

# IN THE SUPREME COURT OF TEXAS

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No. 20-0394  
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IN RE STATE OF TEXAS

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ON PETITION FOR MANDAMUS  
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**Argued May 20, 2020**

CHIEF JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE GREEN, JUSTICE GUZMAN, JUSTICE LEHRMANN, JUSTICE DEVINE, JUSTICE BLACKLOCK, and JUSTICE BUSBY joined.

JUSTICE GUZMAN filed a concurring opinion, in which JUSTICE LEHRMANN and JUSTICE BUSBY joined.

JUSTICE BOYD and JUSTICE BLAND issued opinions concurring in the judgment.

Under the Texas Election Code, qualified voters are eligible to vote by mail only in five specific circumstances.<sup>1</sup> One is if the voter has a “disability” as defined by statute.<sup>2</sup> In this original proceeding, amidst the COVID-19 pandemic, and with elections upcoming in July and November, the parties ask us to determine whether a voter’s lack of immunity from the disease and concern about contracting it at a polling place is a “disability” within the meaning of the statute.<sup>3</sup> Petitioner,

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<sup>1</sup> TEX. ELEC. CODE §§ 82.001 (absence from county of residence), 82.002 (disability), 82.003 (age), 82.004 (confinement in jail), and 82.007 (participation in address confidentiality program).

<sup>2</sup> *Id.* § 82.002.

<sup>3</sup> While respondents oppose mandamus relief, they join petitioner in asking that we answer this question.

the State of Texas, argues that the answer is no and seeks mandamus relief prohibiting respondents, five county clerks and election administrators (the Clerks),<sup>4</sup> from misinforming the public to the contrary and improperly approving applications for mail-in ballots. The Clerks deny that they have misinterpreted or misapplied the law, either because the State’s position is incorrect or because they have taken no position to the contrary.

Limitations on voting by mail have long been a subject of intense political debate, in this State and throughout the country. We, of course, take no side in that debate, which we leave to legislators and others. The question before us is not whether voting by mail is better policy or worse, but what the Legislature has enacted. It is purely a question of law. Our authority and responsibility are to interpret the statutory text and give effect to the Legislature’s intent. We agree with the State that a voter’s lack of immunity to COVID-19, without more, is not a “disability” as defined by the Election Code. But the State acknowledges that election officials have no responsibility to question or investigate a ballot application that is valid on its face. The decision to apply to vote by mail based on a disability is the voter’s, subject to a correct understanding of the statutory definition of “disability”. Because we are confident that the Clerks and all election officials will comply with the law in good faith, we deny the State’s petition for writ of mandamus.

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<sup>4</sup> Respondents are the County Clerks of Harris and Travis Counties, and the Election Administrators of Dallas, Cameron, and El Paso Counties. They have all appeared separately, and their positions here appear to differ somewhat, but we will refer to them collectively where possible.

## I

### A

The first week of this year, China reported a novel coronavirus in Wuhan, Hubei Province. The first reported case in the United States of COVID-19, the disease caused by the virus, was on January 20 in the State of Washington, and the first reported case in Texas was on March 4 in Fort Bend County.<sup>5</sup> To date, the Texas Department of State Health Services reports 56,560 confirmed COVID-19 cases in Texas: 36,375 recoveries, 22,446 active cases, and 1,536 fatalities.<sup>6</sup> Indications are that people who are over 65 years old or that have pre-existing medical conditions are at a higher risk of being very sick from the disease.<sup>7</sup> In some cases, symptoms are extremely severe, and a sufferer is hospitalized on a ventilator in an ICU for weeks. In others, symptoms are relatively mild and extend only a few days. A person may carry and spread the virus before exhibiting symptoms of the disease.

On March 13, the Governor declared a state of disaster in response to the immediate threat of a COVID-19 pandemic.<sup>8</sup> Federal, state, and local government orders and advisories closed businesses and other activities and cautioned against leaving home, ignoring personal distancing, and gathering in large groups. The Governor's March 31 order imposed restrictions "to reduce the spread

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<sup>5</sup> News Release, Tex. Dep't. of State Health Servs., DSHS Announces First Case of COVID-19 in Texas (Mar. 4, 2020), <https://www.dshs.texas.gov/news/releases/2020/20200304.aspx>.

<sup>6</sup> *Texas Case Counts*, TEX. DEP'T. OF STATE HEALTH SERVS., <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83> (last visited on May 27, 2020).

<sup>7</sup> *Coronavirus Disease 2019 (COVID 19)*, TEX. DEP'T OF STATE HEALTH SERVS., <https://www.dshs.texas.gov/coronavirus/> (last visited May 26, 2020).

