No. 14-20-00358-CV

IN THE FOURTEENTH COURT OF APPEALS
HOUSTON TEXAS

The State of Texas
Intervenor-Defendant – Appellant
v.
Texas Democratic Party, et al.
Plaintiffs – Appellees
&
Zachary Price, et al.
Intervenor-Plaintiffs – Appellees

On Appeal from the District Court of Travis County, 201st Judicial District
Cause No. D-1-GN-20-001610, Hon. Tim Sulak, Presiding.

REPLY IN SUPPORT OF APPELLEES PLAINTIFFS' AND INTERVENOR-PLAINTIFFS' VERIFIED MOTION FOR EMERGENCY RELIEF

To the Honorable Justices of the Fourteenth Court of Appeals:

In its response to Appellees' Emergency Motion, Appellant, the State of Texas (the "State"), asserts an astonishing view of its power to disregard court orders. The State tells this Court that not only is the State entitled to disregard injunctions issued by a trial court against it, but also that courts of appeal lack any power to issue an order that would preserve the rights of the parties pending appeal. Taken to its logical conclusion, this would mean the State is free to act in

violation of law, be found to have acted unlawfully and be enjoined therefrom, yet continue to openly defy a co-equal branch of government for the entirety of the appellate process. Aside from ignoring the actual plain-language scheme set out in statutes and procedural rules, the State's view simply cannot be; otherwise, the separation of powers between the courts and the executive branch is a dead letter in Texas.

Outside of its view that courts cannot prevent state actors from acting unlawfully, the State has no reasoned response for why it should be allowed to openly defy a trial court's temporary injunction, trumpet an interpretation of the Texas Election Code that the trial court explicitly rejected, publicly mischaracterize the trial court's order, and threaten to prosecute anyone who does not follow that interpretation.

Emergency relief from this Court is therefore necessary to (i) clarify that the trial court's order as to the injunctive relief against the State has not been superseded given that the State failed to invoke its right to supersede at the trial court level,[1] and (ii) if the injunctive relief ordered against the State has been superseded, enter a temporary order that the trial court's injunction remains in effect to preserve the rights of the parties while appeal is pending.[2]

[1] To be clear, Appellees' motion does not ask the Court to reach the underlying merits of the trial court's temporary injunction or the merits of the trial court's denial of the State's plea to the jurisdiction.

[2] Additionally, Appellees' Emergency Motion asks that—if the Court considers the order superseded and does not exercise its authority under TRAP 29.3 to issue a temporary order— it

I. The Trial Court's Order Is Not Superseded.

A. The Order is not superseded as to Travis County.

First, the State is simply wrong when it claims that the trial court's Order is superseded with respect to Travis County. Ms. DeBeauvoir has not appealed the trial court's order, nor otherwise sought to have it superseded, so there is no basis for the order to have been superseded.

The State's primary argument to the contrary, that TRAP 29.1 refers to "the order," simply begs the question of whether a party may supersede an order with respect to another party. The answer is clearly no, and tellingly the State fails to cite a single case where a court found that one party could supersede a judgment with respect to another. Whether a judgment has been superseded is a party-specific inquiry. This is clear with respect to both monetary and non-monetary judgments. § 4:56.Who must file, Tex. Prac. Guide Civil Appeals § 4:56 ("Each judgment debtor who wants to suspend enforcement of the judgment against it must file a supersedeas bond."). With respect to monetary judgments, the rule is clear that where there are multiple judgment debtors, each one must obligate itself for the full amount of the bond required to supersede the judgment, either through separate bonds or a joint bond. This is so despite the rules referring to superseding

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reconsider the constitutionality of the Texas Legislature's Act ordering the Supreme Court to amend the rules of procedure to remove a trial court's discretion to deny the State's right to supersede a trial court order. However, the Court need not reach this argument if it holds that the trial court's order as to the State has not been superseded or if it exercises its inherent equitable powers to preserve the rights of the parties pending litigation.

"the judgment" or order generally. *Fortune v. McElhenney*, 645 S.W.2d 934, 935 (Tex. App.—Austin 1983, no writ); *see also Jackson Walker, LLP v. Kinsel*, 07-13-00130-CV, 2014 WL 720889, at *3 (Tex. App.—Amarillo Feb. 14, 2014, no pet.) ("[E]ach judgment debtor should be obligated to supersede the judgment by providing security in an amount equal to his respective liability imposed by the decree."). And courts have similarly held that just one party's supersedeas does not inure to the benefit of others with respect to non-monetary judgments. *Valerio v. Laughlin*, 307 S.W.2d 352, 353 (Tex. Civ. App.—San Antonio 1957, no writ) (with respect to appeal of injunction, rejecting argument that one party could supersede the judgment with respect to other parties, and noting that "[e]ven if the bond filed by Ramos had been a legal one, it would not inure to the benefit of the other defendants who made no attempt to file a supersedeas bond."); *City of Rio Grande City, Tex. v. BFI Waste Services of Tex., LP*, 511 S.W.3d 300, 305 (Tex. App.—San Antonio 2016, no pet.) ("If the private party appellants fail to provide security to supersede the order, *see* TEX. R. APP. P. 29.2, the temporary injunction order remains in effect as to them, but not to the City appellants. Because the City filed a notice of appeal, the order is superseded as to the City appellants.").

