

No. 14-20-00358-CV

The State of Texas	§	IN THE FOURTEENTH
	§	
<i>Appellant,</i>	§	
	§	
v.	§	
	§	
Texas Democratic Party and Gilberto Hinojosa, in his capacity as chairman of the Texas Democratic Party, Joseph Daniel Cascino and Shanda Marie Sansing,	§	COURT OF APPEALS
	§	
<i>Appellees.</i>	§	SITTING IN HOUSTON
	§	

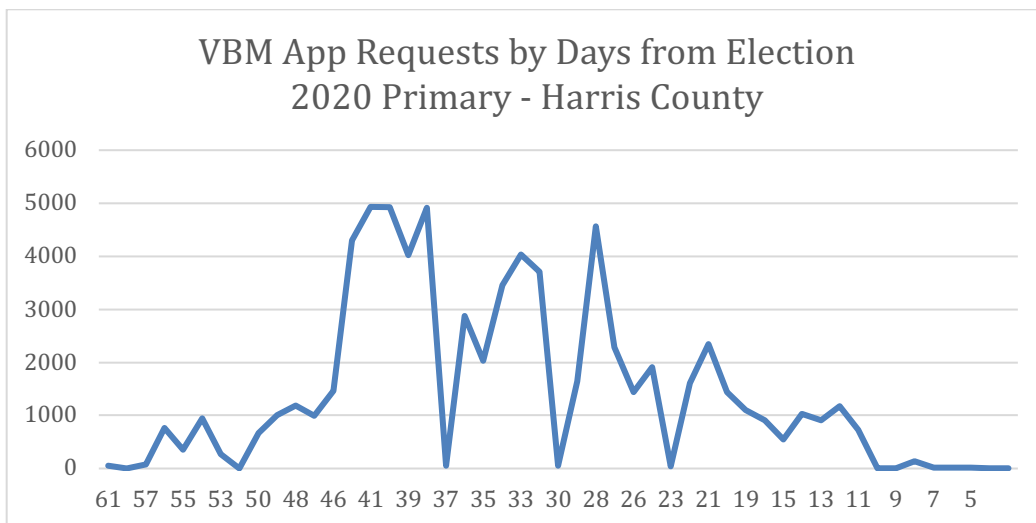
**AMICUS BRIEF OF HARRIS COUNTY ON
MOTION FOR EMERGENCY RELIEF**

Harris County, Texas, submitted an amicus brief in the court below and intends on submitting a revised and updated brief to this Court. Harris County submits this Amicus on Motion for Emergency Relief to advise this Court of (1) the status of the July 14 primary run-off, (2) emphasize the importance of immediate legal clarity on the status of the trial court order for the voters, the election workers, and those who advise them, and (3) make argument on the meaning of recent amendments to rule 24.2 and the lasting effects of the Supreme Court’s holding in *In re State Board for Educator Certification*, 452 S.W.3d 802 (Tex. 2014). No fee has been paid for the preparation of this brief. TEX. R. APP. P. 11.

STATUS OF THE JULY 14 RUN-OFF

1. The vote-by-mail (“VBM”) process is a lengthy and technical one. Voters are already requesting VBM and have been submitting applications since the March 2 primary. There were 70,953 applications for VBM in the primary in Harris County.¹ As of May 9, there were already **78,616** VBM applications for the run-off. This number includes the significant number of voters, about 85% of total VBM requests to date, who request VBM on an annual basis, leaving 11,172 as new VBM requests.

2. During the primary 96.2% of the VBM applications were submitted under the 65+ category and only 0.8% were from the “disability” category. The bulk of the requests came four-to-six weeks before the primary, as illustrated in the following chart:



¹ Note that this number includes duplicates, bad addresses, etc. and is thus higher than the total ballots sent to voters, total returned, and ultimate total number of VBM ballots counted of 53,910.

Although we have not yet hit that time period for the run-off election given the Governor's March 20 order moving the run-off from May 26 to July 14 with in-person early voting set to begin on Monday, July 6,² we have exceeded the total number of requests from the primary. Moreover, we can expect an uptick in requests in early to mid-June as campaigns begin encouraging voters to submit applications through their mail campaign programs.

