

THE STATE OF TEXAS,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	IN THE DISTRICT COURT OF
	§	
CHRIS HOLLINS, in his official	§	
capacity as Harris County Clerk,	§	
<i>Defendant</i>	§	
	§	HARRIS COUNTY, TEXAS
	§	
TEXAS STATE CONFERENCE OF	§	
THE NATIONAL ASSOCIATION FOR	§	
THE ADVANCEMENT OF COLORED	§	127th Judicial District
PEOPLE (“NAACP”) and ANTI-	§	
DEFAMATION LEAGUE	§	
SOUTHWEST REGION	§	
<i>Intervenor-Defendants</i>	§	

**PETITION IN INTERVENTION
BY TEXAS STATE CONFERENCE OF THE NAACP
AND ANTI-DEFAMATION LEAGUE SOUTHWEST REGION,
IN OPPOSITION TO PLAINTIFF’S APPLICATION FOR TEMPORARY INJUNCTION
AND PERMANENT INJUNCTION**

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To the Honorable Court:

Intervenor-Defendants Texas State Conference of the National Association for the Advancement of Colored People (“TX NAACP”) and the Anti-Defamation League Southwest Region (“ADLSW”) respectfully submit this Petition in Intervention, pursuant to Texas Rule of Civil Procedure 60 and in opposition to the application for temporary injunction filed by Plaintiff, the State of Texas.

Plaintiff has mounted a baseless attack on the Harris County Clerk’s authority to mail vote-by-mail applications to voters. If this attack succeeds, it will seriously prejudice Intervenor’s efforts to educate and mobilize voters in the coming election and the ability of Intervenor’s members to cast ballots. Therefore, Intervenor intervenes to defend the authority of the Harris County Clerk and to protect Intervenor’s interests in the outcome of this cause.

Plaintiff cannot meet the high threshold necessary for temporary injunctive relief, and therefore the Court should reject Plaintiff’s application. Plaintiff must satisfy all four of the necessary requirements for a temporary injunction under Texas law, but cannot meet at least three of the four.

First, Plaintiff has no probable right to the relief sought. The Clerk’s planned mailing is a valid exercise of the Clerk’s undisputed authority to conduct and manage Texas’ early voting process, not an *ultra vires* act. On that basis alone, Plaintiff’s Petition must be denied.

Second, the State of Texas cannot show that it will suffer any injury, let alone probable, imminent and irreparable injury, if ballot applications are mailed to voters along with an explanation of ballot-by-mail eligibility requirements. Contrary to Plaintiff’s bald, unsupported allegations, the mailing will reduce confusion by ensuring that eligible voters are informed and

able to vote by mail. That fact, too, provides an independent basis for denial of Plaintiff's Petition.

Third, the balancing of the equities strongly favors denial of Plaintiff's application. The Clerk's planned mailing unequivocally serves the public interest. It will provide access to voting by mail by numerous elderly, disabled, and other eligible voters, including people of color who are disproportionately impacted due to the pandemic, lower rates of internet access, and other factors. It will ease the burden on eligible voters, which has increased as a result of the current COVID-19 pandemic. It will allow election officials to better plan for the processing of absentee ballot elections by encouraging voters to request ballots early, thereby avoiding a pre-Election Day surge in applications. It will confirm voter addresses. It will educate voters on upcoming election deadlines and it will reduce voter confusion. Finally, it will foster civic engagement and turnout.

In contrast, the purported harm which the State foresees absent injunctive relief is nonexistent. Sending ballot applications with a description of eligibility requirements is a public service that will reduce, not increase, voter confusion. Any speculative harm would pale in comparison to the many powerful upsides of allowing the mailing to go forward. That fact provides another urgent, independently sufficient reason why this Court must and should deny Plaintiff's Petition.

The Court should deny Plaintiff's application.

I. Background

A. The Instant Action

1. In Texas, local election officials, including the Harris County Clerk, are "responsible for the management and conduct of the election," including with respect to early voting by mail. See Tex. Elec. Code § 32.071, 83.001.

2. On August 25, 2020, the Harris County Clerk, Chris Hollins, announced his intention to send ballot-by-mail ballot applications to all eligible voters in the County in advance of the 2020 election, accompanied by educational materials explaining the ballot-by-mail process and detailing the state's eligibility requirements.

3. Despite this broad authority over the conduct of elections, on August 27, 2020, State Elections Director Keith Ingram sent a letter to Mr. Hollins threatening legal action if Mr. Hollins did not "immediately halt" his announced plan to dispatch ballot-by-mail applications.

4. On August 31, the Attorney General filed the instant action.

5. Contrary to the Attorney General's complaint, the state's position is not supported by the Texas Election Code. The Attorney General misreads a requirement that clerks mail ballot-by-mail applications to all voters who request them as a prohibition against clerks providing such applications to anyone else.

B. Intervenor TX NAACP and ADLSW

6. The TX NAACP is a nonprofit, nonpartisan organization that was formally established in Texas in 1937. The organization's primary office is in Austin, but it has over 100 chapters statewide, including in Houston. A substantial number of the TX NAACP's more than 10,000 members are Harris County residents who are registered to vote in Texas.

7. The TX NAACP's mission is to ensure the political, educational, social, economic equality of rights of all persons and to eliminate race-based discrimination. As a core part of this mission, the TX NAACP engages in voter education, registration, and mobilization activities and fights against voter suppression.

8. As detailed more fully below, the TX NAACP has intervened to protect the interests of its members in receiving a ballot application and its own interest in its voter education and mobilization initiatives, and in combatting voter suppression.