Second, the State argues that its perfecting of the appeal[3] must supersede the judgment with respect to Travis County because that is necessary to preserve the

[3] The State is wrong that the trial court did not rule from the bench. While the trial court did not issue a written order until April 17, on April 15 the trial court ruled from the bench in favor of granting the temporary injunction and denying the plea to the jurisdiction. RR2 190:9-15.

status quo. As an initial matter, if the State believed that a court ruling on this issue was necessary, it could have, at any point, even in conjunction with its response to Appellee's' emergency motion, filed a motion under TRAP 29.3 and 29.4 seeking relief from this Court. But it did not, and therefore this issue is not before the Court. Instead, consistent with the State's overall dismissive attitude towards a co-equal branch of government, the State simply asserts that, *ipse dixit*, *it already has superseded the order* with respect to a separate party, but the State cites no authority for such a proposition.

Moreover, the State has no authority for the proposition that it can supersede the order *with respect to another party* to maintain the status quo. The State relies exclusively on *BFI Waste Services of Tex., LP*, 511 S.W.3d 300, but there the court did not allow the City to supersede the order with respect to the other parties. Although the court did mention in dicta that its decision would not disrupt the status quo, its holding reflects the common- sense determination that where a party does not take the necessary action to supersede an order, the order is not superseded with respect to that party. Further, as discussed below, the State's interpretation of the status quo is wrong, and it is the State that is trying to disrupt the status quo, necessitating this emergency briefing.

B. The Order is not superseded as to the State.

1. The plain text of TRAP 24.2(a)(3) and binding precedent from the Texas Supreme Court and the Third Court of Appeals confirm that the State has not superseded the trial court's order.

The State is also wrong that TRAP 29.1 permits it to supersede the judgment without making any such request in the trial court. As set forth in Appellees' Motion, the State's contrary reading would render the multiple references to the "trial court" in TRAP 24.2(a)(3) superfluous. Appellees' Mtn. at 11-13. In response, the State argues that the references to the trial court in Rule 24.2(a)(3) apply only where the State is not a party. State's Resp. at 11-12. But the State ignores that TRAP 24.2(a)(3) speaks to instances where the State is a judgment debtor, as here, and that section of the Rule still specifically refers to the trial court. Tex. R. App. P. 24.2(a)(3) ("When the judgment debtor is the state, a department of this state, or the head of a department of this state, **the trial court** must permit a judgment to be superseded . . . .") (emphasis added). The State has no answer for how this language can be read consistently with its interpretation of TRAP 29.1(b). The part of the Rule that requires a request to supersede serves to ensure that (1) it is crystal clear when an order has been stayed and (2) that the judicial branch decides when its orders can be defied while an appeal is pending.

The State further argues that Rule 29.1(b) takes precedence over TRAP 24.2(a)(3) because it is more specific. State's Resp. at 10-11. However, the logic of this view has been rejected both by the Texas Supreme Court and the Third

Court of Appeals. As set forth in Appellees' Motion, in *In re State Board for Educator Certification*, 452 S.W.3d 802 (Tex. 2014), the Texas Supreme Court analyzed the intersection between TRAP 24.2(a)(3) and TRAP 25.1(h), which is the final judgment equivalent of TRAP 29.1.[4] Appellees' Mtn. at 13. There, the Court held that "[t]he Board may appeal without security—this is undisputed—but it has no unqualified right to supersedeas in light of the trial court's discretion under TRAP 24." *In re State Bd. for Educator Certification*, 452 S.W.3d at 808. The Texas Supreme Court's ruling simply cannot be squared with the State's view that TRAP 29.1 (and TRAP 25.1(h)) governs over TRAP 24.2(a)(3). Instead, it is clear that courts, including the Texas Supreme Court view TRAP 24.2(a)(3), as a limiting principle on TRAP 29.1 and 25.1(h) that permits the trial court discretion with respect to supersedeas.

