No. 14-20-00627-CV

In the Court of Appeals for the Fourteenth Judicial District Houston, Texas

THE STATE OF TEXAS,

Appellant,

v.

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

Appellee.

On Appeal from the
127th Judicial District Court, Harris County

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Statement of the Case

Nature of the Case:	Defendant-Appellee Chris Hollins, in his capacity as the Harris County Clerk, plans to send unsolicited vote-by-mail applications to approximately two million registered voters. CR.195, 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.
Course of Proceedings:	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.
Trial Court:	127th Judicial District Court, Harris County The Honorable R.K. Sandill
Trial Court Disposition:	The trial court denied the State's request for a temporary injunction. CR.289-95, App. Tab A.

Statement Regarding Oral Argument

This case presents a question of first impression regarding the scope of an early-voting clerk's authority under the Election Code. As such, the State respectfully suggests that oral argument would be appropriate and helpful to the Court. However, in its order of September 14, 2020, this Court determined that the case was appropriate for submission on the briefs.

Issue Presented

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.

Introduction

Defendant-Appellee Chris Hollins has announced his intention to send applications for mail-in ballots to every registered voter in Harris County under the age of 65, irrespective of whether any given voter requested an application or even qualifies to vote by mail. There are approximately two million such voters, so his plan is to send over two million unsolicited applications. And Hollins has assured the Court that he intends to do so immediately. The State seeks to enjoin Hollins's mass mailing because it is an illegal *ultra vires* action that exceeds the power delegated to him by the Texas Election Code. The millions of unsolicited vote-by-mail applications will also create confusion and facilitate voter fraud in a major national election that is just weeks away.

The trial court concluded that the State was not entitled to a temporary injunction. In its view, Hollins was granted "broad statutory authority" to conduct the mail-in balloting process as he sees fit. CR.293. Because the Legislature did not forbid Hollins to send out unsolicited mail-in-ballot applications, the trial court reasoned, Hollins is permitted to do so. CR.293. Moreover, the trial court dismissed the State's unrebutted evidence of irreparable harm as based on speculation. CR.293. The court's analysis erred as a matter of law at each step.

When it presumed that Hollins has power unless it is specifically denied, the trial court turned the law regarding the scope of municipal power upside down. For a century it has been established that county officials like Hollins lack power unless it is specifically granted. *E.g.*, *Town of Lakewood v. Bizios*, 493 S.W.3d 527, 536 (Tex. 2016); *Foster v. City of Waco*, 255 S.W. 1104, 1106 (Tex. 1926). That is because a

county is solely an agent of the State, and the law does not permit an agent to act without authorization from its principal. Because not one of the provisions of the Texas Election Code to which either Hollins or the trial court pointed establishes authority for Hollins's mass mailing, no such authority exists.

The trial court also erred in concluding that because Hollins's actions are entirely unprecedented, the State's claims of irreparable harm are based on improper speculation. Again, for a century, it has been established 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 v. Cook*, 281 S.W. 837, 842 (Tex. 1926). And when a county acts without legal authority, "[t]he 'inability [of the State] to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State.'" *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 441 (Tex. App.—Austin 2018, pet. denied) (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018)). Hollins cited no authority to the contrary.

Statement of Facts

I. Statutory Background

"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). 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; (b) the voter "has a sickness or physical condition" that prevents the voter from voting in person, *id.* § 82.002; (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.

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," *id.* § 84.001(a), and send it to the early-voting clerk in the voter's jurisdiction, *id.* § 84.001(d). Applications need not take any particular form as long as they provide statutorily required information. *Id.* § 84.001(c), (f). To make this process easier, the Secretary of State has created and maintained a standard form application since the 1970s. *See* Act of 1977, 65th Leg., R.S., ch. 668, § 1(a)-(b), 1977 Tex. Gen. Laws 1687, 1687-88 (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.