9. The Anti-Defamation League (“ADL”) is a national nonprofit, nonpartisan organization, founded in 1913 with a mission to “stop the defamation of the Jewish people and secure justice and fair treatment to all.” ADL, a D.C. corporation with its headquarters in New York City, formally established ADLSW, its Southwest regional office, in Texas in 1958. ADLSW’s primary office is in Houston, but the office’s reach extends from El Paso on the west end of Texas to Beaumont on the east end, and all points south. Major cities in the region include Houston, San Antonio, Corpus Christi, El Paso, and Beaumont.

10. ADLSW’s mission, consistent with ADL’s overall mandate, is to protect the civil rights of all persons, eliminate vestiges of discrimination, racism, and antisemitism within communities in southwest Texas, and to fight hatred in all its forms. As a core part of this mission, the ADLSW engages in and promotes voter education and registration activities. The ADLSW believes that encouraging voters to be active participants in the political process and meaningfully enabling universal access to the ballot are crucial to its founding mission of securing the fair and just treatment of all people.

11. One of ADL’s priority initiatives at both the national and southwest regional levels this election year is to promote voting rights and help ensure safe access to the ballot. This has been a major focus of ADL’s national and regional staff, volunteer leadership, and supporters, occupying a priority position at the organization’s annual national leadership summit in June, and the subject of a series of webinars and projects for staff, volunteer leadership, supporters and members of the community.

12. As detailed more fully below, ADLSW has intervened to protect the interests of its supporters and constituents in receiving a ballot application and its own interest in its voter education, mobilization, and universal access initiatives.

II. Intervenors Oppose Texas’s Application

13. Intervenors join this case as defendants to oppose Plaintiff’s request for a temporary restraining order and its demand for preliminary and permanent injunctive relief.

A. Intervenors Have a Strong Interest in Defeating Plaintiff’s Bid for Injunction and Would be Prejudiced if the Injunction were Granted

14. In Texas, “any party may intervene by filing a pleading, subject to being stricken by the court on motion of any party.” TEX. R. CIV. P. 60. Thus, “no permission is required to intervene; the party opposing the intervention has the burden to challenge it by a motion to strike.” *Jenkins v. Entergy Corp.*, 187 S.W.3d 785, 796–97 (Tex. App.—Corpus Christi 2006, pet. denied) (citing *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990)).

15. Both the TX NAACP and ADLSW have a strong interest in the outcome of these proceedings, in their own right and through their members, supporters, or constituents, and a judgment for Plaintiff would prejudice both Intervenors and these affiliated individuals. *See Zeifman v. Michels*, 229 S.W.3d 460, 467 (Tex. App.—Austin 2007); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017).

1. TX NAACP & Its Members, Supporters, and Constituents Will Be Harmed If the Requested Relief is Granted

16. As part of its core mission, the TX NAACP engages in voter education, registration, and mobilization activities in Texas, including to its members who vote in Harris County. For example, in 2015, to honor the 50th anniversary of the Voting Rights Act, the NAACP created Project VIER (“Voter Information, Education, and Registration”) to reach eligible voters in churches, neighborhoods, and on college campuses, and to take steps to ensure that those individuals are registered to vote and do, in fact, exercise their right to vote.

17. This year, due to the ongoing COVID-19 pandemic, a critical part of the TX NAACP's activities involves educating voters regarding Texas's ballot-by-mail process and ensuring that eligible voters are able to cast a ballot-by-mail if they so choose.

18. If the Attorney General succeeds in this case, it will frustrate the TX NAACP's mission and cause the TX NAACP to divert resources from other programs and activities to the effort to assist the TX NAACP's members, supporters, and constituents (as well as Texas voters more generally), in order to help them overcome the burdens to vote-by-mail access that would be relieved by the County Clerk's lawful plan. The TX NAACP will incur additional costs educating voters regarding the ballot-by-mail process and providing ballot-by-mail applications to Harris County voters, who would otherwise receive applications and educational materials from the County Clerk.

19. The TX NAACP's membership consists largely of African Americans, and it considers its constituents and supporters to be people of color and members of other underrepresented and vulnerable populations, including people with disabilities. As a consequence of the disproportionate impact of COVID-19 on people of color, populations represented by the TX NAACP are more likely to be affected by COVID-19,¹ and thus are more

¹ Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, THE NEW YORK TIMES (July 5, 2020) (“[T]he new federal data...reveals a clearer and more complete picture: Black and Latino people have been disproportionately affected by the coronavirus in a widespread manner that spans the country, throughout hundreds of counties in urban, suburban and rural areas, and across all age groups.”), *at* <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>; Centers for Disease Control and Prevention, *Health Equity Considerations and Racial and Ethnic Minority Groups* (July 24, 2020) (“There is increasing evidence that some racial and ethnic minority groups are being disproportionately affected by COVID-19.”) (footnotes omitted), *at* <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

likely to have a need to cast a ballot-by-mail due to “a sickness or physical condition” that prevents these voters from appearing at the polls in person and a need to obtain a vote by mail ballot. *See* Tex. Elec. Code § 82.002.

20. It follows that they have a greater need to obtain a ballot-by-mail ballot and otherwise negotiate the ballot-by-mail application process, with which they are not familiar.

2. ADLSW & Its Supporters and Constituents Will Be Harmed If the Requested Relief is Granted

21. ADLSW, as part of its mission and pursuant to a resolution of ADL National Commission (the ADL highest-level policy making board), has determined that voter mobilization, education, and registration are essential activities. ADL has long advocated for the advancement of voting rights for all Americans. Today, ADL sees mobilization, education and registration as essential to protecting the voting rights of all Americans especially those whose ability to vote are at risk on the basis of certain immutable characteristics (including but not limited to race, disability and age) due to COVID-19 and other systemic threats to the integrity of the elections system.

22. Accordingly, a critical part of ADLSW’s mission includes voter mobilization activities, which involve educating voters regarding Texas’s vote-by-mail process and ensuring that all eligible voters, regardless of race, disability, age, etc., are able to receive and cast a ballot-by-mail if they so choose.