The State's view that TRAP 29.1(b) operates automatically and requires no action in the trial court, even where the trial court has set bond, is also contradicted by *McNeely v. Watertight Endeavors, Inc*., 03-18-00166-CV, 2018 WL 1576866, (Tex. App.—Austin Mar. 23, 2018, no pet.), which was procedurally identical to the case before this Court—an interlocutory appeal of a temporary injunction and

[4] The State further attempts to downplay *In re State Board for Educator Certification*'s holding by citing an out-of-context quotation in which the Court summarizes the state of the law before its holding. State's Resp. at 14. As set forth above, in that case the Court squarely held that a trial court had discretion to deny the State supersedeas and this holding is not consistent with the State's assertion of an automatic and unqualified right to supersede.

denial of a plea to the jurisdiction.[5] There, the Court "confirm[ed] that the trial court's order remains in place and is not suspended during this appeal" despite the fact that appellants had perfected their appeal. *Id*. at *2. Although the State attempts to undermine *McNeely*, none of these arguments have merit.

First, the State argues that *McNeely* is no longer good law because it was decided before the legislature amended TRAP 24.2(a)(3). However, as discussed extensively in Appellees' Motion and above, that amendment confirms that the State had to request that the **trial court** permit supersedeas. Tex. R. App. P. 24.2(a)(3) ("When the judgment debtor is the state, a department of this state, or the head of a department of this state, **the trial court** must permit a judgment to be superseded . . . .") (emphasis added). It did not do so.

The State also attempts to rewrite *McNeely* as a case about estoppel, despite the fact that the word appears nowhere in the decision. *McNeely* is squarely about whether perfecting an appeal automatically supersedes a trial court temporary injunction where bond has been set—it holds that it does not.

The State also tries to distinguish *McNeely* by claiming that unlike in *McNeely* here there was no counter-supersedeas bond. But that misreads *McNeely* and mischaracterizes the trial court's order here. First, *McNeely* did not use the language "counter supersedeas bond," it simply stated that the trial court had set a

[5] Because this case was transferred from the Third Court of Appeals, this Court should follow precedent from that court. *See* TRAP 41.3.

bond which was sufficient to demonstrate that the trial court was exercising its discretion that its judgment not be superseded. *McNeely*, 2018 WL 1576866, at *1 ("The trial court also ordered Austin Party Cruises to execute and file a $500 bond to effectuate the order."); *id.* at *2 ("In the underlying case, the trial court required Austin Party Cruises to post security before issuing the temporary injunction, thus declining to permit the judgment to be superseded."). Similarly here, the trial court entered a temporary injunction, denied a plea to the jurisdiction and ordered a bond to effectuate the order. CR 962.[6] This refutes any suggestion that Appellees failed to request a bond to secure the injunction pending appeal.[7]

The State also argues that *Texas Education Agency v. Houston Independent School District* (*"TEA"*), 03-20-00025-CV, 2020 WL 1966314 (Tex. App.—Austin Apr. 24, 2020, no pet. h.), supports its argument because in *TEA*, the Court found that the trial court did not have discretion to enter a counter-supersedeas order. However, in *TEA*, the State defendants did precisely what the State has not done here—they sought to vindicate their right to supersedeas in the trial court. In

[6] The State also incorrectly states that it had no opportunity to object to bond being set or the amount thereof. The State in fact had multiple opportunities to object: Appellees filed a proposed order with the trial court that indicated bond should be set in some amount on the day before the hearing, CR 832, and the State did not object; further, on April 16, 2020, the trial court specifically instructed the parties via email to set bond as $0 in the order, and the State did not object; finally, the State could have, of course, delayed filing its notice of appeal to object to the bond, but chose not to do so.

[7] The State relies on *Tex. Health & Human Services Comm'n v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 626 n.4 (Tex. App.—Austin 2013, no pet.), to argue that it was Appellees' burden to seek counter-supersedeas, but the language of that case specifically discusses offering a bond as occurred here.

TEA, the Texas Education Agency filed a brief to the trial court invoking its right to supersede the trial court's order. *See* Exhibit A. This is consistent with the language of TRAP 24.2(a)(3). Here, the State filed no such motion in the trial court. Accordingly, *TEA*'s analysis of whether the trial court had discretion to deny a request for relief from the State agency is fundamentally inapposite to the question here—where the State made no such request.

2. The State's remaining arguments are unavailing.

The State also purports to rely on "decades of case law," but that reliance is largely misplaced because, as explained in *TEA*, the jurisprudence surrounding whether the State perfecting an appeal automatically supersedes a trial court's judgment has evolved, particularly beginning in 2014. 2020 WL 1966314 at *2-*3. As that court notes, in the past tense, **prior to** Rule 24.2(a)(3) "the State's filing of a notice of appeal **would** automatically suspend any judgment." *Id.* at *2. Rule 24.2(a)(3) unsettled that rule, and, in *In re State Bd. for Educator Certification*, the Texas Supreme Court squarely resolved any question on the matter by holding that the trial court had discretion to deny supersedeas to the State under Rule 24.2(a)(3). *See TEA*, 2020 WL 1966314, at *3 (citing *In re State Bd. for Educator Certification*, 452 S.W.3d at 803, 808-09).