<sup>8</sup> The Governor of the State of Tex., Proclamation No. 41-3720, 45 Tex. Reg. 2087, 2094 (2020).

of COVID-19” in Texas.<sup>9</sup> On April 27, the Governor announced phase one of a plan to reopen Texas businesses and other activities.<sup>10</sup> On May 18, he announced phase two.<sup>11</sup> Many are concerned that the reopening is too fast and too soon; for others it is too slow and not soon enough.

There is much uncertainty about the disease and about the future. There are reports that the disease will weaken in the heat of summer, or not; that there may be a second wave later in the year, or not; and that a vaccine could be available as soon as the fall, or not. Some traditional gatherings have been canceled. The Texas Democratic Party has announced that its convention this year will be online. Others are forging ahead. The Republican Party of Texas still plans an in-person convention mid-July.

## **B**

All of this is occurring in an election year.

On March 7, 2020, the Texas Democratic Party (TDP), its Chairman, and two voters sued the Secretary of State and the Travis County Clerk in Travis County District Court seeking a declaration that § 82.002 of the Election Code allows any voter who believes social distancing is necessary to hinder the spread of the virus to obtain a mail-in ballot. Plaintiffs also sought a mandatory injunction requiring defendants to accept and tabulate ballots from voters who applied to vote by mail under the disability provision by virtue of a belief in the necessity of social

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<sup>9</sup> The Governor of the State of Tex., Exec. Order GA-14, 45 Tex. Reg. 2361, 2369 (2020).

<sup>10</sup> Press Release, Office of the Tex. Governor, Governor Abbott Announces Phase One To Open Texas, Establishes Statewide Minimum Standard Health Protocols (April 27, 2020), <https://gov.texas.gov/news/post/governor-abbott-announces-phase-one-to-open-texas-establishes-statewide-minimum-standard-health-protocols>.

<sup>11</sup> Press Release, Office of the Tex. Governor, Governor Abbott Announces Phase Two To Open Texas (May 18, 2020), <https://gov.texas.gov/news/post/governor-abbott-announces-phase-two-to-reopen-texas>.

distancing. TDP nonsuited the Secretary of State, but the State intervened as a defendant and filed a plea to the jurisdiction. Several advocacy groups<sup>12</sup> and an additional voter also intervened as plaintiffs supporting TDP.

On April 17, after a hearing, the trial court issued a temporary injunction declaring that the plaintiffs were “reasonable to conclude that voting in person while the virus that causes COVID-19 is still in general circulation presents a likelihood of injuring [a voter’s] health, and any voters without established immunity meet the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code § 82.002.

The court enjoined Travis County from rejecting ballots that claimed a disability due to the presence of COVID-19. The defendants, including the State, were also enjoined from “issuing guidance or otherwise taking actions that would prevent Counties from accepting and tabulating any mail ballots received from voters who apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic”.

The State immediately appealed. Travis County did not.

The Attorney General published a letter addressed to county judges and county election officials explaining: “Based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code for purposes of receiving a ballot by mail.”<sup>13</sup> The letter

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<sup>12</sup> These included the League of Women Voters of Texas, League of Women Voters Austin Area, MOVE Texas Action Fund, and Workers Defense Action Fund.

<sup>13</sup> Tex. Att’y Gen., Guidance Letter on Ballot by Mail Based on Disability (May 1, 2020), [https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Mail-in%20Ballot%20Guidance%20Letter\\_05012020.pdf](https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Mail-in%20Ballot%20Guidance%20Letter_05012020.pdf).

further prescribed that any “third parties” who advised voters to apply for mail-in ballots due to a fear of COVID-19 could be prosecuted under the Election Code. The letter stated that the Travis County court’s order was stayed by virtue of the appeal. The letter was accompanied by a press release, stating: “Several county officials throughout the State, including the Harris County judge and clerk, are misleading the public about their ability to vote by mail, telling citizens that in light of COVID-19, anyone can claim a ‘disability’ that makes them eligible for ballot by mail.”<sup>14</sup>

Appellees responded by filing an emergency motion in the court of appeals, seeking to enforce the trial court’s injunction against the State. On May 14, the court of appeals granted the motion and reinstated the temporary injunction. The State filed an emergency mandamus petition in this Court, and we stayed the court of appeals’ order pending review of the mandamus petition. The trial court’s order remains superseded.