23. Due to the ongoing COVID-19 crisis, however, ADLSW has been forced to take its voter education and mobilization efforts online. For example, this year, to honor the 100th anniversary of the 19th Amendment, the ADLSW hosted a virtual event to reach voters throughout the region and the state of Texas, to educate them regarding the voting process and voter suppression issues. In addition, the ADLSW has prepared and shared ADL resources

explaining where, how and when to vote, and plans to host a webinar geared to young adults and college students to encourage them to register and serve as poll workers, to combat the shortage of eligible workers in the state.

24. Ballot-by-mail applications serve as a platform to provide voters with information on election dates and deadlines, which is even more critical this year due to the general confusion created by COVID-19. If the Attorney General succeeds in his cause, it will frustrate the ADLSW's efforts and force the office to divert resources from other programs and activities in order to assist the ADLSW's constituents and supporters, as well as Texas voters more generally, to overcome the burdens to ballot-by-mail access that would be relieved by the County Clerk's lawful plan.

25. A substantial number of the ADLSW's more than 5,000 constituents are Harris County residents who are registered to vote in Texas. Some of these individuals are not comfortable using technology to access a ballot-by-mail application online or may not be able to access an application online. And requesting a ballot application is just the first step in a multi-part process to vote by mail under Texas law.² The Clerk's plan to mail ballot-by-mail applications to all voters eliminates a cumbersome step in this process during a challenging time for ADLSW constituents. As a result, if the County Clerk is blocked from mailing ballot-by-mail applications to all registered voters in Harris County, these voters are more likely to be disenfranchised.

26. In addition, some supporters and constituents of the ADLSW are not familiar with the vote-by-mail application process – they have never voted by mail, even though many are eligible to do so, due to various concerns. For example, some ADLSW constituents have

² See Tex. Elec. Code Ann. § 84.007 (West); Tex. Elec. Code Ann. § 86.007 (West).

religious beliefs that require them to strenuously protect their health and safety and that of their family and community members. Despite being eligible to vote by mail, these voters felt at-ease voting in-person in prior elections; however, they no longer feel able to do so, given the COVID-19 pandemic and their religious obligations and values. If the Clerk's plan to mail vote by mail applications to all voters is halted before the November election, supporters and constituents of the ADLSW may be forced to choose between their fundamental right to vote and their fundamental beliefs and values that require them not to jeopardize their health and safety and that of their families and communities.

27. The Clerk's plan to mail ballot-by-mail applications to all voters eliminates a cumbersome step in this process during a challenging time for ADLSW constituents and supporters. As a result, if the Clerk is blocked from mailing vote by mail applications to all registered voters in Harris County, these voters are more likely to be disenfranchised.

28. Even ADLSW's own Regional Director, who lives and works in Houston, faced disenfranchisement in the July 2020 runoff election, due to possible exposure to COVID-19 and an inability to access a ballot-by-mail application in accordance with the Texas vote by mail deadlines.

29. If the Clerk's plan to mail vote by mail applications to all voters is halted before the November election, supporters and constituents of ADLSW may be forced to choose between their fundamental right to vote and their fundamental values, as well as their health and safety, if they are even aware of their eligibility to vote by mail in the first place.

B. Plaintiff Cannot Meet the Requirements for Temporary Injunctive Relief

30. A temporary injunction is an extraordinary remedy, the purpose of which is to preserve the status quo of the litigation's subject matter pending a trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). To obtain a temporary injunction, an applicant

must show: (1) a cause of action, (2) a probable right to the relief sought, and (3) a probable, imminent, and irreparable injury in the interim. *Id.*; *Mattox v. Jackson*, 336 S.W.3d 759, 762 (Tex. App.—Houston [1st Dist.] 2011, no pet.). The temporary injunction applicant bears the burden of production—*i.e.*, it must offer some evidence of each of these elements. *See In re Tex. Natural Res. Conservation Comm'n*, 85 S.W.3d 201, 204 (Tex. 2002) (quoting *Camp v. Shannon*, 162 Tex. 515, 348 S.W.2d 517, 519 (1961); *Dallas Anesthesiology Assocs., P.A. v. Tex. Anesthesia Group, P.A.*, 190 S.W.3d 891, 897 (Tex. App.—Dallas 2006, no pet.). In addition, in order for a temporary injunction to be granted, the balance of the equities – including consideration of the public interest -- must weigh in favor of granting the injunction.” *Int’l Paper Co. v. Harris Cty.*, 445 S.W.3d 379, 396 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

31. The State of Texas must meet all of those requirements. However, it cannot satisfy at least three of the four requirements: probable right to the relief sought; probable, imminent and irreparable injury in the interim; and balance of the equities, including consideration of the public interest, weighs in favor of the injunction. Therefore, its bid for a temporary injunction must be denied.

1. Plaintiff Has No Probable Right to the Relief Sought

32. The State of Texas’ case rests on the allegation that the Clerk’s planned mailing would be an *ultra vires* act. However, the mailing would not be an *ultra vires* act. Accordingly, the plaintiff has no probable right to the injunction it seeks.

33. Plaintiff claims that the mailing would be *ultra vires* because it would be without legal authority. The State’s rationale is that there is no statute specifically empowering County Clerks to send ballot applications to voters who have not requested them, and that the planned mailing is not an exercise of power that is necessarily implied to perform the Clerk’s duties. However, the State is wrong on both points.