It is further worth noting that in *In re State Bd. for Educator Certification*, 411 S.W.3d 576, 577 (Tex. App.—Austin 2013, org. proceeding), which the State

explicitly claims is controlling on this Court, State's Resp. at 12 n.3, the court denied a request for mandamus that was premised on the notion that the trial court lacked discretion to refuse to allow a State agency to supersede a temporary injunction. *In re State Bd. for Educator Certification*, 411 S.W.3d at 577.

The State also argues that this Court should not adopt a rule that requires the State to file a motion that the trial court has no discretion to deny. But it is common to require a party—even the State—to actually seek the relief to which they believe they are entitled before the trial court. And, as demonstrated by *Irving v. State*, No. 14-18-00056-CR, 2019 WL 470263, at *2 n.3 (Tex. App.—Houston [14th Dist.] Feb. 7, 2017, pet. ref'd), this general rule applies even to non-discretionary decisions. It is the State that seeks an exception to the general rules here, asking this Court to hold that where a trial court has issued a temporary injunction running against it, where the trial court has set a bond to which the State has failed to object, and where the explicit language of the rules refers to the trial court permitting supersedeas, the State is entitled to supersede an order with no motion to the trial court or, indeed, to any court. That extreme view must be rejected, or, as explained below, found unconstitutional.

Finally, the State argues that the Court should vacate the $0 dollar bond pursuant to TRAP 24.4(a). State's Mtn. at 19-20. However, despite the case law the State cites regarding TRAP 24.4 motions being heard early, the State has not

filed any such motion, and, accordingly, the request for this relief is not properly before this Court. Further, as explained above, this case is unlike *TEA*, because the State made no request before the trial court that it be permitted to supersede the trial court's order and also failed to object to bond being set. Accordingly, the State is wrong that the trial court abused its discretion because the State never sought any relief—non-discretionary or otherwise—before the trial court.

II. Alternatively, This Court Should Use Its Equitable Authority Under TRAP 29.3 To Order That The Trial Court's Injunction Remains In Effect.

A. Courts of Appeals have authority to issue temporary orders to preserve the rights of the parties regardless of the State's ability to supersede at the trial court level.

Despite there being absolutely no textual support in statute, rule, or any other authority, the State makes the remarkable assertion that courts of appeals have no power to issue temporary orders to preserve the rights of the parties pending appeal if the State has superseded a trial court order. This argument is contrary to appellate courts' explicit authority to do so under TRAP 29.3 and would create fundamental separation of powers problems if credited.

The State contends that the legislature's 2017 amendment to Government Code Section 22.004 created a "statutory right to supersedeas in any case involving a temporary injunction" that prevents any other court, including this Court, from taking any actions whatsoever to protect the rights of the parties involved. Not only

would this disintegrate the separation of powers, but it completely ignores that Government Code Section 22.004 and TRAP 24.2(a)(3)—the only rule of procedure the amendment explicitly mentions—exclusively deal with the trial court's ability to allow counter-supersedeas bond, not with the appellate court's ability to issue separate temporary orders as necessary. *See supra*, Section I (discussing the text of TRAP 24.2(a)(3)); Tex. Gov't Code § 22.004(i) (the State's right to supersede "is not subject to being *counter-superseded*.") (emphasis added). "Counter-superseding" is a term of art that specifically refers to a trial court's decision "to refuse to permit a non-monetary, non-property judgment to be superseded if the judgment creditor posts appropriate security--known as counter-superseding." Kent Rutter & Natasha Breaux, Legislative Update: Appellate Practice at 16, 17, Hous. Law., September/October 2017; *see also*, *TEA*, 2020 WL 1966314 at *2 ("This discretionary security to prevent supersedeas is often referred to as 'counter-supersedeas' security."). The legislative history accords. *See* Bill Analysis, C.S.H.B. 2776 (May 18, 2017) ("Certain courts will allow a plaintiff to counter-supersede with a minimal bond, allowing the injunction to remain in place while additional appeals are pending."). When a court of appeals issues an order under TRAP 29.3, as Appellees request, it is not a counter-superseding by a plaintiff at the trial court, but rather a distinct temporary order issuing from the court of appeals itself.

Additionally, the Court's resolution of this question is controlled by *TEA*. In that case, the Third Court of Appeals held that "the Legislature's statutory directive in Government Code Section 22.004(i) cannot prevent us from exercising our inherent authority, as embodied in Rule 29.3, 'to make any temporary orders necessary to preserve the parties' rights until the disposition of the appeal.'" 2020 WL 1966314, at *5 (citing TRAP 29.3). The Court went on to note that "Courts' inherent judicial power is not derived from legislative grant or a specific constitutional provision, 'but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities.'" 2020 WL 1966314, at *5 (citing *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979)).

