

Cause No. 2020-52383

THE STATE OF TEXAS
Plaintiff,

v.

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

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

127th JUDICIAL DISTRICT

**BRIEF OF AMICUS CURIAE THE LEAGUE OF WOMEN VOTERS OF TEXAS IN
SUPPORT OF DEFENDANT CHRIS HOLLINS**

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Amicus, the League of Women Voters of Texas, respectfully submits this brief in support of Defendant Chris Hollins (in his official capacity as Harris County Clerk) in the above-captioned case.

INTEREST OF AMICUS

The League of Women Voters of Texas (“LWVTX” or the “League”) is an affiliate of the League of Women Voters of the United States (“LWVUS”) and a non-partisan, volunteer organization committed to encouraging informed and active participation in government, working to increase understanding of major public policy issues, and influencing public policy through education and advocacy. The League believes that citizens have a protected right to vote and that governmental entities must make voting accessible. LWVTX is particularly interested in this case because it addresses critical issues affecting participation in the voting process in Texas. The outcome of this case will specifically impact the voter education efforts implemented by the League and will also affect the state and national discourse on the fundamental right to vote.

No fee has been paid or will be paid by LWVTX or by any of the parties for the preparation of this brief. Counsel for amicus curiae are providing their services pro bono.

STATEMENT OF FACTS AND SUMMARY

Texas law allows certain voters to vote by mail. TEX. ELEC. CODE § 82.001-82.004. To cast a ballot by mail, a voter must submit an application and be: (1) absent from their county of residence during early voting and election day, (2) disabled or ill, (3) age 65 or over, or (4) confined to jail but not yet finally convicted of a felony. *Id.* The Harris County Clerk is the officer “in charge of and responsible for the management and conduct of” voting by mail for the county. TEX. ELEC. CODE § 32.071 (as incorporated by reference in TEX. ELEC. CODE § 83.001(c)).

On August 25, 2020, the Harris County Clerk announced via Twitter, “[O]ur office will be mailing every registered voter an application to vote by mail.” Plaintiff’s Original Verified Petition (“Pet.”) at 4. On August 27, 2020, Director of Elections for the Texas Secretary of State Keith Ingram sent a letter to Chris Hollins, the Harris County Clerk, asking Hollins to “immediately halt any plan to send an application for ballot by mail to all registered voters and announce its retraction.” Pet. Ex. 1.

Hollins replied via email on the same day, explaining the County Clerk’s office’s “inten[tion] to include detailed guidance along with the applications to inform voters that they may not qualify and to describe who does qualify. They would then have to complete the application and sign the application, stating that what they put on it is true.” Pet. Ex. 2 at 2. Ingram responded to that email on August 28, 2020, reiterating his concerns. *Id.* at 1. The instant lawsuit was filed on August 31, 2020.

LWVTX writes to support the Defendant’s position and to provide broader context as to why the Harris County Clerk’s actions are profoundly beneficial from a policy perspective. Disseminating applications to vote by mail accompanied by detailed guidance will not mislead voters, who are accustomed to receiving information about elections via mail; rather, it will empower their ability to make a voting plan and educate them about the options available. Finding ways to reach and educate voters is particularly urgent in this year’s elections, when the COVID-19 pandemic has made it significantly more difficult for voters—particularly low-income voters, voters of color, and seniors, a disproportionate number of whom lack access to technology—to access information about the electoral process. The State’s argument boils down to an assertion that Harris County voters are prone to committing fraud, a portrayal for which the State offers no evidence. The Harris County Clerk’s office, supported by amicus, is encouraging

participation in the voting process by making applications for mail-in ballots more accessible. Its actions should not be prohibited by this Court.

ARGUMENT

I. Disseminating Applications To Vote By Mail Will Empower And Educate Voters

Harris County plans to send registered voters a blank application to vote by mail, along with detailed guidance explaining that not all individuals are eligible to vote by mail and the relevant qualifications to do so. Such attempts to engage and educate the electorate through mailed literature, including absentee voter applications and ballots, are allowed by law and engaged in by county and state elected officials, non-partisan organizations, and political parties and candidates themselves.