34. Indeed, in its own Original Verified Petition and Application for Temporary Restraining Order, the State concedes that the clerk is responsible for the management and conduct of the election with respect to early voting. (Plaintiff’s Petition at 4.) And the State does not deny that the details of that role are not spelled out in the statute, but left to the clerk in his discretion. Plaintiff cites no authority for the proposition that the exercise of power must be “necessarily implied to perform the Clerk’s duties.”

a. The Clerk’s plan is consistent with Texas election law

35. “The right to free exercise of intelligent choice by a citizen at the polls is surely one of the most treasured of all American heritages guaranteed by the Constitution and Bill of Rights.” Tex. Att’y Gen. Op. GA-0286 (2004) (quoting *Wooley v. Sterrett*, 387 S.W.2d 734, 738 (Tex. Civ. App.—Dallas 1965, no writ). Consequently, as the Attorney General’s Office has affirmed, the “free exercise of this right [should not] be unreasonably curtailed or restricted by judicial decree which places a narrow or strict construction on legislative rules.” *Id.* (quoting *Wooley* at 738) (alteration in original). To the contrary, “statutes regulating the right to vote should be given a liberal interpretation in favor of that right.” *Id.* (quoting *Thomas v. Groebl*, 147 Tex. 70, 212 S.W.2d 625, 630 (Tex. 1948)).

36. Nonetheless, the Attorney General urges this Court to sharply curtail the Clerk’s authority to facilitate qualified voters’ rights to cast a mail ballot. The Attorney General’s reading of the law is contradicted by the text of the relevant provisions, well-established canons of statutory construction, the structure of the Election Code, and his own conduct in this case. His petition should be dismissed.

b. The Clerk has broad authority to conduct early voting by mail, which is not limited by Section 84.012

37. In Texas, local election officials are the principal officers responsible for the conduct of elections, and the State Legislature has conferred broad authority on them. The Election Code provides that “[t]he presiding judge is in charge of and responsible for the management and conduct of the election,” Tex. Elec. Code § 32.071, and that the early voting clerk, who oversees early voting by mail, “has 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). The Harris County Clerk is the early voting clerk for Harris County. (Plaintiff’s Petition at ¶ 13.) Moreover, the Attorney General has stated that early voting clerks, including the Harris County Clerk, “exercise a sovereign function of government for the benefit of the public, largely independent of the control of others” and has made clear that carrying out some of their duties “require[s] the exercise of independent discretion.” Tex. Att’y Gen. Op. KP-0140 (2017). Making ballot applications available to voters is plainly part of the “conduct and management” of an election and determining how to do so is well within their allowed discretion.

38. Contrary to the Attorney General’s assertion, Texas Election Code Section 84.012 does not limit the Clerk’s broad authority. That section provides that “[t]he 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.” Tex. Elec. Code § 84.012. By its plain language, this provision imposes on the Clerk an affirmative, additional duty to voters that request applications, not a limitation on the Clerk’s power to send applications to other voters. In effect, the Attorney General asks the Court to construe Section 84.012 as requiring clerks to mail an official application form *only* to each applicant requesting one. But that is not what the code provision says. And if that is what the Legislature had meant, it would have included the word “only” in the statute. This Court should presume that the Legislature’s

omission of the word was purposeful – and, thus, that the Legislature did *not* intend to limit the Clerk’s power to provide ballot-by-mail applications *only* to applicants who request them. *See In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008).

39. Defendant Harris County sent ballot applications to persons over age 65 in the primary,³ and the State did not raise any objections. Indeed, the State cites that earlier mailing, without criticism, at multiple points in its petition. *See, e.g.*, Plaintiff’s Petition at paragraph 31. Accordingly, the Attorney General has effectively conceded that Section 84.012 does *not* restrict clerks to sending applications *only* to voters who request them. Indeed, Section 84.012 says nothing about voter eligibility. The same unquestioned authority that permitted Defendant to send unsolicited applications to voters over 65 permits Defendant to send unsolicited applications to all voters.

40. Also, the Attorney General’s proposed reading does not accord with state practice. Both the Secretary of State and a number of county clerks make ballot-by-mail applications available on their websites – despite the absence of any express authorization or direction to do so in Section 84.012 or any other provision of the Election Code. Moreover, Texas’ ballot-by-mail application is thus available to those Texans with access to the internet, a home printer, and knowledge as to which government offices administer elections – a limited group no doubt, but one that nonetheless is irrelevant to eligibility.⁴

³ *See Zach Despart, Harris County sends mail ballot applications to every 65-and-over registered voter*, Hous. Chron. (June 5, 2020); available at <https://www.houstonchronicle.com/politics/houston/article/Harris-County-sends-mail-ballot-applications-to-15320202.php> (last accessed Sep. 8, 2020).

⁴ *See Texas Secretary of State, Request an Application for a Ballot by Mail*, available at <https://webservices.sos.state.tx.us/vrrequest/bbm.asp> (last accessed Sep. 2, 2020); Harris County Clerk, *VOTING BY MAIL*, available at <https://www.harrisvotes.com/VotingInfo#VoteByMail> (last accessed Sep. 2, 2020); *see also Dallas County Elections, Absentee Voting*, available at

c. The Legislature’s intent, as evidenced by the statutory text and structure, confirms the Clerk’s authority

41. The statutory text and the structure of the ballot-by-mail system confirm that the Legislature did not intend Section 84.012 to act as a limit on the Clerk’s authority. *See Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014) (“While we must consider the specific statutory language at issue, we must do so while looking to the statute as a whole, rather than as isolated provisions.”) (internal quotation marks omitted). The Attorney General urges the Court to read Section 84.012 as a mechanism for screening out ineligible voters. (Plaintiff’s Petition at ¶ 32 (“[S]ending ballot-by-mail applications to every voter...is certain to result in large numbers of vote-by-mail applications from voters who are ineligible to vote by mail.”).) But the text of the provision and the structure of the ballot-by-mail system belie this claim.

42. First, as noted above, Section 84.012 does not require the Clerk to verify an applicant’s eligibility prior to providing an application. To the contrary, even on the Attorney General’s reading, the Clerk is required to provide an application to any applicant who requests one.