The State argues that the logic of *TEA* should be limited to cases where the Court would otherwise lose jurisdiction; however, the case clearly speaks to a wider array of circumstances where the parties' rights are threatened pending appeal. As explained below, such circumstances are present here and necessitate the Court use its inherent powers, and those set forth under TRAP 29.3 . *See also McNeely*, 2018 WL 1576866, at *2.

Further, the State's view contradicts long-held precedent that appellate courts may issue orders to preserve parties' rights even during times where the State's right to supersede was considered automatic. *See, e.g.*, *Mote Res., Inc. v.*

R.R. Comm'n of Tex., 618 S.W.2d 877, 879 (Tex. Civ. App. 1981) (issuing a temporary order having the same practical effect as denying Appellant's supersedeas). The 1981 decision in *Mote Res.*, came at a time in Texas law when the State had a near-absolute right to suspend judgment pending appeal. *See TEA*, 2020 WL 1966314, at *2 (quoting *In re State Bd. for Educator Certification*, 411 S.W.3d 576, 577 (Tex. App.—Austin 2013, orig. proceeding) (Jones, C.J., concurring) ("Until 1984, 'the State's right to suspend a final judgment during appeal was close to absolute.'"). If the legislature had wished to curtail an appellate court's long-standing authority to issue temporary orders preserving the rights of the parties, it could have done so easily—just as it explicitly curtailed trial courts' authority to allow counter-supersedeas. Whether such a legislative enactment might run afoul of constitutional separation of powers principles is a separate question that this Court need not address since the legislature has never made such an enactment.

In support of its contention that TRAP 29.3 does not permit a court of appeals to issue temporary orders preserving the rights of the parties, the State cites the solitary case *In re Geomet Recycling LLC*, 578 S.W.3d 82 (Tex. 2019). But this case is no help. Not only did *In re Geomet* deal with an entirely inapposite statute, but the opinion actually confirms an appellate court's authority under TRAP 29.3 to do what trial courts cannot while an appeal is pending. The real

party in interest in *In re Geomet* asked the court of appeals to lift a statutory stay of proceedings in order to allow the trial court to enter and enforce a temporary injunction. *Id.* at 86. The Supreme Court held that when the proceedings were explicitly stayed by statute, the appellate court did not have authority under TRAP 29.3 to lift that stay. But Appellees are not requesting that the stay in the trial court be lifted or that this Court use its authority to instruct the trial court to counter-supersede or do anything at all. Instead, Appellees request that this Court use its own explicit authority to issue a new temporary order. And, the Texas Supreme Court in *In re Geomet* expressly recognized that appellate courts may do exactly that:

> But [Appellee] does have recourse. Section 51.014(b) stays "all other proceedings in the trial court." It does not prevent [Appellee] from asking the court of appeals to protect it from irreparable harm. Rule 29.3 expressly contemplates that such relief is directly available in the court of appeals. It authorizes the court of appeals, during an interlocutory appeal, to "make any temporary orders necessary to preserve the parties' rights until disposition of the appeal." Tex. R. App. P. 29.3. Indeed, [Appellee] correctly urges that Rule 29.3 gives an appellate court great flexibility in preserving the status quo based on the unique facts and circumstances presented. That is true. But even the flexible contours of Rule 29.3 do not include the power to make orders contrary to the stay mandated by the legislature. Rule 29.3 does, however, broadly empower the court of appeals to preserve parties' rights when necessary.

Id. at 89. Thus, it is perfectly permissible for a court of appeals to issue an order under TRAP 29.3 regardless of a trial court's discretion in allowing counter-supersedeas.

B. Court action is necessary to preserve the rights of Appellees.

The Court's use of its inherent powers and TRAP 29.3 is needed here to preserve the parties' right and the status quo pending appeal. As discussed in more detail in Appellees' Motion, Appellees sought a temporary injunction from the trial court because they wished to apply for a mail ballot now as they were legally entitled to, yet feared that they would be prosecuted or have their application rejected or ballot not counted—despite their clear legal entitlement to do so under section 82.002 of the Texas Election Code; further, forcing counties to wait in continuous limbo would render them fundamentally unprepared to ramp up for an increase in mail ballots. Appellees' Mtn. at 24-25. The trial court agreed and clarified that **under existing law**, Appellees were entitled to vote by mail. It then enjoined the parties from, *inter alia*, issuing guidance contrary to its order.

Even under this Court's accelerated schedule, this appeal, including any next stages at the Texas Supreme Court, is likely to continue until at least the end of June. With the deadline to apply for mail ballots being July 2, 2020, this creates the likely scenario that either Appellees—and the rest of Texan voters—never have an opportunity to vindicate the rights granted them by the legislature prior to the July runoff elections or, in an unlikely best case, Appellees and other affected voters are forced to wait until the very last minute to submit their mail ballot applications. Either scenario risks widespread disenfranchisement. *See* Appellees'

Mtn. at 20 (noting, *inter alia*, disenfranchisement during April 7 primary in Wisconsin).

