

**CASE No. 20-50407**

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

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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.*

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

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**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

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Pursuant to Rule 29(b)(3) of the Federal Rules of Appellate Procedure, the Tarrant County Republican Party (“Tarrant GOP”) moves the Court for leave to file a brief as Amicus Curiae in support of Defendants-Appellants. Tarrant GOP has conferred with counsel for the parties, and the parties consent to the filing of Tarrant GOP’s brief.

**Interests of Amicus Curiae**

Tarrant GOP is a political organization recognized by the Texas Election Code. Tarrant County, Texas is a county of over 1.8 million Texans. As such it is responsible for organizing and promoting the Republican Party—and ultimately the principles that Party represents—on a county-wide level. Earlier this year, over 128,000 citizens of Tarrant County cast a ballot for one of the candidates for United States Senator in the Republican primary.<sup>1</sup> In 2016, over 668,000 citizens of Tarrant County cast a ballot for a candidate for President of the United States.<sup>2</sup> Accordingly, the voting rights of Tarrant GOP and the integrity of the elections in which its candidates participate are directly affected by the merits in this appeal. Tarrant GOP

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<sup>1</sup> See “Republican Party Cumulative Report,” available at [https://www.tarrantcounty.com/content/dam/main/elections/2020/PM20/reports/cumulative\\_rep.pdf](https://www.tarrantcounty.com/content/dam/main/elections/2020/PM20/reports/cumulative_rep.pdf) (last visited June 1, 2020).

<sup>2</sup> See “November 8, 2016, Joint General and Special Elections - Election Results,” available at <https://www.tarrantcounty.com/content/dam/main/elections/2016/1116/cumulative.pdf> (last visited June 1, 2020).

files this brief in the interest of election integrity in Tarrant County and all counties in Texas.

Further, just a few weeks ago, the Texas Supreme Court issued its ruling in *In re: State of Texas*, No. 20-0394, 2020 WL 2759638 (Tex. May 27, 2020). Elections benefit from clarity and, to that end, Tarrant GOP has an interest in consistent rulings from all courts reviewing these issues.

### **Relevance of Amicus Curiae Brief**

Texas places high value on the integrity of elections and has enshrined the concept in its Constitution. *See* TEX. CONST. ART. VI, § 4 (preserving “the purity of the ballot box”). Tarrant GOP believes that elections are pure when the process by which elections are conducted is uniform, reliable, and predictable. This concurs with Principle 189 of the 2018 Republican Party of Texas Platform, which provides, in pertinent part, for the “increased scrutiny and security in balloting by mail” and for “protecting the integrity of our elections.” *Principle 189 (Fair Election Procedures), Platform of the Republican Party of Texas, 2018.*

To that end, Tarrant GOP seeks to ensure that elections are conducted safely, consistently, predictably and according to the letter and spirit of Texas law. As the United States Supreme Court once held, “there must be a substantial regulation of elections if they are to be fair and honest and if some

sort of order, rather than chaos, is to accompany the democratic processes.”  
*Storer v. Brown*, 415 U.S. 724, 730 (1974).

Fraudulent voting is not a theoretical or abstract issue for Tarrant County and Tarrant GOP. In the last presidential election, individuals were indicted in Tarrant County for vote fraud, stemming from the use of mail-in ballots the Plaintiff-Appellees’ seek here. For Tarrant GOP and all voters in Tarrant County, this is a real and pertinent issue.

Therefore, Tarrant GOP supports the Defendant-Appellants’ position to ensure that local election administrators adhere to the statutory requirements that limit eligibility for voting by mail and recognize that, based on the plain language of the relevant statutory text, a fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition or a lack of immunity to COVID-19 does not constitute a “disability” or a “physical condition” that “prevents” a voter “from appearing at the polling place on election day” under the Election Code for purposes of receiving a ballot by mail. *See* Tex. Elec. Code § 82.002(a). This is also consistent with the Texas Supreme Court’s recent holding on this issue. *In re: State of Texas*, No. 20-0394, 2020 WL 2759638 (Tex. May 27, 2020).

Pursuant to FED. R. APP. P. 29(a)(3), the Tarrant GOP sets forth its interest and the reasons its views are desirable and relevant to the disposition of the case. The proposed brief accompanies this motion as an attachment.

**Conclusion**

The proposed amicus requests that this Court grant leave to file its brief of amicus curiae and direct the clerk to file the brief.

Respectfully submitted,

*/s/ H. Dustin Fillmore III*

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**CERTIFICATE OF ELECTRONIC COMPLIANCE**

I certify that (1) the required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses. I will mail the correct number of paper copies of the foregoing document to the Clerk of the Court when requested.