3. Of the 11,172 requests post-primary through May 9, 95.8% were in the 65+ age category while 2.9% were from the "disability" category. The Harris County Clerk's Elections Division was already seeing an uptick in "disability" VBM applications before the trial court's April 17 ruling with ratio doubling from the primary. Since the trial court's ruling and the resulting publicity, the ratio of "disability" VBM applications has increased to 8.6% of those additional applications submitted since the ruling.³ In sum, the VBM requests are already well underway for the July 14 run-off, and voters are already trending toward requesting VBM under the "disability" category. Thus, the status quo of existing law and voter behavior encompasses the trial court's order.

² Gov. Greg Abbott, Proclamation, Mar. 20, 2020, *available at* https://gov.texas.gov/uploads/files/-press/PROCLAMATION_COVID-19_May_26_Primary_Runoff_Election_03-20-2020.pdf.

³ This ratio was calculated excluding the annual VBM requests that had been submitted during the primary season.

VOTERS, ELECTION WORKERS, AND THOSE WHO ADVISE THEM NEED IMMEDIATE LEGAL CLARITY

4. Voters want the option to VBM. Prof. Robert M. Stein of Rice University as part of his ongoing work studying voter behavior has conducted polls of both Harris County likely voters and its election workers to ascertain their concerns about voting during the coronavirus pandemic.⁴ His results, which will soon be published formally and will be discussed in-depth in Harris County's forthcoming amicus brief on the merits in this case, demonstrate that every demographic of voters, whether by party, race, age, or gender, prefers having the option to VBM given the pandemic. Overall, 69.3% of likely voters stated they were very or somewhat likely to VBM if available. Of voters under 65 (i.e., those who must have a reason under Texas law), 66.6% are very or somewhat likely to VBM if available.

5. Voting in-person with social distancing is also popular with voters, and many voters would prefer that over VBM. But, effectively having social distancing at in-person locations depends on having more voters VBM so that the curve of voter congregation can be spread out. Otherwise, especially in a county as large as Harris County, there will be simply too many bodies to move through too few spaces in too little time.

⁴ See Gabrielle Banks, *Survey: Harris County poll workers willing to show up amid pandemic, voters' reaction mixed*, HOUSTON CHRON. May 9, 2020, available at <https://www.houstonchronicle.com/news/houston-texas/houston/-article/Survey-Harris-County-poll-workers-willing-to-15259330.php>.

6. Additional polling found that 43% of likely Texas voters would “definitely” VBM if they were eligible because of the coronavirus.⁵ But, **nine percent** of Texas voters stated if they cannot VBM and are only eligible to vote in person in the July 14 run-off they do not plan to vote at all — a significant abridgement of voting rights.⁶

7. Prof. Stein also polled 1,800 of the approximate 6,000 Harris County poll workers. Barely half stated they would be likely to work under normal polling conditions, but more than 80% said they would be somewhat or very likely to work if conditions were modified to incorporate social distancing, personal protective equipment, sanitized gloves, or Plexiglas screens. The most popular option was social distancing, which again, will not be possible without shifting more voters to VBM.

8. Unfortunately, the Attorney General’s press statements and abject refusal to accept the trial court’s preliminary injunction have not only injected uncertainty into the process but directed threats of criminal prosecution to voters and those who advise voters including the Harris County Judge, the County Clerk, and presumably even the undersigned counsel. *See* Mot. For Emer. Relief at Ex. A, May 1, 2020, Paxton Memo to County Judges and County Election Officials, Ex. B, Apr.

⁵ *See* Public Policy Polling, Texas Survey Results, Q9, available at <https://static.texastribune.org/media/files/d72e152a3ad3380ae5a007c0849f2dd1/DTPPP-Texas-April27-28-2020.pdf>.

⁶ *Id.* at Q7.

15, 2020 Press Release. The Attorney General’s May 1 memo was accompanied by a press release that singled out the Harris County Judge and County Clerk:

Several county officials throughout the State, including the Harris County judge and clerk, are misleading the public about their ability to vote by mail, telling citizens that in light of COVID-19, anyone can claim a “disability” that makes them eligible for ballot by mail.

