

Cause No. _____

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

**Plaintiff's Original Verified Petition and
Application for Temporary Restraining Order,
Temporary Injunction, and Permanent Injunction**

The State of Texas, by and through Ken Paxton, the Attorney General of Texas, files this Original Verified Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction against Defendant Chris Hollins, in his official capacity as Harris County Clerk. The State seeks an injunction against Hollins to prevent him from sending over two million applications for mail ballots to every registered voter in Harris County, irrespective of whether any given voter requested an application or even qualifies to vote by mail. Hollins' actions will create confusion, facilitate fraud, and is an illegal *ultra vires* act because it exceeds his statutory authority.

Discovery Control Plan

1. Discovery is intended to be conducted under Level 2 of Texas Rule of Civil Procedure 190.3.

Claims for Relief

2. Plaintiff seeks injunctive relief. Therefore, this suit is not governed by the expedited actions process in Tex. R. Civ. P. 169.

Venue

3. Venue is proper in Harris County under section 15.002(a)(1), (a)(2), and (a)(3) of the Texas Civil Practices and Remedies Code.

Waiver of Sovereign Immunity

4. Neither sovereign immunity nor governmental immunity applies to the State of Texas's *ultra vires* claim. "The basic justification for th[e] *ultra vires* exception to sovereign immunity is that *ultra vires* acts—or those acts without authority—should not be considered acts of the state at all." *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017) (internal quotation marks and citations omitted). As a result, "*ultra vires* suits do not attempt to exert control over the state—they attempt to reassert the control of the state over one of its agents." *Id.*

5. In addition, Section 31.005(b) waives Defendant's sovereign immunity to this enforcement action.

Parties

6. The plaintiff is the State of Texas, by and through its Attorney General, Ken Paxton. *Yett v. Cook*, 115 Tex. 205, 221, 281 S.W. 837, 842 (1926) ("That the state has a justiciable 'interest' in its sovereign capacity in the maintenance and operation of its municipal corporations in accordance with law does not admit of serious doubt."); *see also State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015) ("As a sovereign entity, the State has an intrinsic right to enact, interpret, and enforce its own laws."); Tex. Elec. Code § 31.005(b) (providing that "the secretary may seek enforcement of [an] order [under section 31.005] by a temporary restraining order or a writ of injunction or mandamus obtained through the attorney general").

7. The defendant is Chris Hollins in his official capacity as the Harris County Clerk. *See Hall*, 508 S.W. at 240 (stating that "an *ultra vires* suit must lie against the allegedly responsible government actor in his official capacity") (internal

quotation marks omitted); Tex. Elec. Code § 31.005 (proper defendant is “a person performing official functions in the administration of any part of the electoral processes” who “fails to comply” with an order from the Secretary of State).

8. Defendant may be served with process at the Harris County Civil Courthouse, 201 Caroline, Suite 310, Houston, Texas 77002.

Legal Background

9. It is well-established law that, as a subdivision of the State of Texas, Harris County possesses only those powers granted to it by the state legislature. *E.g.*, *Town of Lakewood v. Bizios*, 493 S.W.3d 527, 536 (Tex. 2016). Defendant Chris Hollins is an agent of that County and cannot take any action in his official capacity that exceeds the scope of the County’s powers.

10. It is also well-established law that Texas has a strong presumption that voters will cast their ballots in person. “The history of absentee voting legislation in Texas shows that the Legislature has been both engaged and cautious in allowing voting by mail.” *In re State*, 602 S.W.3d 549, 558 (Tex. 2020). A qualified voter may vote by mail only (a) “if the voter expects to be absent from the county of the voter’s residence on election day,” Tex. Elec. Code § 82.001; (b) if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day, *id.* §82.002; (c) “if the voter is 65 years of age or older on election day,” *id.* § 82.003; or (d) if “at the time the voter’s early voting ballot application is submitted, the voter is confined in jail,” *id.* § 82.004.

