

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TEXAS DEMOCRATIC PARTY;)
GILBERTO HINOJOSA, Chair of the)
Texas Democratic Party; JOSEPH)
DANIEL CASCINO; and SHANDA)
MARIE SHANSING,)

Plaintiffs,)

v.)

5:20-cv-00438-FB

GREG ABBOTT, Governor of Texas;)
RUTH HUGHS, Texas Secretary of)
State; DANA DEBEAUVOIR, Travis)
County Clerk; and JACQUELYN F.)
CALLANEN, Bexar County Elections)
Administrator,)

Defendants.)

DEFENDANT BEXAR COUNTY ELECTIONS ADMINISTRATOR
JACQUE CALLANEN’S RESPONSE TO PLAINTIFFS’
MOTION FOR PRELIMINARY INJUNCTION

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Now comes Defendant Bexar County Elections Administrator Jacque Callanen,¹ and files this Response to Plaintiffs’ Motion for Preliminary Injunction (docket no. 9):

PROCEDURAL BACKGROUND

1. On March 20 and April 7, 2020, Plaintiffs initiated parallel state and federal court litigation regarding the effect of the ongoing COVID-19 pandemic on voter eligibility to vote by mail under

¹ Plaintiffs have named Jacque Callanen as a Defendant in this matter in her official capacity as the Elections Administrator of Bexar County. In so doing, any claims they have asserted against her are asserted against Bexar County. *Rosas v. Bexar Cty.*, No. 5:14-CV-1082-DAE, 2015 WL 1955406, at *3 (W.D. Tex. Apr. 29, 2015).

Chapter 82 of the Texas Elections Code during the elections scheduled to occur during the summer and fall of 2020. In the state court litigation—in which Bexar County and Administrator Callanen are not named as defendants—Plaintiffs sought a declaration “that Tex. Elec. Code § 82.002 allows any eligible voter, regardless of age and physical condition, to request, receive and have counted, a mail-in ballot, if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease.” Orig. Pet. at ¶ 19, D-1-GN-20-001610 (201st Dist. Ct. Travis County).

2. On April 17, 2020, the 201st Judicial District Court of Travis County, Judge Tim Sulak presiding, entered a Preliminary Injunction Order finding that an absence of COVID-19 immunity is a “physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of . . . injuring the voter’s health” within the meaning of Section 82.002 of the Elections Code, and enjoining the State of Texas and Travis County Clerk Dana DeBeauvoir “from issuing guidance or otherwise taking actions that would prevent Counties from accepting and tabulating any mail ballots received from voters who apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic for all elections affected by the pandemic for the reason that the ballots were submitted based on the disability category[.]” Docket no. 10-4 at 4-5. The State’s appeal of that order is currently pending before the Fourteenth Court of Appeals, and the State of Texas has separately filed a petition in the Texas Supreme Court seeking a writ of mandamus to compel the Elections Administrators in Cameron, Dallas, and El Paso Counties and the County Clerks of Harris and Travis Counties to administer the 2020 elections in accordance with the narrower interpretation of Chapter 82 set forth by the Attorney General in unofficial guidance and in the state court litigation.

3. In this case, Plaintiffs seek a declaration that, unless voters concerned about contracting COVID-19 are permitted to vote by mail, the elections conditions created by the COVID-19 pandemic would violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 and the First, Fourteenth, Fifteenth, and Twenty-Sixth Amendments. Docket no. 9 at ¶¶ 79-103. Plaintiffs also allege that Attorney General Ken Paxton—who is not a named party in this litigation—acted in furtherance of a conspiracy to suppress voting, in violation of 42 U.S.C. § 1985, by publishing a letter expressing his office’s opinion that fear of contracting COVID-19 does not qualify a voter to vote by mail and stating that “third parties [who] advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, . . . could [be] subject . . . to criminal sanctions imposed by Election Code section 84.0041.” Docket nos. 9 at ¶¶ 47-49, 104-10; 10-2 at 5-6. Plaintiffs seek an order prohibiting Defendants from “deny[ing] a mail in ballot to any Texas voter that applies for a mail-in ballot because of the risk of transmission of COVID-19” and that prohibits “Defendants, including General Paxton . . . from issuing threats to or seeking criminal prosecution of voters and others advising voters on mail ballot eligibility based on the risk of transmission of COVID-19.” Docket no. 10-5 at 2.

4. The State Defendants oppose this relief, contending principally that the *Pullman* abstention doctrine applies, docket no. 39 at 16-18; that the *Ex Parte Young* exception to sovereign immunity does not permit Plaintiffs’ claims against the State Defendants because the State Defendants “do not enforce Texas Election Code Section 82.002 or 82.003[.]” *id.* at 19-23; and that Plaintiffs cannot show a likelihood of success on the merits, *id.* at 26-37.