Appellee Chris Hollins is the early-voting clerk for Harris County. Because Harris County is a subdivision of the State of Texas, it—and by extension its agents—possess only those powers granted by the Legislature. *See, e.g.*, *Bizios*, 493 S.W.3d at 536. The limits of this power are "strictly construe[d]." *Id.* "Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." *Foster*, 255 S.W. at 1106.

As an early-voting clerk, Hollins "is an officer of the election in which [he] serves." Tex. Elec. Code § 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.[1]

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

Hollins has ignored these limitations on his power. On August 25, 2020, his office announced on 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 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://abc13.com/texas-mail-in-ballot-voting-coronavirus-during/6243587/.

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 registered to vote in Harris County. RR.207. 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 the remainder has a disability, and it is unclear how many of those disabilities prevent a voter from voting in person. RR.251. Finally, the number of eligible voters who are

[1] If anything, it has rejected such a rule. For example, S.B. 1051, 79th Leg., R.S. (2005), proposed to grant county clerks this authority, but the bill never made it past committee.

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. 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). Specifically, Ingram explained that "[a]n official application from [Hollins's] office will lead many voters to believe that 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.

The Secretary gave Hollins until noon on August 31, 2020 to cease his unlawful actions and to issue a retraction before she referred the case to the Attorney General for "appropriate steps." RR.202. Hollins refused. *Cf.* RR.204. The Secretary immediately referred the case to the Attorney General.

III. Procedural History

The State, acting by and through its Attorney General, filed this suit seeking temporary and permanent injunctive relief against Hollins's *ultra vires* action. CR.4-15. 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 that Hollins would not seek to mail the applications until five days after the trial

court resolved the temporary injunction to allow for the non-prevailing party to seek relief on appeal. CR.24.[2]

In his response to the State's request for a temporary injunction, Hollins was not able to point to a single statute authorizing his actions. Instead, Hollins argued he is free to send out unsolicited applications because there is no statute prohibiting him from doing so. CR.47-49. In his written response, Hollins did not contest that if the State is right on the law, it 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. During that hearing, the court heard testimony from Hollins himself about how he views the limits of his power. In particular, he testified that the Election Code gives him "very broad authority" to conduct early voting however he sees fit, RR.143, and that the Election Code "lays out minimums" and "generally what [he is] allowed to do" but that he is empowered "to go above and beyond" those powers granted to him, RR.141, 171. Importantly, Hollins did not offer any testimony regarding how he could undo his mass mailing once it starts.

On this question of irreparable harm, the court also heard testimony from Keith Ingram 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

[2] In an independent lawsuit, the Supreme Court of Texas issued an order that stayed Hollins's action for a similar period. *In re Hotze*, No. 20-0671(order issued Sept. 2, 2020).

applications to voters who are most likely ineligible to vote by mail will invite potential voter fraud. RR.68-70. And worse, Ingram said that the possibility of increased voter fraud would result in greater distrust for the election process, leading to disenfranchisement of Harris County voters. RR.61-62. The *court* raised the question of whether this testimony was speculative, RR.84-85, and Hollins's counsel seized on that suggestion during her closing remarks, RR.185; *see also* Resp. to Rule 29.3 Motion at 22-23. But Hollins offered no testimony rebutting Ingram's account.

The trial court allowed both parties to submit additional briefing and evidence on issues of irreparable harm and whether the State's request injunction is precluded because the State elected not to challenge Hollins's earlier mailing to voters over 65. RR.189-91. The State complied, providing numerous authorities for how it had satisfied its burden. CR.263-70. Hollins, by contrast, offered nothing more than conclusions of law without citation to case or exhibit. CR.277-82. And once again, Hollins did not dispute or rebut the irreparable harm the State will suffer in the absence of relief.