The ability of organizations to send applications to large groups of voters is explicitly facilitated by the Election Code, which allows individuals or organizations to request multiple applications online.¹ TEX. ELEC. CODE § 84.013 (“The secretary of state . . . shall furnish the [application] forms in reasonable quantities without charge to individuals or organizations requesting them for distribution to voters.”). Similarly, the Secretary of State—along with election officials from 29 other states—participates in a program that involves conducting voter outreach, including mailing blank voter registration applications, to a large number of unregistered voters, some of whom may turn out to be ineligible to vote.²

¹ ¹ Texas Secretary of State, *Request an Application for a Ballot by Mail*, sos.state.tx.us (accessed Sep. 6, 2020) <https://webservices.sos.state.tx.us/vrrequest/bbm.asp>.

² See, e.g., Stephen Chang, *Texas Joins Electronic Registration Center*, March 9, 2020, <https://www.sos.state.tx.us/about/newsreleases/2020/030920.shtml> (announcing Texas’ joining of the Electronic Registration Information Center, a consortium of member states whose mission is to assist states in increasing voter participation).

Nonpartisan organizations, including amicus, who engage in voting rights work understand that it is a difficult task to reach and educate voters about their rights and options with respect to voting. Accordingly, amicus’ national office has historically employed mailed literature as one of the tactics it uses in support of its mission to educate voters. In addition, political campaigns, including those of Governor Greg Abbott and President Donald Trump, frequently disseminate mailers with attached mail ballot applications. *See Ex. 1* (compilation of examples of mailers).

Information contained in mailers, like Harris County’s, is intended to be accurate and not misleading. Such mailers are an invaluable method of empowering the electorate, particularly low-income communities, people of color, and seniors. As explained below, these groups disproportionately lack access to online information, excluding them from common avenues to the political process. *See infra* at 10-11. The mailing of application materials is an effective and commonplace method of enabling and encouraging voters to participate in the democratic process. There is no principled reason to exclude counties from taking the same steps to educate voters and facilitate voting (including by mail for those eligible) that non-profit organizations and political campaigns have historically undertaken.

Harris County’s plan—to send out a vote by mail application with a pamphlet explaining that not all voters are eligible to vote by mail but that voters who meet the statutory qualifications may do so—is precisely the sort of straightforward engagement that empowers voters to make their own determinations about whether they qualify to vote by mail. It is also consistent with the recent Texas Supreme Court decision on voting by mail, which emphasizes the role that individuals play in determining their eligibility to vote:

[T]he application form provided by the Secretary of State requires only that voters check a box indicating whether the reason for seeking a ballot by mail is a disability.

The voter is not instructed to declare the nature of the underlying disability. The elected officials have placed *in the hands of the voter* the determination of whether in-person voting will cause a likelihood of injury due to a physical condition.

In re State of Texas, 602 S.W.3d 549, 561 (Tex. 2020) (emphasis added).

The Harris County Clerk's professed course of action is to explain the criteria for eligibility to vote by mail to anyone who receives its mailer. The Clerk has expressed that he "share[s] the State's] concerns of voters who do not qualify to vote by mail applying." Pet. Ex. 2 at 2. To that end, the mailer will "include detailed guidance along with the applications to inform voters that they may not qualify and to describe who does qualify. They would then have to complete the application and sign the application, stating that what they put on it is true." *Id.* Each person receiving the mailer, therefore, will have ample opportunity to review the criteria for eligibility to vote by mail and determine whether one or more of them applies to their particular situation. As discussed below, each individual applicant must then reaffirm that choice by designating which criteria entitles them to vote by mail on the actual mail ballot application form.³

The State provides no reason to believe that the instructions provided by Harris County will be misleading. The State's own petition admits the weakness of its argument by implication, by acknowledging without objection that Harris County has already sent applications to vote by mail to all eligible voters over the age of 65—even absent request. Pet. at 5, 8. The State claims that people who receive Harris County's ballots—all of whom are registered voters—may have moved within Texas or become disqualified by committing a felony, *see id.* at 8. But these sorts

³ Texas Secretary of State, *Application for Ballot by Mail*, <https://webservices.sos.state.tx.us/forms/5-15f.pdf>.

of concerns would apply equally to the mailing of ballots to those over 65, an act with which the State takes no issue.

