No. 20-0729

In the Supreme Court of Texas

THE STATE OF TEXAS,
Petitioner,

v.

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

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

PETITION FOR REVIEW AND BRIEF ON THE MERITS

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Statement of the Case

Nature of the Case:	Defendant-Respondent Chris Hollins, in his capacity as the Harris County Clerk, plans to send unsolicited vote-by-mail applications to every registered voter in Harris County—more than two million of them. CR.195; RR.207. The State seeks to enjoin Hollins's action as *ultra vires* and in excess of the scope of a county clerk's authority under the Texas Election Code. CR.14-15.
Trial Court:	Along with its original petition, the State sought a temporary restraining order and a temporary injunction. CR.14. Hollins filed a written response to the State's motion for temporary injunction on September 8, 2020. CR.33-134.The trial court held a hearing on September 9, 2020. RR.1.
Disposition in the Trial Court:	The trial court denied the State's request for a temporary injunction for failure to show a likelihood of success on the merits on September 11, 2020. CR.289-95; App. A.
Parties in the Court of Appeals:	The State was the appellant in the Fourteenth Court of Appeals; Hollins was the appellee.
Disposition in the Court of Appeals:	Without addressing the State's likelihood of success on the merits, the Fourteenth Court of Appeals affirmed the trial court's denial of the temporary injunction on September 18, 2020, on the grounds that the State had not shown a likelihood of irreparable harm. App. B. The memorandum opinion was unpublished and per curiam. The panel consisted of Justices Spain, Hassan, and Poissant.

Statement of Jurisdiction

Texas Government Code section 22.001(a) affords this Court jurisdiction over this case, which presents an important question to the jurisprudence of the State. The decisions below fundamentally misunderstand the scope of power afforded to county officials in Texas. For a century, it has been settled law that county officials

lack power unless specifically granted. The trial court below presumed the opposite, declaring that Hollins had broad power unless the Legislature specifically denied it. Without addressing the merits of this ruling, the court of appeals held that the State was not harmed by such a fundamental shift in the balance of power between the State and its constituent local governments. Its ruling is contrary to both this Court's jurisprudence, *Yett v. Cook*, 281 S.W. 837, 842 (Tex. 1926), that of the United States Supreme Court, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 & n.17 (2018), and that of the Austin Courts of Appeals, *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 441 (Tex. App.—Austin 2018, pet. denied).

Issue Presented

For nearly a century, this Court has held that county officials have only those powers *specifically granted* or *necessarily implied* by the Legislature, and that the State is injured when a county official exceeds the limits of that power. Contrary to that settled law, the trial court held that because no statute expressly forbids early-voting clerks from sending unsolicited mail-in ballots, they must have the authority to do so. Without addressing that misinterpretation of the law, the court of appeals held that the State was not injured by Hollins's *ultra vires* action. The issue presented is whether Hollins's unlawful actions should have been enjoined.

To the Honorable Supreme Court of Texas:

Chris Hollins, the Harris County Clerk, plans to distribute unsolicited vote-by-mail applications to over two million registered voters in Harris County, even though the vast majority of those voters are not eligible to vote by mail, and even though the Election Code does not authorize such action. In Hollins's view, the Election Code "lays out minimums" of what he must do, but he may do more "to go above and beyond" what the Legislature permitted. RR.171. The trial court endorsed this view. The court of appeals ignored it, holding instead that Hollins may move forward with his plan on the mistaken view that Hollins's *ultra vires* action will not harm the State. Both courts erred, and in so doing worked a foundational shift in the balance of state and local power enshrined in our Constitution.

It has been the law of this State for nearly a century that county officials like Hollins lack power to take any official act unless that power is specifically granted. *E.g.*, *Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527, 536 (Tex. 2016); *Foster v. City of Waco*, 255 S.W. 1104, 1106 (Tex. 1923). And because the counties derive both their existence and their authority from the State, any "doubt concerning the existence of power" is resolved against the county. *Foster*, 255 S.W. at 1106. After all, a county is the State's agent, *see Yett*, 281 S.W. at 843, and an agent may not act without the authorization of its principal. Because neither Hollins nor the courts below have identified any statute authorizing Hollins to send out unsolicited applications to vote by mail, no such power exists.

It has also long been the law that the State is injured when public officials abuse the power delegated by its duly elected Legislature. Indeed, this Court recognized

nearly a century ago that "the state has a justiciable 'interest' in its sovereign capacity in the maintenance and operation of its municipal corporations in accordance with law." *Yett*, 281 S.W. at 842. The court of appeals recognized that this justiciable interest will support standing, but it held that it does not support a temporary injunction because *ultra vires* conduct does not "automatically result[] in harm to the sovereign." App. B at 7. That was error, and it conflicts with the Third Court of Appeals' recent decision in *Texas Association of Business v. City of Austin*, 565 S.W.3d 425, 441 (Tex. App.—Austin 2018, pet denied).

And even if injury to the State's sovereignty were not enough, the State presented ample and unrebutted evidence of the practical harm Hollins will cause with his mass mailing. This Court has never adopted the view that the first person to violate state law gets a free pass, and it should not do so here where the Secretary of State's long-serving Director of Elections has offered unrebutted testimony that Hollins's unlawful conduct will cause significant disruption in the upcoming November election.

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

Statement of Facts

I. Legal Background

A. Counties and county officials in our constitutional system

Under our Constitution, "[t]he several counties of this State are . . . legal subdivisions of the State." Tex. Const. art. XI, § 1. They are created at the will of the

Legislature "for the convenience of the people," *id.* art. IX, § 1, and the "powers conferred upon them are rather duties imposed than privileges granted," *Willis v. Potts*, 377 S.W.2d 622, 625 (Tex. 1964).

The constitutional position of counties stands in sharp contrast to that held by home-rule cities. Since 1911, cities of a certain size may adopt an appropriate charter and thereafter possess the "full power of local self-government," Tex. Loc. Gov't Code § 51.072, to the extent not "inconsistent with the Constitution of the State, or of the General Laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5(a). Such cities "need not look to the Legislature for grants of authority"—rather they have power to act unless the particular power has been withdrawn by the Legislature. *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 592 (Tex. 2018). For a brief period, the State experimented with affording counties the same ability to adopt a charter and engage in home rule. Tex. S.J. Res. 3, 43d Leg., R.S., 1933 Tex. Gen. Laws 983 (adopting former Tex. Const. art. IX, § 3). But no county ever went through this process, David B. Brooks, 35 *Tex. Prac., County and Special Dist. Law* § 1.9 (2d ed. 2019), and the counties' power to do so was repealed in 1969, Tex. H.J. Res. 3, 61st Leg., R.S., 1969 Tex. Gen. Laws 3230.

Because counties have no home-rule powers, it is well established that Harris County—and, by extension, Hollins as its agent—possesses only those powers that the Legislature specifically grants. *Bizios*, 493 S.W.3d at 536.

B. Mail-in ballots and the power of early-voting clerks

It is equally well-established that Hollins may not manage the vote-by-mail process as he sees fit. "The history of absentee voting legislation in Texas shows that

the Legislature has been both engaged and cautious in allowing voting by mail." *In re State*, 602 S.W.3d 549, 558 (Tex. 2020) (orig. proceeding). A qualified voter may vote by mail only if (a) "the voter expects to be absent from the county of the voter's residence on election day," Tex. Elec. Code § 82.001(a); (b) the voter "has a sickness or physical condition" that prevents the voter from voting in person, *id.* § 82.002(a); (c) the voter is at least 65 years of age on election day, *id.* § 82.003; or (d) "at the time the voter's early voting ballot application is submitted, the voter is confined in jail," *id.* § 82.004(a).

In addition to closely controlling who is qualified to vote by mail, the Legislature has carefully controlled the process by which voters apply to vote by mail. It first adopted rules regarding what information the application must contain in 1931, Act of May 5, 1931, 42d Leg., R.S., ch. 105, 1931 Tex. Gen. Laws 180, 180-81; and it has amended the application rules numerous times in the intervening 90 years, *see, e.g.*, Act of May 10, 1935, 44th Leg., R.S., ch. 300, § 1, 1935 Tex. Gen. Laws 700, 700; Act of May 29, 1965, 59th Leg., R.S., ch. 678, §§ 5-9, 1965 Tex. Gen. Laws 1552, 1555. Indeed, the Legislature has fine-tuned all aspects of the mail-in ballot process, down to when county clerks may appoint deputies to assist in "receiving applications and accepting absentee ballots." Act of March 14, 1945, 49th Leg., R.S., ch. 30, § 1, 1945 Tex. Gen. Laws 48, 48 (allowing such appointment for counties with populations over 4,000). This history reflects consistent and considerable concern that—if not properly controlled—the process could "lead to certain illegal activities because people can gain access to mail-in ballots." Sen. Comm. on State Affairs, Bill Analysis, Tex. H.B. 1483, 75th Leg., R.S. (June 17, 1997).

Currently, to receive a ballot to vote by mail, an eligible voter "must make an application for an early voting ballot to be voted by mail as provided by this title" and send it to the early-voting clerk in the voter's jurisdiction. Tex. Elec. Code §§ 84.001(a), (d). Applications must provide statutorily required information but need not take any particular form. *Id.* §§ 84.001(c), (f). To make the submission process easier, the Secretary of State has created and maintained a standard form application since the 1970s. *See* Act of May 28, 1977, 65th Leg., R.S., ch. 668, §§ 1(a)-(b), 1977 Tex. Gen. Laws 1687, 1687 (then-codified in Tex. Elec. Code art. 5.05). By law, the Secretary must maintain a supply of these forms to be provided upon request to either individuals or organizations. Tex. Elec. Code § 84.013.

Defendant-Respondent Chris Hollins is the early-voting clerk for Harris County. As an early-voting clerk, Hollins "is an officer of the election in which [he] serves." *Id.* § 83.001(b). He is to "conduct the early voting in each election" in accordance with the terms of the Election Code. *Id.* § 83.001(a). Relevant here, Hollins is empowered (and required) to "mail without charge an appropriate official application form for an early voting ballot to each applicant *requesting*" such an application. *Id.* § 84.012 (emphasis added); *see also id.* § 1.010(b). The Legislature has not, however, granted county early-voting clerks the power to send out unsolicited applications for mail-in ballots.

II. Hollins's Disregard of the Limits of His Authority

Hollins, who assumed office in June, has a "really broad" understanding of his own power. RR.134.[1] In his view, "the code lays out minimums" of what he must do. RR.171. But Hollins believes that he may—and should—go "above and beyond" what the Legislature permits, doing whatever he considers to be good "customer service," RR.171; *see also, e.g.*, RR.143 ("I would say that my authority to conduct and manage early voting gives me very broad authority."). His "broad authority," he claims, allows him to make innumerable policy choices, RR.134, some of which are both unauthorized by the Election Code and likely to mislead or cause significant confusion among voters, RR.82-83.

As pertinent here, Hollins's office announced on August 25, 2020, via Twitter that it "will be mailing every registered voter an application to vote by mail." RR.195. The tweet also stated "Check your mail! Every Harris County registered voter will be sent an application to vote by mail next month." RR.195. This is in addition to the nearly 400,000 mail-in ballot applications Hollins's office sent to voters who are aged 65 and older ahead of the July primary runoff. RR.122-23; *see also* Shelley Childers, *Nearly 400K Vote-by-Mail Applications Sent to Harris Co. Seniors Ahead of Election*, ABC (June 11, 2020), https://tinyurl.com/y8b59mds.

Most of the individuals targeted by Hollins's latest proposed mass mailing are not eligible to vote by mail. Currently, there are approximately 2.4 million people

[1] Hollins was appointed to replace Diane Trautman following her May resignation. Zach Despart, *Texas Democratic Party Official Appointed Interim Harris County Clerk*, Hous. Chron. (May 19, 2020), https://tinyurl.com/y3ukjmkm.

registered to vote in Harris County. RR.123; *see also* Tex. Secretary of State, *Harris County Voter Registration Figures*, https://www.sos.state.tx.us/elections/historical/harris.shtml (last visited Sept. 21, 2020). As of July 1, 2019, only 10.9% of the Harris County population is 65 years old or older. RR.251. Only an estimated 6.4% of those under 65 years old has a disability, and it is unclear how many of those disabilities prevent a voter from voting in person. RR.251. Though Hollins has criticized this figure as relying on a narrower definition of "disability" than contained in the election code, *also* Appellee's Resp. to Rule 29.3 Motion at 6 n.2, *State v. Hollins*, 14-20-00627-CV (Tex. App.—Houston [14th Dist.] 2020, pet. filed), historically, between 1.0% and 2.6% of voters requesting vote-by-mail applications have listed "disability" as the reason. RR.348. Finally, the number of eligible voters who are confined in jail or expect to be absent from the county is necessarily small. RR.348 (reflecting total applications requested under these categories in 2016).