Without addressing any of the authorities provided by the State, the trial court denied the State's requested relief on September 11. CR.291-95. It reasoned that the Election Code grants early voting clerks "broad powers," 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.[3] CR.292-93. The trial court also chided the State

[3] Though the trial court also discussed a "Section 31.005 Claim," CR.293-95, that was in error. The State has brought a single claim based on *ultra vires* action.

for its "arbitrary and selective objection" in this case compared to the State's decision not to sue the County for sending out applications to registered voters *over* the age of 65, who are invariably qualified to vote by mail. CR.295.

The State filed an immediate notice of interlocutory appeal under Civil Practice and Remedies Code section 51.014(a)(4). CR.287-88.

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. *E.g.*, *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). As the trial court noted, this case presents a very narrow issue of law. RR.28. As a result, these three elements overlap substantially.

The State demonstrated both a cause of action and a likelihood of success on the merits because, as a matter of law, Hollins may only take those actions authorized by the Legislature. And the Legislature has not authorized him to send out unsolicited mail-in-ballot applications. To the contrary, every provision cited by either Hollins or the Court emphasizes that the forms are only available on request.

The State also demonstrated irreparable harm to its sovereign interest in enforcing its own law. It is well-established law in this jurisdiction that the State suffers an injury when laws enacted by the representatives of the people are not properly enforced. That is precisely what will happen here if Hollins sends out his mailers. Moreover, even if the State had to offer evidence of harm, it did so. Indeed, the only evidence about harm in the record is the unrebutted testimony of Ingram, who stated unequivocally that Hollins's action is likely to lead to confusion, the submission of

ballot applications by people who are not eligible to vote by mail, and decreased turnout. In light of that unrebutted testimony, the State was entitled to a preliminary injunction as a matter of law.

Standard of Review

The court of appeals reviews a trial court's decision to deny a temporary injunction 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 without 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 trial 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).

Argument

I. The State is Likely to Succeed on the Merits.

The trial court abused its discretion when it concluded that Hollins had power to send out unsolicited vote-by-mail applications simply because it got the law wrong. Hollins does not have broad powers to take any action relating to mail-in balloting that the Legislature has not forbidden. Harris County, and by extension Hollins as its agent, have only the powers given to it expressly or by necessary implication. And

none of the statutes cited by Hollins or the trial court provides Hollins with the 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 possesses only those powers that are specifically conferred on it by statute or the constitution. *Guynes v. Galveston County*, 861 S.W.2d 861, 863 (Tex. 1993). The 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), *rev'd on other grounds*, 390 U.S. 474 (1968); see TEX. CONST. art. IX, § 1 ("The Legislature shall have power to create counties for the convenience of the people"); *id.* art. XI, § 1 ("The several counties of this State are hereby recognized as legal subdivisions of the State."). As a political subdivision, the County "represent[s] no sovereignty distinct from the state and 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) (quotation omitted); *accord Quincy Lee Co. v. Lodal & Bain Engineers, Inc.*, 602 S.W.2d 262, 264 (Tex. 1980).[4]

Appellee Chris 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. Municipalities and their officials also have power "necessarily implied to perform its duties." *City*

[4] This contrasts with home-rule cities. By constitutional amendment, such cities "have the power of self-governance unless restricted by state law." *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W. 3d 586, 598 (Tex. 2018). No similar amendment empowers counties to engage in self-governance.

of San Antonio v. City of Boerne, 111 S.W.3d 22, 29 (Tex. 2003). Any implied powers must, however, be "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.*

Tellingly, the only case that Hollins has cited 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, janitor, and elevator operators." *Anderson v. Wood*, 152 S.W.2d 1084, 1085 (Tex. 1941). In *Anderson*, the 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 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.

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

Neither Hollins nor the trial court has identified any statute that authorizes Hollins to send unsolicited mail-in-ballot applications to every voter in Harris County.

This is with good reason: The Election Code does *not* generally empower county clerks to manage the election process as they see 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 three 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. Section 84.012 does not empower early-voting clerks to send out unsolicited mass mailings.