Parallel to this state-court litigation, on April 7, the TDP and three voters also sued state officials, the Travis County Clerk, and the Bexar County Elections Administrator in the United States District Court for the Western District of Texas. TDP alleged that the State’s interpretation of the Election Code (1) violates the Twenty-Sixth Amendment as applied, (2) discriminates on the basis of age and race in violation of the Equal Protection Clause as applied, (3) violates the First Amendment, and (4) is void for vagueness.<sup>15</sup> The plaintiffs also accuse the Attorney General of voter

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<sup>14</sup> Press Release, Tex. Att’y Gen., AG Paxton Advises County Officials to Avoid Misleading the Public on Vote by Mail Laws (May 1, 2020), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-advises-county-officials-avoid-misleading-public-vote-mail-laws>.

<sup>15</sup> *Tex. Democratic Party v. Abbott*, No. SA-20-CA-438-FB, 2020 WL 2541971, at \*13 (W.D. Tex. May 19, 2020).

intimidation.<sup>16</sup> After a hearing, on May 19 the court concluded that the plaintiffs were likely to prevail on their claims and issued a preliminary injunction.<sup>17</sup> The court concluded that “lack of immunity from COVID-19 is indeed a physical condition”<sup>18</sup> and declared that “[a]ny eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in [the] upcoming elections during the pendency of pandemic circumstances.”<sup>19</sup> The order enjoined the State from “issuing any guidance, pronouncements, threats of criminal prosecution or orders, or otherwise taking any actions inconsistent with this Order.”<sup>20</sup> The State appealed, and on May 20 the United States Court of Appeals for the Fifth Circuit stayed that order.<sup>21</sup>

## C

The State initiated this original proceeding on May 13, naming the Clerks as respondents. The State asks the Court to use the power granted by the Election Code “to compel the performance of any duty imposed by law in connection with the holding of an election”.<sup>22</sup> The State complains that the Clerks have defined “disability” as a “generalized fear common to all voters of contracting

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at \*28–32.

<sup>18</sup> *Id.* at \*5.

<sup>19</sup> *Id.* at \*6.

<sup>20</sup> *Id.* at \*7.

<sup>21</sup> *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 2616080 (5th Cir. May 20, 2020).

<sup>22</sup> TEX. ELEC. CODE § 273.061.

disease.” According to the State, the Clerks are encouraging voters to apply to vote by mail, “regardless of whether they have any ‘disability,’ as the Legislature defined that term” and accepting invalid applications under their own faulty definition of “disability.” Furthermore, the State argues, by failing to apply the correct definition of disability, the Clerks are ignoring the oath they took to “‘preserve, protect, and defend . . . the laws of’ the State of Texas and ‘faithfully execute [their] duties’ accordingly.” The State’s assertions with respect to each county official are detailed below. The State asks for relief within 14 days of filing the petition because election officials will soon begin mailing out ballots for elections held in July.

On May 15, the plaintiffs and intervenor-plaintiffs from the Travis County litigation moved to intervene in this proceeding. They argued that the relief sought by the State is a collateral attack on the temporary injunction that they had won, which is still pending appeal, and that they should be allowed to intervene as interested parties. Moreover, the issues in this proceeding mirror those decided by the Travis County litigation. The State opposed the motion to intervene, arguing that the Texas Rules of Appellate Procedure do not provide for an intervention in a mandamus proceeding. Before the Court had ruled on the motion to intervene, the movants filed a joint response to the State’s petition for writ of mandamus.

The response argued that:

- the State has failed to show that respondents ignored a ministerial duty because the State cannot show that the election administrators have a duty to reject some voters who apply to vote by mail by virtue of a disability;
- the State is seeking an injunction, not mandamus relief, which, under the Election Code, lies only to correct an act that has already been performed;

- the mandamus petition is an impermissible attack on the temporary injunction;
- there is an adequate remedy on appeal;
- the record is insufficient to decide whether voters without COVID-19 immunity are eligible to vote by mail because the issue involves a review of medical evidence not present in the record, which the Travis County trial court heard before issuing its ruling;
- the State’s interpretation of § 82.002 is refuted by the plain language of the statute, as well as prior opinions from the Attorney General;
- the statute should be read to “maximize Texans’ ability to exercise their right to vote”; and
- the State’s reference to voter fraud is extraneous to the legal problems posed by the petition.

The Court denied the motion to intervene, noting that it would consider the intervenors as amici and review their filings as such.

We set out the State’s assertion regarding each Clerk as follows.

