

IN THE SUPREME COURT OF TEXAS

=====
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.¹ One is if the voter has a “disability” as defined by statute.² 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.³ Petitioner,

¹ 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).

² *Id.* § 82.002.

³ 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),⁴ 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.

⁴ 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.⁵ 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.⁶ 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.⁷ 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.⁸ 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

⁵ 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>.

⁶ *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).

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

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

of COVID-19” in Texas.⁹ On April 27, the Governor announced phase one of a plan to reopen Texas businesses and other activities.¹⁰ On May 18, he announced phase two.¹¹ 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

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

¹⁰ 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>.

¹¹ 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 groups¹² 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.”¹³ The letter

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

¹³ 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.

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.”¹⁴

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.¹⁵ The plaintiffs also accuse the Attorney General of voter

¹⁴ 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>.

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

intimidation.¹⁶ After a hearing, on May 19 the court concluded that the plaintiffs were likely to prevail on their claims and issued a preliminary injunction.¹⁷ The court concluded that “lack of immunity from COVID-19 is indeed a physical condition”¹⁸ 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.”¹⁹ 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.”²⁰ The State appealed, and on May 20 the United States Court of Appeals for the Fifth Circuit stayed that order.²¹

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”.²² The State complains that the Clerks have defined “disability” as a “generalized fear common to all voters of contracting

¹⁶ *Id.*

¹⁷ *Id.* at *28–32.

¹⁸ *Id.* at *5.

¹⁹ *Id.* at *6.

²⁰ *Id.* at *7.

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

²² 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.”²³ She is quoted as saying her office “can’t turn on a dime”; preparation for any eventuality is necessary.²⁴ 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.²⁵ 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.”²⁶

2

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.”

²³ 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>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *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.”²⁷

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.

5

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

²⁷ 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”.²⁸ The Harris

²⁸ 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.²⁹ This case also presents questions of state-wide importance.³⁰

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.”³¹ The County Clerk of Harris County³² 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

²⁹ See TEX. R. APP. P. 52.3(e).

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

³¹ TEX. ELEC. CODE § 82.002(a).

³² 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.³³ In 1921, the absentee could also make an affidavit before a notary public, who would then request a ballot from the county clerk.³⁴ When the voter had marked the ballot in the notary’s presence under oath, the notary would mail it to the county clerk.³⁵ 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.³⁶ This was the first use of voting by mail.

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

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

³⁵ *Id.* at 219.

³⁶ 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.³⁷ 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”.³⁸ The provisions were codified as § 37 of the Election Code enacted in 1951.³⁹ 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.”⁴⁰

In 1969, absentee voting was extended to voters who could not appear at a polling place for “religious belief”.⁴¹ 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.⁴² In 1981, the requirement of a physician’s certificate accompanying an application to vote absentee based on sickness or physical disability was dropped.⁴³ In 1991, religious belief was dropped as a

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

³⁸ *Id.* § 2, at 701–702.

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

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

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

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

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

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

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.”⁴⁶

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,⁴⁷ who have a “disability”,⁴⁸ who are over 65 years of age,⁴⁹ who are incarcerated,⁵⁰ or who are participating in the address confidentiality program administered by the Attorney General.⁵¹ “Disability” is defined as a sickness or physical condition preventing in-person voting without a likelihood of harm to the

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

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

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

⁴⁷ TEX. ELEC. CODE § 82.001.

⁴⁸ *Id.* § 82.002.

⁴⁹ *Id.* § 82.003.

⁵⁰ *Id.* § 82.004.

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

voter's health,⁵² and as “[e]xpected or likely confinement for childbirth on election day”.⁵³ The ordinary meaning of “physical” is “of or relating to the body”.⁵⁴ The parties agree that this excludes mental or emotional states, including a generalized fear of a disease. “Condition” can mean “a state of being”.⁵⁵ 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.⁵⁶

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”,⁵⁷ 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

⁵² TEX. ELEC. CODE § 82.002(a).

⁵³ *Id.* § 82.002(b).

⁵⁴ *Physical*, MERRIAM-WEBSTER ONLINE (2020).

⁵⁵ *Condition*, MERRIAM-WEBSTER ONLINE (2020).

⁵⁶ 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))).

⁵⁷ *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”.⁵⁸ 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

⁵⁸ 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.”⁵⁹ The Clerks also defend their speech before the commissioners courts as accurate attempts to convey information about rapid changing electoral conditions.⁶⁰ 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.”⁶¹ “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.”⁶² Further, “if the applicant is not entitled to vote by mail, the clerk shall reject the application”.⁶³

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.”⁶⁴ 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 1981.⁶⁵ And the application form provided by the Secretary of State requires only that voters check a box indicating whether the reason

⁵⁹ See El Paso Resp. Br. at 14.

⁶⁰ See *id.* at 10.

⁶¹ TEX. ELEC. CODE § 86.001(a).

⁶² *Id.* at § 86.001(b).

⁶³ *Id.* at § 86.001(c).

⁶⁴ Post-Sub. Br. at 9.

⁶⁵ 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.⁶⁶ The voter is not instructed to declare the nature of the underlying disability.⁶⁷ 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.

* * * * *

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.