<https://www.dallascountyvotes.org/absentee-voting/> (last accessed Sep. 2, 2020); Bexar County Elections Department, *VOTE BY MAIL*, available at <https://www.bexar.org/3271/Vote-by-Mail> (last accessed Sep. 2, 2020); Tarrant County Elections, *VOTING BY MAIL (ABSENTEE BALLOT)*, available at [https://www.tarrantcounty.com/content/main/en/elections/Early-Voting-Information/Voting-by-Mail.html?linklocation=departmentcarousel&linkname=Elections:Voting%20by%20Mail%20\(Absentee%20Ballot\)](https://www.tarrantcounty.com/content/main/en/elections/Early-Voting-Information/Voting-by-Mail.html?linklocation=departmentcarousel&linkname=Elections:Voting%20by%20Mail%20(Absentee%20Ballot)) (last accessed Sep. 2, 2020); Travis County Clerk, *Ballot by Mail*, available at <https://countyclerk.traviscountytexas.gov/elections/ballot-by-mail.html> (last accessed Sep. 2, 2020); Collin County, *Absentee & By-Mail Voting*, available at https://www.collincountytexas.gov/elections/election_information/Pages/absentee_bymail_voting.aspx (last accessed Sep. 2, 2020); Denton County Texas, *Early Voting by Mail and Absentee*, available at <https://www.votedenton.com/early-voting-by-mail-absentee/> (last accessed Sep. 2, 2020).

43. Second, the Election Code evinces a clear legislative policy choice to make applications widely available. Specifically, Section 84.013 requires the Secretary of State to “furnish the forms in reasonable quantities without charge to individuals or organizations requesting them for distribution to voters.” Tex. Elec. Code § 84.013. And the Republican and Democratic parties both intend to use this provision to distribute ballot applications to voters across Texas in advance of the 2020 election.⁵ It defies common sense that the Legislature would permit third-parties to distribute ballot-by-mail applications to every voter in a county, while limiting the ability of the officials responsible for the conduct of the ballot-by-mail process to distribute such applications.

44. Third, applicants are “not required to use an official application form” to apply for a mail ballot. Tex. Elec. Code § 84.001(c). If the Legislature intended Section 84.012 to serve a gatekeeping function by screening out ineligible applicants at the point of providing an official application form, it would make little sense to require the Clerk to accept applications that are not on such a form.

45. Accordingly, the State cannot show that it has a probable right to the relief sought. Its petition must therefore be dismissed on that ground alone.

2. Plaintiff Cannot Establish A Probable, Imminent, and Irreparable Injury Absent Injunctive Relief

46. The State of Texas also cannot show that it will suffer any injury, let alone a probable, imminent and irreparable injury, if the court denies its request. Plaintiff claims incorrectly that the planned mailing will create confusion and facilitate fraud.

⁵ See Patrick Svitek, *Texas Supreme Court temporarily blocks Harris County from sending mail-in ballot applications to all its voters*, Texas Tribune (Sep. 2, 2020); Texas Democrats, Press Release, *Here’s How Texas Democrats Are Going to Send Nearly One Million Vote-by-Mail Applications to Eligible Texans* (Aug. 10, 2020).

47. As explained above, the mailing will reduce, not foster, confusion. The mailing will perform a number of educative functions, including explaining who is eligible to vote by mail; and how to obtain a ballot-by-mail if one is eligible. Without this mailing, voters are much more likely to be bewildered about those questions, and their ability to cast a timely ballot will be jeopardized.

48. Moreover, the State cites no evidence that the planned mailing will likely cause fraud at all, let alone evidence of likely fraud at a level that would outweigh the many, significant upsides for Texas eligible voters.

49. Voting by mail is a secure mode of casting a ballot that has long been a part of the Texas election system. *See In re State*, 602 S.W.3d 549, 558 (Tex. 2020) (detailing history of absentee voting in Texas). And experts from the FBI to the Brookings Institution have recently rejected claims that voting by mail is a source of significant fraud.⁶

50. Plaintiff cites *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) as support for its fraud allegation, but in fact, *Veasey* undercuts the state's position.

51. In *Veasey*, the Court rejected the argument by the State of Texas that the goal of preventing voter fraud justified a voter ID law, noting evidence "that in-person voting, the only

⁶ See Miles Park, *There's No Evidence Supporting Trump's Mail Ballot Warnings, FBI Says*, NPR (Aug. 26, 2020), available at <https://www.npr.org/2020/08/26/906262573/theres-no-evidence-supporting-trump-s-mail-ballot-warnings-fbi-says>; Elaine Kamarck & Christine Stenglein, *Low rates of fraud in vote-by-mail states show the benefits outweigh the risks*, Brookings Institution (June 2, 2020), available at <https://www.brookings.edu/blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risks/>; see also Josh Margolin & Lucien Bruggeman, *Russia is 'amplifying' claims of mail-in voter fraud, intel bulletin warns*, abcnews.com (Sep. 3, 2020), available at <https://abcnews.go.com/Politics/russia-amplifying-claims-mail-voter-fraud-intel-bulletin/story?id=72799959> (noting that Russia intends to sow doubt about voting by mail to undermine confidence in American elections).

concern addressed by the law at issue, yielded only two convictions for in-person voter impersonation fraud out of 20 million votes cast in the decade leading up to SB 14's passage." *Id.* at 239. The Court did make a comparative statement about the potential and reality of fraud in the mail-in ballot context as compared to in-person voting, but specifically emphasized that it did not intend a criticism of allowing mail-in ballots, which on the contrary "are a vital means of enabling voting when it would otherwise difficult or impossible for some people to exercise their right to vote in person." *Id.*

52. The State of Texas cannot establish the risk of irreparable harm needed for a temporary injunction. On that basis alone, the State's motion for temporary injunction must be denied.