The primary law addressing when an application to vote by mail should be provided is Texas Election Code section 84.012. On its face, section 84.012 of the Election Code instructs early-voting clerks to send applications *at the request of a voter*. It does not empower them to do so unsolicited. Hollins has never seriously argued otherwise.

The trial court 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, then declined to read such a prohibition into the statute as if the State were asking the courts to add words to 84.012. CR.292-93. That is not the State's request. Because Hollins lacks any authority not granted by statute, he lacks the power to mail unsolicited applications. *Wasson Interests*, 489 S.W.3d at 430 (quotation omitted). The State does not have to point to a prohibition on unsolicited mail-

ings. Unless there is a provision authorizing unsolicited mailings, Hollins lacks authority to send them. The State points to section 84.012 to emphasize the lack of statutory authority, not to suggest section 84.012 also contains a prohibition on unsolicited mailings.

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

To the extent that the trial court adopted Hollins's view that his conduct is authorized by Section 84.013, that too was error. Hollins argued that he has authority to send unsolicited applications because "Section 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 makes 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 1977, 65th Leg., R.S., ch. 668, § 1(a)-(b), 1977 Tex. Gen. Laws 1687, 1687-88 (then-codified in Tex. Elec. Code art. 5.05). 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.

The section does not empower early-voting clerks like Hollins to take any action at all.

Second, section 84.013 says absolutely nothing about how individuals or organizations *distribute* vote-by-mail applications to voters. It merely requires the Secretary of State to maintain a supply of printed copies of applications "in reasonable quantities" to meet demand. Because this statute 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 the Harris County Clerk's office is an "organization," and they are treated the same as private individuals under the statute. As an initial matter, Ingram testified that the Secretary has advised individuals and organizations that they may send unsolicited applications to voters aged 65 and older, but *not* to 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 that before this year. RR.50, 57-58, 68, 75-76, 92-93.

Moreover, 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. By contrast, when Hollins acts in his official capacity as early-voting clerk, he is acting on behalf of the State. *See supra* at 10-11. 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, the trial court erred to assume that because private individuals may distribute the materials that section 84.013 requires the Secretary to maintain, Hollins can do so as well.

3. 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. Specifically, the trial court relies 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 two core canons of statutory construction.

First, and most importantly, it is a textbook example of "failure to follow the whole-text canon, which 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). In interpreting a statute, the Court is to give effect to the legislature's intent by looking to the statute's plain language. *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008). Courts presume that 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).

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). But the very next subsection says that the "authority shall furnish" those forms "in a reasonable quantity to a person *requesting them*." *Id.* § 1.010(b) (emphasis added).

This case involves a question of when an early-voting clerk may *furnish* an application—not whether he has made them available. Because the term "furnish" 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 common understanding of "furnish" is "to provide or supply with what is needed, useful, or desirable." *Webster's Third New Int'l Dictionary* 923 (2002 ed.); *see also, e.g.*, *New Oxford English 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 power to provide forms only "to a person requesting them."[5]

[5] To the extent that Hollins asserts that he is a "person" under section 1.010, that would be specious. 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"). The word "person" in this sentence refers to the person who would be "submitting or filing the document." Here, that is a voter—not Hollins as the early-voting clerk. Moreover,

The difference between these two terms 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 argued that the State is being hypocritical to argue that he may not mail unsolicited mail-in ballot applications when the Secretary and Attorney General have never objected to posting the applications online. 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. *New Oxford English Dictionary*, *supra*, at 111 (defining available as "able to be used or obtained; at one's disposal"); *cf. Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 477 (5th Cir. 2020) (en banc). The application is not "furnished"—that is, provided—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, 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 controls. 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.*, *White v. Sturns*, 561 S.W.2d 372, 374-75 (1983) (collecting cases). As a result, in the event

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Hollins provided no evidence that he has actually requested copies of the application from the Secretary of State either.