11. “To be entitled to vote an early voting ballot by mail, a person who is eligible for early voting must make an application for an early voting ballot to be voted by mail as provided by this title.” *Id.* § 84.001(a). “An application must be submitted by mail to the early voting clerk.” *Id.* § 84.001(c). Hollins is the early voting clerk for Harris County. *See id.* § 83.002.

12. “The early voting clerk shall conduct the early voting in each election.” *Id.* § 83.001(a). “The clerk is an officer of the election in which the clerk serves.” *Id.* § 83.001(b). “The clerk has the same duties and authority with respect to early voting as a presiding election judge has with respect to regular voting, except as otherwise provided by this title.” *Id.* § 83.001(c). “The presiding judge is in charge of and responsible for the management and conduct of the election at the polling place of the election precinct that the judge serves.” *Id.* § 32.071.

13. As an early voting clerk, Hollins is empowered (and required) to “mail without charge an appropriate official application form for an early voting ballot to each applicant requesting the clerk to send the applicant an application form.” *Id.* § 84.012. No statute, however, empowers an early voting clerk to send a vote-by-mail application form to any applicant who does not request one from the clerk. And power to send unsolicited applications to millions of voters, *the vast majority of whom do not qualify to vote by mail*, cannot fairly be implied from the statutory scheme.

Factual Background

14. On August 25, 2020, the Harris County Clerk announced on Twitter, “Update: our office will be mailing every registered voter an application to vote by mail. To learn more about voting by mail in Harris County, Please visit <http://HarrisVotes.com/votebymail>.” The tweet also stated, “Check your mail! Every Harris County registered voter will be sent an application to vote by mail next month.” <https://twitter.com/HarrisVotes/status/1298372637912072193>.

15. Currently, there are approximately 2.37 million registered voters in Harris County. During the 2016 general election, based on votes cast for presidential candidates, a little over 100,000 voters in Harris County voted by mail. See Cumulative Report, Harris County, Texas, General and Special Elections, November 8, 2016, available at <https://harrisvotes.com/HISTORY/20161108/cumulative/cumulative.pdf>. Moreover, the majority of those who chose not to vote by mail are not eligible to do so.

As of July 1, 2019, only 10.9% of the Harris County population is 65 years or older. *See* U.S. Census Bureau, QuickFacts, Harris County, Texas, *available at* <https://www.census.gov/quickfacts/fact/table/harriscountytexas/PST045219>. And from 2014-2018, only 6.4% of the Harris County population under 65 had a disability based on ACS survey data. *Id.* In addition, the number of voters eligible but confined or absent from the county on election day is necessarily limited. Thus, one can safely conclude the vast majority of registered Harris County voters to whom Hollins intends to send applications to vote by mail are not legally eligible to cast mail-in ballots.

16. Harris County has already sent vote-by-mail applications to every eligible voter over the age of 65, all of whom *are* eligible to vote by mail. “Nearly 400K vote-by-mail applications sent to Harris Co. seniors ahead of election,” Shelley Childers, Thursday, June 11, 2020 (<https://abc13.com/texas-mail-in-ballot-voting-coronavirus-during/6243587/>) (“[Hollins] said the county clerk’s office sent out nearly 400,000 mail-in-ballot applications to Harris County voters who are 65 and older.”).

17. On August 27, 2020, Keith Ingram, Director of Elections for the Texas Secretary of State, sent a letter to Hollins, stating, “It has come to our office’s attention that Harris County intends to send an application to vote by mail to every registered voter in the county. Such action would be contrary to our office’s guidance on this issue and an abuse of voters’ rights under Texas Election Code Section 31.005.” Exhibit 1.