Nathan L. Hecht
Chief Justice

Opinion delivered: May 27, 2020

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

⁶⁷ *Id.*

IN THE SUPREME COURT OF TEXAS

No. 20-0394

IN RE STATE OF TEXAS

ON PETITION FOR MANDAMUS

Argued May 20, 2020

JUSTICE GUZMAN, joined by JUSTICE LEHRMANN and JUSTICE BUSBY, concurring.

The Texas Election Code permits qualified voters to vote by mail if the voter has a “disability,” which the Legislature defines as “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.”¹ The parties dispute whether lack of immunity to the COVID-19 virus, by itself, constitutes a “disability” that enables all Texas voters without such immunity to vote by mail. Today, the Court unanimously answers that question “no.”² The legal

¹ TEX. ELEC. CODE § 82.002(a). The Code also provides that “[e]xpected or likely confinement for childbirth on election day is sufficient cause to entitle a voter to vote [by mail] under Subsection (a),” *id.* § 82.002(b), but that provision is not at issue in this mandamus proceeding.

² *Ante* at 21 & 24 (“[L]ack 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).”); *post* at 1 (Boyd, J., concurring) (“[A] person’s lack of immunity to COVID-19 can constitute a ‘physical condition’ But even when it does, the voter is not eligible to vote early by mail unless, because of the voter’s physical condition, voting in person will probably injure the voter’s health.”); *post* at 1 (Bland, J., concurring) (“The Texas Election Code does not permit all Texas voters who lack immunity to the COVID-19 virus to vote by mail.”).

reasoning may differ among the writings,³ but the Court is unified in holding that: (1) vote by mail is not available based solely on lack of immunity to COVID-19;⁴ (2) fear of contracting a disease is not a physical condition;⁵ (3) “likelihood” of “injuring the voter’s health” means injury is probable;⁶ and (4) voters can take their health and health history into consideration in determining whether to request a vote-by-mail ballot.⁷ In the final analysis, every member of the Court reaches

³ See *ante* at 20-21 (lack of COVID-19 immunity is not a physical condition under the statute because it is not “an abnormal or at least distinguishing state of being”); *post* at 1 (Boyd, J., concurring) (under section 82.002(a) a “physical condition” means a “bodily state of being that limits, restricts, or reduces a person’s physical abilities,” which may include lack of immunity, but such condition is a “disability” only to the extent injury is probable based on that condition and other factors); *post* at 1, 6-8 (Bland, J., concurring) (lack of immunity to COVID-19 is a “physical condition” under the statute but whether it is a “disability” under the Election Code requires a probability that the condition would result in injury, depending on health and environmental circumstances unique to each individual).

⁴ *Ante* at 2 (“We agree . . . that a voter’s lack of immunity to COVID-19, without more, is not a ‘disability’ as defined by the Election Code.”); *post* at 5-6 & 8 (Boyd, J., concurring) (lack of immunity to COVID-19 may, but does not necessarily, constitute a “physical condition” or give rise to a “likelihood” of injury; accordingly, “[v]oters who claim to have a disability under section 82.002(a) *merely* because they lack immunity to COVID-19 or have a fear or concern about contracting the virus would do so in violation of the statute”); *post* at 1 (Bland, J., concurring) (“Lack of immunity to the COVID-19 virus will not, for all voters, create a likelihood that in-person voting will injure their health.”).

⁵ *Ante* at 20 (“The parties agree that this excludes mental or emotional states, including a generalized fear of a disease.”); *post* at 3 n.2 (Boyd, J., concurring) (“Because a ‘physical condition’ must be *physical*, an emotional limitation—including concern or fear of contracting a disease—does not constitute a physical condition.”); *post* at 6 (Bland, J., concurring) (“[T]he statutory definition eliminates anything *not* physical from consideration—thus, a generalized fear of contracting COVID-19 or some non-physical reason does not entitle a voter to apply for a mail-in ballot based on a disability.”).

⁶ *Ante* at 21 (observing “that ‘likelihood’ means a probability”); *post* at 6 (Boyd, J., concurring) (“[T]he term ‘likelihood’ refers to a ‘probability,’ as opposed to mere ‘possibility.’” (citing *JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 836 (Tex. 2018), and *State v. K.E.W.*, 315 S.W.3d 16, 23 (Tex. 2010)); *post* at 8 (Bland, J., concurring) (observing the Court has defined “likelihood” as meaning “probably” (citing *K.E.W.*, 315 S.W.3d at 23)).

⁷ *Ante* at 2, 22 (“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[.]’”; “We agree . . . 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.”; and “[E]lection officials have no responsibility to question or investigate a ballot application that is valid on its face.”); *post* at 7 (Boyd, J., concurring) (“Whether a person’s sickness or physical condition creates a ‘likelihood’ that voting in person ‘at the polling place on election day’ will cause injury to the person’s health depends on innumerable factors, including the nature of the person’s sickness or physical condition, the person’s health history, the nature and level of the risk that in-person voting would pose in light of the particular sickness or physical condition, the adequacy of safety and sanitation measures implemented at and near the polling place to reduce that risk, and the level of caution the voter exercises.”); *post* at 7 & 8 (Bland, J., concurring) (“When coupled with the voters’ health history and the level of active infection in the voter’s community, a lack of immunity may or may not lead the voter to conclude that in-person

the same result for essentially the same reason: lack of immunity to the COVID-19 virus, in and of itself, does not constitute a disability under section 82.002(a) of the Election Code; rather, whether a voter is eligible to vote by mail ultimately depends on the voter’s own assessment of his or her individual health status. Though we disagree over how the legislatively enacted eligibility provisions may be construed,⁸ our discourse and debate here, as in every case, reflects the importance of the rights at issue⁹ and “diligent and honest efforts” to resolve “hard and fine questions of law.”¹⁰