On August 27, 2020, Keith Ingram, Director of Elections for the Texas Secretary of State, sent a letter pressing Hollins to halt his unlawful mailing. RR.202-03. The Secretary had concluded, Ingram explained, that Hollins's proposed mailing was an abuse of voters' rights. RR.202 (citing Tex. Elec. Code § 31.005). Ingram explained that "[a]n official application from [Hollins's] office will lead many voters to believe they are allowed to vote by mail, when they do not qualify." RR.202. Moreover, sending applications to every registered voter would "impede the ability of persons who need to vote by mail to do so" by "[c]logging up the vote by mail infrastructure with potentially millions of applications from persons who do not qualify to vote by mail." RR.202.

III. Procedural History

When Hollins refused to change course, the State, acting by and through Attorney General Ken Paxton, filed this suit seeking temporary and permanent injunctive relief against Hollins's *ultra vires* action in the early afternoon of August 31. CR.4-16. The State also sought a temporary restraining order to prevent Hollins from acting in advance of a hearing on the State's requested relief. CR.13-14. The trial court never ruled on that request, however, because the parties reached a Rule 11 agreement. CR.24. This Court has since enjoined any mass mailing of unsolicited applications in order to preserve its own jurisdiction. Stay Order, *In re State*, No. 20-0715 (Sept. 15, 2020) (orig. proceeding).

In his response to the State's request for a temporary injunction, Hollins could not point to a single statute authorizing his actions. Instead, Hollins argued he is free to send out unsolicited applications because he has broad general power to manage early voting, and that there is no statute prohibiting him from sending unsolicited applications. CR.47-49. In his written response, Hollins did not contest that if the State is right on the law, and he lacks authority to mail unsolicited applications, the State will suffer an irreparable injury absent immediate relief. *See generally* CR.35-51.

The trial court held a hearing on the State's request for a temporary injunction on September 9. The court heard testimony from Hollins himself about his views on the limits of his power—or lack thereof. Hollins explained in detail his view that the Election Code gives him "very broad authority" to "make decisions about the administration of the election." RR.143. In Hollins's mind, the Election Code "lays out minimums" and "generally what [he is] allowed to do," but he is empowered

"to go above and beyond" what the Legislature permitted. RR.141, 171. Hollins did not explain how he has come to that conclusion during his brief tenure. By contrast, Ingram—who has served in his capacity as Director of Elections for a decade—explained that "[t]hat's not the way the Election Code works." RR.81. The Election Code starts from the well-established presumption that county officials cannot act without authorization, and it "allows things. It doesn't prohibit everything that's possible. . . . And what it allows in [section] 84.012 is for the Clerk to send applications to people who request[] them." RR.81.

On the question of irreparable harm, Ingram further explained that allowing Hollins's unlawful action would likely lead to increased voter confusion, which would ultimately deplete the Secretary of State's resources in resolving those problems. RR.63-64. Ingram also testified that sending out millions of applications to voters who are most likely ineligible to vote by mail will overwhelm the vote-by-mail infrastructure and invite potential voter fraud. RR.68-70. And worse, Ingram said, the possibility of increased voter fraud will lead to distrust for the election process and actual or perceived disenfranchisement of Harris County voters. RR.61-62.

Hollins did not offer any testimony contradicting these harms.

The *court* raised the question whether Ingram's testimony was speculative. The State acknowledged that it had no direct evidence of how an act like Hollins's has affected a prior election. But at the court's request, RR.84-85, Ingram explained why: *Hollins's act is entirely* "*unprecedented.*" RR.85 (emphasis added). Ingram relied on his experience at the Secretary of State's office in handling somewhat similar situations when he emphasized that "nobody has ever done this before." RR.85. He

elaborated that "[t]his is [the] first time in almost nine years in [his] job that" Ingram has "had to send a letter like this to a county." RR.84. Nevertheless, Hollins's counsel seized on the court's suggestion, arguing for the first time during closing remarks that the State had failed to meet its burden of proof on irreparable harm. RR.185; *see also* Appellee's Resp. to Rule 29.3 Motion at 22-23 (citing RR.185).

The trial court allowed both parties to submit additional briefing and evidence on the issues of irreparable harm and whether the State's requested injunction is precluded because the State chose not to challenge the Harris County Clerk's office's earlier mailing to voters over the age of 65. RR.189-91. The State complied, providing numerous authorities supporting its irreparable harm and establishing that the State's discretionary enforcement decisions are not subject to judicial review. CR.263-70. Hollins, by contrast, offered nothing more than conclusions of law. CR.273-82. And, lacking any citation to any case or exhibit, Hollins's conclusions of law failed to rebut the irreparable harm the State will suffer in the absence of relief. Nor did Hollins offer any proof of harm that he or his office would suffer if the injunction were granted—aside from his inability to complete his unlawful action in time for this election.

Without addressing any of the authorities provided by the State, the trial court denied the State's requested relief on September 11. CR.289-95. It concluded that the Election Code grants early-voting clerks "broad statutory authority," and that there is nothing in section 84.012 limiting that authority. CR.293. In particular, the court relied on section 1.010 of the Election Code. CR.292. The trial court also chided the State for supposedly engaging in "arbitrary and selective objection" in

this case compared to the State's decision not to sue Harris County for sending out applications to registered voters *over* the age of 65, who are invariably qualified to vote by mail. CR.295.[2]

The State filed an immediate notice of interlocutory appeal under Civil Practice and Remedies Code section 51.014(a)(4). CR.287-88. The court of appeals ordered the State to file its opening brief on the merits in less than 36 hours, declined to hear oral argument, and issued its ruling affirming the trial court in the afternoon of September 18. App. B.

Unlike the trial court, the court of appeals did *not* endorse Hollins's extraordinary view of his own authority to act without statutory authorization. Indeed, the State's likelihood of success on the merits is never mentioned. *Cf. id.* Yet the court of appeals concluded Hollins should be allowed to continue his action because in its view "[t]he State failed to meet its burden to prove 'probable, imminent, and irreparable injury,'" *id.* at 6 (emphasis omitted), and thus is not entitled to an order "'preserv[ing] the status quo of the litigation's subject matter pending a trial on the merits,'" *id.* at 5 (quoting *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002)). It rejected the inherent injury to the State that flows from the *ultra vires* actions of county officials as well as the evidence that Hollins's behavior is likely to cause considerable disruption in the upcoming election.

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[2] Though the trial court also discussed a "Section 31.005 Claim," CR.293-95, that was in error. This action is brought by the State by and through Attorney General Ken Paxton. The State has brought a single claim based on *ultra vires* action. The Secretary of State is not a party to this case.

The State immediately notified this Court of its intent to petition for review of this decision. Letter from Solicitor General of Texas Kyle D. Hawkins to Clerk of the Supreme Court of Texas Blake Hawthorne, *In re State*, No. 20-0715 (Tex. Sept. 18, 2020) (orig. proceeding). The Court ordered the State to file this brief as both a petition for review and a brief on the merits. Order, *State v. Hollins*, No. 20-0729 (Tex. Sept. 18, 2020).

Summary of the Argument

To establish entitlement to a temporary injunction, the State had to show three elements: (1) a cause of action; (2) a probability of success on the merits; and (3) a likelihood of irreparable harm without interim relief. *See Butnaru*, 84 S.W.3d at 204. The trial court concluded that the State failed to satisfy the second element: a probability of success on the merits. CR.291-93. The court of appeals expressed no opinion on the matter, instead ruling only that the State had not shown a likelihood of irreparable harm. App. B at 6. Both courts erred.

The trial court misevaluated the State's likelihood of success on the merits. As a matter of law, any action that Hollins takes that has not been authorized by the Legislature is *ultra vires.* The Legislature has not authorized Hollins—or any other county official—to send out unsolicited mail-in ballot applications. Therefore, the State has demonstrated both a cause of action and a likelihood of success on the merits as a matter of law. Hollins cannot avoid this conclusion by citing a handful of general statutes or pointing to the State's prior enforcement practices. The Legislature decides what power Hollins possesses, and it has not given him the broad, open-

ended authority to manage the election process—much less its carefully articulated vote-by-mail rules—that he claims.

The court of appeals erred in holding that the State failed to show irreparable harm. As an initial matter, the State demonstrated a likelihood of irreparable harm to its "intrinsic right to enact, interpret, and enforce its own laws." *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015) (citing *Printz v. United States*, 521 U.S. 898, 912 n.5 (1997)). The court of appeals acknowledged this right for the purposes of supporting standing but concluded this right is nonetheless too insubstantial to support a temporary injunction. App. B at 7-10. This conclusion ignores both widespread precedent and *why* state sovereignty is important: It "is not just an end in itself," but "secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992). Put another way, our Constitution entrusts to the Legislature the power to determine the rules by which we are governed. The State—and by extension the people—are hurt any time that design is upset by the whims of a local official who is displeased that "customer service in general is not in the code." RR.171. That injury cannot be recompensed any other way. And the State is entitled to an injunction preventing such harm, even when the unprecedented nature of the official's conduct makes it impossible to show how similar conduct has caused harm in the past.

Standard of Review

A trial court's decision to deny a temporary injunction is reviewed for abuse of discretion. *Butnaru*, 84 S.W.3d at 204; *see also, e.g.*, *Harris County v. Gordon*, 616 S.W.2d 167, 168 (Tex. 1981). A trial court abuses its discretion when it "acts with-

out reference to guiding rules or principles or in an arbitrary or unreasonable manner." *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018) (per curiam) (orig. proceeding). In that regard, a court "has no 'discretion' in determining what the law is or applying the law to the facts." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). Accordingly, "a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion." *Id.*; *see also, e.g.*, *In re Geomet Recycling LLC*, 578 S.W.3d 82, 91-92 (Tex. 2019) (orig. proceeding).

ARGUMENT

I. The State Has Established a Cause of Action and Likelihood of Success on the Merits.

The trial court erred when it concluded that Hollins has power to send out unsolicited vote-by-mail applications. Contrary to Hollins's perceptions, Hollins's authority to manage the mail-in ballot process does not give him "broad" powers to take any action relating to that process which the Legislature has not forbidden. Instead, the Election Code carefully spells out precisely what actions may be taken and by whom. Hollins has only the powers given expressly or by necessary implication. And none of the statutes cited by Hollins or the courts below provide Hollins with the broad power he claims.

A. It is well established that county officials possess only those powers specifically delegated by the Legislature.

It is well-established law that, as a subdivision of the State of Texas, Harris County has no sovereign power of its own: It "is a subordinate and derivative branch of state government." *Avery v. Midland County*, 406 S.W.2d 422, 426 (Tex. 1966),

vacated on other grounds, 390 U.S. 474 (1968); *see* Tex. Const. art. IX, § 1; Tex. Const. art. XI, § 1. As a political subdivision, the County "possess[es] only such powers and privileges" as the State confers upon it. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430 (Tex. 2016); *e.g.*, *Guynes v. Galveston County*, 861 S.W.2d 861, 863 (Tex. 1993); *Quincy Lee Co. v. Lodal & Bain Engineers, Inc.*, 602 S.W.2d 262, 264 (Tex. 1980). Hollins is an agent of Harris County and cannot take any action in his official capacity that exceeds the scope of the County's powers.

Tellingly, the only case that Hollins cited in the trial court (at CR.46) to support his broad view of his own power involved not whether a county had authority to act in the first place, but *which* county officer had authority to "employ and discharge the court house engineer, janitors, and elevator operators." *Anderson v. Wood*, 152 S.W.2d 1084, 1085 (Tex. 1941). In *Anderson*, this Court looked carefully at how the Texas 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 contract at issue did not fall within the specific grant of authority to the Sherriff, but instead within the authority of the Commissioners Court, which possesses general statutory authority to contract for a county. *Id.* at 1088. Hollins can point to no such general grant of authority. Put another way, he is the Sheriff in *Anderson*. And, like that Sheriff, Hollins only has the power granted to him by the Legislature. The trial court apparently agreed because it did not cite *Anderson* in its order denying the State's temporary injunction. *See* CR.289-95.