The Harris County Clerk has already demonstrated a commitment to explaining the eligibility criteria for voting by mail on its website, with which the State has articulated no objection. Tracking the Election Code, the website states,

You may vote early by-mail if you are registered to vote and meet one of the following criteria: Away from the county of residence on Election Day and during the early voting period; sick or disabled; 65 years of age or older on Election Day; or Confined in jail, but eligible to vote.⁴

In fact, in announcing the initiative to send out mail ballot applications to all registered voters, the Harris County Clerk again explained that: “You are eligible to Vote by Mail in Texas if: You are age 65 or older by Election Day; You will be outside of Harris County for all of the Early Voting period and on Election Day; You are confined in jail but otherwise eligible to vote; or You have a disability.”⁵ In characterizing Harris County’s communications surrounding the initiative, the State neglects to mention this articulation of the eligibility standards to vote by mail.

Further, the State’s unsubstantiated claim concerning “large amounts of misinformation provided over the last several months regarding who is and is not eligible to vote by mail in light of the COVID-19” pandemic,⁶ Pet. at 9, is belied by the Harris County Clerk’s office’s clear guidance on this question. Its website states the following:

⁴ Harris County Clerk’s Office, *Voting Information: Voting by Mail*, <https://www.harrisvotes.com/VotingInfo#VoteByMail>.

⁵ Harris County Clerk, *Tweet posted on August 25, 2020*, <https://twitter.com/HarrisVotes/status/1298372639229186049?s=20>.

⁶ The State’s contention that there was widespread misinformation about vote by mail eligibility is false. As the understanding about who and who could not vote by mail shifted based on court decisions, so too did the information contained in voter outreach efforts.

[L]ack 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 do not qualify to vote by mail as ‘disabled’ if you have a fear of contracting COVID-19 but are otherwise healthy. To qualify, you must have an accompanying physical condition.**⁷

At this stage, the State has offered no reason to believe that the information offered by Harris County in its mailer will depart from the straightforward information communicated by the website.

Unable to articulate any specific objections to Harris County’s plan, the State instead paints a dismal picture of the Harris County electorate and asks this Court to officially endorse that view. The State asserts that applications to vote by mail are “ripe material for voter fraud” and that it is “inevitable that voters . . . will wrongly assume they are eligible to vote a mail ballot.” Pet. at 8. It goes so far as to assert that Harris County’s actions are “certain to result in large numbers of vote-by-mail applications from voters who are ineligible to vote by mail.” *Id.* Yet it offers no basis for this characterization—and certainly not one legally sufficient to justify injunctive relief.

Although the petition is rife with speculation attacking voters’ integrity, the State has submitted no factual evidence for this claim. The State similarly relied on baseless allegations in the vote by mail litigation before the Texas Supreme Court earlier this year, claiming that voter fraud tied to mail-in balloting was “all too common” and alleging “that the Clerks [were] accepting ‘improper application[s],’” but the only “proof” the State could marshal was a reference to two hearsay news articles that together refer to fewer than 100 *allegations* of election fraud (not even specifically mail ballot fraud) in the last decade. *See* Petition for Writ of

⁷ Harris County Clerk’s Office, *Voting By Mail FAQs*, https://www.harrisvotes.com/Docs/VotingInfo/VotingByMailFAQs_en-US.pdf (emphasis in original).