/s/ H. Dustin Fillmore III  
H. Dustin Fillmore III

**CERTIFICATE OF COMPLIANCE**

I certify that this document complies with (1) the type-volume limitation set forth in Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 700 words, excluding the parts exempted by rule; (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Georgia) using Microsoft Word for Windows (the same program used to calculate the word count).

/s/ H. Dustin Fillmore III  
H. Dustin Fillmore III

### **CERTIFICATE OF CONFERENCE**

I certify that I conferred with counsel for Plaintiffs-Appellees and Defendants-Appellants concerning the merits of the instant motion. Plaintiffs-Appellees and Defendants-Appellants are unopposed and consent to the motion.

/s/ H. Dustin Fillmore III  
H. Dustin Fillmore III

### **CERTIFICATE OF SERVICE**

I hereby certify that on July 1, 2020, a copy of the foregoing motion was filed electronically with the Clerk of the Court using the Court's ECF System. Notice of this filing will be sent electronically by operation of the Court's electronic filing system to all counsel of record.

/s/ H. Dustin Fillmore III  
H. Dustin Fillmore III

**CASE No. 20-50407**

**UNITED STATES COURT OF APPEALS  
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TEXAS DEMOCRATIC PARTY; GILBERTO HINOJOSA, CHAIR OF THE TEXAS  
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## **IDENTITY AND INTEREST OF AMICUS CURIAE**

*Amicus Curiae*, the Tarrant County Republican Party (“Tarrant GOP”), is the organized Republican Party in Tarrant County, Texas. As such it is responsible for organizing and promoting the Republican Party—and ultimately the principles that Party represents—on a county-wide level. Accordingly, the voting rights of the Tarrant GOP and the integrity of the elections in which its candidates participate are directly affected by the merits in this appeal. Tarrant GOP files this brief in the interest of election integrity in Tarrant County—indeed, all counties in Texas.

Tarrant GOP will address three important issues:

***First***, there is an established nexus between mail-in ballots and voter fraud in Tarrant County;

***Second***, a qualified Texas voter’s alleged fear of contracting a virus does not constitute a “disability” (as defined in Texas law) that justifies allowing vote by mail; and

***Third***, in the district court’s rush to overhaul the Texas election code, it bypassed other important issues that a legislative body would likely give careful consideration to before enacting such sweeping changes.

These are matters of substantial importance to every voter in Tarrant County, and all of Texas. Elections in Texas are quickly approaching. If the district court’s order is allowed to stand, widespread voter fraud and election

chaos in Tarrant County (and the rest of Texas) is sure to follow. Tarrant GOP is fighting for election integrity.

No party's counsel authored any part of this brief or contributed any money to fund this brief, nor has any person (aside from the undersigned counsel) funded the preparation and submission of this brief. See Fed. R. App. P. 29(a)(4)(E).

### **SUMMARY OF ARGUMENT**

The constitutionality and enforceability of Texas election law should not wax and wane with the phobias (alleged or real) of a few voters. The virus that started in China, and has now made its way to Texas, has not changed Texans' voting *rights*. Texans have the exact same voting rights they had before. The Court should—in the interest of preserving “the purity of the ballot box” (TEX. CONST. ART. VI, § 4)—reject the effort to stymie Texas elections through (1) an ill-considered, eleventh-hour, seismic shift in Texas election law by court order, and (2) the placement of a federal judge to oversee all elections for the foreseeable future. Otherwise, fraud, intimidation, and chaos will inevitably follow.

### **ARGUMENT**

#### **A. Tarrant County has a history of mail-in ballot voter fraud.**

IT IS SO ORDERED that during the pendency of the pandemic circumstances:

(1) Any 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 upcoming elections during the pendency of pandemic circumstances.

*Tex. Democratic Party v. Abbott*, CV SA-20-CA-438-FB, 2020 WL 2541971, at \*6 (W.D. Tex. May 19, 2020).

A mere 42 days after this lawsuit was filed, the district court essentially overhauled Texas election law and placed itself in charge of Texas elections for the foreseeable future—until that uncertain date when “the pandemic circumstances giving rise to [the order] have subsided.” *Id.* at \*6–7. The district court’s order entitles all eligible Texas voters “to vote by mail,” and virtually anyone who does anything plausibly inconsistent with the district court’s order can be hauled before the district court to face contempt charges. *Id.* at \*7 (numbered paragraphs (2), (3), (5)). This should not be.