Hollins appears to now concede that *Anderson* does not support his view that he may go "above and beyond" the powers granted to him by the Election Code.

Indeed, though it was his only authority before the trial court, his appellate brief did not mention it at all. *Cf.* Appellee's Br., *State v. Hollins*, No. 14-20-00627-CV (Tex. App.—Houston [14th Dist.] 2020, pet. filed). Instead, Hollins has changed tacks and asserted to the court of appeals that the Legislature explicitly granted him the power he claims by allowing him to "manage" the early-voting process. *Id.* at 10-20; *see also* Motion to Vacate at 3, *In re State*, No. 20-0715 (Tex. Sept. 18, 2020) (orig. proceeding). The court of appeals notably did not adopt this reasoning. *See generally* App. B.

B. The Legislature has not allowed county officials to send unsolicited mail-in ballot applications.

Hollins lacks statutory authority to mail millions of unsolicited mail-in ballot applications. In construing a statute, this Court's "objective is to determine and give effect to the Legislature's intent." *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008). In doing so, the Court "consider[s] it 'a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent.'" *Id.* (quoting *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999)). That is, the Court presumes the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). Moreover, it "read[s] statutes as a whole so as to render no part inconsistent, superfluous, or devoid of meaning." *Levinson Alcoser Assocs., L.P. v. El Pistolon II, Ltd.*, 513 S.W.3d 487, 493 (Tex. 2017).

Nothing in the Election Code empowers Hollins to administer the entire early-voting process as he sees fit. Instead, 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 to other public officials, *see, e.g.*, *id.* § 87.0431. And none of the provisions cited by either Hollins or the trial court give power to early-voting clerks—or any other county official, for that matter—to send out these applications without request.

1. Hollins's general power to "manage" or "conduct" the mail-in ballot process does not create general power to determine the rules by which the process is governed.

Hollins's theory regarding what statute empowers him to send unsolicited applications to vote by mail has been something of a moving target. In the court of appeals, he relied most heavily on his general responsibility "for the management and conduct of" early voting in Harris County, under Texas Election Code sections 32.071 and 83.001(a). Appellee's Br. 2, 10-18. This argument, however, runs afoul of one of the most basic and frequently recited principles of statutory construction: "While [this Court] must consider the specific statutory language at issue, [it] must do so while looking to the statute as a whole, rather than as 'isolated provisions.'" *In re State*, 602 S.W.3d at 559 n.56 (quoting *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014)). This principle "calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). When read in context, the provisions allowing an early-voting clerk to "manage" or "conduct" early voting are far more limited than Hollins portrays.

Indeed, when read in context, Hollins's entire argument hangs on one statutory provision: Texas Election Code section 32.071, which provides that "[t]he presiding judge is in charge of and responsible for the management and conduct of the election at the polling place of the election precinct that the judge serves." Subsections 83.001(a) and (c) provide that the early-voting clerk has the same powers during the early-voting period as section 32.071 provides to the presiding judge on election day.[3] Section 83.002 merely identifies for what elections county clerks like Hollins serve as the early-voting clerk. As a result, Hollins's argument rises and falls on the meaning of section 32.071.

Section 32.071, however, relates to one subchapter of chapter 32 of the Election Code. Far from providing the presiding election judge general authority to run elections as he sees fit, it simply identifies who is responsible for such tasks as setting working hours for election clerks, Tex. Elec. Code § 32.072; administering oaths, *id.* § 32.074; and taking action to prevent breaches of the peace at the polls, *id.* § 32.075. Election judges, including presiding judges, are appointed by the Commissioners Court (or another governing body) to perform very specific functions. *Id.* § 32.002. Section 32.071 does *not* allow the presiding election judge, for instance, to increase the number of election clerks, *id.* § 32.033, even though he is given the power to

[3] Many of these rules make little sense in the context of mail-in voting, but Hollins is incorrect to equate early voting with voting by mail. *See* Appellee's Br. 2. Most early voting occurs in person, meaning that someone must be provided with the same power to manage the polling place as the presiding election judge has on election day. *See* Tex. Elec. Code § 82.005. The Legislature chose a county clerk as that person for many elections. *Id.* §§ 83.001(a), 83.002.

appoint such clerks, *id.* § 32.002. Section 83.001 similarly identifies the early-voting clerk as the person to administer the rules set by the Legislature for early voting, but it does not allow him to go "above and beyond" those rules as Hollins apparently believes. RR.141, 171.

2. Section 84.012 does not empower early-voting clerks to send out unsolicited mass mailings.

The Legislature's rule for when an early-voting clerk is empowered to send applications to vote by mail is instead found in Texas Election Code section 84.012. Section 84.012 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."

On its face, section 84.012 of the Election Code instructs early-voting clerks to send applications only *at the request of a voter*. Courts presume that the Legislature understood—and followed—the rules of English grammar. Tex. Gov't Code § 311.011; *see also* Scalia & Garner, *supra* at 140 (describing presumption as "unshakeable"). Here, the indirect object of the sentence—that is, the person affected by the verb to whom the application may be sent—is "each applicant requesting the clerk to send the applicant an application form." *See* Sidney Greenbaum, *The Oxford English Grammar* §§ 3.17, 5.3 (1996). The modifying phrase "requesting" is a limiting one, meaning that people who have not requested applications are not among those to whom an application may be mailed. *Id.* at §§ 5.6, 5.8-5.9. Thus, section 84.012 empowers Hollins to send applications only to those who have requested them.

This conclusion is further supported by the title of the section: a "Clerk [is] to Mail Application Form on Request." Though the title of a statutory section "does not limit or expand the meaning of a statute," Tex. Gov't Code § 311.024, it is well settled that a "heading gives some indication of the Legislature's intent." *In re United Services Auto. Ass'n*, 307 S.W.3d 299, 307 (Tex. 2010) (orig. proceeding); *see In re State*, 602 S.W.3d at 564 (Boyd, J., concurring); Scalia & Garner, *supra* at 221-22 (stating that holistic statutory interpretation requires consideration of all statutory terms, including section headings). Here, both the title of section 84.012 and its text tie a clerk's power to send a ballot to a request from the voter. The section does not empower Hollins to do so unsolicited. Indeed, Hollins has never seriously argued otherwise.

The trial court, however, misunderstood the significance of section 84.012. It construed the State's argument to be that section 84.012 contains an implicit prohibition on unsolicited mailings, and then rejected that strawman argument on the ground that it cannot add words to section 84.012. CR.292-93. But the State never made such a request because the State does not have to point to a prohibition on unsolicited mailings. *E.g.*, *Bizios*, 493 S.W.3d at 536. The baseline assumption is that Hollins lacks authority unless it is specifically granted by statute. *E.g.*, *Wasson Interests*, 489 S.W.3d at 430. The State points to section 84.012 because it is the only provision in the Election Code that expressly and specifically empowers Hollins to send mail-in ballot applications. Because it does not allow Hollins to do so absent a request, Hollins lacks such authority—regardless of whether section 84.012 *prohibits* unsolicited mailings. There would have been no need to expressly empower the

early-voting clerk to mail applications upon request if he already had unlimited power to mail applications. So Hollins's reading would render section 84.012 superfluous.

Indeed, if anyone is trying to alter the text of section 84.012, it is Hollins and the trial court. They seek to excise the second half of section 84.012, which requires a request from the voter. And this Court may not remove language included by the Legislature any more than it can insert language that the Legislature omitted. *See Ferreira v. Butler*, 575 S.W.3d 331, 337 (Tex. 2019) ("As we have said countless times, courts must construe a statute's words according to their plain meaning because changing the meaning of a statute by adding words to it is a legislative function, not a judicial function.") (cleaned up); *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920) ("Courts must take statutes as they find them.").

3. Section 84.013 does not address early-voting clerks' power at all.

Hollins has tried to avoid this conclusion by citing a number of other provisions that are not directly applicable to when an application by mail should be sent. For example, Hollins has argued that he has authority to send unsolicited applications because "[s]ection 84.013 of the Election Code specifically contemplates that individuals and organizations will broadly distribute vote-by-mail applications to voters, without limitation." CR.35; *see also* CR.39, 44 ("The plain text of [section] 84.013 thus permits Hollins to distribute vote-by-mail applications to voters."), 46-47. The trial court made reference to section 84.013 in its order, CR.292, but the significance of the statute to its analysis is unclear. To the extent that the court concluded that 84.013 granted *any* power to Hollins, this was error for at least three separate reasons.

First, section 84.013 is not addressed to the power or duties of early-voting clerks at all. To help ensure efficiency and uniformity, the Secretary of State has been required to create an official ballot application since the 1970s. Act of May 28, 1977, 65th Leg., R.S., ch. 668, § 1(a)-(b), 1977 Tex. Gen. Laws 1687, 1687-88. Section 84.013 simply requires the Secretary to maintain adequate copies of that official applications to meet demand:

> 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.

Tex. Elec. Code § 84.013. The section does not empower early-voting clerks like Hollins to take any action at all.

Second, section 84.013 says nothing about how individuals or organizations *distribute* vote-by-mail applications to voters. It contemplates that unspecified individuals or organizations may wish to distribute applications to vote by mail. But it merely requires the Secretary of State to maintain a supply of printed copies of applications "in reasonable quantities" to meet demand. Because the term "maintain" is not defined by statute, the Court should consult applicable dictionary definitions to determine a statutory term's common, ordinary meaning. *City of Fort Worth v. Rylie*, 602 S.W.3d 459, 467 n.19 (Tex. 2020). The ordinary meaning of "maintain" is to "keep in a state of repair, efficiency or validity." *Webster's Third New Int'l Dictionary* 1362 (2002 ed.). The only term in section 84.013 that empowers further action is the term "furnish," which the Secretary must do without charge *on request. See infra* at 25.

Because section 84.013 does not address how Hollins (or anyone else) distributes vote-by-mail applications, it does not support his argument.

Third, Hollins's reliance on this subsection depends on the notion that he is an "individual[]" and that the Harris County Clerk's office is an "organization," and that they are treated the same as private individuals under the statute. Appellee's Br. 18-19. As an initial matter, Hollins's assumption that private individuals routinely distribute applications to vote by mail to all registered voters is belied by the record. Ingram testified that the Secretary has advised individuals and organizations that they should *not* send out unsolicited applications to people under the age of 65. RR.67-69. He has only heard of two campaigns that have sent unsolicited vote-by-mail applications to persons under 65, and that no campaign had done so before this year. RR.50, 57-58, 68, 75-76, 92-93.

Moreover, Hollins is comparing apples to oranges when he conflates what the State has empowered him to do as a county clerk with what private individuals are free to do. Distributing information associated with a political campaign is typically considered core political speech protected under the First Amendment. *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011); *Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010). Private individuals and non-governmental organizations have First Amendment rights. *See Citizens United*, 558 U.S. at 353. By contrast, Hollins has admitted that he is sending out these applications in his official capacity. RR.15-16. When Hollins acts in his official capacity as early-voting clerk, he is acting on behalf of the State. *See supra* at 14-16. And the State may control the speech of its agents in carrying out the State's business. *See Garcetti v.*

Ceballos, 547 U.S. 410, 421-22 (2006). As a result, it is improper to extrapolate that because the State has not banned private individuals from distributing campaign materials, it cannot prevent Hollins from doing so in his official capacity.[4]

4. Section 1.010 does not empower Hollins to send applications not authorized by section 84.012.

Similarly misplaced is the trial court's apparent reliance on section 1.010(a) of the Election Code. CR.292-93. Section 1.010(a) provides that when the Election Code "requires an application, report, or other document or paper to be submitted or filed," the relevant authority must "make printed forms for that purpose, as officially prescribed, readily and timely available." Tex. Elec. Code § 1.010(a). Hollins asserts that by sending out unsolicited applications he is simply making them "available." *E.g.*, Appellee's Br. 12-13. The trial court evidently agreed as it relied on this provision as evidence of the "Legislature's desire for mail voting applications to be freely disseminated." CR.292. This reasoning, however, contradicts at least three core canons of statutory construction.