**1**

The State alleges that “Harris County’s early voting clerk . . . (along with other Harris County officials)” filed an amicus brief in the Travis County litigation advocating for a finding that a healthy person who fears infection should be able to vote and that therefore all voters should be able to vote by mail. The State alleges that the Clerk was quoted as saying that her office would not challenge any voter applying to vote by mail. Further, she asked the Harris County commissioners court for sufficient funds to “to provide an absentee ballot to every voter in Harris County” and promised to conduct a widespread voter information campaign “promoting voting by mail.” Therefore, the State

contends, she is “overriding the Legislature’s policy decisions”. The County also filed an amicus brief in the Fifth Circuit Court of Appeals taking the same position it took in Travis County.

The Harris County Clerk responded that she has only proposed that voters “for whom voting in person presents a likelihood of injury to the voter’s health” are eligible to vote by mail. “Election officials . . . have advised [voters] to vote by mail if they do not have immunity to a highly contagious disease that is likely to injure their health.”

The County took the position in the Travis County court that the County “and its Election Administrator Need Immediate Clarity.” The only references to the Clerk at all, in the amicus filed at the time of the mandamus petition, are two references to the need for clarity on the law. It is not clear why the State ascribes all the statements in the brief to the Clerk. The brief explained that clarity was required to effectively run polling locations and protect election workers. In the County’s amicus brief in the Fifth Circuit, the County Attorney again, not the Clerk stated that “Harris County wishes to increase the ratio of VBM as a practical not a partisan matter because doing so will enable less crowded conditions during in-person voting and thus better social distancing.” In the same brief, the County stated that it was not advocating for universal voting by mail, but only preparing for what promises to be “the most challenging election in American history.” The brief notes that “[e]lection administrators naturally thought this broad definition would include those who could contract COVID-19 by voting in-person as polling places tend to be crowded with no room to socially distance. But clear guidance was not forthcoming.”

The brief does argue that because of the seriousness of COVID-19 infection, and “because no one is known to be immune to COVID-19, all voters should be free to VBM in the July 14 run-off

and the November election.” The brief also reported that mail-in ballot applications have already started to accrue; so far about 2.9% of applications make a claim for a mail-in ballot under the disability provision. Of these, only a very small number have further noted that the purported disability is related to the pandemic. Once again, the brief’s only references to the Clerk cite the election administrators’ need “to know clear rules for conducting elections during the pandemic as soon as possible so they may plan accordingly.”

In her statements before the Harris County commissioners court, the agenda reflects a “[r]equest by the County Clerk for potential expansion of voting by mail due to COVID-19 including a review of budget requirements for such a program.” On the same page of the agenda, the County Attorney is noted to have requested a discussion of “the effect of COVID-19 pandemic on elections,” and a “filing by the County Attorney of a friend of court brief in state litigation seeking to allow all eligible voters to vote by mail during the pandemic, and authorization to file similar briefs in federal court and other similar litigation.”

Further, in a letter to the commissioners court, the Clerk reviewed budget concerns raised by an “expanded Mail Ballot Program.” The letter states: “The County Clerk’s Office is preparing to scale up the mail program and now are providing the Court a cost estimate list of items in order to expand the vote by mail program for the July 14, 2020 primary runoff election with the early voting period from July 6-10.” The letter proceeds to discuss the added expenses of increased voting by mail at escalating levels of mail-in ballots. The letter also states that the office is engaging in a “robust Voter Outreach campaign,” “encourag[ing] eligible voters to vote by mail,” and “expand[ing] vote by mail infrastructure.”

The Clerk is reported to have said that “her office is planning for any outcome in a lawsuit filed by Democrats and voting rights advocates seeking to force the Texas secretary of state to allow any resident to request a mail ballot.”<sup>23</sup> She is quoted as saying her office “can’t turn on a dime”; preparation for any eventuality is necessary.<sup>24</sup> She described the added costs of providing mail-in ballots, from an additional 700,000 mail-in ballots to the cost if the full population voted by mail.<sup>25</sup> The article also states, “Trautman on April 13 said her office would not challenge any voter’s request for a mail ballot, effectively opening the accommodation to anyone.”<sup>26</sup>

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The State argues that the Travis County Clerk declared on her website that she would “provide a mail-in ballot to any voter who claims ‘disability’ because of fear of exposure to the novel coronavirus”. Further: “Based on the Travis County Trial Court’s recent order, mail-in-ballots are a legal alternative to in-person voting for many voters while COVID-19 is in general circulation.” She also neither “opposed nor appealed the Travis County District Court’s temporary injunction”. The State complains that the Clerk stated that “[i]f the voter swears [to be disabled], I believe the voter.”

This statement no longer appears on the website.