With the salient points distilled and clarified—and with full confidence that voters and the State’s elected officials will comply with the law—I join the Court’s opinion denying mandamus relief.¹¹

Eva M. Guzman
Justice

OPINION DELIVERED: May 27, 2020

voting is likely to injure the voter’s health. . . . [T]he plain text of the Election Code makes clear that it is the voter—not an election official—who determines whether a ‘physical condition’ will cause a ‘likelihood’ that voting in person will injure the voter’s health.”).

⁸ See *Worsdale v. City of Killeen*, 578 S.W.3d 57, 77 (Tex. 2019) (“[R]easonable minds often disagree about how a statute may reasonably be construed.”).

⁹ Alexander Hamilton, *The Papers of Alexander Hamilton*, Vol III, pp. 544-45, Harold C. Syrett, ed. (New York, Columbia Univ. Press, 1962) (“A share in the sovereignty of the state, which is exercised by the citizens at large, in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law.”).

¹⁰ See Hon. Neil M. Gorsuch, *Law’s Irony*, 37 HARV. J.L. & PUB. POL’Y, 743, 752-53 (2014).

¹¹ *Ante* at 22-24.

IN THE SUPREME COURT OF TEXAS

No. 20-0394

IN RE STATE OF TEXAS

ON PETITION FOR MANDAMUS

JUSTICE BOYD, concurring.

I agree with the Court that “a voter’s lack of immunity to COVID-19, without more, is not a ‘disability’ as defined by the Election Code.” *Ante* at _____. But I reach that result for different reasons. Reading the phrase “physical condition” within its statutory context, I conclude that it refers to a bodily state of being that limits, restricts, or reduces a person’s physical abilities. Under this reading, a person’s lack of immunity to COVID-19 can constitute a “physical condition” as the statute uses that phrase. But even when it does, the voter is not eligible to vote early by mail unless, because of the voter’s physical condition, voting in person will probably injure the voter’s health. We cannot decide on this record whether any particular voter is eligible for mail-in voting under that standard. Fully expecting that the state’s election officials and voters will apply the eligibility statute as the Court construes it, I join the Court’s judgment denying the State’s petition for writ of mandamus.

* * *

The Texas Election Code permits a qualified voter who has a “disability” to vote early by mail. TEX. ELEC. CODE § 82.002. Section 82.002 includes two subsections, each providing a different description of “disability.” Under subsection (a), the voter must satisfy two requirements:

(1) the voter must have “a sickness or physical condition,” and (2) that sickness or physical condition must “prevent[] the voter from appearing at the polling place on election day without a likelihood of . . . injuring the voter’s health.” *Id.* § 82.002(a). Under subsection (b), “[e]xpected or likely confinement for childbirth on election day is sufficient” to qualify as a disability, without regard to subsection (a)’s requirements. *Id.* § 82.002(b). The parties focus in this case on subsection (a).

A. Physical condition

The parties dispute whether a voter’s lack of immunity to COVID-19 constitutes a “physical condition” that satisfies subsection (a)’s first requirement. The Court holds it does not because the phrase “physical condition” means not just a “physical state of being,” but a physical state of being that is “abnormal” or “distinguishing” and rises to the level of “incapacity.” *Ante* at _____. Because a lack of immunity to COVID-19 is not “abnormal,” “distinguishing,” or an “incapacity,” the Court concludes it cannot qualify as a “physical condition” under section 82.002(a). *Ante* at _____.

I reach a different conclusion on the meaning of “physical condition.” Because the Code does not define that phrase, we must apply its common, ordinary meaning unless the statutory context indicates that the statute uses the phrase to communicate a different meaning. *City of Fort Worth v. Rylie*, No. 18-1231, — S.W.3d —, 2020 WL 2311941, at *6 n.19 (Tex. May 8, 2020) (“When, as here, a statute does not define a term, we typically apply the term’s common, ordinary meaning, derived first from applicable dictionary definitions, unless a contrary meaning is apparent from the statute’s language.”). Although “physical condition” might

ordinarily refer generally to one’s bodily state of being, we must consider whether the statutory context requires a different meaning here. *Id.*¹

The textual context of the phrase “physical condition” in section 82.002(a) is both clear and illuminating. As indicated in its title, section 82.002 provides eligibility for mail-in voting to those who have a “disability.” TEX. ELEC. CODE § 82.002. Subsection (a) first requires that the voter have either a “sickness” or a “physical condition.” *Id.* § 82.002(a). It then requires that the sickness or physical condition “prevents” the voter from voting in person without a likelihood of injury to the voter’s health. *Id.* And subsection (b)’s alternative form of “disability” requires an expected or likely “confinement” for childbirth on election day. *Id.* § 82.002(b). Within this statutory context—defining “disability” to mean a “sickness” or “physical condition” that “prevents” or “confines”—I would hold that a “physical condition” under section 82.002(a) is not just *any* bodily state of being, but a bodily state that *limits, restricts, or reduces* the person’s physical abilities.²