of a conflict, section 84.012, which governs when early-voting clerks are empowered to provide mail-in ballots, governs over section 1.010, which more generally provides for the availability of forms of all kinds. *E.g.*, *Armour Pipe Line Co. v. Sandal Ener., Inc.*, 546 S.W.3d 455, 462 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

4. The trial court's order cannot be upheld on the ground of implied power.

Nor can the trial court's decision be upheld under the principles of implied power. Harris County and Hollins have only such power as is explicitly granted or "*necessarily implied* to perform [their] duties." *City of San Antonio*, 111 S.W.3d at 29 (emphasis added). It is not enough that Hollins views the additional powers as potentially helpful to carrying out a duty assigned to Hollins under the Election Code. The Supreme Court has repeatedly held that "a municipal power will be implied only when without its exercise the expressed authority would be nugatory." *State ex rel. City of Jasper v. Gulf State Utils. Co.*, 189 S.W.2d 693, 648 (Tex. 1945) (cleaned up) (quoting *Foster*, 255 S.W. at 1106); *see also, e.g.*, *Bizios*, 493 S.W.3d at 536 (county's implied powers are only those that are "*indispensable*" to carrying out the powers expressly granted).

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, Keith Ingram, the Secretary of State's long-serving Director of Elections, 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.at 60-62, 64-65. Indeed, this concern is fully supported by the content of the information put out by Hollins, which is incomplete at best, *see, e.g.*, CR.266 (agreeing with assessment that "A disability is something that YOU define for yourself"), and affirmatively misleading at worst, *compare, e.g.*, CR.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* CR.197 (Ex. 2 at 2) (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. The Court should take action to preclude that outcome.

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 him when he distributed unsolicited applications to Harris County voters over 65 years of age. These arguments fail for at least three reasons.

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

The State's decision to seek relief here, but not elsewhere, is a wholly legitimate and unreviewable exercise of discretion under 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.) (internal quotation marks omitted). Because States have 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 (1924) (internal citation omitted).

To give a concrete example, no one would assert that it is illegitimate for a police officer to ticket a driver going twenty-five miles per hour over the speed limit just because he chose *not* to ticket a driver going five-miles per hour over the speed limit. The judicial role in speeding cases is to decide whether the State has proven its case

that a driver charged with speeding violated the law, not whether some other driver *also* violated the law. Just as in this case, does not extend to second-guessing legitimate exercises of discretion to enforce or not to enforce the law in a particular instance. *See also, e.g.*, *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987); *Lewright v. Bell*, 94 Tex. 556, 557, 63 S.W. 623 (1901). This is true in all jurisdictions. And it should have been true here.

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

2. Where, as here, there is no allegation of 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 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 judged. *See generally* CR.289-95.

To use the doctrine of selective enforcement as a defense, Hollins would have 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

inter alia 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.)).

Even if Hollins could identify a county early-voting clerk who the Attorney General treated differently—and he has not—that would not establish cognizable selective enforcement here. Hollins does not argue the Attorney General filed this suit with discriminatory intent and based on a protected characteristic such as race or religion. Indeed, the only apparent classification at issue is based on age. *See* CR.49. And it is well-established that age is not a suspect classification. *See In re H.Y.*, 512 S.W.3d 467, 476 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) ("Age has never been held to be a suspect classification" warranting heightened scrutiny).

Rather than engage in any serious legal analysis, the trial court simply ignored the necessary elements for a selective enforcement defense. Denying the State relief based on that misapplication of law is an abuse of discretion.

3. Even if Hollins tried to allege such a defense, he cannot because the State has not engaged in selective enforcement.

Finally, the trial court erred when it 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. But 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. And private

individuals are not similarly situated to Hollins. Because the circumstances are significantly different, there can be no comparison for purposes of selective enforcement.

a. *Those over the age of 65*: It is not sufficient to point to the State's decision not to bring an enforcement for sending applications to those aged 65 and over because it is not the "same act[]." *Malone Serv. Co.*, S.W.2d at 766. As explained by Keith Ingram in his testimony, sending unsolicited vote-by-mail applications to persons under the age of 65 is more harmful than sending unsolicited vote-by-mail applications to persons over 65 because persons over 65 are invariably eligible to vote by mail. RR.81. There are also fewer voters over 65, so the act is less likely to clog the system. *Compare* RR.207 *with* RR.122. This exercise of discretion "will not be controlled by other authorities." *Bullock*, 583 S.W.2d at 894 (quoting *Charles Scribner's Sons*, 262 S.W. at 727).