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<sup>23</sup> Zach Despart, *Harris County OKs up to \$12M for mail ballots amid corona virus concerns*, HOUST. CHRON. (Apr. 28, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-OKs-up-to-12M-for-mail-ballots-15232775.php>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

Travis County responded that the statements on the website were an accurate reflection of the law, and the State neglected to add that the website also referred interested voters to read the trial court's injunction, with a link to the order. Moreover, the Clerk is required by law to believe a voter who swears to be disabled. In effect, the State is complaining that the Clerk is following the plain language of § 82.002. And, "the State's argument that [the Clerk] is advocating or advising voters to violate the law is factually baseless."

3

The State argues that the Cameron County Elections Administrator's website published a reference to the state trial court's order, which explained, "In light of this temporary judgement and its underlying reasoning, the Cameron County Elections Department will not reject any voter's request for a mail-in ballot based on the eligibility category of disability."

The Cameron County Elections Administrator responded that he updated the website each time a court spoke on the issue, including after this Court stayed the district court and the court of appeals' order. The website was later revised to reflect that, "the Texas Supreme Court is temporarily not allowing voters to use the coronavirus as a 'disability' to request a mail-in ballot. The Court is anticipated to issue guidance on this issue in the near future." The website further states that "[o]ur office has no legal authority to administratively require voters to substantiate their disability at the time the application is submitted." In an affidavit to the Court, the Administrator explained: "In no way have I ever expanded or attempted to expand the Legislature's determination of who is eligible

to vote by mail. Disability, under the Code, does mean a sickness or physical condition. I have not defined the word to mean a generalized fear common to all voters of contracting disease.”<sup>27</sup>

4

The State alleges that the Dallas County commissioners court issued a resolution stating that due to the threat of COVID-19, any voter who wanted a mail-in ballot could check the box indicating a disability. The Elections Administrator presented the Attorney General’s May 1 letter to the commissioners but explained that “however . . . we do not investigate the reason or require further explanation for the disability if the application is marked disability.”

The Administrator responded that she is not a member of the commissioners court “and did not sponsor nor weigh in regarding the resolution.” Moreover, the State has cited to only a proposed version of the resolution, not the one that was adopted. The Administrator’s presentation of the Attorney General’s letter was only accompanied by a description of her practice, which is consistent with the Election Code. That is, Administrators cannot investigate the reason why the disability box is marked on an application. There is no evidence that she took a position contrary to the law, or even that she advocated for expanding the availability of mail-in ballots.

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The State alleges that the El Paso Elections Administrator “told the El Paso County Commissioners Court that she plans to provide mail-in ballots to any voter who requests one due to the COVID-19 pandemic unless the Travis County temporary injunction is reversed.” The El Paso

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<sup>27</sup> Supp. MR at 13.

commissioners court then voted to file an amicus brief in the Travis County litigation supporting the plaintiffs' interpretation of § 82.002.

The Administrator responded that she “recognized a potential problem in carrying out her duties: the Travis County order might cause an increase in the number of applications for mail-in ballots, which would increase her office’s expenses, like postage, staffing, and supplies.” Thus she worked with the commissioners court in anticipation of potential budgetary problems. Moreover, the Administrator contends that the State’s description of her comments is inaccurate. Instead, she explained the litigation and informed the commissioners that it was not clear how § 82.002 would be interpreted at the time of the November elections. She also noted that because there is no requirement that a voter describe her disability, the disability is taken “at face value.” Thus she summarized the pending litigation and accurately described how a mail-in ballot should be considered, according to both the Attorney General and Secretary of State: “evaluate a ballot by mail application for completeness and issue a ballot if the application is complete.”

#### **D**

The Clerks join the State in requesting the Court to interpret § 82.002. The Election Code provides that the “supreme court or a court of appeals may issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election”.<sup>28</sup> The Harris

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<sup>28</sup> TEX. ELEC. CODE § 273.061.

County Clerk agrees with the State that because of imminence of the July elections, filing first in this Court is justified.<sup>29</sup> This case also presents questions of state-wide importance.<sup>30</sup>

## II

Eligibility for voting by mail is provided by Chapter 82. Section 82.002(a), entitled “Disability”, provides that “[a] qualified voter is eligible for early voting by mail if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter’s health.”<sup>31</sup> The County Clerk of Harris County<sup>32</sup> argues that a lack of immunity to COVID-19 is a “physical condition” that is, a physical state and that “likelihood” does not mean a probability. Thus, a voter without immunity has a “disability” under the statute. The State contends that lack of immunity in an otherwise healthy person is not a “physical condition” because it does not distinguish the person from the general populace. “No one can be immune to all possible diseases.” What does distinguish people without immunity, the State argues, is at most a fear of contracting COVID-19, and fear is not a “physical condition”. The State argues that because a lack of immunity is not a

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<sup>29</sup> See TEX. R. APP. P. 52.3(e).