The Court also rejects the idea that *every* bodily state of being qualifies as a “physical condition” under section 82.002(a). *Ante* at _____. In this respect, the Court and I disagree with JUSTICE BLAND, who would broadly construe “physical condition” to mean any “state of health or physical fitness” or “physical state of the body.” *Post* at _____. In my view, that construction applies the phrase’s common, ordinary meaning without considering whether the phrase carries a different

¹ See also *Ritchie v. Rupe*, 443 S.W.3d 856, 867 (Tex. 2014) (“[O]ur text-based approach to statutory construction requires us to study the language of the specific provision at issue, within the context of the statute as a whole, endeavoring to give effect to every word, clause, and sentence.”); *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014) (plurality op.) (“We thus begin our analysis with the statute’s words and then consider the apparent meaning of those words within their context.”).

² Because a “physical condition” must be *physical*, an emotional limitation—including concern or fear of contracting a disease—does not constitute a physical condition under section 82.002(a).

meaning in light of its statutory context. Under JUSTICE BLAND’S construction, lacking immunity would always constitute a “physical condition,” but so would having immunity, as they both describe a “physical state of the body.” Then, of course, everyone would have a “physical condition,” and subsection (a)’s first requirement would actually require nothing at all. We could delete subsection (a)’s requirement (a “sickness or physical condition”) and retain its second requirement (a likelihood of injury to health) and the statute’s meaning would not change.

After properly rejecting that construction, however, the Court relies on an alternative dictionary definition to conclude that section 82.002(a) requires a physical condition that is “abnormal” or “distinguishing.” *Ante* at _____. I find nothing in the statutory context to suggest or support this meaning. In light of the statutory context, this construction is over-inclusive because it encompasses conditions that have nothing to do with “disabilities” that “prevent” or “confine” a person’s activities. A person with a lengthy handle-bar mustache, for example, might have an “abnormal” and “distinguishing” physical condition, but not the type that fits within the context of conditions that prevent or confine a person’s physical abilities.

At the same time, the Court’s construction is also under-inclusive because it excludes physical conditions that prevent or confine a person’s abilities merely because other people have the same physical condition. If, for example, the world had been struck with a virus far more contagious and aggressive than COVID-19, such that ninety-nine percent of all Texans were infected and adversely affected, they would all suffer from a “sickness,” even if the sickness was not then abnormal or distinguishing. In the same way, ninety-nine percent of the voting population may have a “physical condition” under the statute, even though that condition is not abnormal or

distinguishing. Contextually, the phrase “physical condition” speaks to conditions that involve a lack of ability that prevents and confines, not to normality, numbers, or percentages.

Relying on the dictionary definition of “disability,” the Court concludes that a physical condition under section 82.002(a) must be an “incapacity,” as well as abnormal or distinguishing. *Ante* at _____. But if the legislature wanted to require an “incapacity,” it could have just said the voter must have a “disability” since, according to the Court, the common, ordinary meaning of “disability” is “incapacity.” *Ante* at _____. Instead, the legislature described two specific types of qualifying “disabilities”; the phrase “physical condition” serves as just the first requirement for one of those types. *See* TEX. ELEC. CODE § 82.002(a), (b). The second requirement for that type of disability is that the person’s physical condition “prevents the voter from appearing at the polling place on election day without a likelihood of . . . injuring the voter’s health.” *Id.* § 82.002(a). Subsection (a)’s second requirement describes the required nature or level of limitation (which falls far short of “incapacity,” as the Court uses that term), while its first requirement (a “sickness or physical condition”) describes what must cause that limitation.

Construing the phrase within its statutory context, I would hold that a “physical condition” under section 82.002(a) is a bodily state of being that limits, restricts, or reduces a person’s abilities. It does not include every bodily state of being, but it includes more than just abnormal or distinguishing conditions that incapacitate a person. Under this construction—to use the Court’s example—being “too tired to drive to a polling place,” *ante* at _____, *could* qualify as a “physical condition” under section 82.002(a) because that physical condition could limit, restrict, or reduce the person’s physical abilities. And for the same reason, so could a lack of immunity to COVID-

19. But even when it does, the person satisfies only the first requirement for claiming a disability that makes the person eligible to vote early by mail.

B. Likelihood of injury to health

Because section 82.002(a) includes a second requirement, merely having a sickness or physical condition does not constitute a “disability” that makes a person eligible for early mail-in voting. Subsection (a) also requires that the person’s physical condition be so severe or substantial that it creates a “likelihood” that voting in person would require personal assistance or would injure the voter’s health. The Court is incorrect to read my opinion as concluding that “a lack of immunity alone could . . . be a likely cause of injury to health from voting in person.” *Ante* at ____ . Subsection (a) requires not just a sickness or physical condition, but also circumstances that create a likelihood that, in light of that sickness or physical condition, voting in person would injure the person’s health.

Consistent with our precedent, I would hold that the term “likelihood” refers to a “probability,” as opposed to a mere “possibility.” *See JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 836 (Tex. 2018) (explaining that a court’s error in excluding evidence is “likely harmful” if “it probably caused the rendition of an improper judgment”); *State v. K.E.W.*, 315 S.W.3d 16, 23 (Tex. 2010) (“‘Likelihood’ connotes more than mere possibility or conjecture and is synonymous with ‘probability.’”). And the Court agrees. *See ante* at ____ .

