

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

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

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

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

APPLICATION FOR BALLOT BY MAIL

CHRIS HOLLINS



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

PROTECTING YOUR RIGHT TO VOTE

1 APPLICANT'S VOTER REGISTRATION: Name/Address/City/State/Zip Code
JOHN Q. PUBLIC
 123 MAIN STREET
 HOUSTON, TEXAS 77078-0044

PREFERRED MAILING ADDRESS (REQUIRED FOR OUT OF COUNTY & IN JAIL): Address/City/State/Zip Code

PHONE NUMBER: (optional)

1230000000

2 REASON FOR APPLYING FOR BALLOT BY MAIL:

Age 65 or older

Have a disability

*Outside the county throughout Early Voting & Election Day (Oct. 13 - Oct. 30, 2020 & Nov. 3, 2020)

Confined in jail

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

3 ELECTIONS FOR WHICH YOU ARE APPLYING:

ALL 2020 ELECTIONS

November 3, 2020

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

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

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

Check this box if acting as an ASSISTANT

X Signature of Assistant

PRINT FULL NAME of Assistant

Assistant's Address of Residence or Title of Elections Official

Assistant's Relationship to Applicant

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

Check this box if acting as a WITNESS

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

X Signature of Witness

PRINT FULL NAME of Witness

Witness' Address of Residence or Title of Elections Official

Witness' Relationship to Applicant

4. In a letter dated August 27, 2020, Keith Ingram, the Secretary of State's Director of Elections, directed Hollins to "immediately halt any plan to send an application for ballot by mail to all registered voters." JSOF ¶ 3. On August 31, 2020, Hollins and Ingram spoke by phone and discussed Hollins's plan and the Secretary of State's objection to it. *Id.* ¶ 4.

5. The Secretary of State does not object to Hollins sending unsolicited vote-by-mail applications to all registered voters in Harris County age 65 and over. JSOF ¶ 5.

6. The Secretary of State does not object to Hollins sending unsolicited educational information regarding the eligibility criteria for voting by mail to all registered voters in Harris County, including those under age 65. JSOF ¶ 7.

7. The educational information set forth in Hollins's proposed mailer concerning the eligibility criteria for voting by mail is accurate and would be helpful to Harris County voters in determining for themselves whether they are entitled to vote by mail this November. Both Ingram and the State's counsel acknowledged as much at the September 9 hearing.

8. The Secretary of State objects only to Hollins sending unsolicited vote-by-mail applications to voters under age 65. JSOF ¶ 6.

9. Both the Harris County Clerk's website and the Secretary of State's website maintain a PDF of the vote-by-mail application that any member of the public can access, download, and print. JSOF ¶¶ 8-10.

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

to vote, or (c) has a “disability,” defined broadly as a “a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter’s health.” *Id.* §§ 82.001-82.004.

11. On May 27, 2020, the Texas Supreme Court held that “[t]he decision to apply to vote by mail based on a disability is the voter’s, subject to a correct understanding of the statutory definition of ‘disability.’” *In re State*, 602 S.W.3d 549, 550, 560-61 (Tex. 2020). On the definition of “disability,” the Court held that while “a voter’s lack of immunity to COVID-19, without more, is not a ‘disability’ as defined by the Election Code,” “a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of a disability.” *Id.* at 550, 561.

12. According to the Centers for Disease Control and Prevention (CDC), “people of any age” with certain underlying medical conditions are at increased risk for severe illness from COVID-19. JSOF ¶ 11. These underlying medical conditions include obesity; high blood pressure; smoking; diabetes; asthma; cardiovascular disease; cancer; chronic obstructive pulmonary disease (COPD); and numerous other medical conditions. *Id.*

13. Based on the Health of Houston Survey, substantial numbers of Harris County residents between ages 18 and 64 have one or more of the medical conditions listed by the CDC as putting individuals at potentially increased health risks from COVID-19. JSOF ¶ 12.

14. Both Hollins and the State agree that the government should encourage voter participation in elections.

PROPOSED CONCLUSIONS OF LAW

Legal Standards

1. “A temporary injunction is an extraordinary remedy and does not issue as a matter of right.” *Tex. Black Iron, Inc. v. Arawak Energy Int’l Ltd.*, 527 S.W.3d 579, 584 (Tex. App. – Houston [14th Dist.] 2017, no pet.). “To obtain a temporary injunction, the applicant must plead and prove: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *Id.* “The applicant bears the burden of production to offer some evidence of each of these elements.” *Id.*

2. To succeed on its *ultra vires* claim, the State bears the burden to “allege, and ultimately prove, that [Hollins] acted without legal authority or failed to perform a purely ministerial act.” *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).¹

3. For the reasons set forth below, the State has not met its burden to establish that a temporary injunction is warranted here.

