

Case No. 20-50407

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

---

TEXAS DEMOCRATIC PARTY; GILBERTO HINOJOSA, CHAIR OF THE TEXAS  
DEMOCRATIC PARTY; JOSEPH DANIEL CASCINO; SHANDA MARIE SANSING;  
BRENDA LI GARCIA,

*Plaintiffs - Appellees*

v.

GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; RUTH HUGHS, TEXAS  
SECRETARY OF STATE; KEN PAXTON, TEXAS ATTORNEY GENERAL,

*Defendants-Appellants.*

---

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

---

---

**HARRIS COUNTY, TEXAS'S AMICUS CURIAE IN SUPPORT  
OF OPPOSITION TO DEFENDANTS-APPELLANTS'  
EMERGENCY MOTION FOR STAY PENDING APPEAL**

---

---

SUSAN HAYS  
LAW OFFICE OF SUSAN HAYS, P.C.  
P.O. Box 41647  
Austin, Texas 78704  
(214) 557-4819  
(214) 432-8273 (fax)  
hayslaw@me.com  
*Appellate Counsel for Harris County*

Vince Ryan  
HARRIS COUNTY ATTORNEY  
Robert Soard  
FIRST ASSISTANT COUNTY ATTORNEY  
Scott Lemond  
ASSISTANT COUNTY ATTORNEY  
1019 Congress St., 15<sup>th</sup> Floor  
Houston, TX 77002  
Telephone: (713) 755-5585  
Telecopier: (713) 755-8848

## INTRODUCTION

Harris County, Texas, is enormous, relatively young, and diverse. It is also facing a near-overwhelming challenge of conducting a safe election for the at least 1.5 million voters it expects to vote in November during the COVID-19 pandemic. Increasing the ratio of voters who vote by mail (“VBM”) is a crucial tool to spread out the curve of voter congregation during in-person voting so that social distancing and other safety measures may be effectively implemented to protect those voters who wish to vote in person. 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. For Harris County’s elections department this is a math issue, not a political one.

Texas Attorney General Ken Paxton (“AG Paxton”), however, has engaged in a game of shifting positions as to what Texas VBM statutes mean even while threatening to prosecute anyone who disagrees with his interpretation whether voters, election clerks, or the lawyers and organizations who advise them. Even during yesterday’s oral argument at the Texas Supreme Court in its suit against five, urban county chief elections officers,<sup>1</sup> the State again shifted its legal interpretation of the Election Code, now conceding that election clerks in fact have no statutory

---

<sup>1</sup> Depending on local options, the chief elections officer in a county is either the elected County Clerk or a quasi-independent Elections Administrator. For convenience this brief refers to these officials as either “election administrators” or “election clerks.”

power to second guess a voter’s statement as to which VBM category applies and claiming that its petition for writ of mandamus was only about VBM applications that contain stray marks or notations about COVID-19 — the “dimpled chad” of the pandemic presumably. The State also conceded that those with certain underlying conditions such as diabetes could legally VBM under the disability category. This re-positioning on the application of existing law to the pandemic only adds further proof to support the district court’s vagueness-as-applied finding. Given the stakes and the strength of the evidence, this Court should deny the State’s motion.

Much like “flattening the curve” of the pandemic, a safe and fair election will require flattening the curve of voters congregating in locations where they physically cannot socially distance. This can be accomplished in large part by expanding VBM from its current typical ratio in a general election of under 10% or the widely varying ratio in primary run-offs of approximately 20% to 40% to a stable, higher percentage so that the in-person voters whether during early voting or election day are decreased to a safely manageable number.<sup>2</sup> [ROA.825](#), [827](#). Despite the State’s rhetoric, neither the Plaintiffs nor Harris County have advocated for a “universal vote-by-mail system.” *See* Mot. at 15. To the contrary Harris County wishes to make all preparations for what will prove to be the most challenging election in American

---

<sup>2</sup> Election results available at <https://www.harrisvotes.com>.

history. To do so, Harris County and its elections administrator need a variety of tools to spread out voter congregation and respond nimbly to the pandemic’s ebb and flow and resulting voter behavior. Thankfully, the existing and broad “disability” definition — *if* its full application is allowed — will enable increased VBM which will serve both to flatten the curve of voter congregation during in-person voting and enable individual at-risk voters to protect themselves. However, the State of Texas refuses to apply the plain language of the law or fully cooperate in efforts to ensure a safe election.