First, it is another textbook example of "failure to follow the whole-text canon." Scalia & Garner, *supra* at 167. In particular, Hollins and the trial court ignore the very next subsection, which says that the "authority shall furnish" those forms "in a reasonable quantity to a person *requesting them*." Tex. Elec. Code § 1.010(b) (emphasis

[4] The State is not, as Hollins suggested in the court of appeals, asking this Court to read "private" into section 84.013. Appellee's Br. 19. It simply notes that what the State empowers public officials to do is governed by a different standard from what it does (or does not) ban private individuals from doing.

added). The Court presumes that when the Legislature uses different words in different subsections of the same statute, the Legislature intended different meanings. *See Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 564 (Tex. 2016) ("'[W]hen the legislature uses certain language in one part of the statute and different language in another, the Court assumes different meanings were intended.'" (quoting *DeWitt v. Harris County*, 904 S.W.2d 650, 654 (Tex. 1995))).

This case involves a question of when an early-voting clerk may *furnish* an application—not whether he has made them available. The common understanding of "furnish" is "to provide or supply with what is needed, useful, or desirable." *Webster's*, *supra* at 923; *see also, e.g.*, *New Oxford American Dictionary* 705 (2010) (defining furnish as "to supply someone with (something); give (something) to someone"); Bryan A. Garner, *Garner's Dictionary of Legal Usage* 382 (2011) (describing "furnish" as an alternative to "deliver, give, assign, transmit, and the like"). And section 1.010 gives election officials the power to provide forms only "to a person requesting them." Indeed, this is consistent with section 84.013, which requires the Secretary to maintain copies of the forms, but empowers her to "furnish the forms in reasonable quantities without charge to individuals or organizations requesting them."

The difference between "furnishing" and "making available" can be best demonstrated by examining one of Hollins's army of strawmen: the fact that various election officials have posted mail-in ballot applications online. Hollins has argued that there is no principled distinction between posting applications online and mailing unsolicited ballot applications. CR.45-46. The trial court appears to have accepted that argument. CR.292, 295. But the act of posting the application online

through a weblink is simply the act of making it "available"—that is, to make something "able to be used *or obtained*; at one's disposal." *New Oxford American Dictionary*, *supra* at 111 (emphasis added); *cf. Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 477 (5th Cir. 2020) (en banc) (holding that a utility makes service available when it has "adequate facilities to provide service to the area within a reasonable time after a request for service is made"—being ready to provide service at a moment's notice is not required). An application that is posted via weblink is "able to be obtained," like an application sitting in a county office is "able to be obtained." But the application is not "furnished"—that is, provided to the requestor—unless and until the website user clicks on the link—that is, makes an electronic request. *Cf.* Garner, *supra* at 382 (noting that "furnish" is used for a nonspecific "means of supplying a thing").

Second, Hollins's argument is contrary to the general rule that "[w]hen interpreting a statute, [courts] presume the Legislature intended the entire statute to be effective and none of its language to be surplusage." *Tafel v. State*, 536 S.W.3d 517, 521 (Tex. 2017) (per curiam). If making applications "available" as required by section 1.010(a) meant delivering them to voters, there would be no need for section 1.010(b). It is also profoundly unclear what work section 84.012 would do if section 1.010(a) already required early-voting clerks to deliver vote-by-mail applications directly to voters.

Instead, the better reading is that section 1.010(a) (like section 84.013) simply requires the specified officials to have the applications on hand in the event of a request. Section 1.010(b) specifies that any form must be "furnish[ed]" on request.

Sections 84.012 and 84.013 further require that when the requested form is an application to vote by mail, that application must be "mailed" or otherwise "furnished" "without charge." Far from being absurd as Hollins suggests, reading the provisions in this way complies with the Court's obligation to read different provisions in harmony and to give every term in the statute independent meaning. *See, e.g.*, *Pedernal Ener., LLC v. Bruington Eng'g, Ltd.*, 536 S.W.3d 487, 491 (Tex. 2017) ("We construe statutes so that no part is surplusage, but so that each word has meaning."); *Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 66 (Tex. 2014) (Boyd, J., dissenting) ("It has been said that courts can ignore a statute's unambiguous language only when 'the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.'" (quoting Scalia & Garner, *supra* at 237 & Joseph Story, *Commentaries on the Constitution of the United States* § 427 (1833))).

Third, even if there were a conflict between sections 1.010 and 84.012 (and there is not), under ordinary rules of construction, section 84.012 would control. Under the Code Construction Act, "[i]f the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision unless the general provision is the later enactment and the manifest intent is that the general provision prevail." Tex. Gov't Code § 311.026(b). This provision codifies what has long been the law in Texas. *E.g.*, *Graphic Packaging Corp. v. Hegar*, 538 S.W.3d 89, 98 (Tex. 2017); *Sam Bassett Lumber Co. v. City of Houston*, 198 S.W.2d 879, 881 (Tex. 1947). As a result, the Court first tries to reconcile the conflict, which it can easily do as the State explains above.

Graphic Packaging, 538 S.W.3d at 98. But, in the event of an irreconcilable conflict, section 84.012, which empowers early-voting clerks to mail applications to vote by mail upon request, governs over section 1.010, which more generally provides for the availability of forms of all kinds. *E.g.*, *Harris County Appraisal Dist. v. Tex. Workforce Comm'n*, 519 S.W.3d 113, 122 (Tex. 2017); *Armour Pipe Line Co. v. Sandal Ener., Inc.*, 546 S.W.3d 455, 462 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

5. Hollins's actions cannot be upheld on the ground of implied power.

Finally, though Texas law recognizes the concept of implied powers for subdivisions of the State, this principle cannot support Hollins's decision to send unsolicited applications to two million voters absent any statutory authorization to do so. By way of contrast: In ratifying the United States Constitution, Texas agreed that the United States Congress would possess the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution [its enumerated] Powers." U.S. Const. art. I, § 8, cl. 18. And the United States Supreme Court has interpreted that clause to encompass a "broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *United States v. Comstock*, 560 U.S. 126, 133-34 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 413, 418 (1819)). There is, however, no equivalent clause in the Texas Constitution empowering counties.

Instead, municipalities and their officials have power "necessarily implied to perform [their] duties." *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003). A power can be implied only if it is "indispensable" to an express grant of authority. *Foster*, 255 S.W. at 1105–06. Consequently, "[a]ny fair, reasonable,

substantial doubt concerning the existence of power is resolved by the courts against the [county], and the power is denied." *Id.* at 1106.

Put another way, it is not enough that Hollins—or a court—views the additional powers as potentially helpful to carrying out a duty assigned to Hollins under the Election Code. Instead, this Court has repeatedly held that "a municipal power will be implied only when without its exercise the expressed authority would be rendered *nugatory*." *State ex rel. City of Jasper v. Gulf State Utils. Co.*, 189 S.W.2d 693, 698 (Tex. 1945) (cleaned up) (emphasis added) (quoting *Foster*, 255 S.W. at 1106); *see also, e.g.*, *Bizios*, 493 S.W.3d at 536 (reiterating that county's implied powers are only those that are "*indispensable*" to carrying out the powers expressly granted). This is unlike the power of home-rule cities, which "have all power not denied by the Constitution or state law." *City of Laredo*, 550 S.W.3d at 592; *cf. Chambers-Liberty Counties. Navigation Dist. v. State*, 575 S.W.3d 339, 350 (Tex. 2019) (stating that a navigation district, which, which like a county, derives its power from "enactments of the Legislature," is "not like a home-rule city").

Far from being necessary to perform his functions as an early-voting clerk, Hollins's actions actively undermine the proper function of the Election Code. For example, Ingram testified that sending unsolicited vote-by-mail applications to every registered voter, bearing the imprimatur of Harris County, will needlessly confuse voters and will invite potential voter fraud by those who improperly maintain their own eligibility to vote by mail. *E.g.*, RR.57-58, 60-62, 64-65. Moreover, it will clog up the vote-by-mail infrastructure, which is designed to accommodate the "limited voting by mail" authorized by the Legislature. *In re State*, 602 S.W.3d at 559. This could

result in voters who need to vote by mail not receiving ballots in a timely fashion. RR.202, 207.

This concern is fully supported by the content of the information put out by Hollins, which is incomplete at best, *see, e.g.*, RR.266 (agreeing with assessment that "A disability is something that YOU define for yourself"), and affirmatively misleading at worst, *compare, e.g.*, RR.292-93 (implying that drive-through voting is available for all voters), *with* Tex. Elec. Code § 64.009 (allowing curbside voting only for those "physically unable to enter the polling place"), *and* RR.197 (stating that a voter is disabled if she is pregnant), *with* Tex. Elec. Code § 82.002 (defining disability to include "[e]xpected or likely confinement for childbirth on election day").

Moreover, Hollins's *ultra vires* actions harm the very voters that he claims to be trying to help. Specifically, due to Hollins's *ultra vires* actions, many Harris County residents who are eligible to vote by mail may be under the impression that they need not request an application. This confusion could lead a voter not to receive a ballot in a timely fashion and ultimately not to be able to vote. That is why the State has asked the courts to take swift action to prevent that outcome.[5]

[5] Hollins and his counsel have suggested that the State is engaged in dilatory tactics to wait out the "clock" because it "knows" that he must complete his mailings by "early October." Letter from Susan Hayes to Blake Hawthorne, Sept. 19, 2020. To the contrary, the State has met every briefing deadline set by the courts, seeking extensions in other cases as necessary. *Id.* Ex. A. The only time the State has urged caution is when it asked this Court to allow it time to file a thorough petition for review. That request was entirely appropriate as this case is about far more than the mass mailing that Hollins plans for this month: It is about the reach of county

C. Hollins cannot avoid the conclusion that his behavior is unlawful by pointing to alleged selective enforcement.

Hollins has tried to avoid the conclusion that his conduct is unlawful by asserting that the State has not previously sued to enforce limitations on his power. In particular, he points to the fact that private parties are not precluded from distributing these mailers, and that the State did not sue when Hollins's office distributed unsolicited applications to Harris County voters over 65 years of age earlier this year. These arguments fail for at least three reasons.

1. The State has broad discretion regarding how to deploy its scarce resources.

The State's decision to seek relief here, but not elsewhere, is a wholly legitimate and unreviewable exercise of discretion under the separation of powers. *See City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 591 (Tex. 2015) (per curiam) ("The Texas Constitution provides that one governmental branch may not exercise those powers committed to a coordinate branch." (citing Tex. Const. art. II, § 1)).

The Attorney General has the inherent authority to exercise his enforcement discretion, and that discretion may not be reviewed. "In matters of litigation the Attorney General is the officer authorized by law to protect the interests of the State, and even in matters of bringing suit the Attorney General must exercise judgment and discretion, which will not be controlled by other authorities." *Bullock v. Tex. Skating Ass'n*, 583 S.W.2d 888, 894 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.)

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power, which extends far beyond the present election. A question this important merits careful briefing and study.

(internal quotation marks omitted). Because the State has limited resources, the decision of when to enforce its laws necessarily and "at all times" involves "the exercise of broad judgment and discretion. Even in the matter of bringing suits the Attorney General must exercise judgment and discretion, which will not be controlled by other authorities." *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 727 (Tex. 1924) (citation omitted).

The trial court abused its discretion by sitting in judgment of the Attorney General's discretionary enforcement decisions.

2. Because Hollins has not alleged that the Attorney General engaged in invidious discrimination, selective enforcement is not a defense.

Instead of dismissing Hollins's argument that the State is not entitled to relief because it has engaged in "selective enforcement," CR.280, the trial court bought it wholesale, CR.295 ("[T]he irony and inconsistency of the State's position in this case is not lost on the Court."). In particular, the court disparaged the State for its "arbitrary and selective objection" to this mass mailing when it had not objected to mailings to those over the age of 65. CR.295. Conspicuously absent from the trial court's reasoning is any reference to the legal standards by which claims of selective enforcement are ordinarily judged—likely because Hollins cannot meet that standard. *See generally* CR.289-95.