The State Has Not Established a Probable Right to the Relief Sought Because Hollins Has Authority and Discretion Under the Election Code to Send Applications to Voters

4. In his role as Harris County’s “early voting clerk” for the November 2020 elections, Hollins has the authority and duty to “conduct the early voting,” which includes voting by mail. *Id.* §§ 83.001(a), 83.002(1); *see id.* § 81.001. As early voting clerk, Hollins maintains “the same duties and authority with respect to early voting as a presiding election judge has with respect to regular voting.” *Id.* § 83.001(c). Thus, Hollins is broadly “in charge of and responsible for the management and conduct of” Harris County’s early voting, including voting by mail. *Id.* § 32.071.

¹ The State’s Petition appeared also to assert a claim under Texas Election Code § 31.005, but the State’s counsel represented at the September 9 hearing that the State is not pursuing any claim under § 31.005 and is only asserting an *ultra vires* claim.

5. By conferring authority upon Hollins for the “management and conduct” of all early voting in Harris County, the Legislature has afforded Hollins discretion to direct and control the administration of the vote-by-mail process. The verb “conduct” broadly means “to direct or take part in the operation or management of.” Merriam-Webster’s Dictionary. To “manage” means “[t]o exercise executive, administrative, and supervisory direction of.” *Id.*

6. Within his broad charge of and responsibility for the “management and conduct” of early voting in Harris County, the Election Code assigns Hollins certain specific duties with respect to voting by mail. Key here, because vote-by-mail applications must be “submitted or filed” with the County Clerk’s Office, Hollins “shall make printed [vote-by-mail applications] readily and timely available.” Tex. Elec. Code § 1.010(a). Such printed vote-by-mail applications “shall be furnished without charge, except as otherwise provided by this code.” *Id.* § 1.010(c).

7. The Election Code does not specify how county clerks must make printed vote-by-mail applications “readily and timely available.” Rather, the Election Code leaves that determination to the discretion of each county clerk in exercising his or her statutory authority over the “management and conduct” of the vote-by-mail process. Tex. Elec. Code §§ 32.071, 83.001(a).

8. As Hollins testified at the September 9 hearing, the pandemic has inhibited various methods of making printed vote-by-mail applications “readily and timely available.” For instance, the Harris County Clerk’s Office building is closed to the public due to the pandemic. Other government offices at which applications might otherwise be made available to voters are likewise closed to the public. In this context, Hollins has chosen to make vote-by-mail applications “readily and timely available” by sending such applications to all registered voters in the County, along with detailed and accurate educational information about the eligibility criteria for voting by mail.

9. The Court concludes that Hollins’s plan to distribute vote-by-mail applications to all registered voters in Harris County falls within his charge of and responsibility for the “management and conduct” of early voting in Harris County, including his determination of how to make applications “readily and timely available” to voters amidst the pandemic.

10. Moreover, Hollins’s plan comports with the letter and spirit of the Texas Supreme Court’s recent decision in *In re State*. Just as the Texas Supreme Court held was proper, Hollins’s plan “place[s] in the hands of the voter” the determination of whether each voter meets the criteria to vote by mail and, if so, whether to exercise that option. 602 S.W.3d at 550, 561. By distributing accurate educational information and applications to voters in a single document, Hollins is empowering Harris County voters to make their own informed determinations about whether they can and will apply to vote by mail, as the Texas Supreme Court and the Legislature intended.

11. The State admits that no provision of the Texas Election Code expressly prohibits Hollins from sending vote-by-mail applications to all registered voters in Harris County.

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

13. The State misconstrues § 84.012. On its face, § 84.012 imposes a *duty* on Hollins to take an affirmative act—namely, if a voter requests a vote-by-mail application, Hollins “shall” mail them one. Nothing in § 84.012 *prohibits* Hollins from sending applications to other voters.

14. This interpretation is clear from both the plain text of § 84.012 and the Code Construction Act, which governs the meaning of terms in the Election Code. *See* Tex. Elec. Code § 1.003. Under the Code Construction Act, the word “[s]hall” imposes a duty.” Tex. Gov’t Code

§ 311.016(2). By using the word “shall” in § 84.012, the Legislature imposed a duty on Hollins to send an application to any voter who requests one. But that *duty* in no way constitutes an implicit *prohibition* on Hollins sending applications to voters who have not requested them. If the Legislature had wanted to impose such a prohibition, it could easily have done so, but did not. *See, e.g., id.* § 311.016(5) (“‘May not’ imposes a prohibition and is synonymous with ‘shall not.’”).

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

16. The State’s interpretation of § 84.012 is also undermined by its acquiescence to Hollins sending unsolicited vote-by-mail applications to voters age 65 and over. As the parties stipulated, “[t]he Secretary of State does not object to the sending of unsolicited vote-by-mail applications to voters aged 65.” JSOF ¶ 5. But the State does not explain how § 84.012 could prohibit sending unsolicited vote-by-mail applications to voters under age 65 but not to voters age 65 and over. If § 84.012 prohibits Hollins from sending unsolicited applications to voters of any age, as the State’s *ultra vires* claim in this case suggests, then the Attorney General of Texas has openly consented to unlawful conduct by government officials. This selective enforcement of the State’s election laws with respect to different groups of voters simply cannot be.