## ARGUMENT

### I. **The Texas Legislature already made the policy choice to revise the “disability” excuse for VBM to its current broad language.**

Underlying much of this lawsuit and the sundry related litigation is the meaning of the Texas Election Code’s definition of “disability” applied to the context of a pandemic. Two district courts, one state and one federal, have now reviewed the language and concluded that a lack of immunity to COVID-19 qualifies a voter to VBM under existing Texas law — and not an extension or expansion of the text of the law.

#### A. **The plain text of current Texas law allows anyone without immunity to COVID-19 to VBM without questioning from election officials or the State.**

Texas law allows certain voters to request an application to vote by mail. [TEX. ELEC. CODE § 84.001](#). To cast an early voting ballot by mail, a voter must submit

an application. *Id.* at § 84.001(a). To be eligible to receive a ballot by mail, a voter must be: (1) absent from the county of residence during early voting and election day, (2) “disabled,” (3) age 65 or over, or (4) confined to jail but not yet finally convicted of a felony. [TEX. ELEC. CODE §§ 84.001-.004](#). Election clerks do not have the power to second-guess a voter’s representation but do have the mandatory duty to issue a ballot to an eligible voter who completes an application. *See* [TEX. ELEC. CODE §§ 84.001\(b\)](#) (“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.”).

Texas law also presciently provides broad definition of “disability” for the purpose of qualifying to VBM defining as a “disabled” voter one who 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*.

[TEX. ELEC. CODE § 82.002](#) (emphasis added). Thus “disability” is something of a misnomer as the definition is much broader than that term is commonly understood. Election 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. Despite its statutory duty to do so, the Texas Secretary of State (“SOS”) has only provided guidance that restated the statute and suggested that counties have extra

supplies on hand. [TEX. ELEC. CODE § 31.003](#); App. Ex. 4. The Texas Democratic Party which advises its county chairs on conducting its primary and directly manages primaries in some rural counties who do not have a county chair, consequently filed a declaratory judgment action in state court as to the meaning of Section 82.002 in the context of the ongoing COVID-19 pandemic. The state district court agreed that any voter without immunity to COVID-19 qualified under “disability,” as did the district court below.

**B. More than thirty-five years ago, the Texas Legislature made the policy choice to broaden the “disability” category and end the practice of voters having to provide evidence of their condition.**

The Texas Legislature made the policy choice to broaden the availability of VBM to those under 65 who have medical reasons why they cannot safely VBM more than thirty-five years ago. For many years, Texans under 65 wanting to vote “absentee,” as VBM was once known, for health reasons had to provide a medical certificate from a doctor to qualify. Act of May 28, 1977, 65th Leg., R.S., ch. 668, § 1, 1977 Tex. Gen. Laws 1687 (H.B. 1845). In the 1980s after a single-shot bill and a comprehensive rewrite and recodification of the Texas Election Code, the language changed as illustrated below comparing the old to the new:

| <u>Prior Law</u>  | <u>Current Law</u>   |
|---|--|
| Voter required to provide the “certificate of a duly licensed physician or chiropractor or accredited Christian Science practitioner certifying to such sickness or physical disability shall accompany the application . . . .” <sup>3</sup> | No medical certificate required, but voter certifies the information is true.  |
| “because of sickness or <i>physical disability</i> . . . cannot appear in the polling place” <sup>4</sup>   | “sickness or <i>physical condition</i> that prevents the voter from appearing at the polling place on election day without a <i>likelihood</i> of needing personal assistance or of <i>injuring the voter’s health</i> ” |

Thus, the Texas Legislature choose to expand the breadth of the “disability” category by replacing the word “disability” with the broader “condition,” and removing the requirement that the “sickness or physical disability” be such that the voter could not physically appear to vote in person at all and replacing it with the lesser standard that appearing in person would create a “likelihood of needing personal assistance or of injuring the voter’s health.” Moreover, the Legislature removed the requirement for a medical certificate and allowed the voters themselves to swear to their circumstances.

---

<sup>3</sup> Act of May 28, 1977, 65<sup>th</sup> Leg., R.S., ch. 668, § 1, 1979 Tex. Gen. Laws 1687 (H.B. 1845), *amended by* Act of May 26, 1981, 67<sup>th</sup> Leg., R.S., ch. 301, § 1, 1981 Tex. Gen. Laws 854 (S.B. 531) (replacing with voter certification).