AG Paxton Advises County Officials to Avoid Misleading the Public on Vote by Mail Laws, May 1, 2020, available at <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-advises-county-officials-avoid-misleading-public-vote-mail-laws>. While the Attorney General’s choice of singling out the Harris County Judge and Clerk when officials in many counties are publicly discussing the application of the definition of “disability” in the context of a deadly pandemic is somewhat puzzling, it comes with a real threat of prosecution for felony charges. For this additional reason, this Court should quickly issue an order clarifying that the trial court declaratory judgment and preliminary injunction are still in place.

THIS COURT HAS THE AUTHORITY TO ISSUE A TEMPORARY ORDER TO ENFORCE THE TRIAL COURT ORDER

9. This appeal and the trial court’s order address a narrow issue: how to apply Section 82.002, Texas Election Code, and its definition of “disability” for the purpose of qualifying for VBM in the context of a pandemic? Despite the Attorney General’s histrionic press releases and rhetoric, the issue in the trial court’s order is not “fear” of the coronavirus, but whether those with the physical condition of a lack

of immunity to coronavirus may VBM given the plain language of the “disability” definition. This lawsuit calls for no “expansion” or suspension of the law as written by the Legislature, but merely its application to a deadly pandemic.

10. Moreover, the nature of this case argues for enforcing the trial court’s declaratory judgment and injunction pending appeal. The declaratory judgment merely applies the law to the fact of a deadly pandemic. The injunction largely requires no action by the State — other than not misleading the public on the law — only requiring the overt act of the State posting the order on the appropriate agency website and circulating a copy to every county’s election official. Order on Application for Temporary Injunctions and Plea to the Jurisdiction, at 4-5, ¶¶ 3-5, Apr. 17, 2020, CR 957-62.

11. In 2014, the Texas Supreme Court addressed the issue of whether a trial court could refuse to allow an order against the government to be superseded and analyzed the interplay of Texas Rules of Appellate Procedure 24.1(a), 24.2(a)(3), 25.1(h), and Civil Practice and Remedies Code § 6.001. *In re State Bd. for Educator Certification*, 452 S.W.3d 802 (Tex. 2014). The Court held that while the State’s notice of appeal may automatically supersede a final judgment, it does not eviscerate a trial court’s discretion to decline to do so. *Id.* at 808. The Court also pointedly noted the absurdity of allowing “boundless entitlement to supersede adverse non-money judgments” as doing so would “vest unchecked power in the executive

branch, at considerable expense to the judicial branch, not to mention the wider public we both serve.” *Id.*

12. The Legislature apparently responded to this ruling by directing the Supreme Court to amend Rule 24.2(a)(3) which it did effective May 1, 2018,⁷ by adding the following sentence:

When the judgment debtor is the state, a department of this state, or the head of a department of this state, the trial court must permit a judgment to be superseded except in a matter arising from a contested case in an administrative enforcement action.

TEX. R. APP. P. 24.2(a)(3). First, this amendment does nothing to limit the power of courts of appeal, as it only addresses trial courts. Second, this language raises the issue of whether the State must ask for the order to be superseded with its use of “must permit” implying the prerequisite of a request for permission.

13. The sentence follows a sentence allowing a trial court to refuse to permit superseding a non-money, non-property judgment if the judgment creditor posts adequate bond. In the case of temporary injunctions, a bond for the “judgment creditor” (that is, the winner) is set in the order itself. *See McNeely v. Watertight Endeavors, Inc.*, 2018 WL 1576866, *2 (Tex. App. – Austin Mar. 23, 2018) (per curiam) (noting that when the trial court permitted the winner of an injunction to post bond on its injunction, the court declined to permit the judgment against a city

⁷ Misc. Docket No. 18-9061, Apr. 12, 2018.

to be superseded). Here, the court set the bond amount at \$0 — which makes sense given the nature of the case: a mere declaratory judgment for the meaning of the plain language of the statute in the context of a deadly pandemic.