<sup>30</sup> See *Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001).

<sup>31</sup> TEX. ELEC. CODE § 82.002(a).

<sup>32</sup> The position of the County Clerk of Harris County is clearest. The El Paso County Election Administrator joins the Harris County Clerk’s “textual analysis” of § 82.002 in passing. El Paso Br. at 23. The County Clerk of Travis County contends that the district court’s temporary injunction properly defined “disability.” Travis Br. at 16–17. According to the Clerk, lack of immunity to COVID-19 is a disability given the disease’s extremely contagious nature and the lack of knowledge about the virus.

“physical condition”, whether “likelihood” can mean something less than a probability need not be decided.

## A

The history of absentee voting legislation in Texas shows that the Legislature has been both engaged and cautious in allowing voting by mail. When it has permitted absentee voting based on a voter’s bodily state, it has always been in terms of a physical disability.

Voting before election day was first permitted by statute in Texas in 1917. A voter who expected to be absent from his county of residence on election day an “absentee” could appear beforehand in person before the county clerk and mark his ballot, which the clerk retained to be counted with all the votes cast.<sup>33</sup> In 1921, the absentee could also make an affidavit before a notary public, who would then request a ballot from the county clerk.<sup>34</sup> When the voter had marked the ballot in the notary’s presence under oath, the notary would mail it to the county clerk.<sup>35</sup> In 1933, the option of voting before a notary was discarded, but an absentee could apply to the county clerk for a ballot by mail, and after receiving and marking it, return it by mail to the county clerk.<sup>36</sup> This was the first use of voting by mail.

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<sup>33</sup> Act of May 26, 1917, 35th Leg., 1st C.S., ch. 40, § 1, 1917 Tex. Gen. Laws 62, 63–64.

<sup>34</sup> Act of Mar. 12, 1921, 37th Leg., R.S., ch. 113, § 1, 1921 Tex. Gen. Laws 217, 218.

<sup>35</sup> *Id.* at 219.

<sup>36</sup> Act of Jan. 30, 1933, 43rd Leg., R.S., ch. 4, § 1, 1933 Tex. Gen. Laws 5, 5–6.

In 1935, absentee voting was expanded to a voter “who because of sickness or physical disability cannot appear at the poll place” on election day.<sup>37</sup> The voter was required to submit a sworn application accompanied by “a certificate of a duly licensed physician certifying as to such sickness or physical disability”.<sup>38</sup> The provisions were codified as § 37 of the Election Code enacted in 1951.<sup>39</sup> A 1963 amendment to § 37 provided that “[e]xpected or likely confinement for childbirth on election day shall be sufficient to entitle a voter to vote absentee on the ground of sickness or physical disability” but was also required to be supported by a physician’s certificate “that because of pregnancy and possible delivery she will be or may be unable to appear at the polling place on election day.”<sup>40</sup>

In 1969, absentee voting was extended to voters who could not appear at a polling place for “religious belief”.<sup>41</sup> A 1975 amendment extended absentee voting to voters 65 years of age or older on election day and those who could not appear at a polling place because of confinement in jail.<sup>42</sup> In 1981, the requirement of a physician’s certificate accompanying an application to vote absentee based on sickness or physical disability was dropped.<sup>43</sup> In 1991, religious belief was dropped as a

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<sup>37</sup> Act of May 17, 1935, 44th Leg., R.S., ch. 300, § 1, 1935 Tex. Gen. Laws 700, 700.

<sup>38</sup> *Id.* § 2, at 701–702.

<sup>39</sup> Act of May 30, 1951, 52nd Leg., R.S., ch. 492, § 1, 1951 Tex. Gen. Laws 1097, 1109–1113.

<sup>40</sup> Act of May 24, 1963, 58th Leg., R.S., ch. 424, § 14, 1963 Tex. Gen. Laws 1017, 1034.

<sup>41</sup> Act of Mar. 27, 1969, 61st Leg., R.S., ch. 82, § 1, 1969 Tex. Gen. Laws 202, 203.

<sup>42</sup> Act of May 30, 1975, 64th Leg., R.S., ch. 682, § 5, 1975 Tex. Gen. Laws 2080, 2082.