Mandamus, *In re State of Texas*, 602 S.W.3d at 2-4 (Tex. 2020) (orig. proceeding). The Court in that case refused mandamus, finding no evidence in the record that any Clerk had accepted a faulty application. In fact, a 2020 analysis conducted by the Brennan Center found that “it is still more likely for an American to be struck by lightning than to commit mail voting fraud.”⁸

In addition to the “detailed guidance” that the Harris County Clerk will be including, the application for a mail-in ballot itself is a check against fraudulent applications. By law, it includes “a statement informing the applicant of the offenses prescribed by Sections 84.003 and 84.004” (knowingly providing false information on the application, or intentionally causing false information to be provided), as well as a statement preceding the signature space that “I certify that the information given in this application is true, and I understand that giving false information in this application is a crime.” TEX. ELEC. CODE § 84.011(a)(1)-(2). Accordingly, voters must fill out and attest to their own eligibility information and sign the forms themselves under penalty of perjury. *See id.* § 84.001.

The State clearly disagrees with the Harris County Clerk about the likelihood and prevalence of fraud. But this disagreement does not create a cause of action that justifies injunctive relief. The Texas Supreme Court has made clear that voters must determine whether they qualify to vote by mail. *In re State of Texas*, 602 S.W.3d at 550 (“[T]he decision to apply to vote by mail . . . is the voter’s”). Harris County’s actions do not interfere with that individual determination—instead, the mailer merely informs voters of the criteria they may use when making such a choice.

⁸ Wendy D. Weiser and Harold Ekeh, *The False Narrative of Vote-by-Mail Fraud*, Brennan Center for Justice, April 10, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud>.

Amicus understands that Texas voting laws can be confusing. However, the solution to this confusion is to inform and educate voters—not squash informational outreach, as the State attempts to do here. Disseminating instructions and applications to vote by mail serves to educate voters about who is eligible to vote by mail, and then empowers them to do so.

II. Disseminating Applications To Vote By Mail Remedies Structural Inequities Exacerbated By The COVID-19 Pandemic

The Harris County Clerk’s office’s decision to disseminate applications to vote by mail did not occur in a vacuum. COVID-19 has drastically altered daily life throughout the world, and Harris County is no exception. Harris County Judge Lina Hidalgo declared an emergency over the COVID-19 virus on March 11, 2020.⁹ Governor Abbott declared an emergency for the State of Texas on March 13, 2020.¹⁰ See TEX. GOV’T CODE §§ 401.062, 418.011 *et seq.* And on March 13, President Trump declared a national emergency.¹¹ As of September 3, 2020, Harris County has had 108,819 confirmed cases of COVID-19, and 1,389 deaths.¹² The county is currently at Risk Level 1, which signifies “a severe and uncontrolled level of COVID-19 in Harris County,”

⁹ Harris County Judge Lina Hidalgo, *Declaration of Local Disaster for Public Health Emergency*, March 11, 2020, <http://www.deerparktx.gov/DocumentCenter/View/8534/Harris-County---Declaration-of-Local-Disaster-for-Public-Health-Emergency>.

¹⁰ Governor Greg Abbott, *Proclamation by the Governor of the State of Texas*, March 13, 2020, https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf.

¹¹ President Donald Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, March 13, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

¹² Harris County Public Health, *2019 Novel Coronavirus*, <https://publichealth.hARRISCOUNTYTX.GOV/Resources/2019-Novel-Coronavirus> (last visited September 3, 2020).

meaning residents must “take action to minimize contacts with others wherever possible and avoid leaving home except for the most essential needs.”¹³

In the current climate, physically accessing information about the electoral process has become disproportionately difficult in comparison to pre-pandemic times. Residents are being discouraged from leaving their homes, but even those who feel comfortable do not have the same opportunities to access information that they had prior to the pandemic. Libraries, traditionally of paramount significance for people seeking out physical information, are closed to the public.¹⁴ The Department of Public Safety—at which many Texans register to vote—closed offices on March 19, 2020, and on May 26, 2020 began a phased reopening with limited services available by appointment only.¹⁵ Post offices, which in the past have been convenient locations for groups such as *amicus* to distribute information about voting, have turned away volunteers trying to drop off materials such as voter registration cards.¹⁶

With many in-person sources of election information closed or limited, the public has been left largely to rely on online sources. However, not all Harris County voters have access to the internet, particularly at home. In addition to making physical forms of information more difficult to access, the COVID-19 pandemic has highlighted what is commonly referred to as the

¹³ Harris County, *Harris County COVID-19 Threat Level System*, <https://www.readyharris.org/Stay-Safe> (last visited September 3, 2020).