14. The State failed to ask for permission to counter that bond and the enforcement of the injunction order. Consequently, the trial court's order remains in place. This analysis makes sense because otherwise it would be impossible to ever obtain an effective injunction and declaratory judgment on the meaning of the law against a government in a time-sensitive situation leaving litigants without any effective remedy at all.

15. Courts should interpret laws to avoid constitutional problems. *In re Green*, 221 S.W.3d 645, 649 (Tex. 2007) (per curiam); *see also* TEX. GOV'T CODE §§ 311.021(1), 311.023(5). Injunctions arising out of declaratory judgments against the State should be honored to avoid the separation of powers problem *State Board for Educator Certification* raised and to maintain the status quo of the meaning of the law as written. Further, as *State Board for Educator Certification* noted, federal law likewise treats injunctions against the government differently not granting the government a stay as a matter of right. 452 S.W.3d at 807 n.36. For time-sensitive contexts such as the conduct of elections, clarity in the law must be achievable and enforceable before the election, or the validity of the election itself is put at risk for a multitude of election contest lawsuits.

16. Even if the State were not required to ask the trial court to supersede a preliminary injunction on a declaratory judgment against it, Rule 29.3 empowers this Court to immediately clear the air. This Court may make any temporary orders necessary to preserve the parties' rights pending appeal. TEX. R. APP. P. 29.3; *see In re Tex. Nat. Res. Conservation Comm'n*, 85 S.W.3d 201, 207 (Tex. 2002) (noting in an accelerated appeal between two governments that courts of appeals may grant temporary orders, shorten briefing schedules, or allow submission on the briefs under Rules 28.3 and 29.3). Here, the rights of voters to a safe and fair election are already at stake for the July 14 run-off as they are already making the decision to request VBM under the "disability" category. The declaratory judgment and injunction concern a simple matter of statutory interpretation of the plain language of existing law. This is not a case of an injunction striking down laws or imposing numerous substantive acts by the government. Rather the order just requires that the State publicize a court order of great public interest.

17. Finally, it is unclear what "rights" the State would lose if the trial court's order remains in place and enforceable for the July 14 run-off. While Attorney General Ken Paxton as a political actor may wish to suppress the vote and keep that estimated nine percent of Texas voters who are unwilling to risk their lives and health from voting, in his official capacity such a goal is unconstitutional and immoral.

18. Harris County wishes to encourage eligible voters to VBM during the July 14 primary run-off and the November general election in order to flatten the curve of voter congregation at in-person voting sites so that election officials can effectively provide the medically warranted and preferred by voters and election workers alike social distancing. This Court's immediate order granting emergency relief is necessary to achieve that goal of a safe and fair election.

CONCLUSION AND PRAYER

19. The shortest path to clarity for voters and public servants is to simply issue an order granting relief under Rule 29.3. For these reasons, Harris County asks this Court to immediately issue a temporary order clarifying that the trial court's order on the meaning of "disability" under the Election Code in the context of a pandemic entitles any voter without immunity to coronavirus to VBM remains in effect for the duration of the appeal and specifying that those VBM applications under the "disability" category will be valid for the July 14 run-off and the any resulting votes not *ex post facto* rendered moot by any subsequent court ruling. The safety of Harris County voters and election workers depends on it.

Respectfully submitted,

Vince Ryan
State Bar No. 17489500
HARRIS COUNTY ATTORNEY
Robert Soard
FIRST ASSISTANT COUNTY ATTORNEY
State Bar No. 18819100
Terence O'Rourke
SPECIAL ASSISTANT COUNTY ATTORNEY
State Bar No. 15311000
Douglas Ray
SPECIAL ASSISTANT COUNTY ATTORNEY
State Bar No. 16599300
Scott Lemond
ASSISTANT COUNTY ATTORNEY
State Bar No. 00791097
Jay Aiyer
ASSISTANT COUNTY ATTORNEY
State Bar No. 00795058
1019 Congress St., 15th Floor
Houston, TX 77002
Telephone: (713) 755-5585
Telecopier: (713) 755-8848

/s/ Susan Hays

Susan Hays
LAW OFFICE OF SUSAN HAYS, PC
State Bar No. 24002249
P.O. Box 41647
Austin, Texas 78704
Telephone: (214) 557-4819
Telecopier: (214) 432-8273
hayslaw@me.com

Attorneys for Harris County

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2020, I served a copy of this **Amicus Brief on Motion for Emergency Relief** on the counsel listed below via the electronic filing in compliance with Texas Rule of Appellate Procedure 9.5. My email address is hayslaw@me.com.