Certainly, there are voters who need absentee ballots to exercise their franchise. And Texas law allows for this. *See* TEX. ELEC. CODE § 82.002. But there are problems with mail-in balloting, as this Court has discussed before. *Veasey v. Abbott*, 830 F.3d 216, 255 (5th Cir. 2016). During the last presidential election, Tarrant County was the site of enough organized voter

fraud that the local media labeled it a “voter fraud ring.”<sup>1</sup> Several of the people who committed voter fraud were indicted for taking advantage of the very process that Plaintiff-Appellants seek here: mail-in ballots for the elderly and disabled. As reported, one of the participants in the voter fraud ring stood accused:

...of marking a voter’s ballot without his consent in March 2016, and altering and submitting applications in January and February 2016 to request ballots by mail for the Democratic Party for 2016 elections for 13 people who had made no such requests.

*Id.*

Voter fraud in Tarrant County has even been of such concern that it led to a ballot contest for the Democratic Party nomination for the Texas State House District 90.<sup>2</sup> Alleged fraud in the mail-in ballot process was at the heart of that dispute.<sup>3</sup> The contestant in that case believed the purported fraud illegally affected the outcome of the race.<sup>4</sup> As such, voter fraud concerns are very real in Tarrant County. Tarrant GOP has a real and on-

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<sup>1</sup> See <https://www.star-telegram.com/news/local/fort-worth/article219920740.html> (last visited June 2, 2020) (“Four women in ‘voter fraud ring’ arrested. They targeted seniors on city’s north side”)

<sup>2</sup> *Burnam v. Romero*, Cause No. 096-271239-14, Contestant’s Original Petition and Request for Disclosure (attached as Appendix Item 1).

<sup>3</sup> *Id.* at 6-7.

<sup>4</sup> *Id.* at 5.

going interest in all election officials' compliance with the Texas Election Code to ensure pure and fair elections.

**B. The district court misconstrued Texas election law.**

As previously noted, the Texas Legislature permits voting by mail in limited circumstances. Section 82.002 of the Texas Election Code permits a qualified voter to vote early by mail if the qualified voter suffers from a “disability,” that is “if the voter has a *sickness* or *physical condition* that prevents the voter” from voting in person “without *a likelihood of needing personal assistance* or of *injuring the voter’s health*.” TEX. ELEC. CODE § 82.002(a) (emphasis added).

But the district court was not content with the Texas Legislature’s definition for “disability” and chose instead the Oxford English Dictionary’s online-definition. *Tex. Dem. Party v. Abbott*, 2020 WL 2541971, at \*5, n.16. Preferring Oxford University Press (the publisher of the Oxford English Dictionary and a department of the University of Oxford located in Oxford, England) to the Texas Legislature, the district court determined that fear and anxiety of contracting COVID-19 is inextricably intertwined with voters’ physical health. *Id.* at \*5. The court also found that a lack of immunity to COVID-19 was a physical condition. *Id.* Unsurprisingly, these holdings conflict with the plain meaning of section 82.002’s text.



But there was no need to import a definition of “disability” from Great Britain when the Texas Legislature has already defined the term. The district court was wrong to do so. *See Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (“When a statute includes an explicit definition, we must follow that definition, even if it varies from that term’s ordinary meaning.”); *Meese v. Keene*, 481 U.S. 465, 484–85 (1987) (“It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.”); *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 442 (Tex. 2009) (“Since the Legislature provided its own definition for ‘general contractor,’ we elevate the Legislature’s substituted meaning even when it departs from the term’s ordinary meaning.”). Straying from the definition of disability prescribed by the Texas Legislature caused the district court to wrongfully encroach on the Legislature’s function to decide what the law should be. *Cf. Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999).

The Texas Legislature’s definition for “disability” comprehends an eligible Texas voter who has “a sickness or physical condition that prevents the voter” from voting in person “without a likelihood of needing personal assistance or of injuring the voter’s health.” TEX. ELEC. CODE § 82.002(a). The Election Code does not define the terms “sickness” and “physical condition.” So, a reviewing court should rely on “the plain meaning of the text as

expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context.” *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018). “Words not statutorily defined bear their common, ordinary meaning unless a more precise definition is apparent from the statutory context.” *Id.* In order to determine a term’s common, ordinary meaning, courts should typically look first to dictionary definitions. *Id.*

The common understanding of “sickness” is the “state of being ill” or having “a particular type of illness or disease.” NEW OXFORD AM. DICTIONARY 1623 (3d ed. 2010). The scope of the statute is limited to qualified voters who are actually suffering from a known, identifiable illness or disease. What’s more, the statute mandates the particular disease must be so severe that the voter will *likely* “need personal assistance” *or likely* suffer an injury by physically appearing at the polling place. TEX. ELEC. CODE § 82.002 (a). Thus, a quadriplegic might qualify, but a voter who is worried about catching a virus would not.