There is no allegation that Plaintiff's exercise of discretion in this case is illegitimate. Therefore, the Court may not review Plaintiff's decision to challenge the sending of unsolicited vote-by-mail applications to voters under 65 and not to challenge the sending of unsolicited vote-by-mail applications to voters aged 65 and older. The Court's only role is to decide whether the sending of unsolicited vote-by-mail applications to voters under 65 is *ultra vires*. It is. Whether the sending of unsolicited vote-by-mail applications to voters aged 65 and older is also *ultra vires* is simply not part of the Court's calculation.

b. ***Private parties***: Private parties distributing applications is also a different act for selective-prosecution purpsoes. 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 accurate reflect the relevant legal provisions and caselaw. 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 Legal Woman Voters or by a campaign or Engage Texas or whoever); 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.

Moreover, 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, potentially implicate the realm political speech. *See Meyer v. Grant*, 486 U.S. 414, 422 (1988) (concluding that restrictions on the payment of circulation of ballot-initiative petitions implicate "core political speech" for which First Amendment protection is "at its zenith).[6] As a result, the

[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

State's ability to regulate such speech is limited. *Id.* 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 (at 14-15), 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 10-11. 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.

Because Hollins's proposed mailing is *not* in conformance with State policy and is in excess of the power delegated to Hollins by the Legislature, it is *ultra vires*.

II. The State Has Established Irreparable Harm.

The trial court also erred by dismissing the State's harm as speculative. Assuming that Hollins's objection to irreparable harm is properly preserved, "[t]he 'inability [of a state] to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State.'" *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 441 (Tex. App.—Austin 2018, pet. denied) (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018).

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official acting on behalf of the State, Hollins is in a different category for free speech purposes.

That is precisely what happened here. Moreover, because Hollins did *not* properly preserve any objection, the only evidence in the record is that the State's interest in a properly running election system will be irrevocably undermined.

A. The State is harmed in its sovereign capacity.

The State has an undisputed—and indisputable—interest in preserving the integrity of its elections, particularly when those elections affect a state- or nation-wide office. *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)). Ingram testified that Hollins's unprecedented plan to send unsolicited vote-by-mail applications to all voters in Harris County under the age of 65 will harm that integrity, as well as lead voters to feloniously submit improper vote-by-mail applications, despite the instructions and information sent to voters along with the application. RR.50-55, 82-83. Ingram's testimony is unrebutted. This established imminent and irreparable injury, which is one of the three elements Plaintiff must prove to be entitled to a temporary injunction.

But Plaintiff need only establish that Hollins's plan would be *ultra vires* to establish an "injury." *Tex. Ass'n of Bus.*, 565 S.W.3d at 441.[7] *Yett v. Cook* has made this clear for nearly a century. 281 S.W. 837, 842 (1926).

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[7] *Maryland v. King*, 567 U.S. 1301, 1303 (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) ("The State . . . has a significant interest in enforcing its enacted laws.").