¹⁴ Houston Public Library, *COVID-19 Closure FAQs*, August 21, 2020, <https://houstonlibrary.org/learn-explore/covid-19-closure-faqs>.

¹⁵ Texas Department of Public Safety, News Release, March 19, 2020, https://www.dps.texas.gov/director_staff/media_and_communications/pr/2020/0319a; Texas Department of Public Safety, News Release, May 21, 2020, https://www.dps.texas.gov/director_staff/media_and_communications/pr/2020/0521a.

¹⁶ Ashley Lopez, Houston Public Media, *Voting Group Says It Is No Longer Allowed To Leave Voter Registration Cards In Post Offices*, August 28, 2020, <https://www.houstonpublicmedia.org/articles/news/texas/2020/08/28/380788/voting-group-says-it-is-no-longer-allowed-to-leave-voter-registration-cards-in-post-offices/>.

“digital divide,” which refers to uneven distributions in the access to and use of technology between different groups of people.

In particular, low-income communities and communities of color have greater percentages of individuals who have inconsistent access, or lack access entirely, to information provided online. Comp-U-Dopt, a non-profit organization dedicated to providing technology to groups who are historically underserved, estimates that about one in four Houston families at or below the poverty line lack access to technology.¹⁷ In the Houston area’s 10 largest school districts, about 9% of households do not have a computer and nearly twice that number lack broadband internet access.¹⁸ Common Sense Media, a nonprofit that provides education and advocacy to families to promote safe technology and media for children, found in a recent report that low income populations and people of color have lower rates of internet connectivity than their higher income and white peers.¹⁹

Even for individuals who are able to access a vote by mail application online, the requirement to print out a physical copy of the application poses a more significant burden during the COVID-19 pandemic. People are being discouraged from leaving their homes, and a significant number might not feel safe doing so—particularly those with disabilities, who are eligible to vote by mail. Even for those who would be willing to risk additional exposure to the

¹⁷ Roxanne Bustamante, *Digital divide: How some Harris County students are being left behind*, KTRK-TV Houston, May 21, 2020, <https://abc13.com/computers-coronavirus-covid-19-covid-in-schools/6199225/>.

¹⁸ Jacob Carpenter and Shelby Webb, *Now more than ever, Houston’s ‘digital divide’ puts children’s education in peril*, Houston Chronicle, April 6, 2020, <https://www.houstonchronicle.com/news/education/article/houston-digital-divide-coronavirus-kids-schools-15178184.php>.

¹⁹ Laura Isensee, *Report: Texas Leads Country With Widest Digital Divide for Students, Teachers*, Houston Public Media, July 9, 2020, <https://www.houstonpublicmedia.org/articles/news/2020/07/09/377502/report-texas-leads-country-with-widest-digital-divide-for-students-teachers/>.

virus in order to utilize a printer, many of the facilities where they might do so, such as libraries and office buildings, are closed to the public indefinitely.²⁰ Of course, this burden falls disproportionately on low-income voters, who are less likely to have access to the technology that would enable them to print out such an application.²¹

The Harris County Clerk's decision to mail out applications to vote by mail, accompanied by detailed guidance on who is eligible to utilize them, is a sensible measure to ameliorate the particular hardships regarding access to election information and applications caused by COVID-19. Mailing out an application along with eligibility information ensures that a significantly greater number of registered voters—especially voters in low-income communities and communities of color—will receive both educational materials to help them make an informed choice about their eligibility to vote by mail and that they will simultaneously have the means (the ballot application) to apply.

CONCLUSION

For the foregoing reasons, this Court should deny the State's petition in this case.

Date: September 8, 2020

Respectfully submitted,

Mimi M.D. Marziani

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TEXAS CIVIL RIGHTS PROJECT

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²⁰ See *supra* note 14.

²¹ See *supra* notes 17-19.