Nor does a fear of contracting COVID-19 qualify as a “physical condition.” The common understanding of the term “physical” is “of or relating to the body as opposed to the mind.” NEW OXFORD AM. DICTIONARY 1321 (3d ed. 2010). A fear of contracting a physical condition is a mental

condition, not a physical condition. Therefore, a fear of COVID-19 is not a physical condition for purposes of section 82.002.

The Texas Legislature could have included a term like “fear” in the statute, but it did not. In Texas, the interpreting court presumes the Legislature included each word for a purpose and that words not included were purposefully omitted. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). Consequently, courts are to presume that the Legislature intended to allow voting by mail only when a voter has a physical illness, and not merely a mental apprehension of suffering from a physical illness.

Importantly, the Texas Supreme Court has very recently addressed the meaning of “disability” in section 82.002. In its opinion, the court reasoned that a “physical condition” for purposes of section 82.002 has to be “an abnormal or at least distinguishing state of being.” *In re: State of Texas*, No. 20-0394, 2020 WL 2759638, n. 3 (Tex. May 27, 2020). The Court concluded 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” the Texas Election Code. *Id.* If a lack of immunity is not an abnormal or distinguishing condition, it stands to reason that a desire to avoid contracting COVID-19 is not one either. Instead, such a desire is likely common to everyone.

The Texas Supreme Court’s recent, common-sense interpretation of section 82.002 indicates that it would not consider a desire to avoid contracting COVID-19 to be a “physical condition” or “sickness” under section 82.002. Because this Court defers to Texas courts for interpretation of Texas law, *Van Houten v. City of Fort Worth*, 827 F.3d 530, 534 (5th Cir. 2016), the Court should follow the Texas Supreme Court’s reasoning, and conclude that Texas law allows voters to vote by mail only when they have a true sickness or physical condition—as distinguished from an alleged fear.

The bottom line is section 82.002 protects voters who are disabled, not voters who imagine that they might become disabled if they are unlucky in the future. Every voter in Texas is afraid of something. It is likely that many Texas voters are afraid of COVID-19. But a fear of contracting COVID-19 is not a disability under section 82.002, because a fear of *contracting* a particular illness or disease is not *actually having* that particular illness or disease. A person ill with COVID-19 would certainly qualify as having a sickness or physical condition, but a fear of COVID-19 is not the same as having COVID-19.

**C. The district court bypassed important logistical issues a legislative body would consider before overhauling Texas election law.**

“Citizens should have the option to choose voting by letter carrier versus voting with disease carriers.” *Tex. Dem. Party v. Abbott*, 2020 WL 2541971, at \*6. At first blush, this may appear to be a laudable notion. The Texas Legislature may address this issue in the future. And when it does, it will engage in the legislative process—which, among other things, will consist of gathering evidence to determine the practical effects of the sudden elimination of any barriers to voting by letter carrier.

Here are a few issues that would likely be considered by Texas’s legislative branch when considering this seismic change to election law:

- Can the United States Postal Service handle the situation of a sudden elimination of any barrier to voting by letter carrier?
- Are there any recent studies to show the reliability of the United States Postal Service, and if so, what do these studies show?<sup>5</sup>
- What is the “failure to deliver” rate of the United States Postal Service?
- Does the United States Postal Service’s “failure to deliver” rate fluctuate depending upon the time of year, and is it worse during the time when major elections take place?

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<sup>5</sup> See, e.g., <https://www.forbes.com/sites/stevepociask/2016/04/08/post-office-performance-is-out-of-service/#de9268b6b36f> (last visited June 16, 2020); [https://www.prc.gov/docs/95/95462/Final\\_2015\\_ACD.pdf](https://www.prc.gov/docs/95/95462/Final_2015_ACD.pdf) (last visited June 16, 2020). The district court improperly assumes the infallibility of the letter carrier.

- What is the “late delivery” rate of the United States Postal Service, and what number of days (or weeks) have to go by before a letter is considered “late”?
- Does the “late delivery” rate of the United States Postal Service fluctuate depending upon the time of year, and is it worse during the time when major elections take place?
- How many Texas votes would be lost because the United States Postal Service fails to deliver the ballot or is late in delivering the ballot?
- How many Texans have voted by mail in the past, and how many are expected to vote by mail (going forward) if all barriers are removed to obtain absentee ballots?
- How many people are used to count absentee ballots, and how many people will be needed to count these ballots going forward?
- What is the procedure for securing sufficient people to count absentee ballots?
- Are the people who count absentee ballots volunteers?
- What is the average age of persons tasked with counting absentee ballots?
- What are the normal logistical problems associated with counting absentee ballots, and what logistical problems will likely arise with a sudden increase in absentee ballots?
- Are there sufficient resources (personnel and financial) to handle a sudden increase in absentee ballots throughout Texas?
- What are the areas of Texas, if any, that could struggle to properly handle a sudden increase in absentee ballots?
- What is the rate of fraud for absentee ballots?