<sup>4</sup> Act of April 19, 1979, 66<sup>th</sup> Leg., R.S., ch. 91, § 1, 1979 Tex. Gen. Laws 167 (H.B. 434), *repealed by* Act of May 13, 1985, 69<sup>th</sup> Leg., R.S., ch. 211, §§ 1, 9, 1985 Tex. Gen. Laws 898, 1076 (S.B. 616) (enacting modern Election Code).

Under current law, in high contrast to prior law, the voter decides whether they qualify under “disability” not election clerks and not the State. The danger the current situation poses — absent the preliminary injunction — lies with the Attorney General whose penchant for selective prosecutions<sup>5</sup> leaves voters and election administrators alike vulnerable to being made a political example at the risk of felony prosecution whether before or after the election. Voters should not be subject to after-the-fact prosecution or loss of their vote. As the district court rightfully held, this situation violates the First Amendment, the Twenty-Sixth Amendment, and the Due Process Clauses of the Fifth and Fourteenth Amendments for vagueness, and amounts to voter intimidation under [52 U.S.C.A. § 10306\(b\)](#).

**II. The status quo is allowing voters to decide whether they qualify to VBM under the “disability” category based on the plain language of the law.**

Texas and Harris County are currently scheduled to have primary runoff elections on July 14, 2020, with early voting beginning June 29.<sup>6</sup> The last day to

---

<sup>5</sup> Over a thirteen-year period from 2005 to 2018 of the at least seventy-three voter fraud cases Texas brought, 74% of which were against persons with Spanish surnames and 66% were against women. Robert Brischetto, *Texas’ desperate search for fraudulent voters*, SAN ANTONIO EXPRESS NEWS, Mar. 9, 2019, <https://www.mysanantonio.com/opinion/commentary/article/Texas-desperate-search-for-fraudulent-voters-13674630.php>

<sup>6</sup> See Governor Abbott Issues Proclamation Regarding July 14 Early Voting for Special, Runoff Elections, May 11, 2020, *available at* <https://gov.texas.gov/news/post/governor-abbott-issues-proclamation-regarding-july-4th-early-voting-for-special-runoff-elections> (moving early voting start date from July 2 to June 29 but only adding 4.5 days given the July 4<sup>th</sup> holiday); Gov. Greg Abbott, Proclamation, Mar. 20, 2020, [https://gov.texas.gov/uploads/files/-press/PROCLAMATION\\_COVID-19\\_May\\_26\\_Primary\\_Runoff\\_Election\\_03-20-2020.pdf](https://gov.texas.gov/uploads/files/-press/PROCLAMATION_COVID-19_May_26_Primary_Runoff_Election_03-20-2020.pdf);  
Texas Secretary of State, *Current Election Information*,



apply for a vote by mail ballot is July 2, 2020. [ROA.841](#). Holding an election in Harris County is a challenge for every election requiring months of preparation. [ROA.819](#). Adjusting to changes for the July 14 run-off will be easier than the November election because of its typical lower turnout and much higher VBM ratio; moreover, it will provide valuable data on voter behavior for planning the November election. [ROA.831-32](#). Harris County needs as much preparation as possible for the high turnout November presidential year general election to accommodate COVID-19's effects on public health and safety particularly considering the anticipated added time individuals will take to vote with the repeal of straight-ticket voting, the resulting added time each voter will take to vote given the enormous length of the Harris County ballot. [ROA.825-26](#), [831](#).

**A. Harris County voters have already submitted more than 75,000 VBM applications for the July 14 run-off and the ratio of “disability” applications is already up.**

The VBM process is a lengthy and technical one. *See* [ROA.821-23](#). Voters have been requesting VBM ballots for months and have been submitting additional applications since the March 2 primary. There were 70,953 applications for VBM in the primary in Harris County.<sup>7</sup> As of May 9, there were already **78,616** VBM

---

<https://www.sos.state.tx.us/elections/laws/current-elections-information.shtml>. (moving the primary run-off from May to July 14).