3. The Balancing of the Equities Strongly Favors Denying Plaintiff's Motion for Temporary Injunction

53. The public interest strongly favors proactively sending absentee ballot applications to all registered voters in Texas, for many reasons.

54. The planned mailing will provide access to ballot-by-mail by numerous elderly, disabled, and other ballot-by-mail eligible voters, with a disproportionate impact on people of color. It will ease a burden on those voters who are eligible at a time when voters, many of whom have been battered and bewildered by the pandemic, are stretched thin. It will allow election officials to better plan for the processing of absentee ballot applications by encouraging more voters to submit their applications early. It will help election officials confirm voter addresses, which is extremely important from an election security and voting rights perspective, when the ballots themselves are mailed out. And, as the results of the July 2020 runoff demonstrate, it will increase civic engagement and voter participation. The mailing will

accomplish all of these ends by providing critically needed voter education and thereby reducing confusion.

a. Increasing ballot access and easing burdens on eligible voters

55. COVID-19 has had a tragic and terrifying effect on nearly every aspect of American life. As of September 2, 2020, the Texas Department of State Health Services reports more than 621,000 confirmed cases and nearly 13,000 fatalities due to the disease in Texas. In Harris County, 111,525 cases of COVID-19 and 2,335 fatalities have been reported.⁷ Businesses, schools, and places of worship have been shuttered and Texans have seen their daily lives change drastically. And, as the Supreme Court has observed, “[a]ll of this is occurring in an election year.” *In re State*, 602 S.W.3d 549, 551 (Tex. 2020).

56. Indeed, COVID-19 has already created – and will continue to create – significant obstacles to Texans’ ability to exercise their right to vote. Obtaining voting materials, like ballot-by-mail applications, has become relatively more difficult due to government office closures, curtailment of some voter mobilization efforts, and other measures taken in response to COVID-19.⁸ For example, the Harris County Clerk’s office is currently closed to the general

⁷ See Texas Department of State and Health Services, *Texas Case Counts: COVID-19*, available at: <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83> (last accessed Sept. 7, 2020).

⁸ See, e.g., Asher Price, *Coronavirus in Texas: Voter registration has flatlined in big urban counties*, Austin American Statesmen (May 19, 2020 5:01 AM), <https://www.statesman.com/news/20200519/coronavirus-in-texas-voter-registration-has-flatlined-in-big-urban-counties>; Asher Price, *As Texas grapples with coronavirus, voter registration numbers are down*, Austin American Statesman (July 13, 2020 5:00 AM), <https://www.statesman.com/news/20200713/as-texas-grapples-with-coronavirus-voter-registration-numbers-are-down>.

public.⁹ Furthermore, Texas does not allow its voters to request a mail ballot online. Although Texas does allow voters to request an *application* for a mail ballot online, obtaining an application online is not an option for many Texans: According to a recent report by the Texas State Demographer, the 2018 American Community Survey (ACS) estimates indicate that there are over 1.6 million households in Texas without internet access, making up 16.9% of Texas households.¹⁰ This is especially dire for Hispanic and African American Texans, of whom 14.2% and 12%, respectively, lack internet access.¹¹

57. To be responsive to voters' needs during this pandemic, election officials should act to minimize the difficulty of accessing the ballot box. Mailing ballot-by mail applications to all registered voters in Harris County, along with information about ballot-by-mail eligibility, will help to ensure that qualified voters who want or need to vote by mail are not excluded from the franchise due to unfamiliarity with the process and related deadlines or inability to obtain an application. The challenged practice thus removes several potential confusion points for voters during a period when stress is high for many Texans and time is in short supply.

58. It is undisputed that the planned mailing will provide access to ballot-by-mail for voters who are potentially eligible for it. It cannot be disputed that such access is a vital, positive good. And that every vote is critically important.

⁹ See Harris County Clerk's Office, *Homepage*, available at <https://www.cclerk.hctx.net/> (last accessed Sep. 2, 2020) ("The County Clerk's Office and annexes, in compliance with State and Local guidelines and the Stay Home Work Safe policy, is currently closed to the general public. Our offices are open for appointments (Assumed Names/DBA, Birth/Death Certificate, & Marriage Licenses only)").

¹⁰ See Texas Demographic Center, *Internet Access in Texas and the 2020 Census*, available at https://demographics.texas.gov/Resources/publications/2019/20191219_InternetAccess2020Census.pdf (last accessed Sept. 7, 2020).

¹¹ *Id.*

59. The Attorney General's position is diametrically opposed to the concept of a responsive government. Contrary to the Attorney General's contention, applications sent by the Clerk will likely bolster voters' faith in the integrity of the voting process and minimize confusion, given that state law imposes no limits on third-parties' ability to send out ballot-by-mail applications. The Clerk, a government official, is seeking to provide accurate and trusted information regarding the ballot-by-mail process.