But the Court suggests that voters who lack immunity to COVID-19 but have no other “sickness or physical condition” could never satisfy section 82.002(a)’s second requirement because “contracting COVID-19 in general is highly improbable.” *Ante* at ____ . Although it may be true that, statistically, any particular person “in general” is not likely to contract COVID-19,

section 82.002(a) does not consider such generalities. Under section 82.002(a), the question is whether a voter who has a sickness or physical condition faces a likelihood of injury to health at a specific particular place and time—“the polling place on election day.” TEX. ELEC. CODE § 82.002(a). Whether a person’s sickness or physical condition creates a “likelihood” that voting in person “at the polling place on election day” will cause injury to the person’s health depends on innumerable factors, including the nature of the person’s sickness or physical condition, the person’s health history, the nature and level of the risk that in-person voting would pose in light of the particular sickness or physical condition, the adequacy of safety and sanitation measures implemented at and near the polling place to reduce that risk, and the level of caution the voter exercises.

This limited record is simply insufficient to answer that question as to any particular voter.³ Even if I could consider the many conflicting scientific studies and anecdotal reports I have read or read about, I simply don’t know whether any particular person’s lack of COVID-19 immunity would prevent that person from voting in person at the polling place on election day without facing the probability that doing so will injure the person’s health. Nor do I know whether or how the safety and sanitation measures our state’s election authorities are implementing will affect that level of risk. We simply cannot answer those questions on this limited record.

³ A group of healthcare professionals and institutions that submitted an amicus curiae brief asserts that “the rate of transmission likely to result from a mass congregation cannot be quantified precisely.” They also submitted the declaration of a medical doctor, however, who asserts that voters will in “reasonable medical probability” face “a likelihood of injuring their health, if they appear at a polling place on Election Day,” creating a “likelihood of injuring their own health at an open polling place where people congregate, even with all, good faith attempts to control massing.” Even if we accepted this declaration as undisputed fact, however, it does not and cannot speak to the specific circumstances any particular voter will experience at the polling place on election day.

We can confirm, however, that merely having a physical condition, including a lack of immunity to COVID-19, does not constitute a disability or make one eligible to vote early by mail under section 82.002(a). Instead, subsection (a) requires that the person’s physical condition create a probability that voting in person will injure the person’s health. The law leaves it to the voters to make that determination for themselves, *see ante* at ____, but they must make that determination based on the statute’s requirements.

C. Mandamus relief

Finally, I agree with the Court’s denial of the State’s request for mandamus relief. Up to this point, the State and the Respondents (and others) have engaged in a legitimate disagreement over the meaning of section 82.002(a). Now that the Court has resolved that issue, Respondents, like the voters and other election officials, must accept and abide by the statute’s restrictions as the Court construes it. Voters who claim to have a disability under section 82.002(a) *merely* because they lack immunity to COVID-19 or have a fear or concern about contracting the virus would do so in violation of the statute. And although, as the State acknowledges, election officials have no responsibility to question or investigate a ballot application that is valid on its face, they are not free to advise or instruct voters to ignore or violate the statute’s requirements. But because I share the Court’s confidence that Respondents will “comply with the law in good faith,” *ante* at ____, I join its judgment denying the State’s petition.

Jeffrey S. Boyd
Justice

Opinion delivered: May 27, 2020

IN THE SUPREME COURT OF TEXAS

No. 20-0394

IN RE STATE OF TEXAS

ON PETITION FOR MANDAMUS

Argued May 20, 2020

JUSTICE BLAND, concurring.

The Texas Election Code does not permit all Texas voters who lack immunity to the COVID-19 virus to vote by mail. Lack of immunity to the COVID-19 virus will not, for all voters, create a likelihood that in-person voting will injure their health. But a lack of immunity to disease is a physical condition. And a voter who lacks COVID-19 immunity may be disabled under the Election Code if the voter's lack of immunity, together with that voter's health history and the local voting environment, causes a likelihood that in-person voting will injure the voter's health. Accordingly, I disagree with the Court that a "physical condition" under the Election Code excludes a lack of immunity to COVID-19. I otherwise join the Court's opinion denying relief.

I

Voting-by-mail has existed in Texas for nearly 100 years.¹ Since 1935, Texas has permitted an eligible voter who is disabled, as the statute defines it, to request a mail-in ballot.² Originally, vote-by-mail applications based on disability required a physician’s certificate.³ But the Legislature eliminated that requirement in 1981.⁴ It again declined to require proof of disability when it recodified the Election Code in 1985.⁵

The current Election Code provides that an eligible voter may request a mail-in ballot for five reasons: absence from the voter’s county of residence, disability, reaching age 65, confinement in jail, or participation in a confidentiality program.⁶ To receive a mail-in ballot, the voter must sign an application containing “an indication of the ground of eligibility” to vote absentee.⁷ The law requires no further explanation, but it is a crime to falsify information on an application.⁸

¹ *See ante* ____ (explaining that voting before election day has been permitted by statute in Texas since 1917 and vote-by-mail since 1933) (first citing Act of May 26, 1917, 35th Leg. 1st C.S., ch. 40, § 1, 1917 Tex. Gen. Laws 62, 63–64; then citing Act of Jan. 30, 1933, 43rd Leg., R.S., ch. 4, § 1, 1933 Tex. Gen. Laws 5, 5-6).