<sup>7</sup> Note that this number includes duplicates, bad addresses, etc. and is thus higher than the total ballots sent to voters, total returned, and ultimate total number of VBM ballots counted of 53,910.

applications for the run-off. [ROA.825](#). This number includes the significant number of voters, about 85% of total VBM requests to date, who request VBM on an annual basis, leaving 11,172 as new VBM requests. *Id.*

During the primary in Harris County 96.2% of the VBM applications were submitted under the 65+ category and only 0.8% were from the “disability” category. [ROA.826](#). The bulk of the requests came four-to-six weeks before the primary. *Id.* Although that time period for the postponed run-off has not yet arrived Harris County has already exceeded the total number of requests from the primary demonstrating increased voter interest in voting and VBM particularly. In addition, an uptick in requests in early June is likely as campaigns begin encouraging voters to submit applications through their mail campaign programs. *Id.*

Of the 11,172 requests *post-primary* through May 9, 95.8% were in the 65+ age category while 2.9% were from the “disability” category. *Id.* Harris County was already seeing an uptick in “disability” VBM applications before the state trial court’s April 17 ruling with the ratio doubling from the primary. [ROA.826-27](#). In the last month, the ratio of “disability” VBM applications has increased to 8.6% of those additional applications. *Id.* In sum, the VBM requests are already well underway for the July 14 run-off, and voters are already trending toward requesting VBM under the “disability” category presumably because of the ongoing pandemic. Thus, existing law and voter behavior combines to a status quo the lower court’s

order protects and this Court should protect by allowing the preliminary injunction to stay in place pending appeal.

Voters want the option to VBM, and election workers want adequate social distancing which is only possible with a VBM higher ratio. Harris County has been fortunate to have Prof. Robert M. Stein of Rice University to assist its preparation for the remaining 2020 elections as part of his ongoing work studying voter behavior. He conducted polls of both Harris County likely voters and its election workers to ascertain their concerns about voting during the pandemic. [ROA.860](#). His results demonstrate that every demographic of voters, whether by party, race, age, or gender, prefers having the option to VBM given the pandemic. [ROA.861-62](#), [864-76](#). Overall, 69.3% of likely voters stated they were very or somewhat likely to VBM if available. [ROA.872-73](#). Of voters under 65 (i.e., those who must have a reason under Texas law), 66.6% are very or somewhat likely to VBM if available. *Id.* Given that many of these voters also say they would vote if there were social distancing and other measures taken for polling sites, Stein concludes that between one-third and one-half of previous in-person voters are likely to choose VBM over in-person voting. [ROA.862](#).

**B. A stay will harm Harris County, its election officials, and its voters.**

As argued above, the State is wrong that a stay will enforce the status quo and will not harm others. Mot. at 19. In addition, this case is not duplicative of the state

court case applying the definition of “disability” to the context of the pandemic as this case seeks to protect an array constitutional rights and this preliminary injunction was largely prompted by AG Paxton’s behavior, not the words in a state statute. *See* Mot. at 6. Finally, AG Paxton’s *l’état c’est moi* argument, Mot. at 19-20, only underscores that his focus in this case is misplaced: it should be on the voters and their health.

AG Paxton is also duplicitously incorrect to say the district court’s order prevents him from enforcing “critical anti-fraud provisions.” *See* Mot. at 1. The Attorney General’s “voter fraud” prosecution toolbox is full.<sup>8</sup> The preliminary injunction affects none of the numerous statutes criminalizing voter behavior and empowering the Attorney General to enforce them. Section 84.0041 which prohibits “knowingly” providing false information on a VBM application gives AG Paxton the greatest leverage over voters given his shifting definitions of what is “false” in the context of the pandemic.

---

<sup>8</sup> *See* [TEX. ELEC. CODE § 273.021](#) (grants the AG the power to prosecute any criminal offense under the Election Code); *see also* [TEX. ELEC. CODE §§ 61.008](#) (unlawfully influencing voter); 64.012 (prohibits illegal voting such as voting when not eligible, voting more than once, impersonating another voter, marking ballot without permission of voter); 64.036 (unlawfully assisting voter); 276.012 (unlawfully engaging in organized election fraud); 276.013 (election fraud). Paxton also has VBM-specific tools. *See* [TEX. ELEC. CODE §§ 86.010](#) (unlawfully assisting voter voting by mail), 84.0041 (prohibits *knowingly* providing false information on an application for ballot by mail); 86.0051 (prohibits another from depositing mail ballot in the mail for the voter); 86.0052 (prohibits compensating another for depositing mail ballots in the mail on behalf of another person); 86.0105 (prohibits compensating another for assisting voter voting by mail); 276.010 (unlawfully buying and selling ballot materials).