18. Ingram further stated that sending unsolicited vote-by-mail application forms “will confuse voters about their ability to vote by mail.... An official application from your office will lead many voters to believe they are allowed to vote by mail, when they do not qualify,” and “by sending an application to every registered voter, you could impede the ability of persons who need to vote by mail to do so. Clogging up the vote by mail infrastructure with potentially millions of applications from persons who do not qualify to vote by mail will make it more difficult for eligible mail voters to receive their balloting materials in a timely manner and will hamper efforts to qualify and count these ballots when received by your office.” *Id.*

19. The letter concluded, “[Y]ou must immediately halt any plan to send an application for ballot by mail to all registered voters and announce its retraction. If you have not done so by noon on Monday, August 31, 2020, I will request that the Texas Attorney General take appropriate steps under Texas Election Code 31.005.” *Id.*

20. On August 28, 2020, Hollins responded that he disagreed with Ingram and would not halt his plans to distribute applications to vote by mail to all registered voters of Harris County regardless of whether such applications were requested or whether the voter is eligible to vote by mail. Exhibit 2. Rather, Hollins indicated that he would include literature with the mailings that would explain the criteria for voting mail ballots. *Id.*

21. As of noon, August 31, 2020, Hollins had not complied with Ingram’s demand.

**The State of Texas requests that
Hollins’s *ultra vires* acts be enjoined**

22. The Court should issue such an injunction because Hollins lacks the authority to send vote-by-mail applications to every registered voter in Harris County. His decision to do so is therefore *ultra vires*. That is particularly true here, where Hollins plans to send millions of applications regardless of whether those recipients request such applications and regardless of whether they even qualify to vote a mail ballot.

23. In an *ultra vires* case, a plaintiff must allege, and ultimately prove, that an officer acted without legal authority or failed to perform a purely ministerial act. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

24. Counties in Texas are limited to exercising those powers that are specifically conferred on them by statute or the constitution. *Gwynes v. Galveston Cty.*, 861 S.W.2d 861, 863 (Tex. 1993). The County has no sovereign power of its own: It “is a subordinate and derivative branch of state government.” *Avery v. Midland Cty.*, 406

S.W.2d 422, 426 (Tex. 1966), *rev'd on other grounds*, 390 U.S. 474 (1968); see TEX. CONST. art. IX, § 1 (“The Legislature shall have power to create counties for the convenience of the people”); *id.* art. XI, § 1 (“The several counties of this State are hereby recognized as legal subdivisions of the State.”). As a political subdivision, the County “represent[s] no sovereignty distinct from the state and possess[es] only such powers and privileges” as the State confers upon it. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430 (Tex. 2016) (quotation omitted); accord *Quincy Lee Co. v. Lodal & Bain Engineers, Inc.*, 602 S.W.2d 262, 264 (Tex. 1980).

25. A commissioners court also has power “necessarily implied to perform its duties.” *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 29 (Tex. 2003). Such powers must, however, be “indispensable” to perform such an express grant of authority, *Foster v. City of Waco*, 255 S.W. 1104, 1105–06 (Tex. 1923). “Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.” *Id.*

26. Hollins is expressly empowered to send vote-by-mail applications to anyone who applies. Tex. Elec. Code § 84.012.

27. But there is no statute empowering County Clerks to send applications to vote by mail to voters who have *not* requested such an application. And Hollins’s plan to send vote-by-mail applications to *every* registered voter, regardless of whether the application was requested or whether the recipient is qualified to vote a mail ballot, is not an exercise of power that is necessarily implied to perform his duties.

28. To the contrary, sending millions of unsolicited vote-by-mail applications will affirmatively undermine the Election Code. Unlike some other states, Texas allows ballot by mail only under limited circumstances. Though early voting clerks are charged with reviewing ballot applications, the integrity of the system relies heavily on voters to make good-faith determinations of whether they may vote by mail.

29. The first step in that process is sending applications to vote by mail to voters who first ask for them. Voters who take the step of requesting a vote-by-mail application have presumably reviewed the eligibility criteria in good faith.

