Cause No. 2020-52383

THE STATE OF TEXAS, *Plaintiff,*	§	In the District Court of
v.	§	Harris County, Texas
CHRIS HOLLINS, in his official capacity as Harris County Clerk, *Defendant.*	§	127th Judicial District

Plaintiff's Supplemental Brief in Support of its Application for Temporary Injunction

On September 9, 2020, the Court heard Plaintiff's application for temporary injunction. As ordered by the Court, Plaintiff hereby submits its supplemental brief on two issues: (1) Plaintiff's exercise of discretion in bringing *ultra vires* suits; and (2) whether Plaintiff has shown imminent "injury" as required to obtain a temporary injunction.

The two issues are related. When a county acts without legal authority, "[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). But when the State determines the action will cause little to no injury, the State may choose not to spend its own scarce resources, and those of the judiciary, to sue the county to stop the *ultra vires* act. In this case, as Keith Ingram[1] testified, Plaintiff decided not to sue counties for sending unsolicited vote-by-mail applications to voters

1 Keith Ingram is the Director of the Elections Division with the Texas Secretary of State's Office. He

aged 65 and older because, among other reasons, it determined that the risk from the injury to the rule of law and function of the mail-in ballot system was small. But Plaintiff is suing Defendant to enjoin its plan to send unsolicited vote-by-mail applications to all registered voters under the age of 65 because it determines that the injury is large enough to justify action.

I. The State has the discretion to file, or not file, *ultra vires* suits against counties that it believes plan to violate the law.

Plaintiff's decision to sue Defendant in this case 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). It is as legitimate as a police officer's decision to not pull over a driver going five miles per hour over the speed limit, but to pull over a driver going twenty-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, whether the driver is charged with going five or twenty-five miles per hour over the speed limit. But the judicial role in those cases, 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.

The Attorney General has the inherent authority to exercise his enforcement discretion, and a legitimate use of that discretion may not be reviewed. "In matters of

has served in that position since 2012.

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). "The office of Attorney General is one of ancient origin, and in all jurisdictions its duties have been multifarious, [necessarily] involving at all times 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*, 114 Tex. 11, 27, 262 S.W. 722, 727 (1924) (internal citation omitted); *cf. Lewright v. Bell*, 94 Tex. 556, 557, 63 S.W. 623 (1901) ("The grounds alleged in the petition are that … the attorney general has refused to bring suit to annul its charter. We are clearly of opinion that a mandamus does not lie to compel the attorney general to bring suit in such a case."); *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987) ("Although the duties of district or county attorneys are not enumerated in Article V, § 21, our courts have long recognized that, along with various civil duties, their primary function, is to prosecute the pleas of the state in criminal cases. An obvious corollary to a district or county attorney's duty to prosecute criminal cases is the utilization of his own discretion in the preparation of those cases for trial." (internal citations and quotation marks omitted)).

Selective enforcement is almost never a defense where the conduct alleged violates the law. Instead, the Defendant must 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 such impermissible consideration[s]" 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.)). Defendant cannot make such a showing here because he cannot point to another early voting clerk who has sent unsolicited mail-in ballot applications to all registered voters—let alone that the State singled him out for some invidious purpose.

It is not sufficient to point to the State's decision not to bring an enforcement action for sending applications to those over 65 because it is not the "same act[]." *Id.* As explained by Keith Ingram in his testimony, sending unsolicited vote-by-mail applications to persons under 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. There are also fewer voters over 65, so the act is less likely to clog the system. This exercise of discretion "will not be controlled by other authorities." *Bullock v. Tex. Skating Ass'n*, *supra*; *Charles Scribner's Sons v. Marrs*, *supra*.

There is no allegation that Plaintiff's exercise of discretion in this case is in any way 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.

II. Plaintiff established imminent, irreparable injury.

The State has also established irreparable injury. The State has an undisputed—and indisputable—interest in preserving the integrity of its elections, particularly when those elections affect 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)). Keith Ingram testified that Defendant'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 leading voters to feloniously submit improper vote-by-mail applications, despite the instructions and information sent to voters along with the application. 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 Defendant's plan would be *ultra vires* to establish an "injury." *Tex. Ass'n of Bus.*, 565 S.W.3d at 441.[2] *Yett v. Cook* has made this clear for nearly a century. 281 S.W. 837, 842 (1926).

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

[2] *See also 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.").

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.*

Since *Yett*, the Supreme Court of Texas has "clarif[ied] the types of relief that may be sought without legislative consent" in *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"). Under modern sovereign immunity law, the passage from *Yett v. Cook* quoted above would read that the State can maintain an *ultra vires* suit, not a mandamus 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)). In both *Yett v. Cook* and *City of El Paso v. Heinrich*,

there was no legislative consent to suit. In 1926, that meant that the State could pursue a mandamus suit. Today, post-*Heinrich*, that means that the State can pursue an *ultra vires* suit.

With that clarification, *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. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) ("[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), *reh'g denied* (Jan. 28, 2020), *review denied* (June 19, 2020 (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.

III. Conclusion

Consequently, if Plaintiff demonstrates that Defendant's plan is *ultra vires*, the State is entitled to a temporary injunction. It proves all three necessary elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

Date: September 10, 2020.

Respectfully submitted,

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Certificate of Service

I hereby certify that on September 10, 2020, in accordance with Texas Rule of Civil Procedure 21(a), a true and correct copy of the foregoing *Plaintiff's Supplemental Brief in Support of its Application for Temporary Injunction* was served on all counsel of record using the Court's electronic filing system.

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