**III. COVID-19 pandemic is serious and poses a high risk of serious harm to voters' and election workers' health.**

Harris County, home to the largest number of both medical research institutions and COVID-19 cases in Texas, understands that COVID-19 places all voters in the position of contracting a disease that may be fatal or cause severe suffering with long-term health consequences — that is, “injuring the voter’s health” — should they be forced to vote in person. Consequently, 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. Unfortunately, some downplay the disease’s seriousness and the pandemic’s likely staying power. Harris County prefers to and asks this Court to also listen to the medical professionals.

Attached to this amicus are declarations that were attached to an amicus brief filed in the Supreme Court of Texas this week executed by front-line health care providers, an epidemiologist, and other medical healthcare professionals studying and fighting COVID-19 in Texas. App. Ex 8. Harris County urges the panel to review the declarations, and like the health care professionals, take this pandemic seriously. In sum, COVID-19 poses a triple threat to public health and safety by (1) the virulence and the randomness of its transmission, (2) the perplexing range of symptoms as it attacks any number of bodily systems, and (3) the severity and unpredictability of the rapid onset of that severity. Whom it strikes and how it strikes them is unpredictable but always poses a potentially fatal threat to voters of all ages.

Despite AG Paxton’s posturing, this is indeed a voting rights case because requiring voters to risk COVID-19 exposure to vote imposes potentially severe, definitely unpredictable, and possibly fatal burdens.

As the State did in the district court, it relies on a list of measures for in-person voting it claims will suffice to protect voters. Mot. at 14 (citing Ex. O Sherbet Decl.). (describing training election workers, providing masks, sanitizing wipes, and plexiglass screens, etc.). But medical professionals disagree. Adequately sanitizing a space for COVID-19 requires trained professionals, appropriate supplies, and time. *See* App. Ex. 2 Obie Decl. at ¶ 17; Ex. 6 Rucker Decl. at ¶¶ 5-7. Wiping down equipment periodically will not protect voters or poll workers as the virus hangs in the air for substantial amounts of time such that premature wiping leaves surfaces only clean for the virus to land back on them as the air settles. *Id.* Moreover, busy poll workers, even with pre-election training, are unlikely to be able to replicate the high level of cleaning standards necessary to adequately sanitize a space. *Id.* In sum, the State’s touted precautions for in-person voting are woefully inadequate.

#### **IV. The Appellees should prevail on the merits.**

Harris County would prefer that state and local officials work together to plan, fund, and implement a safe election for all. But AG Paxton’s own actions created the unconstitutional vagueness the district court found, actions that continued in yesterday’s further muddling of what would be “illegal” voting for voters who select

“disability” to VBM. Because of his actions threatening voters and public officials even while shifting his view of what is an “illegal” vote, the Appellees are likely to prevail, and this Court should lift the stay.

*First*, neither the state nor federal court orders made any ruling about “fear” of the virus, yet the State has consistently mis-represented the rulings as about mere “fear” with AG Paxton aggressively threatening anyone who exercises their right to vote safely because of “fear” to felony charges as he does anyone who advises them of that course of action. *See* [ROA.854-55](#); Mot. App. Ex. F, Order on Application for Temporary Injunction, *TDP v. DeBeauvoir*, No. D-1-GN-20-001610, 201<sup>st</sup> Dist. Court, Travis County, Texas, Apr. 17, 2020.

*Second*, State omits from its motion and its appendix the May 1 press release directing his threats to Harris County, apparently prompted by Harris County daring to take steps to prepare for what everyone knows will be an unusual and difficult election. *See* Mot. at 11. To prepare the elections, the Harris County Clerk sought resources to successfully implement a safe and fair election. On April 28, the Harris County Commissioner’s Court voted to make up to \$12 million available to cover personal protective equipment (“PPE”) for election workers, sanitation supplies, and the added costs the anticipated higher ratio of VBM as processing mail-in ballots is more expensive per vote than in-person votes. Order of Commissioners Court, [ROA.836](#). This act of preparation inexplicably drew the ire of the Attorney General.

On May 1, Attorney General Ken Paxton issued a second “advisory,” this one directed at county election administrators (normally the province of the Secretary of State) and again threatening voters and those who advise them with felony charges should they VBM under the “disability” category because of the pandemic. The memo was accompanied by a press release that singled out the Harris County Judge and County Clerk:

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.