- Does the rate of fraud for absentee ballots fluctuate depending upon the time of year, type of election, geographical location, or other factors?
- How many lost votes can we expect if the Texas election process is suddenly overhauled to allow for all eligible voters to be granted absentee ballots?
- Will a logistical nightmare ensue?

As the attached Declaration of Kelley Roberson (Presiding Judge of the Early Voting Ballot Board and Signature Verification Committee) confirms, there are significant logistical issues that should be considered. *See* App. 2 at 1–4.

The Texas Legislature is far better equipped to carefully consider the logistical realities confronting outwardly laudable ideas to overhaul Texas election law. *See McKleskey v. Kemp*, 481 U.S. 279, 319 (1987) (“Legislatures also are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.”) (internal quotes and citation omitted); *In re Cao*, 619 F.3d 410, 419 (5th Cir. 2010) (“In practice, the legislature is better equipped to make such empirical judgments, as legislators have [the] ‘particular expertise’ necessary to assess what limits will adequately prevent corruption in the democratic election of their peers.”) (quoting *Randall v. Sorrell*, 548 U.S. 230, 248 (2006)).

This case highlights the superiority of elected legislators (and the legislative process) determining how best to run an election in Texas. In the 42-day period between the filing of the lawsuit and the district court's order overhauling Texas election law, no real consideration was given to the practical effects of such a sudden and substantial alteration to the legal landscape. The mundane, logistical details of actually running an election are either unknown to or ignored by the district court. But logistical details are important to know and carefully consider, because a court order does not automatically create a new reality (*ex nihilo*) in which logistical (sometimes immovable) details of running an election simply vanish. *See* App. 2 at 2–3 (¶¶ 6–10). The Texas Legislature, not the district court, should be the branch of government to tackle this issue.

What's worse is the district court's order constitutes a weapon to bully anyone who disagrees with Plaintiffs-Appellees *and* anyone unable to respond—at least to the liking of the Plaintiffs-Appellees—to the seismic duties (apparent *and* ensconced) in the court's order. *Tex. Democratic Party v. Abbott*, 2020 WL 2541971, at \*7 (numbered paragraphs (2), (3), (5)). In fact, the district court has already affixed a label to *those* people—people “who would, if they could, nullify [the Declaration of Independence and the United States Constitution] trading our birthright as a sovereign people for



a modern mess of governing pottage in the hands of a few and forfeiting the vision of America as a shining city upon a hill.” *Id.* at \*1. *Those* people are already traitors in the eyes of the district court.

It is no exaggeration to say the district court—on the eve of highly contentious elections—radically overhauled Texas election law and placed itself at the pinnacle of power to oversee all Texas elections for the foreseeable future. And the court also served notice of the label that is already affixed to anyone who may be accused of acts or omissions discordant with the court’s order. These realities will cause chaos in Texas elections, as anyone with any authority (however small) over the election process can be bullied with threats of being hauled before a federal district judge in San Antonio, Texas to face a contempt of court accusation. *See, e.g.*, App. 2 at 2–3 (¶¶ 6–10). This case proves the U.S. Supreme Court’s wisdom in cautioning against court-ordered changes to election rules on the eve of an election. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (citing *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S. Ct. 9 (2014); *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)).

## CONCLUSION

Amicus Curiae Tarrant GOP respectfully requests that the Court to reverse the district court's decision, vacate the preliminary injunction, and remand with instructions to dismiss Plaintiffs' complaint.

Respectfully submitted,

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## CERTIFICATE OF ELECTRONIC COMPLIANCE

I certify that (1) the required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses. I will mail the correct number of paper copies of the foregoing document to the Clerk of the Court when requested.

/s/ H. Dustin Fillmore III  
H. Dustin Fillmore III

### **CERTIFICATE OF COMPLIANCE**

I certify that (1) this document complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the document exempted by Rule 32(f), this document contains 3110 words; and (2) this document complies with the typeface requirements of Federal Rule of Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Georgia font.

/s/ H. Dustin Fillmore III  
H. Dustin Fillmore III

### **CERTIFICATE OF SERVICE**

I hereby certify that on July 1, 2020, a copy of this brief was filed electronically with the Clerk of the Court using the Court's ECF System. Notice of this filing will be sent electronically by operation of the Court's electronic filing system to all counsel of record.