The State's primary answer to this is the non-sequitur that voting by mail is a privilege not a right. As an initial matter, this is a merits argument, improperly buried in the State's response. The State's merits argument is also incorrect as the State has clearly set forth a statutory right to vote by mail under the appropriate conditions, which the trial court found were met[8]; the trial court did not, as the State attempts to suggest, create a new right to vote by mail. Moreover, the language of TRAP 29.3 regarding preserving a parties' rights on appeal is not a reference to constitutional rights but rather their underlying ability to practically benefit from the relief they seek. For instance, in *TEA*, which concerned the power of the Texas Education Agency to take over Houston Independent School District, the Court's decision to use its power under TRAP 29.3 did not turn on an assessment of what sort of right the appellee sought to preserve.

The State also asserts that the injunction impairs its ability to say what the law is. This assertion is a breathtaking rejection of the authority of the judicial branch: the trial court has already rejected the State's interpretation of what the law is, and enforcing that erroneous view is an ultra vires action.

[8] So too, if the Executive unilaterally denied voters who were going to be out of the county on election day the ability to vote by mail, those voters would be able to sue to protect their statutory right.

Finally, the State also argues that emergency relief is inappropriate because "Appellees are asking this Court to weigh their subjective preference to vote by mail against the Legislature's view that the best way to prevent voter fraud is to require the majority of voters to vote in person." State's Resp. at 25. This gross mischaracterization of both the instant motion and the relief Appellees sought and were awarded at the trial court barely merits response. At the trial court, Appellees argued that in fact it was the legislature, through section 82.002, which determined that where voters' health was likely to be put at risk through appearing at a polling place, voters could apply to vote by mail. Here, while the COVID-19 pandemic rages and threatens to seriously harm the physical health of voters who appear at polling places, all voters who do not have immunity to COVID-19 fall under the plain language definition of Section 82.002. The trial court agreed with the Appellees and rejected the State's contrary view. Whether the trial court's decision was erroneous is not before the Court on this motion. Instead, what is before the Court is whether, while the appeal is pending, the State may fundamentally disregard the trial court's order, issue statements and threats directly contrary thereto, and eliminate the rights Appellees sought to secure through their temporary injunction. In other words, can the executive branch of state government defy the orders of the judicial branch without even bothering to seek a stay of court rulings?

Relief is also necessary to maintain the status quo. The State's contrary view relies on an erroneous interpretation of the pre-litigation status quo as being simultaneously a world (a) pre-COVID-19, and (b) where there existed clear law barring eligible voters from voting by mail under the "disability" category while a highly infectious and deadly virus to which all individuals are susceptible remains in circulation during a pandemic like COVID-19. Both propositions are inaccurate. First, the status quo pre-litigation was a world in which COVID-19 was devastating Texas and promising to continue to devastate for some time to come. In that status quo, section 82.002 of the Texas Election Code existed and allowed individuals to vote by mail. Appellees' suit was not to **expand** the availability to vote by mail but to provide clarity as to the existent state of the law. And, that is precisely what the trial court's order does: it does not create a new category for voting by mail, but merely clarifies that "any voters without established immunity [to COVID-19] meet the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code § 82.002." CR 959-60. As the amicus brief filed by Harris County in support of this motion for emergency relief states, the underlying case here "calls for no 'expansion' or suspension of the law as written by the Legislature, but merely its application to a deadly pandemic." Harris Cty. Br. at 6-7; *see also Sanchez v. Bravo,* 251 S.W.2d 935, 938 (Tex. Civ. App.--San Antonio 1952, no writ) ("The

right of the citizen to cast his ballot and thus participate in the selection of those who control his government is one of the fundamental prerogatives of citizenship and should not be impaired or destroyed by strained statutory constructions."). Applying the so-called Democracy Cannon, the Texas Supreme Court long ago held, ""[a]ll statutes tending to limit the citizen in his exercise of [the right of suffrage] should be liberally construed in his favor." *Owens v. State ex rel. Jennett*, 64 Tex. 500, 1885 WL 7221, at *7 (Tex. Oct. 20, 1885).

Second, as set forth in Appellees' Emergency Motion, prior to this litigation the State had refused to provide State-wide guidance with respect to voting by mail during COVID-19; indeed, the State had informed counties' election officials that they should take independent action to run elections in the face of COVID-19. Appellees' Mtn. at 21. And, in intervening, the State specifically invoked county-level authority with respect to determining whether mail ballots meet the necessary criteria. *Id*. Now that counties sensibly are following the trial court ruling, the state wants to rule by fiat and do so without timely judicial review.