To use the doctrine of selective enforcement as a defense, Hollins would have had to show *both* that he "has been singled out for prosecution while others similarly situated and committing the same acts have not," and "that the government has purposefully discriminated on the basis of [an] impermissible consideration[]" such

as race or religion. *State v. Malone Serv. Co.*, 829 S.W.2d 763, 766 (Tex. 1992) (citing *United States v. Rice*, 659 F.2d 524, 526 (5th Cir. 1981); *Wolf v. State*, 661 S.W.2d 765, 766 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.)). He cannot allege or prove either.

a. As an initial matter, Hollins cannot demonstrate that the Attorney General has treated any similarly situated clerk differently. Indeed, rather than engage in any serious legal analysis, the trial court simply placed the burden on the State to offer "evidence or compelling explanation for its arbitrary and selective objection to the mailing of vote by mail applications." CR.295. In particular, the court was troubled that the State has not prevented (1) Hollins from sending mail-in ballot applications to individuals over the age of 65, CR.295, or (2) private parties from sending applications to voters, CR.293. Because the circumstances of these two groups are significantly different, there can be no comparison for purposes of selective enforcement.

First, it is not sufficient to point to the State's decision not to bring an action for sending applications to those aged 65 and over because it is not the "same act[]." *Malone Serv. Co.*, 829 S.W.2d at 766. Those over the age of 65 are not similarly situated to those under the age of 65 under state law. Tex. Elec. Code § 82.003. As Ingram explained, persons over 65 are invariably eligible to vote by mail, so sending unsolicited vote-by-mail applications to them does not present the same risk of confusion and fraud as sending such applications to those *under* 65 years of age. RR.81. There are also fewer voters over 65, so the act is less likely to clog the system. RR.122. This exercise of discretion cannot "be controlled by other authorities." *Bullock*, 583 S.W.2d at 894 (quoting *Charles Scribner's Sons*, 262 S.W. at 727).

Second, private parties distributing applications to those under the age of 65 are also not similarly situated to Hollins for purposes of analyzing whether the Attorney General has engaged in unlawful selective enforcement. It is precisely *because* Hollins is charged with administering the election that receipt of mail-in ballot applications from him are 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 at 560–61, are likely to be assumed true regardless of whether they accurately reflect the relevant legal provisions and case law. As Ingram explained, voters are not likely to give the same weight to an unsolicited mailing received from a political campaign. RR.55 ("[P]eople take that differently than they would from mailing by the [League of] Woman Voters or by a campaign or Engage Texas or whoever"); RR.56 ("So it's just a different thing when it comes from a government official. It has an prominent [sic], however you say that word, of officialness that makes people believe it."). Hollins made no attempt to rebut this testimony.

Third, it is far from clear that the State *could* prohibit private parties from sending out these mailers that include applications. Communications of the sort that Hollins highlights, RR.315-19, 326-38, implicate political speech. *See Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988) (concluding that restrictions circulation of ballot-initiative petitions implicate "core political speech" for which First Amendment protection

is "at its zenith").[6] As a result, the State's ability to regulate such speech is limited. *Id.* at 425. The State can—and does—prosecute private individuals who provide information that is false and leads individuals to submit false applications to vote by mail. Tex. Elec. Code §§ 84.0041, 276.013. But efforts to prevent the speech before it happens could potentially fall within the Supreme Court's jurisprudence regarding prior restraints and thus be subject to strict scrutiny. *Cf. Citizens United*, 558 U.S. at 335 (discussing that "onerous restrictions [that] function as the equivalent of prior restraint" are also given close scrutiny).

As discussed above, Hollins's proposed speech falls into a different category. He is proposing to communicate in his capacity as Harris County Clerk—that is, as an agent of the County exercising delegated power from the State. *Supra* at 14-16. Because Hollins is speaking on behalf of the State, the State is entitled to ensure that his speech accurately reflects State policy. *Garcetti*, 547 U.S. at 421-22.

b. Even if Hollins could identify a county early-voting clerk whom the Attorney General has treated differently—and Hollins cannot—that does not justify the trial court's refusal to enter a temporary injunction on the grounds of selective enforcement. Hollins has not alleged, and the trial court did not find, that the Attorney General filed this suit with discriminatory intent or based on a protected characteristic such as race or religion. This is for good reason: This is the first that an early-voting

[6] For the avoidance of doubt, the State is not taking any position on whether any particular mailer is or is not protected by the First Amendment—only that as a public official acting on behalf of the State, Hollins is in a different category for free-speech purposes.

clerk has ignored the limits of his power in such a blatant and inexcusable way. *See* RR.84.

Because there is no allegation that the State's exercise of discretion in this case is illegitimate, the Court's only role is to decide whether the sending of unsolicited vote-by-mail applications to voters under the age of 65 is *ultra vires*. It is. Neither Hollins's choice to send unsolicited vote-by-mail applications to voters aged 65 and older nor private parties' decision to send them to all voters is part of the Court's calculation.

3. The Attorney General's exercise of his enforcement discretion does not change the meaning of the law.

Hollins has implicitly conceded this fact on appeal because he disclaimed any argument that selective enforcement is a defense to this enforcement action, arguing instead that the State's enforcement priorities somehow changed the scope of the Legislature's delegation. Appellee's Br. 17. Specifically, Hollins argues that the fact that the Attorney General has never before needed to bring this type of lawsuit "undercuts the State's *statutory interpretation*" because it would mean that the Attorney General "has openly consented to unlawful conduct by government officials in this very case." *Id.* at 17. That is like an individual pulled over for driving ninety-five miles per hour down I-35 arguing that the speed limit is not *really* seventy miles per hour because the state troopers have "openly consented" to drivers going seventy-five miles per hour by declining to ticket them. That argument would be laughable at a traffic stop, and it should fare no better here.

As an initial matter, Hollins's own evidence belies any assertion that the State has endorsed the distribution of unsolicited applications for mail-in ballots even to those over the age of 65: During a recorded phone call, Ingram very clearly stated that he did not like such a distribution, but that he would not object to it. CR.96-97. And as Ingram explained during the temporary injunction hearing, he is not aware of any such unsolicited mailings—particularly to those under 65 years of age—before this year. RR.50, 57-58, 68, 75-76, 92-93. As this Court is well aware, during that time, the pandemic and the upcoming presidential election have resulted in an inundation of emergency litigation that has flooded the Attorney General's already busy docket. Hollins cites to no authority that a decision *not* to pursue an enforcement action under such circumstances says anything about the meaning of a statute.

To the contrary, at its heart, such an argument appeals to desuetude, which has been thoroughly discredited in every American jurisdiction other than West Virginia. Scalia & Garner, *supra* at 337. "If 10, 20, 100, or even 200 years pass without any known cases applying the statute, no matter: The statute is on the books and continues to be enforceable until its repeal." *Id.* at 336. Because the Legislature has never declared that county clerks have the power that Hollins affords himself, his conduct is *ultra vires*, and the trial court erred in holding otherwise.

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

For at least three reasons, the court of appeals erred in holding that the State failed to show a likelihood of irreparable harm absent relief. *First*, "[t]he 'inability [of a state] to enforce its duly enacted [laws] clearly inflicts irreparable harm on the

State.'" *Tex. Ass'n of Bus.*, 565 S.W.3d at 441 (quoting *Perez*, 138 S. Ct. at 2324 n.17). *Contra* App. B at 6-7. That is precisely what happened here. *Second*, the State offered testimony from Ingram—based on his decade of experience—that Hollins's conduct is likely to undermine the integrity of the fast-approaching election. That testimony stands both uncontroverted and unrebutted by any evidence of counterbalancing harm to Hollins. And, *third*, the State's reliance on that evidence is not impermissibly speculative simply because Hollins's unlawful conduct is wholly without analogous precedent. Put simply, there is no basis in law or logic that requires the State to wait until *after* a major, hotly contested election has been thrown into chaos before it seeks relief. Indeed, at that point, there will be no relief available. Cash will not be able to fix it, which is the definition of irreparable harm. *Pike v. Tex. EMC Mgmt., LLC*, No. 17-0557, 2020 WL 3405812, at *23 (Tex. June 19, 2020) (citing *Dresser-Rand Co. v. Virtual Automation Inc.*, 361 F.3d 831, 848 (5th Cir. 2004)).

A. The State is harmed in its sovereign capacity.

The court of appeals recognized (App. B at 6) that under this Court's precedent, "the state has a justiciable 'interest' in its sovereign capacity in the maintenance and operation of its municipal corporations in accordance with law." *Yett*, 281 S.W. at 842. But the court of appeals concluded the State's interest merely establishes standing, not an entitlement to injunctive relief, because *ultra vires* conduct is not inherently harmful. App. B at 7. This disregard of the sovereign injury suffered by the State is contrary to longstanding precedent in Texas and federal courts recognizing that the State is inherently irreparably harmed by violations of its law.

First, the court of appeals' decision is inconsistent with courts across this country—including this one—that have addressed the harm to sovereigns and their citizens caused by officials' *ultra vires* conduct. "As a sovereign entity, the State has an intrinsic right to enact, interpret, and enforce its own laws." *Naylor*, 466 S.W.3d at 790 (citing *Printz*, 521 U.S. at 912 n.5) (explaining that all three branches of government inhere within the states' "nature as sovereigns"). The theory behind an *ultra vires* lawsuit is that it "reassert[s] the control of the state," and "enforce[s] existing policy" as declared by the Legislature. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). That injury is sufficient to show irreparable harm, not just standing to sue. *See Perez*, 138 S. Ct. at 2324; *see also, e.g., Valentine v. Collier*, 956 F.3d 797, 803 (5th Cir. 2020) (per curiam); *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019); *Tex. Ass'n of Bus.*, 565 S.W.3d at 441.

This principle exists not "for the benefit of the State[] as [a] political entit[y], or even for the benefit of the public officials governing the State[]." *New York*, 505 U.S. at 181. The "ultimate purpose" of the structural provisions of the Constitution "is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991).[7] That is, the State is recognized to have a protectable interest in the applicability of its laws so that

[7] *See also, e.g.*, *Maryland v. King*, 567 U.S. 1301, at *3 (2012) (Roberts, C.J.) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (citations omitted))); *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 742 (S.D. Miss. 2014) (mem. op.) ("The State . . . has a significant interest in enforcing its enacted laws.").

it may stand as a "guardian and protector of all public rights" as enacted by the people's representatives. *Yett*, 281 S.W. at 842; *accord Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) ("Because the State is the appealing party, its interest and harm merge with that of the public." (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009))).

That harm is particularly apparent here. The State has an undisputed—and indisputable—interest in preserving the integrity of its elections, *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), and in setting the rules by which the holders of state- or nation-wide office are selected in Texas, *cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808 (1995) (quoting *The Federalist* No. 52, p. 326 (C. Rossiter ed. 1961) (Madison)). If that integrity is undermined, that harms every citizen in the State of Texas because it calls into question the legitimacy of those elected representatives who will determine the rules by which we will be governed for the next two to six years. As the United States Supreme Court has recognized, the State's "interest in protecting public confidence 'in the integrity and legitimacy of representative government'" is "closely related to the State's interest in preventing voter fraud" but nonetheless "has independent significance, because it encourages citizen participation in the democratic process." *Crawford v. Marion County Elec. Bd.*, 553 U.S. 181, 197 (2008). That confidence is undermined when the State's laws are disobeyed.

The court of appeals erred as a matter of law when it dismissed that injury as insufficient by holding that the State must show some additional injury, beyond the harm it suffers whenever its laws are violated. App. B at 9. To be sure, generally a

plaintiff carries a heavy burden to show that the injury he alleges will be irreparable if not enjoined. *See, e.g.*, *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 284 (Tex. 2004) ("A permanent injunction issues only if a party does not have an adequate legal remedy"); *Town of Palm Valley v. Johnson*, 87 S.W.3d 110, 111 (Tex. 2001) (explaining that even a statute providing for injunctive relief "does not permit injunctive relief without the showing of irreparable harm otherwise required by equity").

Nevertheless, for a narrow class of interests, the infringement is itself irreparable harm, so the plaintiff need not make any further showing. For example, this Court has said that the infringement of First Amendment rights is itself irreparable harm. *See Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981). That is because "any significant denigration of First Amendment rights inflicts irreparable injury," so the plaintiff need not make any showing beyond a likely violation of his rights in order to obtain injunctive relief. *Sw. Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 365 (Tex. Civ. App.—Amarillo 1979, no writ); *see, e.g.*, *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012); *Iranian Muslim Org.*, 615 S.W.2d at 208.