/s/ H. Dustin Fillmore III  
H. Dustin Fillmore III

**APPENDIX**

Appendix Item 1 (“App. 1”)	True and correct copy of Contestant’s Original Petition and Request for Disclosure to Contestee in <i>Lon Burnam v. Ramon Romero, Jr.</i> ; Cause No. 096-271239-14; In the 96th Judicial District Court of Tarrant County, Texas
Appendix Item 2 (“App. 2”)	Declaration of Kelly Roberson, Presiding Judge of the Early Voting Ballot Board and Signature Verification Committee

# App. 1

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CAUSE NO. 096-271239-14

LON BURNAM	§	IN THE DISTRICT COURT OF
Contestant	§	
	§	
V.	§	TARRANT COUNTY, TEXAS
	§	
RAMON ROMERO Jr.,	§	
Contestee	§	_____ JUDICIAL DISTRICT

**CONTESTANT'S ORIGINAL PETITION  
AND REQUEST FOR DISCLOSURE TO CONTESTEE**

COMES NOW, Lon Burnam, Contestant, and files his election contest and would show the Court as follows:

**DISCOVERY LEVEL**

1. Discovery is intended to be conducted under Level 2 of TEX. R. CIV. P. 190.

**PARTIES**

2. Contestant Lon Burnam was a candidate for Texas State House of Representative District 90 in the Democratic Party held on March 4, 2014 in Tarrant County, Texas.

3. Contestee Ramon Romero Jr. opposed Contestant in the race referred above. Contestee can be served with process at 421 Conner Ave, Fort Worth Texas, 76105-1114.

**JURISDICTION AND VENUE**

4. Contestant brings this contest pursuant to Chapters 221, 231 and 232 of the TEXAS ELECTION CODE. This Court has jurisdiction over this cause pursuant section 221.002 of the code. Venue is set in Tarrant County.

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**FACTUAL BASIS**

5. The Democratic Primary was held on March 4, 2013. On March 13, 2014, the Tarrant County Democratic Party Executive Committee canvassed the primary election results in Texas House of Representatives District 90. Contestee was declared the winner by 111 votes. Contestee received 430 ballots by mail. A sufficient number of the ballots by mail for Contestee were obtained illegally to effect the outcome.

6. The Contestee canvassed neighborhoods seeking persons to apply to vote by mail. His representatives used an iPad with an application on it that that was an application for a ballot by mail. The canvassers would simply ask the voter to sign the iPad. These signatures would be downloaded as a printed application and sent to the election officials so that a ballot could be mailed to the voter. Such assistance provided to a voter requires the signature of the assistant on the application for ballot by mail. Texas Election Code, § 84.003.

7. On information and belief there are in excess of 180 such applications obtained in this manner. This exceeds the margin of votes between Contestant and Contestee.

**CAUSE OF ACTION**

8. Obtaining ballots by using this device invalidates the votes. The only time that the code allows electronic signatures is at the polling place. *See* Section 63.002. Electronic devices used in the voting process must be approved by the Secretary of State, which in this case, has not been done. The Secretary of State says that the only authority for using electronic signatures is code Section 63.002 which limits such

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signatures to use at the polling place. There is no other authority for using electronic signatures in an uncontrolled environment as was done here. See the attached communication from the Secretary of State on this issue which is attached hereto as Exhibit "A" and incorporated by reference herein in this petition.

9. Contestant further says, upon information and belief that these illegal procedures were such that:

(a) Persons who were not eligible to vote in the election at issue were allowed to cast ballots which were counted in this election;

(b) Persons who were eligible to vote in this election were denied the right to vote and/or their vote was diluted by ineligible votes in the election at issue;

(c) The errors that caused persons who were eligible to vote to be denied the right to vote and that allowed persons to vote that were ineligible to vote to have ballots counted in this election were caused by the persons charged with registering and assisting voters;

(d) If the votes in this election are correctly tallied, Contestant is the winner of this election.

10. Pursuant to Section 221.008, of the Texas Election Code, Contestant seeks to have the Court cause to have ballots and applications for ballots by mail to be unsecured to determine the election contest.

11. Pursuant to Section 232.009, of the Texas Election Code, the district clerk shall promptly deliver notice of the filing of this election contest to the presiding officer of the final canvassing authority of the contested 2014 Democratic Primary election, the



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Honorable Deborah Peoples, Tarrant County Democratic Headquarters, 2806 State Street, Fort Worth, Texas 76111.

**REQUEST FOR DISCLOSURE**

12. Under the authority of Texas Rules of Civil Procedure 194, Contestant requests that Contestee disclose within fifty (50) days of service of this request, the information or material described in Rules 194.2 and 194.3 and 194.5.

**NOTICE OF INTENT TO USE DOCUMENTS**

13. Pursuant to Tex. R. Civ. P. 193.7, Contestant, by and through the undersigned attorney, notifies Contestee of Contestant’s intention to use, at any pretrial proceeding or at trial, any documents produced by Contestee in response to Contestant’s written discovery.