In that case, "Charles B. Cook filed this suit for mandamus against W. D. Yett, mayor, and other officers of the city of Austin, to secure the issuance of a writ of mandamus requiring the officers named to call an election for councilmen for the first Monday in February, 1925." *Id.* at 838. The Court ruled that citizen Cook could not pursue the lawsuit. "His lack of special interest is fatal to his capacity to maintain his suit in the absence of a valid statute authorizing him to sue." *Id.* at 841. "However, the people of the city are not without remedy, for the reason that the state, the guardian and protector of all public rights, can maintain a mandamus suit for redress of the wrongs complained of, if any exist." *Id.* at 842. The Court described this rule, which allows the State to "maintain an action to prevent an abuse of power by public officers and, and in general protect the interest of the people at large," as "elementary" to our governmental system. *Id.*

Under modern sovereign immunity law, the passage from *Yett v. Cook* quoted above would read that the state can maintain an *ultra vires* suit. *See Nazari v. State*, 561 S.W.3d 495, 508–09 (Tex. 2018) ("[M]andamus is not a process that can be resorted to against the state without its consent, and ... no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent." (citing *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847)); *see also City of El Paso v. Heinrich*, 284 S.W.3d 366, 369 (Tex. 2009); *see also Bachynsky v. State*, 747 S.W.2d 868, 870 (Tex. App.—Dallas 1988, writ denied) (noting that the State may bring many types of suits to protect sovereign and quasi-sovereign interest, "but the nature of the relief sought is almost always the same: injunctive or equitable").

But the principle still applies. *Yett v. Cook* demonstrates that the State is entitled to relief in an *ultra vires* suit against a municipal corporation if it shows that the municipal corporation acted *ultra vires*, regardless of whether the State can show that it is otherwise injured. Counties "are created by the state for the purposes of government. . . . [T]he powers conferred upon them are rather duties imposed than privileges granted." *Wills v. Potts*, 277 S.W.2d 622, 625 (Tex. 1964). The State is injured whenever those duties are not fulfilled. *Cf. New Motor Vehicle Bd. of Cal.*, 434 U.S. at 1351 ("[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.").

Indeed, "[t]hat the state has a justiciable 'interest' in its sovereign capacity in the maintenance and operation of its municipal corporations in accordance with law does not admit of serious doubt. Municipal corporations are created for the exercise of certain functions of government. They have a twofold character, one governmental and the other private, and, in so far as their character is governmental, *they are agencies of the state, and subject to state control*." *Yett*, 281 S.W. at 842 (emphasis added). "On the whole, it is evident that the state, not only for the reasons we have given predicated upon our statutes and from the status of a municipal corporation as an agency of the state, but under the ancient and modern rules of the common law, has sufficient interest to, and can, maintain an action to require [a municipal corporation to comply with law]." *Id.* at 843.

"Since the state can bring a mandamus suit similar in purpose to the one before us, it is elementary that the Attorney General has the power to institute such an action." *Id.*; *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").

Yett v. Cook and the decades of caselaw that follow it stand for the proposition that the State, unlike other litigants, may sue municipal corporations to force them to comply with the law, without the need to show an "injury." Or, alternatively but with the same result, the State, but not other litigants, can establish "injury" merely by establishing a violation of state law.

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

Even if its sovereign injury where 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.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 presented no evidence to the contrary.

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

In opposing Rule 29.3 relief, Hollins maintained (at 23) that the State conceded that this evidence was speculative. Not so. The State acknowledged that it had no direct evidence of how an act similar to Hollins's impacted a prior election. But the reason for that is because *Hollins's act is entirely "unprecedented."* RR.85 ("[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. The thrust of Hollins's argument (and the trial court's reasoning) is that the State can do nothing to stop this significant violation of its law simply because no one has ever 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 trial court's order and render a temporary injunction prohibiting Hollins from sending (or causing to be sent) unsolicited mail-in-ballot applications pending final trial on the merits.

Respectfully submitted.

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Certificate of Service

On September 15, 2020, this document was served electronically on Susan Hays, lead counsel for Chris Hollins, via hayslaw@me.com.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance

Microsoft Word reports that this brief contains 8397 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Kyle D. Hawkins
Kyle D. Hawkins

No. 14-20-00627-CV

In the Court of Appeals for the Fourteenth Judicial District Houston, Texas

THE STATE OF TEXAS,

Appellant,

v.