The State's sovereign interest in preventing a violation of its laws is one of this narrow class: A State's "inability to enforce its duly enacted [laws] clearly inflicts irreparable harm." *Perez*, 138 S. Ct. at 2324; *see also Tex. Ass'n of Bus.*, 565 S.W.3d at 441. Our Constitution entrusts the Legislature with the power to "prescrib[e] the

rules by which the duties and rights of citizens are to be regulated."[8] Tex. Const. art. III, § 1. The shift of that power from the people's representatives to a single county official causes the type of injury that money cannot recompense and that will routinely lead to a finding of irreparable harm. *See EEOC*, 933 F.3d at 447 (explaining that a violation of the State's legal code harms "Texas's concrete interest, as a sovereign [S]tate, in maintaining compliance with its laws"). In short, injury is inflicted on the State the moment Hollins acts *ultra vires*, and that injury can never be remedied by damages or other retrospective relief.

Second, this Court's precedent supports that longstanding and widespread rule. There is no dispute that the State, as "the guardian and protector of all public rights," may "maintain an action to prevent an abuse of power by public officers, and in general protect the interest of the people at large." *Yett*, 281 S.W. at 842; *see also White Deer Indep. Sch. Dist. v. Martin*, 596 S.W.3d 855, 863 (Tex. App.—Amarillo 2019, pet. denied) (holding that "the State has an interest in enforcing its laws"); *Bachynsky v. State*, 747 S.W.2d 868, 870 (Tex. App.—Dallas 1988, writ denied) (Hecht, J.) (noting that the State may bring many types of suits to protect sovereign and quasi-sovereign interests, "but the nature of the relief sought is almost al-ways the same: injunctive or equitable"). If the State has a "justiciable interest," as *Yett* held and the court of appeals agreed, it has necessarily suffered an injury

[8] *See The Federalist* No. 78, p. 464 (C. Rossiter ed. 1961) (Hamilton) (defining legislative power); *see also Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 465 (Tex. 1997), *as supplemented on denial of reh'g* (Oct. 9, 1997) (citing John Locke, *Second Treatise of Government* 380-81 (1960 ed.)).

because standing doctrine "requires a concrete injury to the plaintiff." *See Heckman v. Williamson County*, 369 S.W.3d 137, 150, 154 (Tex. 2012); *see also Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018).

Yett stands for the proposition that the State is injured when its laws are violated. Indeed, the court of appeals implicitly recognized as much. App. B at 6-7. But the court of appeals failed to grasp what follows: Once the State shows a violation of its laws, it has also shown inherent and irreparable injury to its sovereignty. That means the State's evidentiary burden to show irreparable harm is satisfied by carrying its burden to show a violation.

As explained above, the State proved its likelihood of success on the merits by showing that Hollins's mass mailing is *ultra vires*. Hollins fails to explain how, given that the very violation of the State's laws undisputedly injures the State enough to confer standing, the injury caused by Hollins's *ultra vires* conduct is anything but irreparable. Indeed, there is no dispute that once Hollins commits his unlawful *ultra vires* action, it cannot be undone or otherwise redressed. *Butnaru*, 84 S.W.3d at 204.

B. The State provided unrebutted evidence that Hollins's actions will likely cause significant harm in the upcoming election.

Even if its sovereign injury were not sufficient (and it is), the only evidence in the record is that the State *will* be irreparably harmed. State officers will be required to combat the confusion that will inevitably result from Hollins's action. Even if they were able to divert their full attention to that task, it likely will not repair the resulting damage. *See* RR.55-59, 60-62, 64-65 (receiving testimony from Director of Elections that Hollins's action is likely to lead to (1) a depletion of the Secretary of State's

resources, (2) voters making decisions without assistance and potentially opening themselves up to liability, and (3) decreased turnout). Moreover, the time State officers spend on this issue will distract them from their other critical duties just weeks before a major election. Hollins's only response was to point to his own mailer as providing sufficient guidance to voters to avoid these problems. Appellee's Br. 3, 24-26. But Ingram provided unrebutted testimony that Hollins's unprecedented plan will cause such harm despite the instructions and information sent to voters along with the application. RR.50-55, 82-83.

As importantly, Hollins did not offer any evidence of a countervailing injury. "[W]hen exercising such jurisdiction, a court must, among other things, balance competing equities." *In re Gamble*, 71 S.W.3d 313, 317 (Tex. 2002). Maintaining the smooth running of the election system is considered a significant interest weighing in favor of the State. *See id.* at 317-18 & n.17 (stressing the importance of avoiding election delays (citing *Blum v. Lanier*, 997 S.W.2d 259, 263 (Tex.1999))). Hollins points to no countervailing injury beyond his inability to pursue his own policy preferences.

C. Hollins cannot avoid this conclusion because his conduct is unprecedented.

Finally, in seeking to lift the stay, Hollins maintains (at 12, 29) that the State's evidence is speculative. *See also* Appellee's Br. 8, 24-25. Not so. To be sure, there is no direct evidence of how an act similar to Hollins's has affected a prior election in Texas because *Hollins's act is entirely "unprecedented."* RR.85 (emphasis added) ("[N]obody has ever done this before."). Indeed, "[t]his is [the] first time in almost

nine years in [his] job that" Ingram has "had to send a letter like this to a county." RR.84. But materials subject to the courts' judicial notice show that the sudden influx of mail-in ballots and applications in other states has disrupted elections and even resulted in voters losing their opportunity to have their vote counted.[9] This fully support Ingram's account that Hollins's actions will likely clog the system and lead to votes not being counted, delays in election results, accusations of mass fraud,[10] and election challenges.[11] Cash is no recompense for such injuries. And the absence of money as an available remedy is the quintessential irreparable harm. *Butnaru*, 84 S.W.3d at 204 ("An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard.").

More fundamentally, the thrust of Hollins's argument is that the State can do nothing to stop this significant violation of its law simply because no one has ever

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[9] Pam Fessler & Elena Moore, *Signed, Sealed, Undelivered: Thousands of Mail-in Ballots Rejected for Tardiness*, NPR (July 13, 2020), https://tinyurl.com/ycrf83tz ("Hundreds of thousands of ballots go uncounted each year because people make mistakes, such as forgetting to sign the form or sending it in too late.").

[10] *E.g.*, Anna Sturla, *Judge Invalidates Paterson, NJ, City Council Election After Allegations of Mail-in Voter Fraud*, CNN, Aug. 20, 2020, https://tinyurl.com/y4x2woc6.

[11] *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 100 (2000) (per curiam) (addressing challenge turning on fewer than 300 votes, many absentee); *Harrison v. Stanley*, 193 S.W.3d 581, 582 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (three ballots by mail); *accord Kelley v. Scott,* 733 S.W.2d 312, 313 (Tex. App.—El Paso 1987, writ dism'd) ("In view of the vote of 191 to 190, the single late absentee ballot of Mrs. Ramirez is critical and is the basis of our decision.").

thought to violate the law in the same way before. The Court should reject that novel limitation on the State's ability to protect its own laws.

Prayer

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

Respectfully submitted.

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Certificate of Service

On September 22, 2020, this document was served electronically on Susan Hays, lead counsel for respondent Chris Hollins, via hayslaw@me.com.

/s/ Kyle D. Hawkins
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Certificate of Compliance

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/s/ Kyle D. Hawkins
KYLE D. HAWKINS

No. 20-0729

In the Supreme Court of Texas

THE STATE OF TEXAS,
Petitioner,

v.

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

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

APPENDIX

Tab A: Trial Court's Order

CAUSE NO. 2020-52383

THE STATE OF TEXAS,	§	
Plaintiff,	§	**IN THE DISTRICT COURT OF**
	§	
vs.	§	**HARRIS COUNTY, TEXAS**
	§	
CHRIS HOLLINS, in his official	§	
Capacity as Harris County Clerk,	§	
Defendant.	§	**127TH JUDICIAL DISTRICT**

ORDER ON TEMPORARY INJUNCTION APPLICATION

Background

On August 25, 2020, the Harris County Clerk, Chris Hollins, tweeted the following:

Two days later, Keith Ingram, the Elections Director for the Secretary of State, sent a letter to Mr. Hollins asking him to "immediately halt any plan to send an application for ballot by mail to all registered voters."

Ingram and Hollins spoke by phone on August 31 and discussed Hollins's plan and Ingram's objections. The State of Texas filed its Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction on that same day. The Parties agreed to litigate the issues at a temporary injunction hearing on September 9.

The State seeks to restrain Hollins pursuant to section 31.005 of the Texas Election Code, which states:

> Sec. 31.005. PROTECTION OF VOTING RIGHTS.
>
> (a) The secretary of state may take appropriate action to protect the voting rights of the citizens of this state from abuse by the authorities administering the state's electoral processes.
>
> (b) If the secretary determines that a person performing official functions in the administration of any part of the electoral processes is exercising the powers vested in that person in a manner that impedes the free exercise of a citizen's voting rights, the secretary may order the person to correct the offending conduct. If the person fails to comply, the secretary may seek enforcement of the order by a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general.

TEX. ELEC. CODE § 31.005.

The State also contends that Hollins is acting *ultra vires* under the State's interpretation of Election Code section 84.012, which reads, "[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." *Id*. § 84.012. In the State's view, section 84.012 prohibits the clerk from sending an application for mail ballot unless and until the voter has requested one.[1]

[1] Voting by mail is a multi-step process. First, a registered voter must submit to the early voting clerk an application indicating the basis on which the voter is qualified to vote by mail. TEX. ELEC. CODE §§ 84.001, 84.007-.009. The early voting clerk must then process the application and mail a ballot to the voter. *Id*. at § 86.001. Finally, the voter must return the marked ballot to the early voting clerk within the statutorily prescribed deadlines. *Id*. at §§ 86.006, 86.007. Importantly, Mr. Hollins plans to send only applications, not ballots, to all registered voters.

Having considered the evidence and arguments presented by the Parties, the Court finds that Mr. Hollins's contemplated action is not *ultra vires* and does not impede the free exercise of voting rights. No writ shall issue.

Analysis

1. *Ultra Vires* Claim

A government official acts *ultra vires* if the official "acted without legal authority or failed to perform a ministerial act." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Here, the Court must determine whether the statutory provisions of the Texas Election Code permit the conduct contemplated by Mr. Hollins. The Court's primary objective in construing a statute is to ascertain the Legislature's intent. *City of Rockwall v. Hughes*, 246 S.W.3d. 621, 625 (Tex. 2008). To do so, the Court reads the statute as a whole, not individual provisions in isolation. *Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 51 (Tex. 2014).

As County Clerk, Mr. Hollins serves as the "early voting clerk" for the November 2020 election in Harris County. TEX. ELEC. CODE § 83.002. The early voting clerk has "the same duties and authority with respect to early voting as a presiding election judge has with respect to regular voting . . .." *Id*. at § 83.001(c). Thus, as it relates to early voting, Mr. Hollins "is in charge of and responsible for the management and conduct of the election . . .." *Id*. at § 32.071. In Texas, early voting is conducted in person and by mail. *Id*. at § 81.001. Accordingly, the Election Code gives Mr. Hollins a broad grant of authority to conduct and manage mail-in voting, subject only to any express limitation on that power by the Legislature. *See Chambers-Liberty Counties Navigation District v. State*, 575 S.W.3d 339,

352 (Tex. 2019) (finding officials' conduct to be *ultra vires* where the conduct conflicted with statutes circumscribing an otherwise broad grant of authority).

The Legislature has spoken at length on the mechanisms for mail-in voting. There are no fewer than 42 Election Code provisions on the subject. *See* TEX. ELEC. CODE, Chs. 84, 86 & 87. In those provisions, the Legislature has made clear that in order to vote by mail a voter first "must make an application for an early voting ballot." *Id*. at § 84.001. But, as to how the voter is to obtain the application, the Election Code is silent.