**CIVIL PRACTICES AND REMEDIES CODE § 30.014**

14. Pursuant to the Civil Practices and Remedies Coe § 30.014, the last three digits of Contestant Burnam’s Driver’s License number are #242.

**PRAYER**

WHEREFORE, Contestant respectfully requests that this petition be duly served on Contestee with notice to the Chairwoman of the Tarrant County Democratic Party; that this Court to declare Contestant the winner of the election at issue; if the Court cannot determine the true winner of the election, Contestant respectfully requests this

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Court void the results of the election and order a new election in accordance with the


Texas Election Code; and for such other relief as Contestant may be properly awarded.

Respectfully submitted,

RAY & WOOD

By   
Randall Buck Wood  
State Bar No. 21905000

2700 Bee Caves Road, Suite 200  
Austin, Texas 78716  
(512) 328-8877 (Telephone)  
(512) 328-1156 (Facsimile)

By   
ART BENDER  
State Bar No. 02954500

THE BENDER LAW FIRM  
600 Eighth Avenue  
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Eserve e-mail address: [eserve@brenderlawfirm.com](mailto:eserve@brenderlawfirm.com)

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**To:** Keith Ingram  
**Subject:** Q - Electronic submission of VBM app

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DISTRICT CLERK

Keith,

My question is, does Section 84.007 of the Election Code ONLY allow vote by mail applications to be submitted by 1) mail, 2) common or contract carrier; or 3) telephonic facsimile machine, if a machine is available in the clerk's office.

Specifically, is it lawful to interpret "telephonic facsimile machine" to include some other form of electronic submission, such as a scanned and emailed regular paper vote by mail application?

For example, if someone was approached by a canvasser at their door and filled out a VBM application on an iPad or similar tablet device, and then signed it electronically on that tablet, could that application then be transmitted to the clerk's office directly? Or would it be permissible for another private individual to print out the application with the electronic signature and then submit that by mail to the clerk?

Thank you,  
Conor

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Conor Kenny  
Chief of Staff  
State Representative Lon Burnam  
(512) 463-0740  
conor.kenny@house.state.tx.us



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**Conor Kenny**

**From:** Keith Ingram <KIngram@sos.texas.gov>  
**Sent:** Thursday, March 20, 2014 2:25 PM  
**To:** Conor Kenny  
**Subject:** RE: Q - Electronic submission of VBM app

We have issued a rule on electronic signature capture devices at the polling place under 63.002 and we have issued lots of advisories and emails and seminar materials about applications for ballots by mail, their methods of delivery and assistance of a voter.

Obviously, there are many great advancements in the world of technology that could assist with election procedures, such as a voter completing an ABBM with an electronic signature. However, these technologies must be proven to work within the legal procedures set forth in the Election Code, and approved by the Legislature. We believe that had the Legislature desired for electronic signature capture to be used in other areas of elections procedures, they would have expanded this capability to more than the signature roster. Therefore, while we have issued advisories and rules on these topics generally, we have not had the need issue any specific legal opinions or seek an opinion from the Attorney General. I am not aware of OAG writing any opinions on this matter.

Keith

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**From:** Conor Kenny [mailto:Conor.Kenny@house.state.tx.us]  
**Sent:** Thursday, March 20, 2014 1:42 PM  
**To:** Keith Ingram  
**Subject:** RE: Q - Electronic submission of VBM app

Has your office or the AG published any opinions or guidance on these two potential problems?

Conor

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**From:** Keith Ingram [mailto:KIngram@sos.texas.gov]  
**Sent:** Wednesday, March 19, 2014 4:21 PM  
**To:** Conor Kenny  
**Subject:** RE: Q - Electronic submission of VBM app

No. There would be one potential problem and once concrete problem with such a procedure. The potential problem is that having a voter sign a form on an electronic device and then taking that elsewhere to print and mail in for the vote would constitute assistance under 84.003. If the person doing this did not sign the application as an assistant, then they would be committing a crime.

Assuming that A did sign the application as an assistant, then this still would not be permissible. The only time the Election Code allows electronically captured signatures is in 63.002 when a voter checks in to vote. The devices used in that process have to be approved by our office. Let me know if you need anything else.

Keith

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**From:** Conor Kenny [mailto:Conor.Kenny@house.state.tx.us]  
**Sent:** Wednesday, March 19, 2014 4:03 PM  
**To:** Keith Ingram

# App. 2

**CASE No. 20-50407**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE FIFTH CIRCUIT**

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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.*

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

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**DECLARATION OF KELLEY ROBERSON**

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The Declarant, Kelley Roberson, under the penalty of perjury, testifies as follows:

1. My name is Kelley Roberson. I am more than eighteen years old, of sound mind, and capable of making this declaration. The facts asserted herein are true and correct and I have personal knowledge of these facts because of my personal involvement in the events described herein.