² *See* Act of May 10, 1935, 44th Leg., R.S., ch. 300, § 1, 1935 Tex. Gen. Laws 700, 700–01.

³ *See id.*, 1935 Tex. Gen. Laws at 701.

⁴ *See* Act of May 26, 1981, 67th Leg., R.S., ch. 301, § 1, 1981 Tex. Gen. Laws 854, 854–55 (striking this requirement from Texas law).

⁵ Act of May 24, 1985, 69th Leg., R.S., ch. 211, § 1, secs. 82.002, 84.001, 1985 Tex. Gen. Laws 802, 897, 901 (codified at TEX. ELEC. CODE §§ 82.002, 84.001–.002).

⁶ TEX. ELEC. CODE §§ 82.001, .002, .003, .004, .007.

⁷ *Id.* § 84.002(a)(6).

⁸ *Id.* § 84.0041(a) (“A person commits an offense if the person: (1) knowingly provides false information on an application for ballot by mail; (2) intentionally causes false information to be provided on an application for ballot by mail; (3) knowingly submits an application for ballot by mail without the knowledge and authorization of the voter; or (4) knowingly and without the voter’s authorization alters information provided by the voter on an application for ballot by mail.”). An offense under section 84 “is a state jail felony.” *Id.* § 84.0041(b).

To request a mail-in ballot based on disability, the voter must have “a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of . . . injuring the voter’s health.”⁹ These requirements appear in Texas Election Code section 82.002:

DISABILITY. (a) 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.

(b) Expected or likely confinement for childbirth on election day is sufficient cause to entitle a voter to vote under Subsection (a).¹⁰

The State maintains, among other grounds for requesting relief, that a lack of COVID-19 immunity is not a “physical condition” under section 82.002, and thus no voter is entitled to vote by mail on that basis. The Harris County Clerk takes the polar opposite position—that all Harris County voters are “disabled” on Election Day.¹¹ To resolve this dispute, we must determine the meaning of a “physical condition” and its place in the overall definition of disability.

⁹ *Id.* § 82.002(a).

¹⁰ *Id.* (emphasis added).

¹¹ According to the Harris County Clerk, “all voters should be free to vote by mail in the July 14 run-off and the November election.”

II

A

Because the Election Code does not define “physical condition,” we look to its “common, ordinary meaning.”¹² The parties do not dispute that “physical” means “of or relating to the body.”¹³ “Condition” means “*the state of something*, especially with regard to its appearance, quality, or working order.”¹⁴ In particular, it means “a person’s or animal’s state of health or physical fitness.”¹⁵ The reasonable reading of these definitions—analyzed individually and in connection with one another—is that a lack of immunity, dealing as it does with the *state* of a person’s immune system (part of the *physical body*) is a “physical condition.”

Reading “physical condition” to exclude a lack of immunity to disease is too narrow a construction. The Legislature could have left the definition of disability at “sickness” or qualified

¹² *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014) (plurality opinion) (“When a statute uses a word that it does not define, our task is to determine and apply the word’s common, ordinary meaning.”); *see also BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 87 (Tex. 2017) (“We must rely on the words of the statute, rather than rewrite those words to achieve an unstated purpose.” (quoting *Jaster*, 438 S.W.3d at 571)).

¹³ *Physical*, AMERICAN HERITAGE DICTIONARY (5th ed. 2020); *Physical*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/physical> (last visited May 25, 2020); *see also Physical*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) (defining “physical” as “relating to the body as opposed to the mind . . .”). The Court analyzes undefined words by reviewing dictionary definitions. *Jaster*, 438 S.W.3d at 563 (citing *Epps v. Fowler*, 351 S.W.3d 862, 873 (Tex. 2011) (Hecht, J., dissenting) (“The place to look for the ordinary meaning of words is . . . a dictionary.”)).

¹⁴ *Condition*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) (emphasis added); *see also Condition*, AMERICAN HERITAGE DICTIONARY (5th ed. 2020) (defining “condition” as “[a] mode or state of being”); *Condition*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/condition> (last visited May 25, 2020) (defining “condition” as “a state of being”).

¹⁵ *Condition*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010). The New Oxford American Dictionary’s first definition (“subsense”) under the main definition (“core sense”) is “a person’s or animal’s state of health or physical fitness.” *Id.* “[A]n illness or other medical problem” follows only after that. *Id.* And, in using that dictionary as a reference, “readers can be confident that the first definition they see is the one most likely to be used by people today . . .” NEW OXFORD AMERICAN DICTIONARY, <https://www.oxfordreference.com/view/10.1093/acref/9780195392883.001.0001/acref-9780195392883> (last visited May 25, 2020). *See also* OXFORD ENGLISH DICTIONARY (3d ed. 2000) (privileging the definition “[a] particular mode of being of a person or thing; state of being” over the definition “[a] state of health, esp. one which is poor or abnormal; a malady or sickness”).