There is no code provision that limits an early voting clerk's ability to send a vote by mail application to a registered voter. Section 84.012 contains no prohibitive language whatsoever, but rather, requires the early voting clerk to take affirmative action in the instance a voter does request an application to vote by mail. That the clerk must provide an application upon request does not preclude the clerk from providing an application absent a request.

Indeed, there are a number of code provisions that demonstrate the Legislature's desire for mail voting applications to be freely disseminated. For example, section 1.010 mandates that a county clerk with whom mail voting applications are to be filed (*e.g.,* Mr. Hollins) make the applications "readily and timely available." *Id*. at § 1.010. In addition, section 84.013 requires that vote by mail applications be provided "in reasonable quantities without charge to individuals or organizations requesting them for distribution to voters." *Id*. at § 84.013. Further, the Court notes that, consistent with these provisions, both the Secretary of State and the County make the application for a mail ballot readily available on their respective websites.

Against the backdrop of this statutory scheme, the Court cannot accept the State's interpretation of section 84.012. To do so would read into the statute words that do not exist and would lead to the absurd result that any and every private individual or organization may without limit send unsolicited mail voting applications to registered voters, but that the early voting clerk, who possesses broad statutory authority to manage and conduct the election, cannot. Mr. Hollins's contemplated conduct does not exceed his statutory authority as early voting clerk and therefore is not *ultra vires*.

2. Section 31.005 Claim

With respect to the State's invocation of section 31.005 — a statute intended to *protect* Texans' exercise of the right to vote — as a basis to restrain Mr. Hollins, the Court is confounded. It appears the State contends that Mr. Hollins's actions "may impede[] the free exercise of a citizen's voting rights," *id*. at § 31.005, by fostering confusion over voter eligibility to vote by mail. That contention rings hollow, however. The State offered no evidence to support such a claim, and the document Mr. Hollins intends to send to voters, as set forth below, accurately and thoroughly informs them of Texas law concerning mail-in voting.

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

HARRIS COUNTY CLERK
S.A.F.E. ELECTIONS
SECURE • ACCESSIBLE • FAIR • EFFICIENT
OFFICE OF CHRIS HOLLINS

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:

1. You are age 65 or older by Election Day, November 3, 2020;
2. You will be outside of Harris County for all of the Early Voting period (October 13th - October 30th) and on Election Day (November 3rd);
3. You are confined in jail but otherwise eligible to vote;
4. 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: VUID #/County Election Pct #
1230000000/906

APPLICATION FOR BALLOT BY MAIL

CHRIS HOLLINS
COUNTY CLERK
HARRIS COUNTY, TEXAS
ESTABLISHED 1836

- 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

Signature of Applicant As Registered

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

The Texas Supreme Court has instructed that the decision to apply for a ballot to vote by mail is within the purview of the voter. *In re State of Texas*, 602 S.W.3d 549 (Tex. 2020). This Court firmly believes that Harris County voters are capable of reviewing and understanding the document Mr. Hollins proposes to send and exercising their voting rights in compliance with Texas law.

Finally, the irony and inconsistency of the State's position in this case is not lost on the Court. The State has stipulated that it has no objection to unsolicited mail ballot applications being sent to voters age 65 or over. But being 65 or older is only one of four statutorily permitted bases for voting by mail in Texas, the others being disability,[2] absence and incarceration. TEX. ELEC. CODE §§ 82.001-.004. The State offers no evidence or compelling explanation for its arbitrary and selective objection to the mailing of vote by mail applications to registered voters under the age of 65.

The Court DENIES the State of Texas's application for temporary injunction.

Signed on September 11, 2020.

R.K. Sandill
Judge, 127th District Court
Harris County, Texas

[2] The Parties dedicated a great deal of briefing and argument to the issue of whether and to what degree Texas voters may qualify to vote by mail under the disability category during the COVID-19 pandemic. This issue, however, is not before this Court, having been decided by the Texas Supreme Court in *In Re State of Texas*, 602 S.W.3d 549 (Tex. 2020).

TAB B: COURT OF APPEALS' OPINION

Affirmed and Memorandum Opinion filed September 18, 2020.

In The

Fourteenth Court of Appeals

NO. 14-20-00627-CV

THE STATE OF TEXAS, Appellant

V.

CHRIS HOLLINS, IN HIS OFFICIAL CAPACITY AS HARRIS COUNTY CLERK, Appellee

On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 2020-52383

MEMORANDUM OPINION

This is an accelerated appeal from an interlocutory order denying appellant's application for temporary injunction. Appellant, the State of Texas, contends the trial court abused its discretion in denying its application for temporary injunction. We conclude the State did not meet its burden of proof and affirm the order of the trial court denying the State's application for temporary injunction.

I. Background

On August 25, 2020, the Harris County Clerk, Chris Hollins, posted a public message on the verified Twitter account of the "Harris County Clerk," stating that the Harris County Clerk's Office would be mailing every registered voter an application to vote by mail. Two days later, Keith Ingram, the Director of Elections for the Secretary of State, sent a letter to Hollins stating that Hollins's proposed plan constituted an abuse of voters' rights under Election Code section 31.005.[1] Ingram directed Hollins to "immediately halt any plan to send an application for ballot by mail to all registered voters."

Ingram and Hollins spoke by telephone on August 31 wherein Hollins informed Ingram he declined to conform to Ingram's request. On that same day, the State filed an application for temporary restraining order, temporary injunction, and permanent injunction in the district court seeking to prohibit Hollins from mailing out vote-by-mail applications to all Harris County registered voters. The State's complaint was that Hollins's proposed plan was an ultra vires act not connected to his official duties as the Harris County Clerk and that such conduct would result in irreparable harm to Texas citizens.

On September 9, 2020, the 127th District Court held a hearing on the State's

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[1] Section 31.005 of the Election Code provides:

(a) The secretary of state may take appropriate actions to protect the voting rights of the citizens of this state from abuse by the authorities administering the state's electoral processes.

(b) If the secretary determines that a person performing official functions in the administration of any part of the electoral processes is exercising the powers vested in that person in a manner that impedes the free exercise of a citizen's voting rights, the secretary may order the person to correct the offending conduct. If the person fails to comply, the secretary may seek enforcement of the order by a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general.

Tex. Elec. Code Ann. § 31.005.

application in which Ingram and Hollins both testified. During the hearing, the State argued that Hollins's proposal was outside the scope of Hollins's authority as early voting clerk and would cause confusion among voters, ultimately inducing some voters to commit felony voter fraud. Ingram testified that by sending the application to voters who might not qualify to vote by mail, the clerk was "walking them into a felony." Ingram explained that section 84.0041 of the Election Code provides that if a voter knowingly or intentionally submits false information on an application to vote by mail, that voter is subject to prosecution for a state jail felony. *See* Tex. Elec. Code Ann. § 84.0041. The State did not take issue with Hollins sending the applications to voters aged 65 years or older because, it argued, there is no chance of confusion with these voters as their age alone (with no other personal determination by the voter) qualifies them to vote by mail.[2] In response, Hollins emphasized the educational nature of the materials sent with the applications, specifically, the red-siren graphics accompanying a warning that, despite receiving the application, not all voters are eligible to vote by mail. Hollins's proposed mailer is depicted below:

[2] Section 82.003 of the Election Code qualifies all registered voters over the age of 65 on election day to vote by mail. *See* Tex. Elec. Code Ann. § 82.003.

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

HARRIS COUNTY CLERK
S.A.F.E. ELECTIONS
SECURE • ACCESSIBLE • FAIR • EFFICIENT
OFFICE OF CHRIS HOLLINS

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:

1. You are age 65 or older by Election Day, November 3, 2020;
2. You will be outside of Harris County for all of the Early Voting period (October 13th - October 30th) and on Election Day (November 3rd);
3. You are confined in jail but otherwise eligible to vote;
4. 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: VUID #/County Election Pct #
123000000/906

APPLICATION FOR BALLOT BY MAIL

CHRIS HOLLINS
COUNTY CLERK
HARRIS COUNTY, TEXAS
ESTABLISHED 1836

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)

123000000

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

Signature of Applicant As Registered

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

The mailer containing the application states, "DO YOU QUALIFY TO VOTE BY MAIL?" in large capital letters and bold font, and specifically instructs the voter to "READ THIS BEFORE APPLYING FOR A MAIL BALLOT." The mailer then lists the four categories of voters that are qualified to vote by mail pursuant to the Election Code. *See* Tex. Elec. Code Ann. §§ 82.001-82.004. The mailer explains the disability qualification by citing language from the Texas Supreme Court's opinion in *In re State*, 602 S.W.3d 549 (Tex. 2020). While Ingram commended Hollins on the informational nature of the mailer, stating, "I've read this full mailer and I think it's very good," he disapproved of including an application in the mailer.

The trial court denied the State's motion for temporary injunction. This interlocutory appeal followed.

II. Analysis

A. Applicable Law and Standard of Review

"A temporary injunction's purpose 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); *Conrad Constr. Co., Ltd. v. Freedman's Town Pres. Coal.*, 491 S.W.3d 12, 15 (Tex. App.—Houston [14th Dist.] 2016, no pet.). "A temporary injunction is an extraordinary remedy and does not issue as a matter of right." *Butnaru*, 84 S.W.3d at 204. 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.*; *Conrad Constr.*, 491 S.W.3d at 15. The applicant bears the burden of production to offer some evidence of each of these elements. *Conrad Constr.*, 491 S.W.3d at 15.

Whether to grant or deny a temporary injunction rests within the trial court's sound discretion. *Butnaru*, 84 S.W.3d at 204; *Conrad Constr.*, 491 S.W.3d at 16. We should reverse an order on injunctive relief only if the trial court abused that discretion. *Butnaru*, 84 S.W.3d at 204.

B. The State failed to meet its burden to prove "probable, imminent, and irreparable injury."

In its brief, the State articulates a single issue:

> For over a century, the Supreme Court has held that county officials have only those powers specifically granted or necessarily implied by the Legislature. Contrary to that well-established law, the trial court held that because no law forbids election clerks from sending unsolicited mail-in ballots, they must have authority to do so. The issue presented is whether this was a misinterpretation of the law and therefore an abuse of discretion.

The temporary injunction applicant, here the State, bears the burden to offer some evidence on each element of a temporary injunction. *Conrad Constr.*, 491 S.W.3d at 15. The State alleged the following to show harm: (1) inherent harm to the State in its sovereign capacity and (2) voter confusion leading to felony voter fraud. We address these in turn.

1. Harm in the Sovereign Capacity

The State argues that under *Yett v. Cook*, it need only establish that Hollins's plan would be ultra vires to establish an injury. *See Yett v. Cook*, 281 S.W. 837, 842 (Tex. 1926). *Yett* merely establishes that the State has standing to assert an ultra vires claim in a mandamus proceeding, not that an ultra vires action is harmful by its very nature. *See id*. at 220-221. The State also cites to *Texas Association of Business v. City of Austin*, for the proposition that its alleged ultra vires claim results in automatic harm to the State. *See Tex. Assoc. of Bus. v. City of Austin*, 565 S.W.3d 425, 441 (Tex. App.—Austin 2018, pet, denied). In that case,

the Austin Court of Appeals found the State would suffer harm if a proposed municipal ordinance that was directly preempted by a state law was put into effect. *See id*. at 441. There was no claim of ultra vires conduct in that case. We are not persuaded by the State's argument that ultra vires conduct automatically results in harm to the sovereign as a matter of law.

2. Voter Confusion

At the preliminary injunction hearing, Ingram testified that, "We don't allow or disallow counties to do anything. Counties are the ones that run elections in Texas, we assist and advise. The limited exception to that is whenever a county election official is abusing voters by misleading them and walking them into a felony." Thus, the State reveals its ultra vires argument is reduced to a single proposition: that the Harris County Clerk, by sending an informational brochure with an application to vote by mail, is misleading voters and potentially "walking them into a felony."

The thrust of the State's argument regarding harm resulting from voter confusion is that voters will be unable to follow the directions on the mailer, erroneously designate themselves qualified to vote by mail, and thus become subject to prosecution for felony voter fraud under section 84.0041 of the Election Code. *See* Tex. Elec. Code Ann. § 84.0041. The State emphasizes that the application sent by the Harris County Clerk (as opposed to applications sent by third-party groups, such as the League of Women Voters) connotes a certain level of official imprimatur that would lead voters to believe they have been sanctioned and approved to fill out the application. However, this argument supports the opposite conclusion. For example, when a voter sees an application sent by the County Clerk with its official imprimatur, red sirens, and directions regarding when a voter is and (more importantly) is not qualified to receive a mail-in ballot

(instructions that are not required to be sent with third-party unsolicited mail-in ballot applications), it is more likely a voter would know to take this application seriously, to read all warnings, and to follow all stated precautions.