30. By contrast, there is no such check in sending vote-by-mail applications to every registered voter. As an initial matter, there is no guarantee that every individual registered to vote in Harris County remains eligible to vote at all in Harris County. Leaving aside death or disqualification of voters (e.g., for committing a felony), Texas is a diverse and mobile society. When people move, they often do not inform the County Clerk in their old place of residence that they have registered elsewhere. At best, applications sent to these individuals will simply go unused. More likely, these excess applications will become ripe material for voter fraud. *See Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2016) (en banc) (“[T]he potential and reality of fraud is much greater in the mail-in-ballot context than with in-person voting.”).

31. Even if the voter rolls in Harris County were perfect, however, sending out applications to vote by mail undermines the function of the system. Voting by mail is a cumbersome process with many steps to limit fraud. Most voters do not qualify for voting by mail. Flooding Harris County with millions of unrequested applications on the eve of an election may thus prevent the timely processing of those who *are* eligible to vote by mail. This is especially true since, as noted above, Harris County has already sent applications to every voter over the age of 65, who *are* eligible to vote by mail.

32. But sending vote-by-mail applications to every voter, without any attempt at all to tailor such a mass-mailing to persons who definitively are eligible to vote by mail, is certain to result in large numbers of vote-by-mail applications from voters who are ineligible to vote by mail. Regardless of whether Hollins includes literature in his mailing attempting to explain vote-by-mail criteria, it is inevitable that voters who receive applications from a public official with the imprimatur of state authority will wrongly assume they are eligible to vote a mail ballot. This confusion is especially

likely to occur given the large amounts of misinformation provided over the last several months regarding who is and is not eligible to vote by mail in light of the COVID-19 epidemic. *See In re State*, 602 S.W.3d 549, 557-560 (Tex. 2020) (rejecting argument by Harris County Clerk that lack of immunity to COVID-19 constitutes a “disability” qualifying voters to cast mail ballots); Letter to County Officials from Attorney General Ken Paxton, May 1, 2020, at 1 (providing guidance on qualifications to vote by mail based on disability in light of “misreporting and public confusion” surrounding that issue).

33. The court must thus infer that some of those ineligible voters will submit the applications and be incorrectly approved to vote. Even if Hollins’ office is perfect in screening out ineligible voters, this could itself lead to disenfranchisement because voters who submit deficient applications to vote by mail after a certain date may not receive notice that they must attend the polls in person. Tex. Elec. Code. § 86.008(c). The Election Code cannot give the Harris County Clerk the implied power to cause such confusion and disenfranchisement.

34. This interpretation of the Election Code is consistent with guidance issued by the State’s Chief Election Officer. In keeping with her role to “maintain uniformity in the application, operation, and interpretation of” the Election Code, Tex. Elec. Code § 31.003, the Secretary of State advised Collins that sending a vote-by-mail application to every registered voter “impedes the free exercise of a citizen’s voting rights.” Specifically, the Secretary determined that mailing vote-by-mail application forms “will confuse voters about their ability to vote by mail.” Exhibit 1.

35. The Secretary’s office also observed that “by sending an application to every registered voter, you could impede the ability of persons who need to vote by mail to do so. Clogging up the vote by mail infrastructure with potentially millions of applications from persons who do not qualify to vote by mail will make it more difficult for eligible mail voters to receive their balloting materials in a timely manner and will hamper efforts to qualify and count these ballots when received by your office.” *Id.*

36. Hollins has rejected that guidance and declared his intent to proceed with his plan to send a vote-by-mail application to every registered voter in Harris County, regardless of whether that application was requested or whether the recipient qualifies to vote by mail.

37. Hollins' plan to send a vote-by-mail application to every registered voter is *ultra vires*. He should be enjoined.

Application for a Temporary Restraining Order

38. "The purpose of a TRO is to preserve the status quo, which we have defined as the last, actual, peaceable, non-contested status which preceded the pending controversy." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (footnote and internal quotation marks omitted).