Thus, Paxton's letter, which sets forth an erroneous view of the law, misquotes the relevant statute, mis-frames the trial court opinion, purports to be the law of land despite having been rejected by the trial court, and then threatens prosecution, is a significant breach of the status quo. Appellees' Mtn. at 9-10, 21-23. And the State makes no serious argument to justify the letter's propriety. The

State asserts that Paxton was receiving a "number of questions" about the trial court's order, but the only evidence the State cites is a letter issued by Paxton *prior to* the Court's order. State's Resp. at 6 (citing Exhibit B to Appellees' Mtn.). Further, even if Paxton were receiving questions, that does not entitle him to force his rejected interpretation on others through the threat of prosecution.

The circumstances on the ground since the trial court order have only heightened the harm that would result were the Court to adopt the State's skewed view of the status quo. Consistent with the trial court's clarification of existing law, counties have stated that they would not reject mail ballots under the disability category due to COVID-19, and even more have corralled resources to prepare for an influx of mail ballots. Appellees' Mtn. at 21-22. As suggested in the Harris County's amicus brief, moreover, it is likely that thousands of voters statewide have started applying for mail ballots due to COVID-19 in accordance with these instructions. Harris Cty. Br. at 2-3 (noting increase in percentage of absentee ballots requested due to "disability" since trial court's order). Denying basic medical and epidemiological facts about COVID-19, the State now seeks to upend this state of affairs through strongman tactics and imperil voters' safety and certainty that they can cast ballots that will be counted.

These strongman tactics make the need for emergency relief here particularly pressing. Despite the State's attempt to disclaim it, State's Resp. at 6,

the State cannot seriously dispute the threatening nature of Paxton's letter. *See, e.g.*, Harris Cty. Br. at 5-6; Appellees' Mtn., Exh. A. As set out in Appellees' Motion, the Attorney General's overbroad threat of prosecution and mischaracterization of the underlying issues in his recent letter results in the impermissible chilling of Appellees' and others' speech and voting rights regardless of the underlying merits of the trial court's temporary injunction. And the Attorney General's threats, absent relief from this Court, may impact not just those voters whom he believes fall outside the scope of his rejected interpretation of the law—they may very well deter even those voters he considers eligible to vote by mail from doing so. The State fails to even mention, let alone attempt to justify, the Paxton letter's unconstitutional chilling of fundamental speech.

Accordingly, the State's unfounded assertions regarding the rights of the parties are incorrect and do not reflect current reality. Nor do they address the damage to fundamental speech and voting rights inflicted by Paxton's threats. Should this Court find that the trial court's order has been superseded, it should exercise its authority under TRAP 29.3 to issue an order that the trial court's injunction remains in effect.

III. The 2017 Amendment to TRAP 24.2(a)(3) Is Unconstitutional.

The State has no real answer to the fact that a unanimous Texas Supreme Court opined that allowing the executive an unbridled ability to supersede

injunctions against it would violate the separation of powers. Appellees' Mtn. at 24-25 (citing *In re State Bd. for Educator Certification*, 452 S.W.3d at 808). The State argues that the Texas Supreme Court's language was dicta, but that language was a crucial part of the reasoning of the Court's decision. The Court reasoned that to hold otherwise, and to accept the State's position "would vest unchecked power in the executive branch, at considerable expense to the judicial branch . . . ." *Id.* at 808.

The State also argues that this Court should infer the Texas Supreme Court believes that the rule is constitutional because the Texas Supreme Court created it three years ago. But there the Court was simply acting pursuant to legislation. *See* Tex. Gov't Code § 22.004(i); *see also Tex. Educ. Agency*, 2020 WL 1966314, at *3 (explaining that the Supreme Court added language to Rule 24.2(a)(3) pursuant to legislative directive). The Court has not had occasion to analyze the constitutionality of the amended language to TRAP 24.2(a)(3).

The remainder of the State's arguments confuse sovereign immunity principles with its purported ability to defy a court order where the court has ruled that the State does not have sovereign immunity. These arguments are improper here and should be addressed in the merits briefing.[9] The State's reliance on general language from *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 482

[9] To the extent not specifically addressed here in the emergency briefing, Appellees reserve their rights to address all sovereign immunity arguments—and all arguments generally that are germane to the appeal—in their Response to the State's Appellate Brief.

(Tex. 1964), is also misplaced. To the extent there is conflict between *Ammex Warehouse* and *In re State Bd. for Educator Certification*, the latter controls because it both post-dates *Ammex Warehouse* and is more specific to the question at hand, in that it directly addresses a scenario where the State is claiming an unbridled right to supersede trial court injunctions.

The remainder of the State's authority is inapposite. *In re Geomet Recycling LLC*, 578 S.W.3d 82 (Tex. 2019), concerned whether an appellate court could lift a stay on proceedings in the trial court under the Texas Citizens Participation Act—a question not at issue here. *Morath v. Sterling City Indep. Sch. Dist.*, 499 S.W.3d 407, 413 (Tex. 2016), concerns an executive action that is not reviewable absent certain circumstances by the courts.