2. I am the Presiding Judge of the Early Voting Ballot Board and Signature Verification Committee, appointed by the Tarrant County Republican Party pursuant to TEXAS ELECTION CODE §§ 87.002 and 87.027.

3. In that role, I have various responsibilities assigned to me by the TEXAS ELECTION CODE. Among these responsibilities is leading the signature verification committee relating to mail-in ballots. That committee is responsible for, on each ballot received by mail, comparing “the signature on each carrier envelope certificate, except those signed for a voter by a witness, with the signature on the voter’s ballot application to determine whether the signatures are those of the voter.” TEX. ELEC. CODE § 87.027(i). This is obviously intended as a deterrent against fraud and meant to ensure that the signature on the ballot is the signature of the voter and to protect the integrity of elections in Tarrant County.

4. I am familiar with the position for which the Plaintiffs in this case are advocating: that any voter can claim the fear of contracting the COVID-19 virus as grounds for requesting a mail-in ballot.

5. As the Tarrant County Republican Party’s appointee to the position of Presiding Judge of the Early Voting Ballot Board and Signature Verification Committee, I have personal knowledge about the election process generally. I also have specific personal knowledge about the mail-in ballot process in Tarrant County (and, presumably, across the State of Texas). I have this knowledge because of my role as set out above and my involvement with this current election process and this involvement in prior elections.

6. The Early Voting Ballot Board and Signature Verification Committee is comprised of volunteers. There are 20 Republican members of the Tarrant County Ballot Board and Signature Verification Committee. Based on the average number of mail-in ballots cast in prior years, this has been enough Republican Party personnel to comprise the committee. Of these 20 members, 13 are aged 65 years or older. The average age of these members is 66. A significant portion (16 of the 20), are aged 60 years or older.

7. If the Court adopts the position taken by the Plaintiffs, this would lead to an unbearable burden on the Early Voting Ballot Board and Signature Verification Committee that would nearly halt the work of this group. As I mention above, each ballot has to be confirmed via the respective voter's signature on the application. If there is a challenge, the process is lengthened by the resolution of that challenge.

8. With the current structure in place for the upcoming election, there are two problems that become immediately apparent if the number of mail-in ballots were to be substantially increased, as the Plaintiffs seek here. First, the large increase in ballots would impede the counting process as each signature would have to be verified subject to a challenge. This delay could result in late reporting of the election results and could have an effect on the overall election results if the majority (or even a large percentage) of the ballots were cast by mail.

9. Second, the Early Voting Ballot Board and Signature Verification Committee are comprised of volunteers only and structured based on the usual number of mail-in ballots cast in past elections. These groups are often retirees because of the amount of time required to serve in this role prohibits full-time employment during the period the groups perform their work. The groups are not comprised of enough volunteers to receive and process the significant number of ballots by mail that would be received by the substantial change the Plaintiffs seek here. This would lead to a higher error rate in processing the ballots because of the lack of adequate staffing. As such, ballots could be counted that should not be; other ballots may be excluded that should be counted. These groups simply are not comprised of enough volunteers to deal with such a significant change in the number of ballots that would need to be processed.



10. If the number of ballots cast by mail increases, then we are afraid of running afoul of the District Court's order. As I understand it, the order subjects volunteers like me and those on the Early Voting Ballot Board and Signature Verification Committee to potentially being called before a San Antonio federal court to explain any anomaly in the vote counting process—all in the context of the problems and difficulties set out above. This would lead to "follow on" litigation and could cause chaos in the counting process, delay, and increased difficulty in accurately reporting election results.

FURTHER, THE DECLARANT SAYETH NAUGHT.

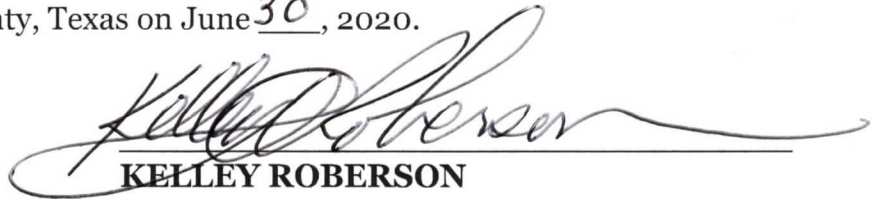


**KELLEY ROBERSON**

**JURAT**

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Tarrant County, Texas on June 30, 2020.



**KELLEY ROBERSON**