

Cause No. 2020-52383

THE STATE OF TEXAS,
Plaintiff,

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In the District Court of

v.

Harris County, Texas

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

127th Judicial District

**Plaintiff’s Reply to Defendant Chris Hollins’s Opposition
to Plaintiff’s Application for Temporary Restraining Order,
Temporary Injunction and Permanent Injunction**

Plaintiff the State of Texas replies to Defendant Chris Hollins’s Opposition to Plaintiff’s Application for Temporary Restraining Order, Temporary Injunction and Permanent Injunction (Defendant’s Response).

As explained in Plaintiff’s Application, Defendant lacks the power to send millions of unsolicited vote-by-mail applications to every registered voter in Harris County under the age of 65. Doing so would be *ultra vires*, and Plaintiff requests that the Court enjoin Defendant’s plan to do so.

In response, Defendant argues, “Section 84.013 of the Election Code specifically contemplates that individuals and organizations will broadly distribute vote-by-mail applications to voters, without limitation.” Defendant’s Response at 1; *see also id.* at 5, 10 (“The plain text of § 84.013 thus permits Hollins to distribute vote-by-mail applications to voters.”), 12, 13.

Section 84.013 does no such thing. It reads:

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.

The statute says absolutely nothing about how individuals or organizations *distribute* vote-by-mail applications to voters. It merely requires the Secretary of State to maintain a supply of printed copies of applications “in reasonable quantities” to meet demand. Plaintiff believes that Harris County prints its own applications, and doubts that Harris County has used copies obtained from the Secretary of State in living memory.

Because this statute does not address how Defendant distributes vote-by-mail applications, it does not support his argument.¹

Second, Defendant suggests that he has “broad authority” to conduct early voting. Defendant’s Response at 4. But this is not only nonresponsive to Plaintiff’s position, it is also unsupported by decades of caselaw from the Texas Supreme Court, which states that “a municipal power will be implied only when without its exercise the expressed authority would be nugatory.” *State ex rel City of Jasper v. Gulf State Utils. Co.*, 189 S.W.2d 693, 648 (Tex. 1945) (cleaned up) (quoting *Foster v. City of Waco*, 255 S.W. 1104, 1106 (Tex. 1926)); *see also, e.g., Town of Lakewood v. Bizios*, 493 S.W.3d 527, 536 (Tex. 2016). Tellingly, the only case he can find to support it involved *which* county officer had authority to “employ and discharge the court house engineer,

¹ Similarly specious is Defendant’s assertion that the Secretary’s position is inconsistent with the publication of an application on the Secretary’s website. The website is not sending an unsolicited application into a voter’s home. A voter who downloads the application, similar to one who requests an

janitor, and elevator operators.” *Anderson v. Wood*, 152 S.W.2d 1084, 1085 (Tex. 1941). The Court looked carefully at how the Constitution and various statutes divided authority to enter contracts relating to the county jail between the Commissioners Court and the Sheriff. *Id.* The Court concluded that the specific contract at issue did not fall within the specific grant of authority to the Sheriff, and by default fell into the contracting authority of the Commissioners Court which possesses general authority to contract for a County unless that authority is removed. *Id.* at 209. But Defendant can point to no such similar grant of broad authority under the Election Code. To the contrary, Defendant is granted only a subset of the presiding election judge’s authority during early voting. Tex. Elec. Code § 83.001(c).

Indeed, in contrast to the general grant of authority to the Commissioners Court to conduct a county’s business,² the Election Code spells out very specific authorities granted to the early-voting clerk, *see, e.g.*, Tex. Elec. Code §§ 84.012, 84.014, & 84.033, to the commissioners court, *see, e.g., id.* §§ 32.002, 42.001, and other public officials, *see, e.g.*, § 87.0431. And the principal provision that governs how Defendant distributes vote-by-mail applications is specific, not broad. It states, “[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 (emphasis added). The statute, in short, expressly conditions Defendant’s authority to mail applications on Defendant receiving a request

application from Defendant, has taken a conscious volitional act to seek out that application.

² Tex. Const. art. V, § 18 (“The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as

from the voter. Even assuming *arguendo* that Defendant could distribute vote-by-mail applications of his own volition to specific classes of voters who unquestionably are qualified to vote a mail ballot, the grant in the statute certainly does not cover indiscriminately distributing applications to every voter, regardless of their eligibility.

Finally, Defendant states, “Private parties and political campaigns avail themselves of this ability to send voters unsolicited applications to vote by mail. For instance, the Republican Party of Texas has sent unsolicited vote-by-mail applications to registered voters in Texas. *See, e.g.*, Ex. 5, Mailer attached to @CGHollins Tweet Regarding Mailed Applications to Vote by Mail.” Defendant’s Response at 5. Defendant maintains (Defendant’s Response at 11) that it would be nonsensical to allow these private parties to send out mailers but not allow the person who runs elections to do so. This gets the analysis exactly backwards: It is precisely *because* Defendant is charged with administering the election that receipt of mail-in ballot applications from him is likely to cause confusion. That is, the receipt of an application from his office implies that the recipient is allowed to use it. Similarly, his statements about the meaning of the law or the Supreme Court’s recent decision in *In re State*, 602 S.W.3d 549, 550, 560–61 (Tex. 2020), are likely to be assumed true regardless of whether they accurately reflect the relevant legal provisions and caselaw. Voters are not likely to give the same weight to an unsolicited mailing received from a political campaign. Moreover, the cited exhibit is a mailer to voters over 65. Such mailings are not at issue in this case.

may be hereafter prescribed.”).

More fundamentally, this is smokescreen. This case is about limitations on government power, not what private parties and political campaigns can do. Section 31.005 of the Election Code applies to government officials like Defendant, not private citizens. Private citizens cannot act *ultra vires*.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

Certificate of Service

I hereby certify that on September 8, 2020, in accordance with Texas Rule of Civil Procedure 21(a), a true and correct copy of the foregoing *Plaintiff's Reply to Defendant Chris Hollins's Opposition to Plaintiff's Application for Temporary Restraining Order, Temporary Injunction and Permanent Injunction* was served on all counsel of record using the Court's electronic filing system.

/s/ Charles K. Eldred
CHARLES K. ELDRED

Unofficial Copy Office of Marilyn Burgess District Clerk