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

Appellee.

On Appeal from the
127th Judicial District Court, Harris County

APPENDIX

Tab A: Trial Court's Order

TINJ4
P7

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:

> **Harris County Clerk** @HarrisVotes · Aug 25
> Update: our office will be mailing every registered voter an application to vote by mail. To learn more about voting by mail in Harris County, Please visit HarrisVotes.com/votebymail.

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

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

APPLICATION FOR BALLOT BY MAIL

12300000005906

CHRIS HOLLINS
COUNTY CLERK
HARRIS COUNTY, TEXAS
1836

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

PROTECTING YOUR RIGHT TO VOTE

1 APPLICANT'S VOTER REGISTRATION: (Name and address must be exactly as it appears on your voter registration certificate)

JOHN Q. PUBLIC
123 MAIN STREET
HOUSTON, TEXAS 77078-0044

PREFERRED MAILING ADDRESS (REQUIRED FOR OUT OF COUNTY & MILITARY) (Address must be exactly as it appears on your voter registration certificate)

PHONE NUMBER: (Optional)

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

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 or Address of Organization You Are Employed By

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 or Address of Organization You Are Employed By

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: TEX. ELEC. 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 C: TEX. ELEC. 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

End of Document

TAB D: TEX. ELEC. 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

End of Document

TAB E: TEX. ELEC. 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

End of Document

TAB F: TEX. ELEC. CODE § 84.014

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 § 84.014

§ 84.014. Action by Early Voting Clerk on Certain Applications

Effective: June 12, 2017
Currentness

If an applicant provides a date of birth, driver's license number, or social security number on the applicant's application for an early voting ballot to be voted by mail that is different from or in addition to the information maintained by the voter registrar in accordance with Title 2, [1] the early voting clerk shall notify the voter registrar. The voter registrar shall update the voter's record with the information provided by the applicant.

Credits
Added by Acts 2017, 85th Leg., ch. 713 (H.B. 4034), § 6, eff. June 12, 2017.

Footnotes

1 V.T.C.A., Election Code § 11.001 et seq.

V. T. C. A., Election Code § 84.014, TX ELECTION § 84.014
Current through the end of the 2019 Regular Session of the 86th Legislature

TAB G: TEX. ELEC. CODE § 84.033

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 B. Canceling Application for Ballot to be Voted by Mail

V.T.C.A., Election Code § 84.033

§ 84.033. Action on Request

Currentness

(a) The election officer shall review each cancellation request to determine whether it complies with Section 84.032.

(b) If the request complies, the early voting clerk shall cancel the application and enter on the application "canceled" and the date of cancellation.

(c) If the request complies, the presiding election judge shall enter on the returned ballot or the notice, as applicable, "canceled," place it and the request in an envelope, and deposit the envelope in ballot box no. 4. The applicant's application is considered to be canceled.

(d) If the request does not comply, the election officer shall deny the request and enter on the request "denied" and the date of and reason for the denial. The presiding election judge shall place the request in an envelope and deposit the envelope in ballot box no. 4.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 1991, 72nd Leg., ch. 203, § 2.08; Acts 1991, 72nd Leg., ch. 554, § 1, eff. Sept. 1, 1991; Acts 1993, 73rd Leg., ch. 728, § 27, eff. Sept. 1, 1993; Acts 1997, 75th Leg., ch. 1381, § 8, eff. Sept. 1, 1997.

V. T. C. A., Election Code § 84.033, TX ELECTION § 84.033
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

Automated Certificate of eService

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Hollis Duncan on behalf of Kyle Hawkins
Bar No. 24094710
hollis.duncan@oag.texas.gov
Envelope ID: 46265467
Status as of 9/15/2020 5:00 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
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Associated Case Party: Chris Hollins, Harris County Clerk

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John B.Swanson		John.Swanson@arnoldporter.com	9/15/2020 4:57:13 PM	SENT