Further, the testimony at the injunction hearing revealed that the Secretary of State's website itself does not define disability, leaving voters without guidance. Conversely, the mailer includes information that helps voters determine whether they are disabled under Texas law for the purposes of voting by mail, including important details about the Texas Supreme Court's ruling clarifying the qualifications for a disability that would allow a registered voter to vote by mail.

When the trial court asked Ingram how many Chapter 84 indictments had been prosecuted in the last 20 years, Ingram responded (on multiple occasions) that he did not know. Further, when the trial court questioned Ingram about the mens rea elements of section 84.0041, Ingram confirmed that a voter would need to act intentionally or with knowledge of his or her fraudulent conduct to be found liable under that section. A mere accidental misinterpretation of "disability," for example, would not subject a voter to liability. When Hollins's counsel questioned Ingram how a voter would knowingly and intentionally violate the statue given all the information on the mailer, Ingram replied:

> I don't know the answer to that question. I mean, for most voters, I agree this is sufficient, but not for all of them. And if they have the attitude, well, I'm not really disabled, but nobody is checking so I'm going to do it then that is exactly what 84.0041 is. And I've got the application in my hand and the Clerk sent it to me.

Ingram's response informs this court that "most" voters will have enough information to decide whether to apply to vote by mail, and only a select few, if any, will knowingly choose to break the law and falsify their application. A voter who intends to engage in fraud may just as easily do so with an application

received from a third-party as it would with an application received from the Harris County Clerk. Mr. Ingram testified at the hearing that, "definitely some mailers have that kind of language [regarding qualifications to vote by mail] on them but not all of them -- not very many of them." As discussed above, a voter would be less likely to engage in fraud using the application sent by the County Clerk because it has an official imprimatur, contains extensive explanations for what qualifies a voter to receive a mail ballot under the law, and is accompanied by text and red-siren graphics traditionally associated with danger and caution in general.

The State failed to meet its burden of showing that mailing the applications will result in irreparable injury. The injury alleged by the State is at best speculative. The State's argument is based on mere conjecture; there is, in this record, no proof that voters will intentionally violate the Election Code and no proof that voters will fail to understand the mailer and intentionally commit a felony, or be aided by the election official in doing so. Ingram's conclusory testimony at the temporary injunction hearing cannot carry the burden the State was required to prove to show actual harm. Conclusory testimony does not raise a genuine issue of material fact. *Elizondo v. Krist*, 415 S.W.3d 259, 264 (Tex. 2013) ("A conclusory statement of an expert witness is insufficient to create a question of fact to defeat summary judgment.") (internal quotations and citation omitted); *Davis v. Knott*, No. 14-17-00257-CV, 2019 WL 438788, at *9 (Tex. App.—Houston [14th Dist.] Feb. 5, 2019, pet. denied) ("A conclusory statement is one that expresses a factual inference without providing underlying facts in support of the conclusion.") (citing *Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 389 n.32 (Tex. 2008) and *Dolcefino v. Randolph*, 19 S.W.3d 906, 930 & n.21 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (holding affidavit's statement that "this was false and defamatory and has injured me in my profession"

was conclusory)).

An injunction is not proper when the claimed injury is merely speculative; fear and apprehension of injury are not sufficient to support a temporary injunction. *Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 861 (Tex. App.—Fort Worth 2003, no pet.). Accordingly, the trial court properly denied the State's application for temporary injunction.

Further, the temporary injunction applicant bears the burden of producing some evidence on each element of a temporary injunction. *Conrad Constr.*, 491 S.W.3d at 15. Because the State fails to produce evidence of irreparable injury, we need not address the State's arguments regarding cause of action or probable success on the merits. *See id*.

We overrule the State's sole issue.

C. Judicial Non-Intervention

"The rule is well established in Texas that the equitable powers of the courts may not be invoked to interfere with public officials in taking any of the steps involved in an election." *Ellis v. Vanderslice*, 486 S.W.2d 155, 159 (Tex. Civ. App.—Dallas 1972, no writ) (citing *City of Dallas v. Dallas Consol. Elec. St. Ry. Co*., 105 Tex. 337, 341–42, 148 S.W. 292, 294 (1912); *Leslie v. Griffin*, 25 S.W.2d 820, 821 (Tex. Comm'n App. 1930); and *Winder v. King*, 1 S.W.2d 587, 589 (Tex. Comm'n App. 1928). "The question is not simply whether a statutory contest is an adequate remedy for irregularities in the process. The question is rather whether the entire election process is immune from judicial interference until the result is declared. The above authorities establish that it is." *Id.* at 160.

III. Conclusion

Because we conclude the State failed to meet its burden in the temporary injunction hearing, we hold the trial court did not abuse its discretion in denying the State's application for a temporary injunction. Accordingly, the order of the trial court is affirmed.

PER CURIAM

Panel consists of Justices Spain, Hassan, and Poissant.

Tab C: Texas Constitution art. IX, § 1

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article IX. Counties (Refs & Annos)

Vernon's Ann.Texas Const. Art. 9, § 1

§ 1. Creation of counties

Currentness

Sec. 1. The Legislature shall have power to create counties for the convenience of the people subject to the following provisions:

(1) Within the territory of any county or counties , no new county shall be created with a less area than seven hundred square miles, nor shall any such county now existing be reduced to a less area than seven hundred square miles. No new counties shall be created so as to approach nearer than twelve miles of the county seat of any county from which it may in whole or in part be taken. Counties of a less area than nine hundred, but of seven hundred or more square miles, within counties now existing, may be created by a two-thirds vote of each House of the Legislature, taken by yeas and nays and entered on the journals. Any county now existing may be reduced to an area of not less than seven hundred square miles by a like two-thirds vote. When any part of a county is stricken off and attached to, or created into another county, the part stricken off shall be holden for and obliged to pay its proportion of all the liabilities then existing, of the county from which it was taken, in such manner as may be prescribed by law.

(2) No part of any existing county shall be detached from it and attached to another existing county until the proposition for such change shall have been submitted, in such manner as may be provided by law, to a vote of the voters of both counties, and shall have received a majority of those voting on the question in each.

Credits
Amended Nov. 2, 1999.

Footnotes

1 Disorganized in 1862, Reorganized in 1873.
2 Recreated 1858.
3 Recreated 1876.
4 Recreated 1876.
5 Recreated 1876.
6 Recreated 1876.
7 Recreated 1870.
8 Reorganized 1845.
9 Recreated 1856.
10 Recreated and reorganized 1921.

Vernon's Ann. Texas Const. Art. 9, § 1, TX CONST Art. 9, § 1
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

Tab D: Texas Constitution art. XI, § 1

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article XI. Municipal Corporations

Vernon's Ann.Texas Const. Art. 11, § 1

§ 1. Counties as legal subdivisions

Currentness

Sec. 1. The several counties of this State are hereby recognized as legal subdivisions of the State.

Vernon's Ann. Texas Const. Art. 11, § 1, TX CONST Art. 11, § 1
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

Tab E: Texas Election Code § 1.010

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 1. Introductory Provisions
Chapter 1. General Provisions (Refs & Annos)

V.T.C.A., Election Code § 1.010

§ 1.010. Availability of Official Forms

Currentness

(a) The office, agency, or other authority with whom this code requires an application, report, or other document or paper to be submitted or filed shall make printed forms for that purpose, as officially prescribed, readily and timely available.

(b) The authority shall furnish forms in a reasonable quantity to a person requesting them for the purpose of submitting or filing the document or paper.

(c) The forms shall be furnished without charge, except as otherwise provided by this code.

Credits
Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986.

V. T. C. A., Election Code § 1.010, TX ELECTION § 1.010
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

Tab F: Texas Election Code § 31.005

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 3. Election Officers and Observers
Chapter 31. Officers to Administer Elections (Refs & Annos)
Subchapter A. Secretary of State

V.T.C.A., Election Code § 31.005

§ 31.005. Protection of Voting Rights

Currentness

(a) The secretary of state may take appropriate action to protect the voting rights of the citizens of this state from abuse by the authorities administering the state's electoral processes.

(b) If the secretary determines that a person performing official functions in the administration of any part of the electoral processes is exercising the powers vested in that person in a manner that impedes the free exercise of a citizen's voting rights, the secretary may order the person to correct the offending conduct. If the person fails to comply, the secretary may seek enforcement of the order by a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986.

V. T. C. A., Election Code § 31.005, TX ELECTION § 31.005
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

Tab G: Texas Election Code § 32.071

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 3. Election Officers and Observers
Chapter 32. Election Judges and Clerks
Subchapter D. Powers and Duties

V.T.C.A., Election Code § 32.071

§ 32.071. General Responsibility of Presiding Judge

Currentness

The presiding judge is in charge of and responsible for the management and conduct of the election at the polling place of the election precinct that the judge serves.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 1997, 75th Leg., ch. 864, § 26, eff. Sept. 1, 1997.

V. T. C. A., Election Code § 32.071, TX ELECTION § 32.071
Current through the end of the 2019 Regular Session of the 86th Legislature

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Tab H: Texas Election Code § 83.001

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 7. Early Voting
Subtitle A. Early Voting
Chapter 83. Officer Conducting Early Voting (Refs & Annos)
Subchapter A. Early Voting Clerk

V.T.C.A., Election Code § 83.001

§ 83.001. Early Voting Clerk Generally

Currentness

(a) The early voting clerk shall conduct the early voting in each election.

(b) The clerk is an officer of the election in which the clerk serves.

(c) The clerk has the same duties and authority with respect to early voting as a presiding election judge has with respect to regular voting, except as otherwise provided by this title.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 1991, 72nd Leg., ch. 203, § 2.06; Acts 1991, 72nd Leg., ch. 554, § 1, eff. Sept. 1, 1991.

V. T. C. A., Election Code § 83.001, TX ELECTION § 83.001
Current through the end of the 2019 Regular Session of the 86th Legislature

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Tab I: Texas Election Code § 83.002

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 7. Early Voting
Subtitle A. Early Voting
Chapter 83. Officer Conducting Early Voting (Refs & Annos)
Subchapter A. Early Voting Clerk

V.T.C.A., Election Code § 83.002

§ 83.002. County Clerk as Early Voting Clerk

Currentness

The county clerk is the early voting clerk for the county in:

(1) the general election for state and county officers and any other countywide election held at county expense;

(2) a primary election; and

(3) a special election ordered by the governor.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 1991, 72nd Leg., ch. 203, § 2.06; Acts 1991, 72nd Leg., ch. 554, § 1, eff. Sept. 1, 1991.

V. T. C. A., Election Code § 83.002, TX ELECTION § 83.002
Current through the end of the 2019 Regular Session of the 86th Legislature

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Tab J: Texas Election Code § 84.012

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 7. Early Voting
Subtitle A. Early Voting
Chapter 84. Application for Ballot (Refs & Annos)
Subchapter A. Application for Ballot

V.T.C.A., Election Code § 84.012

§ 84.012. Clerk to Mail Application Form on Request

Currentness

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.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 1991, 72nd Leg., ch. 203, § 2.07; Acts 1991, 72nd Leg., ch. 554, § 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 864, § 73, eff. Sept. 1, 1997; Acts 1997, 75th Leg., ch. 1381, § 6, eff. Sept. 1, 1997.

V. T. C. A., Election Code § 84.012, TX ELECTION § 84.012
Current through the end of the 2019 Regular Session of the 86th Legislature

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Tab K: Texas Election Code § 84.013

V.T.C.A., Election Code § 84.013

§ 84.013. Application Forms Furnished by Secretary of State

Currentness

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.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 1991, 72nd Leg., ch. 203, § 2.07; Acts 1991, 72nd Leg., ch. 554, § 1, eff. Sept. 1, 1991.

V. T. C. A., Election Code § 84.013, TX ELECTION § 84.013
Current through the end of the 2019 Regular Session of the 86th Legislature

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