_____/s/ Susan Hays_____
Susan Hays

Ken Paxton
ATTORNEY GENERAL OF TEXAS
Jeffrey C. Mateer
FIRST ASSISTANT ATTORNEY GENERAL
Darern L. McCarty
DEPUTY ATTORNEY GENERAL FOR CIVIL
LITIGATION
Thomas A. Albright
CHIEF FOR GENERAL LITIGATION
DIVISION
Anne Marie Mackin
ASSISTANT ATTORNEY GENERAL
Michael R. Abrams
ASSISTANT ATTORNEY GENERAL
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Anna.mackin@oag.texas.gov
Michael.abrams@oag.texas.gov
*Attorneys for Intervenor-Defendant
State of Texas*

Joaquin Gonzalez
Joaquin@texascivilrightsproject.org
Mimi Marziani
mimi@texascivilrightsproject.org
Rebecca Harrison Stevens

Chad W. Dunn
BRAZIL & DUNN, LLP
4407 Bee Caves Road, Suite 111
Austin, Texas
chad@brazilanddunn.com

K. Scott Brazil
BRAZIL & DUNN, LLP
13231 Champions Forest Drive, Suite 406
Houston, Texas 77069
scott@brazilanddunn.com

Dicky Grigg
LAW OFFICE OF DICKY GRIGG, P.C.
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
dicky@grigg-law.com

Martin Golando
THE LAW OFFICE OF MARTIN GOLANDO,
PLLC
N. Saint Mary's, Suite 700
San Antonio, Texas 78205
(210) 892-8543
Martin.golando@gmail.com
Attorneys for Plaintiff

beth@texascivilrightsproject.org
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, Texas 78741

Edgar Saldivar
Thomas Buser-Clancy
Andre Segura
ACLU FOUNDATION OF TEXAS, INC.
P.O. Box 8306
Houston, TX 77288
esaldivar@aclutx.org
tbuser-clancy@aclutx.org
asegura@aclutx.org

Sophia Lin Lakin
Dale E. Ho
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004
slakin@aclu.org
dho@aclu.org
Attorneys for Intervenor Plaintiffs

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Susan Hays
Bar No. 24002249
hayslaw@me.com
Envelope ID: 42875103
Status as of 05/11/2020 11:46:45 AM -05:00

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Kevin Scott Dunn	789266	gatorlaw@consolidated.net	5/11/2020 11:39:19 AM	SENT
Martin Golando	24059153	martin.golando@gmail.com	5/11/2020 11:39:19 AM	SENT
Chad Wilson Dunn	24036507	chad@brazilanddunn.com	5/11/2020 11:39:19 AM	SENT
Joaquin Gonzalez	24109935	joaquinrobertgonzalez@gmail.com	5/11/2020 11:39:19 AM	SENT
Cecilia Hertel		cecilia.hertel@oag.texas.gov	5/11/2020 11:39:19 AM	SENT
Lanora Pettit	24115221	lanora.pettit@oag.texas.gov	5/11/2020 11:39:19 AM	SENT
Joaquin Gonzalez		joaquin@texascivilrightsproject.org	5/11/2020 11:39:19 AM	SENT
kevin scottdunn		scott@brazilanddunn.com	5/11/2020 11:39:19 AM	SENT
Dicky Grigg		dicky@grigg-law.com	5/11/2020 11:39:19 AM	SENT
Edgar Saldivar		esaldivar@aclutx.org	5/11/2020 11:39:19 AM	SENT
Sophia LinLakin		slakin@aclu.org	5/11/2020 11:39:19 AM	SENT