“physical condition”; it did not.¹⁶ It could have used “physical limitation” or “physical defect” or “physical ailment”; it did not. Section 82.002 subsection (b) instructs that “expected or likely confinement for childbirth” qualifies as a disability under subsection (a).¹⁷ Expecting a child is not an “unusually defective state of health”—one can be healthy and pregnant. Instead, subsection (b)’s inclusion of a “non-limiting example,” *see* Tex. Att’y Gen. Op. No. KP-0009 2 (2015), indicates that the Legislature intended for “physical condition” to mean something broader than a defective physical state. We should not read “physical condition” to exclude lack of immunity to COVID-19 when the term’s plain meaning indicates otherwise.¹⁸

The State relies on a tertiary dictionary definition of “condition” to mean an “illness or medical problem,” and posits that a lack of immunity is neither. The more common definition, however, is not limited—the term more commonly means “a person’s or animal’s state of health or physical fitness.”¹⁹ Here, the Legislature provides no indication in the Election Code that a “physical condition” is limited to any particular physical attribute that creates the likelihood of injury to the voter’s health from voting in-person.²⁰ Understanding “physical condition” to mean

¹⁶ We have said that “by not reading language into the statute when the legislature did not put it there . . . we build upon the principle that ‘ordinary citizens [should be] able to rely on the plain language of a statute to mean what it says.’” *City of Rockwall v. Hughes*, 246 S.W.3d 621, 628 (Tex. 2008) (alteration in original) (quoting *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866 (Tex. 1999)).

¹⁷ TEX. ELEC. CODE § 82.002(b) (“Expected or likely confinement for childbirth on election day is sufficient cause to entitle a voter to vote under Subsection (a).”).

¹⁸ Further, titles do not inform the meaning of a statute. “The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute.” TEX. GOV’T CODE § 311.024; *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 47 n.4 (Tex. 2015) (“When the plain meaning of a statute controls, . . . the title of the section carries no weight, as a heading does not limit or expand the meaning of a statute.” (quotation marks omitted)). Replacing the Legislature’s definition of disability with a different one is unwarranted.

¹⁹ *Condition*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).

²⁰ *See Tex. Dep’t of Criminal Justice v. Rangel*, 595 S.W.3d 198, 210 (Tex. 2020) (observing that we “‘may not impose [our] own judicial meaning on a statute by adding words not contained in the statute’s language,’ and we presume that ‘the Legislature purposefully omitted words it did not include’” (alteration in original) (quoting *Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 59 (Tex. 2019))).

simply “an illness or medical problem,” gives the term a meaning akin to sickness, rendering it, inappropriately, “mere surplusage.”²¹ The term is better understood according to its usual definition: a physical state of the body, but in this context only one that creates a likelihood of injury from in-person voting.²²

And that physical state is not the same for any two individuals. In that sense, we are all atypical, with widely variable abilities to combat disease. “Physical condition” covers those physical attributes that determine a person’s state of health. We interpret the words the Legislature has chosen, and we assume they have chosen the words with care.²³ Applying those words, a lack of immunity is a “physical condition” under the Election Code.

B

Including a lack of immunity as a physical condition does not mean that all Texas voters who lack immunity to COVID-19 are disabled and eligible for mail-in ballots. The Court suggests that the statute must provide some limit on what qualifies as a disability; otherwise, the Legislature would have afforded mail-in ballots to all voters, and no other mail-in category is needed. And, of course, the statute provides substantial limits. First, the statutory definition eliminates anything *not* physical from consideration—thus, a generalized fear of contracting COVID-19 or some non-physical reason does not entitle a voter to apply for a mail-in ballot based on a disability. Second,

²¹ *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 74 (Tex. 2016) (“Our objective is to ascertain and give effect to the Legislature’s intent as expressed in the statute’s language. In doing so, we consider the statute as a whole, giving effect to each provision so that none is rendered meaningless or mere surplusage.” (footnote omitted)). The State defines sickness as the “state of being ill” or “having a particular type of illness or disease.”

²² TEX. ELEC. CODE § 82.002.

²³ *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm’n*, 518 S.W.3d 318, 325–26 (Tex. 2017) (“We presume the Legislature ‘chooses a statute’s language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.’” (quoting *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011))).

the statute requires that the voter’s “physical condition” cause a “likelihood” of injury to the voter’s health from in-person voting.²⁴ Without that likelihood, a person is not disabled and not eligible to vote-by-mail for that reason.

A local community containing a high number of people with active infection of a contagious virus presents a health risk for some voters—specifically, those who lack immunity and have health histories or physical attributes that make them susceptible to the worst effects of the disease. But not all areas of Texas are affected—or are affected to the same degree—and the Secretary of State has prepared plans so that voters may vote safely. The level of active infection and protective measures affect the voting environment and, in turn, affect whether any “likelihood” of injury to one’s health by in-person voting exists. When coupled with the voter’s health history and the level of active infection in the voter’s community, a lack of immunity may or may not lead the voter to conclude that in-person voting is likely to injure the voter’s health.

The Court acknowledges that other health deficits might qualify as physical conditions but that a lack of immunity “without more” is not a physical condition. This ignores typical physical states and past medical history that are not ailments or defects but may be contributing factors for an individual voter (age, gender, past lung ailments, smoking history, and weight, to name a few).²⁵ In any event, the “more” does not transform a lack of immunity into a condition; rather, it affects the risk level associated with having that condition. A lack of immunity may present no likelihood at all that in-person voting will injure a voter. But that same lack of immunity might place a voter

²⁴ TEX. ELEC. CODE § 82.002.