17. The State’s position is also undercut by the fact that any private individual, political campaign, or other organization can send unsolicited vote-by-mail applications to voters under age 65. The Election Code in fact facilitates such distribution of vote-by-mail applications. Texas Election Code § 84.013 provides: “The secretary of state shall maintain a supply of the official application forms for ballots to be voted by mail and shall furnish the forms in reasonable quantities without charge to individuals or organizations requesting them for distribution to voters.”

18. It would be bizarre for the Legislature to allow private individuals and organizations to distribute unsolicited vote-by-mail applications while preventing county elections officers from doing the same. *See El Paso Educ. Initiative, Inc. v. Amex Properties, LLC*, 602 S.W.3d 521, 531 (Tex. 2020) (courts should avoid “absurd or nonsensical results”). It simply cannot be that everyone in this State—and, indeed, the entire United States of America—is authorized to send unsolicited vote-by-mail applications to registered Texas voters except for the county elections officers who are charged with managing and conducting the vote-by-mail process.

The State Has Not Established Probable, Imminent, and Irreparable Injury

19. A temporary injunction independently is not warranted because the State has not established probable, imminent, or irreparable injury.

20. The State claims irreparable harm any time there is a purported violation of the Texas Election Code. The Court concludes that Hollins’s plan does not violate the Election Code, but in any event, the State’s theory of harm conflicts with the State’s stipulation that it does not object to Hollins sending unsolicited vote-by-mail applications to voters age 65 and over, which the State contends would also violate the Election Code.

21. The State asserts as harm that voters will be “misled” or “confused” by receiving unsolicited vote-by-mail applications and might commit “voter fraud” because of Hollins’s mailer.

The State offered no evidence or other substantiation at all for these assertions at the September 9 hearing. Instead, the State relied solely on unsupported speculation, which does not suffice to meet the State's burden in seeking a temporary injunction.

22. The State's concerns about purported "confusion" and "voter fraud" are also undermined by the fact that private individuals and organizations can and do distribute unsolicited vote-by-mail applications to voters under age 65. And while Hollins intends to include a prominent and rigorous explanation of the criteria for being entitled to vote by mail, private distributors of vote-by-mail applications do not include explanations of the relevant eligibility criteria.

23. The Secretary of State also does not include any educational information about the eligibility criteria to vote by mail under the "disability" category with the application form it makes available online to the public, which of course includes voters under age 65. Thus, while the State contends that Hollins's mailer will have the "imprimatur" of a government official, the Secretary of State's website and form certainly has that imprimatur, and Hollins's mailer is far less likely to sow confusion compared to the Secretary's distribution of applications via the Internet.

24. Finally, at the September 9 hearing, Ingram and the State's counsel repeatedly suggested that people could be subject to criminal prosecution under Texas Election Code § 84.0041 in connection with Hollins's mailer. But a county clerk does not violate § 84.0041—which prohibits "intentionally caus[ing] false information to be provided on an application for ballot by mail"—by sending applications to voters along with detailed and accurate educational information about the eligibility criteria. And a voter would not violate § 84.0041—which prohibits "knowingly provid[ing] false information on an application"—by reviewing such educational information and determining in good faith that he or she is entitled to vote by mail under the Texas Election Code as construed by the Texas Supreme Court in *In re State*.

Vince Ryan
Harris County Attorney

Respectfully submitted,

/s/ Susan Hays
Cameron A. Hatzel
Assistant County Attorney
State Bar No. 24074373
Email: cameron.hatzel@cao.hctx.net

Douglas Ray
Special Assistant County Attorney
State Bar No. 16599300
Email: douglas.ray@cao.hctx.net
1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 274-5376
Telecopier: (713) 755-8924

Susan Hays
Law Office of Susan Hays, PC
State Bar No. 24002249
P.O. Box 41647
Austin, Texas 78704
Telephone: (214) 557-4819
Telecopier: (214) 432-8273
Email: hayslaw@me.com

Christopher M. Odell
Arnold & Porter Kaye Scholer LLP
State Bar No. 24037205
700 Louisiana St., Ste. 4000
Houston, Texas 77098
Telephone: (713) 576-2400
Telecopier: (713) 576-2499
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
Telephone: (202) 942-5000
Telecopier: (202) 942-5999
Email: Stanton.Jones@arnoldporter.com

* *Pro hac vice* motions filed.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing instrument was served on all parties of record via eFiling on September 10, 2020.

/s/ Susan Hays _____

Unofficial Copy Office of Marilyn Burgess District Clerk