39. If the Court does not issue the requested temporary restraining order, the status quo will be irrevocably broken. Hollins' public statements and communications with the Secretary's office indicate that he intends to carry out his plan soon. Once that happens, there will be no way to recall more than two million pieces of mail.

40. The State will suffer irreparable injury in that event. As a sovereign entity, Texas has an inherent right to enforce its own law. *Naylor*, 466 S.W.3d at 790. And the State "indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). That right will be fundamentally undermined the moment that mail goes out. And no other way exists to make Plaintiff whole. The State's sovereign interest cannot be remedied with monetary damages. State officers will be required to combat the confusion that will inevitably result from Hollins's action. Even if they were able to divert their full attention to that task, it likely will not repair the resulting damage. Moreover, time they spend on this issue will distract them from their other critical duties just weeks before an election.

41. Therefore, the State is entitled to a temporary restraining order preserving the status quo by enjoining Hollins from sending unsolicited vote-by-mail applications until the temporary injunction hearing.

Application for a Temporary Injunction

42. For similar reasons, the State is entitled to a temporary injunction. A temporary injunction's purpose is to preserve the status quo of the litigation's subject matter pending a trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

43. Plaintiff must prove three elements to obtain a temporary injunction: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Id.*

44. Plaintiff describes its probable right to recovery above. Plaintiff is not required to establish that it will prevail at trial to obtain a temporary injunction. *Butnaru* at 211.

45. An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard. *Butnaru* at 204. If Hollins is not enjoined and sends the applications, damages are not available as a remedy and would not compensate Plaintiff in any event for the reasons discussed above.

46. Therefore, Plaintiff is entitled to a temporary injunction enjoining Hollins from committing the *ultra vires* act of sending unsolicited vote-by-mail applications to every registered voter.

Application for a Permanent Injunction

47. Plaintiff requests trial on the merits, where it will seek a permanent injunction enjoining Hollins from committing the *ultra vires* act of sending unsolicited vote-by-mail applications to every registered voter.

Prayer

48. Therefore, Plaintiff seeks a temporary restraining order, temporary injunction, and permanent injunction enjoining Hollins from sending unsolicited vote-by-mail applications to every eligible voter in Harris County.

Request for Disclosure

49. Plaintiff requests that Defendant disclose, within 50 days of the service of this request, the information or material described in Texas Rules of Civil Procedure 194.2.

Notice of Hearing

50. Please take notice that a hearing on Plaintiff's Application for a Temporary Restraining Order will take place on _____, 2020 at [time] by remote videoconference.

Dated: August 31, 2020.

Respectfully submitted,

KEN PAXTON
Attorney General

JEFFERY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General for Civil Litigation

CHARLES K. ELDRED
Assistant Attorney General

KATHLEEN HUNKER
Assistant Attorney General

/S/ Charles K. Eldred
CHARLES K. ELDRED
State Bar No. 00793681

Special Litigation Division
OFFICE OF THE ATTORNEY GENERAL OF TEXAS
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1706 • fax (512) 320-0167
charles.eldred@oag.texas.gov

ATTORNEYS FOR PLAINTIFF

Cause No. _____

THE STATE OF TEXAS,
Plaintiff,

v.

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

§
§
§
§
§
§
§
§

In the District Court of

Harris County, Texas

Judicial District _____

Declaration of Brian Keith Ingram

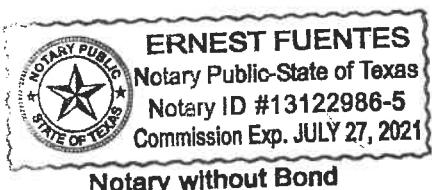
My name is Brian Keith Ingram. I am over eighteen years of age, am of sound mind, and am capable of making this declaration. I am the Director of Elections for the Texas Secretary of State.

I have read the above Original Verified Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction. I verify that the facts stated therein are within my personal knowledge and are true and correct.



Brian Keith Ingram

Sworn and subscribed before me on 9-31-2020, 2020.





Notary Public, State of Texas