None of the State's cases analyze the position taken by the State here: that where a trial court has held that the state does not have sovereign immunity, and has held that the state is acting *ultra vires* and otherwise in violation of law, and has held that in order to prevent irreparable harm to plaintiffs a temporary injunction is necessary, that, under these circumstances, the State nevertheless has an absolute, unbridled right to disregard the trial court. The only decision to analyze such a position is *In re State Bd. for Educator Certification*, where a unanimous Texas Supreme Court noted that the State's position violates the separation of powers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2020, a true and correct copy of the foregoing document was served electronically upon Lanora Pettit, attorney for Appellants.

/s/ Joaquin Gonzalez

Ex. A

CAUSE NO. D-1-GN-19-003695

HOUSTON INDEPENDENT SCHOOL DISTRICT, *Plaintiff,*	§	IN THE DISTRICT COURT OF
v.	§	
THE TEXAS EDUCATION AGENCY and MIKE MORATH, COMMISSIONER OF EDUCATION, in his official capacity; and DORIS DELANEY, in her official capacity, *Defendants.*	§	TRAVIS COUNTY, TEXAS
	§	459th JUDICIAL DISTRICT

DEFENDANTS' RESPONSE TO PLAINTIFF'S REQUEST FOR COUNTER-SUPERSEDEAS RELIEF

Plaintiff Houston Independent School District ("HISD") has filed a motion to deny supersedeas to Defendants upon filing a notice of appeal of the temporary injunction. *See* Plaintiff's Second Amended Complaint. HISD's motion must be deny as it asks the Court to act contrary to Texas law and governing rules.

The Texas Rules of Appellate Procedure and the Civil Practices and Remedies Code permit a governmental entity to supersede a judgment (including a temporary injunction) upon filing a notice of appeal and without posting a bond. Tex. R. App. P. 29.1(b); Tex. Civ. Prac. & Rem. Code § 6.001. Texas courts have long cited these provisions in recognizing that "[a] governmental entity . . . has the right to supersede the judgment of a trial court rendered against it by merely filing a notice of appeal." *In re Tarrant County*, 16 S.W.3d 914, 918 (Tex. App.—Fort Worth 2000, orig. proceeding) (citing Tex. Civ. Prac. & Rem. Code § 6.001). *See also, e.g.*, *Neeley v. W.*

Orange-Cove Consol. ISD, 176 S.W.3d 746, 754 (Tex. 2005) ("The district court's injunction has been stayed by the State defendants' appeal.") (citing same); *Richards v. Mena*, 820 S.W.2d 371, 371 (Tex. 1991) ("[State] Defendants appealed directly to this Court, thereby suspending enforcement of the district court's injunction.") (citing same).

And, in 2017, the Legislature made clear that this right to supersedas is not subject to counter-supersedas when obtained by a State defendant in this type of case:

> *the right of an appellant under Section 6.001(b)(1), (2), or (3), Civil Practice and Remedies Code, to supersede a judgment or order on appeal is not subject to being counter-superseded under Rule 24.2(a)(3),* Texas Rules of Appellate Procedure, or any other rule. Counter-supersedeas shall remain available to parties in a lawsuit concerning a matter that was the basis of a contested case in an administrative enforcement action.

Tex. Gov't Code § 22.004(i) (emphasis added). In further support, at the Legislature instruction, the Texas Supreme Court incorporated the following language into Texas Rules of Appellate Procedure:

> When the judgment debtor is the state, a department of the state, or the head of a department of this state, *the trial court must permit a judgment to be superseded* except in a matter arising from a contested case in an administrative enforcement action.

Tex. R. App. Pro. 24.2(a)(3) (emphasis added).

Further, this ultra vires case does not fall within the narrow exception found in rule 24.2. The Texas Administrative Procedures Act defines a "contested case" as:

> a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." Tex. Gov't Code § 2001.003(1).

The lawsuit here is not a "contested case" because it is not a proceeding to determine "legal rights, duties, or privileges" of a party, and there is no "adjudicative hearing" associated with the challenged enforcement actions. Even if the Court could somehow construe the accountability interventions at issue and the internal Texas Education Agency review processes as such a proceeding, this matter is not a "contested case" because no "adjudicative hearing" has occurred. Thus, the Court lacks any discretion to deny supersedeas to Defendants.

CONCLUSION

In the event that the Court issues a temporary injunction in this case against Defendants, the Court must deny Plaintiff's request to deny supersedeas to Defendants.

Respectfully submitted.

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I hereby certify that on January 7, 2020, the foregoing document was delivered by electronic filing to all counsel of record.

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