60. Furthermore, far from being the radical assault on election integrity depicted in the Attorney General's petition, the Clerk's approach has been adopted by election administrators of both parties in jurisdictions across the country. For example, election administrators in states such as Iowa, Georgia, Michigan, Nebraska, and West Virginia mailed vote-by-mail applications to all registered voters in the state for their primary elections.¹² Several

¹² H.F. 2486, 2020 88th Gen. Assemb., Reg. Sess. (Iowa 2020).; Stephen Gruber-Miller, *Iowa secretary of state will mail every registered voter a ballot request form for June primary*, Des Moines Register (Mar. 31, 2020, 02:23:00 PM), <https://www.desmoinesregister.com/story/news/politics/2020/03/31/iowa-voters-ballot-request-forms-june-primary-coronavirus-covid-19-secretary-state-paul-pate/5097518002/>; Emil Moffatt, *To Encourage Mail-In Voting In May, Georgia Will Send Applications To All Registered Voters*, WBE (Mar. 24, 2020), <https://www.wabe.org/to-encourage-mail-in-voting-in-may-georgia-will-send-applications-to-all-registered-voters/>; *Benson: All voters receiving applications to vote by mail*, Michigan.Gov (May 19, 2020), https://www.michigan.gov/sos/0,4670,7-127-1640_9150-529536--,00.html; Martha Stoddard, *Nebraska sending mail-in ballot applications to all registered voters*, Omaha World-Herald (Aug. 19, 2020), https://omaha.com/news/state-and-regional/govt-and-politics/nebraska-sending-mail-in-ballot-applications-to-all-registered-voters/article_98d340c7-b4d1-57a9-8f4e-7098ed2397bd.html; *Mail-In Absentee Ballot 'Application' to be Sent to Every Registered Voter in WV*, Sos.Wv.Gov (Mar. 26, 2020), <https://sos.wv.gov/news/Pages/03-26-2020-A.aspx>.

states plan to send ballot applications to all voters ahead of the general election,¹³ and additional states will go even further and send ballots to all registered voters for the general election.¹⁴

b. Educating voters and reducing confusion

61. Ballot-by-mail applications will give election officials a valuable opportunity to inform voters of election dates and deadlines. Voter education about deadlines and dates is even more important this year due to the general confusion created by COVID-19. Social science research has confirmed that any “touch” between election officials and voters is valuable in helping voters learn about important dates and deadlines.¹⁵ Moreover, proving much needed

¹³ See, e.g., Del. Code Ann. tit. 15, § 5603; H.R. 4820, 191st Gen. Court, Reg. Sess. (Mass. 2020); New Mexico Stat. Ann. § 1-12-72(D); *Secretary Merrill Outlines Process and Timelines for November General Election*, Press Release, CT.GOV (Aug. 25, 2020), <https://portal.ct.gov/SOTS/Press-Releases/2020-Press-Releases/Secretary-Merrill-Outlines-Process-and-Timelines-for-November-General-Election>; Caroline Cummings, *Iowa secretary of state to send absentee ballot applications to all registered voters*, CBS2IOWA (Jul. 17, 2020), <https://cbs2iowa.com/news/local/iowa-secretary-of-state-to-send-absentee-ballot-applications-to-all-registered-voters>; *Governor Hogan Directs State Board of Elections to Conduct November General Election With Enhanced Voting Options*, Press Release, MARYLAND.GOV, <https://governor.maryland.gov/2020/07/08/governor-hogan-directs-state-board-of-elections-to-conduct-november-general-election-with-enhanced-voting-options/>; Patrick Marley, *Wisconsin Elections Commission approves sending 2.7 million absentee ballot request forms to voters*, Milwaukee Journal Sentinel (Jun. 17, 2020, 11:19:00 AM), <https://www.jsonline.com/story/news/politics/2020/06/17/wisconsin-elections-commission-finalize-mailing-absentee-ballot-request-forms/5329007002/>

¹⁴ See, e.g., A.B. 860, 2019 - 2020 Leg., Reg. Sess. (Cal. 2020); Tracey Tully, *New Jersey Will Hold Mail-in Election in November, Over Trump’s Objections*, The New York Times (Aug. 14, 2020), <https://www.nytimes.com/2020/08/14/nyregion/nj-vote-by-mail-election.html>; State of Vermont Office of the Secretary of State, *First Statewide Elections Directive*, Sos.Vermont.Gov (July 20, 2020), available at <https://sos.vermont.gov/media/hxgjjdkb/secretary-of-state-s-first-2020-statewide-election-procedures-directive.pdf>.

¹⁵ Emma Fernandez, *Reducing the Turnout Gap in San Francisco*, San Francisco Elections Commission (May 2019), <https://sfgov.org/electionscommission/sites/default/files/Documents/meetings/2019/2019-08-21->

voter information, especially at a time where there is much misinformation and disinformation, reduces voter confusion.

c. Smoothing out the pre-deadline surge in applications.

62. According to Texas Election Law, any registered voter who wants a ballot-by mail application mailed to them has until eleven days prior to Election Day to submit a ballot-by-mail application. Tex. Elec. Code § 84.007. However, Texas requires all ballots-by-mail to be postmarked no later than Election Day. Tex. Elec. Code § 86.007. If the majority of eligible voters submit their ballot-by-mail applications at or near the deadline, Harris County election officials will face a serious election administration problem in processing requests and mailing out a huge number of vote by mail ballots in a very short amount of time, or risk disenfranchisement of thousands of voters.

63. Sending ballot-by-mail applications to all registered voters instead allows the Harris County Clerk's office to smooth out over time the number of applications that must be processed and verified. If voters receive applications in advance, many will likely choose to return their applications sooner, rather than at the pre-Election Day deadline. This gives election officials more time to process applications and avoid a potentially disastrous deadline crunch.