²⁵ See CDC COVID-19 RESPONSE TEAM, MORBIDITY & MORTALITY WEEKLY REPORT, PRELIMINARY ESTIMATES OF THE PREVALENCE OF SELECTED UNDERLYING HEALTH CONDITIONS AMONG PATIENTS WITH CORONAVIRUS DISEASE 2019 — UNITED STATES, FEBRUARY 12–MARCH 28, 2020, at 383–85 (Mar. 31, 2020), <http://dx.doi.org/10.15585/mmwr.mm6913e2>.

at risk based on the voter’s innumerable other physical characteristics and the voting environment—the physical condition does not change; it is the risk associated with that condition that changes.

The Election Code does not define likelihood. The State suggests that “likelihood” means “probably,” and we have defined it that way.²⁶ Determining the “likelihood” of injury from a lack of immunity depends entirely on an individual voter’s overall physical condition, voting environment, and health history. We cannot predict—and neither can election officials— whether the likelihood of contracting COVID-19 is probable, or whether “a lack of immunity alone” could likely cause injury from voting in person.” The Election Code does not suggest that such a probability is for a county election official or a court to determine.

Rather, the plain text of the Election Code makes clear that it is the voter—not an election official—who determines whether a “physical condition” will cause a “likelihood” that voting in person will injure the voter’s health. The respondent county clerks have a ministerial duty to approve a voter’s properly completed application for a mail-in ballot based on a “disability.”²⁷ They have no duty—or right—to inquire into a voter’s health history or to instruct a voter as to whether the voter has a disability.²⁸ Election officials are not health care providers. Government

²⁶ See *State v. K.E.W.*, 315 S.W.3d 16, 23 (Tex. 2010) (recognizing that “reasonable probability” is synonymous with “likelihood”).

²⁷ TEX. ELEC. CODE § 86.001(a)–(b).

²⁸ The State concedes that election clerks “have no discretion to do anything but determine whether the voter is entitled to vote by mail and process the application accordingly.” To be entitled to vote-by-mail, a person must complete an application, stating the ground of eligibility. TEX. ELEC. CODE § 84.001(a). A voter is “entitled” to vote by mail based on the application the voter submits to the state. Chapter 86 includes no authorization to reject an application based on an election clerk’s determination of its veracity. *Compare* Act of May 24, 1985, 69th Leg., R.S., ch. 211, § 1, secs. 82.002, 84.001, 1985 Tex. Gen. Laws 802, 897, 901 (codified at TEX. ELEC. CODE §§ 82.002, 84.001), *with* Act of May 10, 1935, 44th Leg., R.S., ch. 300, § 1, 1935 Tex. Gen. Laws 700, 700–01. The Attorney General has opined that no proof of disability is required in prior guidance. Tex. Att’y Gen. Op. No. KP-0009 2 n.2 (2015).

officials do not inquire into the health of a citizen in connection with that citizen’s exercising the right to vote.²⁹

Thus, under the Election Code, an election official may neither dictate that a voter without immunity is disabled, nor dictate the opposite conclusion. No such mandate is present in the statute. Recognizing this, the Texas Secretary of State’s office has informed local election officials that they may not deny a ballot to voters who claim to be disabled, because local election officials “do not have any authority to police that.”³⁰ Instead, the Legislature left it to the voter to make that determination. It is not the place of election officials to categorically determine whether lack of immunity to COVID-19 is, or is not, a “physical condition that prevents [a] voter from appearing at the polling place on election day without a likelihood . . . of injuring the voter’s health.”³¹

Finally, the State observes that voting by mail presents particular challenges to ensuring the integrity of the state’s elections. The majority of voting fraud cases prosecuted in the last decade were based on mail-in ballot schemes in which ballots were obtained and marked by people other than an eligible voter. A fraudulent application for a mail-in ballot should lead to prosecution against the person perpetrating the fraud.³² But the possibility of fraud does not allow for the disenfranchisement of eligible voters who complete an application for a mail-in ballot according to the Election Code.³³

²⁹ See TEX. ELEC. CODE § 86.001.

³⁰ The Texas Secretary of State is the State’s chief election officer. See *id.* § 31.003 (“The secretary of state shall obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code.”).

³¹ *Id.* § 82.002(a).

³² See *id.* §§ 84.0041, 273.021, 273.022.

³³ The right to vote is the “preservative of all rights.” *Shelby County v. Holder*, 570 U.S. 529, 566 (2013) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

* * *

In defining a “physical condition,” the Legislature did not parse out which physical attributes qualify. The Legislature, in choosing the text that it did, placed that decision in the hands of the voter. As a limitation, however, it added a second (and higher) hurdle: whatever the physical condition, that condition must create not a fear, but instead a “likelihood,” that in-person voting will injure the voter’s health. Election officials and courts should not supplant the voter’s role in making that determination. Because we should not define a “physical condition” to except a lack of immunity to disease, I respectfully concur in the Court’s judgment.

Jane N. Bland
Justice

OPINION DELIVERED: May 27, 2020