<sup>43</sup> Act of May 26, 1981, 67th Leg., R.S., ch. 301, § 1, 1981 Tex. Gen. Laws 854, 855.

reason to vote absentee.<sup>44</sup> In 2007, participation in the address confidentiality program administered by the attorney general was added.<sup>45</sup>

From 1935 to 1985, absentee voting was permitted for voters with “sickness” or “physical disability”. That formulation was changed with the recodification of the Election Code in 1985. The provision, § 82.002(a), was entitled “Disability”, retaining that concept as the general requirement, and stated: “A qualified voter is eligible to vote absentee by personal appearance or by mail if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring his health.”<sup>46</sup>

## B

The Legislature has very deliberately limited voting by mail to voters in specific, defined categories: those who will be absent from their county of residence during an election period,<sup>47</sup> who have a “disability”,<sup>48</sup> who are over 65 years of age,<sup>49</sup> who are incarcerated,<sup>50</sup> or who are participating in the address confidentiality program administered by the Attorney General.<sup>51</sup> “Disability” is defined as a sickness or physical condition preventing in-person voting without a likelihood of harm to the

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<sup>44</sup> Act of May 21, 1991, 72nd Leg., R.S., ch. 1234, § 1.02, Tex. Gen. Laws 831, 831.

<sup>45</sup> Act of May 25, 2007, 80th Leg., R.S., ch. 1295, § 7, 2007 Tex. Gen. Laws 4354, 4360.

<sup>46</sup> Act of May 13, 1985, 69th Leg., R.S., ch. 211, § 1, 1985 Tex. Gen. Laws 802, 897.

<sup>47</sup> TEX. ELEC. CODE § 82.001.

<sup>48</sup> *Id.* § 82.002.

<sup>49</sup> *Id.* § 82.003.

<sup>50</sup> *Id.* § 82.004.

<sup>51</sup> *Id.* § 82.007; *see* TEX. CODE CRIM. PROC. arts. 56.81–56.93.

voter's health,<sup>52</sup> and as “[e]xpected or likely confinement for childbirth on election day”.<sup>53</sup> The ordinary meaning of “physical” is “of or relating to the body”.<sup>54</sup> The parties agree that this excludes mental or emotional states, including a generalized fear of a disease. “Condition” can mean “a state of being”.<sup>55</sup> But if “physical condition” as used in § 82.002(a) meant “physical state of being”, it would swallow the other categories of voters eligible for mail-in voting. A voter’s location during an election period is certainly a physical state of being. So are age, incarceration, sickness, and childbirth, even participation in a program. To give “physical condition” so broad a meaning would render the other mail-in voting categories surplusage. Further, such an interpretation would encompass the various physical states of the entire electorate. Being too tired to drive to a polling place would be a physical condition. The phrase cannot be interpreted so broadly consistent with the Legislature’s historical and textual intent to limit mail-in voting.<sup>56</sup>

Another dictionary definition of “condition” is “the physical status of the body as a whole or of one of its parts usually used to indicate abnormality”,<sup>57</sup> as for example a heart condition. The idea of condition as an abnormal or at least distinguishing state of being is consistent with the other

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<sup>52</sup> TEX. ELEC. CODE § 82.002(a).

<sup>53</sup> *Id.* § 82.002(b).

<sup>54</sup> *Physical*, MERRIAM-WEBSTER ONLINE (2020).

<sup>55</sup> *Condition*, MERRIAM-WEBSTER ONLINE (2020).

<sup>56</sup> See *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014) (“While we must consider the specific statutory language at issue, we must do so while looking to the statute as a whole, rather than as ‘isolated provisions.’” (quoting *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011))).

<sup>57</sup> *Condition*, MERRIAM-WEBSTER UNABRIDGED (2020).

statutory categories. A lack of immunity to COVID-19, though certainly physical, is not an abnormal or distinguishing condition.

Section 82.002 describes the physical condition that entitles a voter to vote by mail as a “disability”.<sup>58</sup> It is the same word the Legislature has used consistently since 1935. “Disabled” normally means “incapacitated by or as if by illness, injury, or wounds”. The phrase, “physical condition”, must be read in this light. In no sense can a lack of immunity be said to be such an incapacity.

Accordingly, we conclude that a lack of immunity to COVID-19 is not itself a “physical condition” for being eligible to vote by mail within the meaning of § 82.002(a).