64. In addition, in the face of the public health threat advanced by COVID-19, and the increase in absentee voting, it is highly prudent for the Harris County Clerk to provide access to ballot-by-mail applications to all registered voters in the county, in order to encourage those who are eligible to vote by mail to do so as early as possible – as opposed to mere days before the election. This practice will give the County Clerk ample time to verify voter eligibility per

commission/2019_08_21_Elections_Comm_Item5_Reducing_the_Voter_Turnout_Gap_in_San_Francisco_Emma%20Fernandez.pdf.

statutory requirements. It also helps to ensure that those voters who are entitled to vote absentee will be able to do so within the statutory deadlines provided in the Texas Election Code.¹⁶

d. Confirming voter addresses

65. Maintaining accurate voter address information is a challenge for any election administrator, but it is particularly important this year. As a result of the COVID-19 pandemic, Texas has already seen (and will almost certainly continue to see) a surge in absentee voting in this year's elections.¹⁷ By sending mail ballot applications to all registered voters prior to the election cycle beginning in earnest, the Clerk's office can confirm, and as needed, update the databases of voter addresses. Accurate and up-to-date addresses are important to ensure that absentee ballots are received by voters in time to be returned and counted.

e. Expanding civic engagement and increasing voter turnout

66. "It is to the public interest that all qualified electors vote and the courts should lend encouragement to those who strive towards this end." *Roberts v. Dotson*, 272 S.W.2d 164, 166 (Tex. Civ. App.—Austin 1954, no writ). By sending ballot-by-mail applications to all registered voters, the Harris County Clerk has not just created an effective and statutorily-permissible path for residents to exercise their right to vote, but to increase civic engagement and participation among Harris County residents.

67. In particular, receiving a ballot-by-mail application, with accompanying eligibility information, makes clear to all eligible voters they have the ability to vote by mail and provides them with an easy and convenient method of applying for a ballot, thereby increasing the

¹⁶ See Tex. Elec. Code § 84.007; Tex. Elec. Code § 86.007.

¹⁷ Jasper Scherer, *Mail-in ballots drive surge in early voting turnout for Harris County runoffs*, HOUSTON CHRONICLE (June 29, 2020), <https://www.houstonchronicle.com/politics/houston/article/Mail-ballots-drive-surge-in-early-voting-turnout-15375467.php>.

likelihood that they will actually participate in the election. The results of the July 2020 runoff election in Harris County bear out this prediction: The Clerk mailed ballot applications to all Harris County voters over the age of 65. Voter participation in the July runoff set historical records, in terms of both the number of votes cast overall and the number of absentee ballots cast.¹⁸ These numbers demonstrate that the impact of mailing eligible voters vote by mail applications on civic engagement is real and significant.

68. The Harris County mailing would educate voters in a way that helps increase civic participation.¹⁹ Outreach such as sending out vote-by-mail applications can be particularly helpful for promoting voter turnout in rural or remote areas without consistent access to government services, minority communities, and low-income communities.²⁰

69. In contrast, there are no equities favoring the State here. The equities would strongly favor denial of Plaintiff's Petition. On that ground alone, that petition must be dismissed.

III. Conclusion

70. For the reasons set forth above, Intervenor respectfully submit that any request for temporary relief should be denied.

IV. Intervenor's Answer & Affirmative Defenses

¹⁸ Jasper Scherer, *Harris County Democrats had record turnout in Tuesday's runoff. COVID-19 may have helped*, HOUSTON CHRONICLE (July 15, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-Democrats-had-record-turnout-in-15411656.php>.

¹⁹ *Id.*

²⁰ *Id.*; Bernard L. Fraga, *The Turnout Gap Between Whites and Racial Minorities is Larger Than You Think – and Hard to Change*, WASH. POST (September 25, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/25/the-turnout-gap-between-whites-and-racial-minorities-is-larger-than-you-think-and-hard-to-change/?utm_term=.28dae494c677.

GENERAL DENIAL

71. Subject to such stipulations and admissions as may be made in this litigation, Intervenor generally deny each and every allegation in Plaintiff's Petition (and any amendments or supplements thereto) in accordance with Texas Rule of Civil Procedure 92 and demand strict proof of such allegations in accordance with the appropriate burden of proof as the Court may order in accordance with the laws of the State of Texas.

AFFIRMATIVE DEFENSES

72. Without assuming any burden of proof that they otherwise would not bear, Intervenor asserts that Plaintiffs' claims are barred pursuant to the following defenses, each of which is raised in the alternative. Intervenor expressly reserve the right to amend these defenses as permitted by the Texas Rules of Civil Procedure.

73. Plaintiff's claims are barred for failure to allege facts sufficient to state a legally cognizable claim.

74. Plaintiff's claims are barred, in whole or in part, by acquiescence.

75. Plaintiff's claims are barred, in whole or in part, by estoppel, quasi-estoppel, and/or equitable estoppel.

76. Plaintiff's claims are barred, in whole or in part, by ratification and/or waiver.

77. Plaintiff's claims are barred, in whole or in part, by laches.

78. Plaintiff's claims are barred, in whole or in part, by unclean hands.

79. Plaintiff's claims are barred, in whole or in part, by fraud.

80. Intervenor may assert other defenses that become available or appear during the course of additional investigation or discovery in this case. Intervenor reserve the right to amend this answer to assert any such defense, consistent with the Texas Rules of Civil Procedure.

REQUEST FOR DISCLOSURE

81. Pursuant to Texas Rule of Civil Procedure 194, Intervenors request that Plaintiff discloses, within 30 days of the service of this request, the information or material described in Rule 194.2.

PRAYER FOR RELIEF

82. WHEREFORE, PREMISES CONSIDERED, Intervenors respectfully request the following relief: (1) the Court enter a judgment pursuant to the Declaratory Judgment Act that Plaintiff takes nothing, and deny its requested relief, declaring that sending ballot-by-mail ballot applications to all eligible voters in the County in advance of the 2020 election is within the authority of the Harris County Clerk and not prohibited by State law or the Texas Election Code(2) that Plaintiff's application for temporary injunction and permanent injunction be denied; and (3) that Intervenors be awarded all such other relief in law or equity as Intervenors may show themselves entitled.

Dated: September 8, 2020

Respectfully submitted,

/s/ Lindsey B. Cohan

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CERTIFICATE OF SERVICE

I hereby certify that, on September 8, 2020, in accordance with Texas Rule of Civil Procedure 21a, a true and correct copy of the foregoing document was served on all counsel of record using the Court's electronic case filing system.

/s/ Lindsey B. Cohan