*Ex. 5, AG Paxton Advises County Officials to Avoid Misleading the Public on Vote by Mail Laws*, May 1, 2020, [ROA.853-55](#). Harris County denies its elected officials “mislead” anyone, but instead advised voters as to the contents of a court order and took actions to prepare for the elections. This focus on the Harris County Judge bears mentioning because other counties were making similar preparations and other county officials have voted for, discussed, or made public statements about the issue. But Paxton chose to focus on County Judge Lina Hidalgo, the only Latina and only immigrant county judge of the largest Texas counties.

*Third*, once again, AG Paxton has shifted his interpretation of Texas election law, bringing yet more vagueness to the law he chomps at the bit to enforce. To Harris County’s surprise at yesterday’s Texas Supreme Court oral argument, the State took the position that election clerks cannot reject a VBM application that



checks “disability” nor look behind the check box at the voter’s reasons — in the very mandamus action where he sued five counties’ election administrators complaining that they should reject such applications. *See* App. Ex. K. Instead, the State took the position — for the first time — that only those applications where voters made “extraneous marks” that indicated they were choosing “disability” for the reason of the pandemic would break the law.<sup>9</sup> The Solicitor General failed to explain how these marks would be interpreted given in inherent the ambiguity of a “COVID” notation next to the “disability” check box and whether it means a voter has COVID, thinks they have COVID but cannot get a test, is at high risk for COVID because of underlying conditions, has been exposed to COVID and is self-quarantining, or simply does not want to be exposed to COVID. *See* App. Ex. 7, SOS VBM Application Form. Harris County reviewed the more than 1,000 VBM applications selecting “disability” that have arrived since the primary and the onslaught of the pandemic finding a scant eleven applications with notations of “COVID” or “coronavirus” including one with a scratched-out notation. Most simply notated “COVID,” “coronavirus,” or “COVID-19” with no further explanation. The following three figures are samples excerpted from those applications:

---

<sup>9</sup> *See* Oral Argument, *In re State of Texas*, No. 20-0394, May 20, 2020, at 15:12-14:52, <https://www.youtube.com/watch?v=llwD8A6k1Qg>.

REASON YOU ARE APPLYING FOR AN EARLY BALLOT:

65 years or over

**DISABILITY covid**

Out of the county on Election Day

In jail but otherwise eligible

**5** Reason for Voting by Mail:

65 years of age or older. (Complete Box #6a)  = COVID 19

Disability. (Complete Box #6a)

Expected absence from the county. (Complete Box #6b and Box #8)  
You will receive a ballot for the upcoming election **only**

Confinement in jail. (Complete Box #6b)  
You will receive a ballot for the upcoming election **only**

One elaborated but only to state the voter's request:

Due to COVID-19, I would like to be able to vote by mail for May & Nov elections. If possible. Thank you.

None explained what the voter's health condition was vis-a-vis COVID-19 or explained the exact status of the voter's health, nor would any voter want to reveal private healthcare information on a government form in order to vote.

The State then surprised Harris County again, conceding for the first time in response to a justice's questions about underlying conditions, that those with diabetes, for example, could legally VBM under the "disability" category.<sup>10</sup>

<sup>10</sup> *Id.* at 14:00-13:45.

Likewise, the Solicitor General did not explain what other conditions qualify, whether a diabetic had to be actively ill or if their medical condition was under control they would still have to vote in person, among other many questions voters may have as to AG Paxton's new version of the law.

While the State likes to claim its efforts are all about stamping out "voter fraud," it fails to explain what about more Texans voting by mail constitutes "illegal" voting or "fraud." The Elections Code, however, does explain what constitutes an "illegal vote." See [TEX. ELEC. CODE § 221.001](#). An "illegal vote" is one "that is not legally countable." [TEX. ELEC. CODE § 221.003\(b\)](#). And an "illegal vote" is a criminal offense *only if* a person:

- (1) votes or attempts to vote in an election in which the person knows the person is not eligible to vote;
- (2) knowingly votes or attempts to vote more than once in an election;
- (3) knowingly votes or attempts to vote a ballot belonging to another person, or by impersonating another person; or
- (4) knowingly marks or attempts to mark any portion of another person's ballot without the consent of that person, or without specific direction from that person how to mark the ballot.

[TEX. ELEC. CODE § 64.012\(a\)](#). There are two points here. First, a "qualified voter" is "eligible to vote by mail" if the voter is "disabled." [TEX. ELEC. CODE § 82.002\(a\)](#). But the fact that a voter may not be eligible to VBM does not necessarily make the voter ineligible to vote at all. See [TEX. ELEC. CODE § 64.012\(a\)](#).