## C

JUSTICE BOYD and JUSTICE BLAND would hold that a lack of immunity to COVID-19 is a “physical condition” under § 82.002(a), though a voter would not be entitled to vote by mail without a “likelihood” that voting in person would injure the voter’s health. We all agree that “likelihood” means a probability. But for the population overall, contracting COVID-19 in general is highly improbable. This is not to say that the risk is not greater for certain persons or in certain situations, as we have noted. Indeed, that improbability has justified the efforts throughout the state to reopen business and activities in a gradual return to normalcy. In addition, as the State highlights, authorities planning elections are working in earnest to ensure adherence to social distancing, limits on the

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<sup>58</sup> The Harris County Clerk argues that this heading of the statute cannot “limit or expand the meaning of a statute”, per § 311.024 of the Texas Government Code. But here, “disability” is not merely a heading; it is the determinative word the absentee voting statutes used for fifty years. Nothing in the statutory history of absentee voting or the 1985 recodification suggests that “disability” does not continue to define the statutory categories described.

number of people in one place, and constant sanitation of facilities. By any measure, a lack of immunity alone could not be a likely cause of injury to health from voting in person. We read the opinions of JUSTICE BOYD and JUSTICE BLAND as concluding otherwise.

We agree, of course, that a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of disability. We disagree that lack of immunity, by itself, is one of them. As we have said, the decision to apply to vote by mail based on a disability is the voter's, subject to a correct understanding of the statutory definition of "disability".

### III

The State asks the Court to order the Clerks to refrain from misapplying election law by "misleading the public and providing absentee ballots to unqualified voters." The State complains that the Clerks have "misrepresented" the nature of the § 82.002 disability provision by advocating for the position that anyone without immunity to COVID-19 may vote by mail. The State points to amicus briefs filed by the Clerks in litigation concerning mail-in ballots and to comments made to commissioners courts as evidence of misrepresentation. The State also complains that some of the Clerks have described a court order stating that anyone without COVID-19 immunity may apply for a mail-in ballot. In addition, the State vaguely alleges that the Clerks are accepting invalid applications to vote by mail.

The Clerks contend, in part, that they lack a duty to “police an individual voter’s claimed disability.”<sup>59</sup> The Clerks also defend their speech before the commissioners courts as accurate attempts to convey information about rapid changing electoral conditions.<sup>60</sup> The Clerks argue that the State has failed to identify ministerial duties that the Clerks have ignored.

The Election Code provides that “[t]he early voting clerk shall review each application for a ballot to be voted by mail.”<sup>61</sup> “If the applicant is entitled to vote an early voting ballot by mail, the clerk shall provide an official ballot to the applicant as provided by this chapter.”<sup>62</sup> Further, “if the applicant is not entitled to vote by mail, the clerk shall reject the application”.<sup>63</sup>

The State has conceded that “Respondents have no discretion to do anything but determine whether the voter is entitled to vote by mail and process the application accordingly.” The State acknowledges that the Election Code does not require election clerks to “investigate each applicant’s disability.”<sup>64</sup> Indeed, the Legislature rejected the requirement of a physician’s proof of disability for mail-in voting applications when it amended the Election Code in 1981.<sup>65</sup> And the application form provided by the Secretary of State requires only that voters check a box indicating whether the reason

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<sup>59</sup> See El Paso Resp. Br. at 14.

<sup>60</sup> See *id.* at 10.

<sup>61</sup> TEX. ELEC. CODE § 86.001(a).

<sup>62</sup> *Id.* at § 86.001(b).

<sup>63</sup> *Id.* at § 86.001(c).

<sup>64</sup> Post-Sub. Br. at 9.

<sup>65</sup> Act of May 26, 1981, 67th Leg., R.S., ch. 301, § 1, 1981 Tex. Gen. Laws 854, 855.

for seeking a ballot by mail is a disability.<sup>66</sup> The voter is not instructed to declare the nature of the underlying disability.<sup>67</sup> 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. The respondents do not have a ministerial duty, reviewable by mandamus, to look beyond the application to vote by mail. Moreover, while the State has alleged that the Clerks are accepting “improper application[s],” there is no evidence in the record that any has accepted a faulty application.

The Clerks have assured us that they will fully discharge their duty to follow the law. We are confident that they will follow the guidance we have provided here. Accordingly, we conclude that issuing the writ of mandamus to compel them to do so is unwarranted.

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We agree with the State that a lack of immunity to COVID-19 is not itself a “physical condition” that renders a voter eligible to vote by mail within the meaning of § 82.002(a). Confident that election officials will comply, we decline to issue the writ of mandamus.

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Nathan L. Hecht  
Chief Justice

Opinion delivered: May 27, 2020

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<sup>66</sup> APPLICATION FOR A BALLOT BY MAIL, TEXAS SECRETARY OF STATE, <https://webservices.sos.state.tx.us/forms/5-15f.pdf>.

<sup>67</sup> *Id.*