Section 221.003, dealing with election contests, does not make a vote “illegal” unless a person voted in an election in which the person was not eligible to vote. In other words, the *manner* (e.g., by mail) in which the person voted does not make the “vote” “illegal” for contest-purposes even if the *manner* was less than perfect. A vote may not be counted where: a voter votes twice; outside of his or her jurisdiction; where the voter is underage; or marks another person’s ballot. See [TEX. ELEC. CODE § 64.012\(a\)](#). In other words, under Election Code chapters 64, 82, and 221, voting by mail where a person’s “disability” might be questioned is no more election “fraud” than “speeding” is “driving without a license.”

AG Paxton seems to want to be able to say what the law is whenever he wants while reminding the public of his prosecutorial power over election matters and the stiff criminal penalties he can impose against the defendants he selects. It is one thing for the state to disagree with a trial court’s ruling. It is another to wave a prosecutorial sword while raising the specter of felony charges, and it is yet another altogether to direct those threats at a county executive officer, chief election officers, and the voters.

**V. Harris County, its County Clerk, its election administrator, its poll workers, and its voters need the protection of the federal courts**

The partisan rancor that has erupted around mail-in voting has done nothing but disrupt the planning for the July run-off and November election and is a grave disservice to voting rights and public health. Voters need to know they will access

to safe ways to vote in the July and November elections. Election administrators need to know clear rules for conducting elections during the pandemic as soon as possible so they may plan accordingly. Effectively implementing social distancing at in-person locations depends on having more voters VBM so that the curve of voter congregation can be spread out. Otherwise, especially in a county as large as Harris County, there will be simply too many bodies to move through too few spaces in too little time. This Court should deny the motion for stay as the preliminary injunction preserves the status quo as to the plain language of Texas law as well as the ongoing voter preferences and behaviors, and protects all from the Attorney General's threats of criminal prosecution.

### **CONCLUSION**

Harris County respectfully requests that the stay be lifted, and the preliminary injunction remain in place pending appeal.

Respectfully submitted,

Vince Ryan  
HARRIS COUNTY ATTORNEY  
Robert Soard  
FIRST ASSISTANT COUNTY ATTORNEY  
Scott Lemond  
ASSISTANT COUNTY ATTORNEY  
1019 Congress St., 15<sup>th</sup> Floor  
Houston, TX 77002  
Telephone: (713) 755-5585  
Telecopier: (713) 755-8848

/s/ Susan Hays

SUSAN HAYS  
LAW OFFICE OF SUSAN HAYS, P.C.  
P.O. Box 41647  
Austin, Texas 78704  
(214) 557-4819  
(214) 432-8273 (fax)  
[hayslaw@me.com](mailto:hayslaw@me.com)

*Counsel for Harris County*



**CERTIFICATE OF SERVICE**

I, Susan Hays, certify that today, May 21, 2020, a copy of this Amicus on Response to Emergency Motion to Stay Pending Appeal was served upon all counsel of record via ECF.

\_\_\_\_\_/s/ Susan Hays  
Susan Hays



## **Exhibit List**

- Exhibit 1: Electoral Profile of Harris County Estimated Harris County, Texas, Racial Demographic Totals & Percentages
- Exhibit 2: Harris County Commissioner's Court, Order, Apr. 28, 2020; Harris County Clerk, COVID-19 Agenda Item, Apr. 20, 2020
- Exhibit 3: Key Dates Calendar July Run-Off
- Exhibit 4: Texas Secretary of State, Advisory 2020-14-COVID-19 (Coronavirus) Voting and Election Procedures, April 2, 2020 (SOS COVID-19 Advisory)
- Exhibit 5: 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>; Ken Paxton, Memo to County Judges and County Election Officials, May 1, 2020
- Exhibit 6: Declaration of Robert Stein, Professor of Political Science, Rice University, with 2020 Harris County Voter and Poll Worker Survey
- Exhibit 7: SOS VBM Application Form
- Exhibit 8: Appendix from Brief of Amici Curiae Health Care Professionals and Institutions:
- App. 1 Information re: Institutional Amici Parties
  - App. 2 Declaration of Amici Dr. Ogadinma Obie
  - App. 3 Declaration and CV of Amici Dr. Catherine Troisi
  - App. 4 Declaration of Amici Dr. Joseph Varon
  - App. 5 Declaration of Amici Dr. Paolo Angelini
  - App. 6 Declaration of Amici Dr. Ebony Rucker