LEGAL STANDARDS

5. A party seeking preliminary injunctive relief under Rule 65 of the Federal Rules of Civil Procedure must establish:

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(1) a substantial likelihood that they will prevail on the merits; (2) a substantial threat that they will suffer irreparable injury if the injunction is not granted; (3) their substantial injury outweighs the threatened harm to the party to be enjoined; and (4) granting the preliminary injunction will not disserve the public interest.

Voting for Am., Inc. v. Steen, 732 F.3d 382, 386 (5th Cir. 2013). A preliminary injunction is an “extraordinary remedy” that should be reserved for applicants who have “clearly carried the burden of persuasion on all four requirements.” *Steen*, 732 F.3d at 386 (quoting *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012)).

6. In assessing the constitutionality of state election rules that burden voters’ exercise of their constitutional rights, Courts

must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’

Steen, 732 F.3d at 387-88 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). “Reasonable, nondiscriminatory restrictions” of voters’ constitutional rights may generally be justified by the state’s “important regulatory interests”; state rules that severely burden those rights are permissible only if “narrowly drawn to advance a state interest of compelling importance.” *Steen*, 732 F.3d at 388 (there is ultimately “no ‘litmus-paper test’” to relieve Courts from the “hard judgments” necessary to weigh the plaintiffs’ injury against the state’s interest).

ANALYSIS

7. Defendant Bexar County Elections Administrator Jacque Callanen takes no position regarding the State Defendant’s arguments regarding abstention and standing, or on the merit of

Plaintiffs' claims against the State Defendants. Defendant Callanen files this Response to briefly raise three issues specific to Bexar County.

A. In Administering Elections, Defendant Callanen Complies with the Guidance of the Secretary of State

8. First, the State Defendants contend that the *Ex Parte Young* exception to sovereign immunity does not apply here because the State Defendants lack authority to enforce the Texas Elections Code. Although the State Defendants now claim to lack authority to make interpretations of the Elections Code that are binding on local elections officials, Defendant Callanen and other local elections officials regard the guidance of the Secretary of State as controlling, and comply with that guidance when carrying out their duties. As the State Defendants acknowledge, the Elections Code itself empowers the Secretary of State to “obtain and maintain uniformity in the application, operation, and interpretation of [the Elections] code and of the election laws[,]” and tasks her with “prepar[ing] detailed and comprehensive written directives and instructions relating to and based on this code and the election laws” to guide elections administrators, county clerks, and other local officials tasked with administering elections. Tex. Elec. Code § 31.003. Attorney General Paxton has previously opined that “[t]he Texas Secretary of State is the entity tasked with administering and applying section 82.002.” Tex. Attn’y Gen. Op. No. KP-009 (2015).

9. At the same time that they disclaim the authority to compel local elections officials to comply with their interpretations of the Elections Code in this case, the State Defendants are also separately pursuing a mandamus action in the Texas Supreme Court to do exactly that: To compel local elections officials in Cameron, Dallas, El Paso, Harris, and Travis Counties to administer the Elections Code as interpreted by the Attorney General. Defendant Callanen is not named as a Respondent in that proceeding, but intends in this election, and in all elections, to carry out her

duties in accordance with the requirements of the Elections Code as construed in the interpretations and guidance provided by the Secretary of State—including any guidance issued as a result of the Court’s Orders in this case.

B. Plaintiffs Cannot Show They are Likely to Prevail as to Any Claim Against Administrator Callanen—Because They Have Not Asserted Any Claim Against Her

10. Plaintiffs have not identified any manner in which the Bexar County Elections Administrator has burdened their right to vote, nor have Plaintiffs alleged that she or Bexar County have undertaken any act, policy, or practice that infringes upon any federally protected right. Rather, Plaintiffs complain of the interpretation of Chapter 82 of the Elections Code advanced by various state officials, principally Attorney General Ken Paxton. Because Plaintiffs have not asserted any claim against Administrator Callanen, and do not allege that she has burdened their exercise of their right to vote, they cannot show that they are likely to succeed as to any claim against her, and they are therefore not entitled to the “extraordinary remedy” of a preliminary injunction against her. *Steen*, 732 F.3d at 386.

11. The primary burden on voting during the 2020 election cycle identified by Plaintiffs is the COVID-19 pandemic—an event that was not caused by any action of any state or local official, and whose attendant burdens therefore require no justification by any state interest. Whether the State Defendants have interpreted Chapter 82 of the Elections Code in a manner that unreasonably burdens Plaintiffs’ rights is a separate question. Regardless of the Court’s conclusion regarding this question, state law places the responsibility for that interpretation with the Secretary of State, who is tasked with “obtain[ing] and maintain[ing] uniformity in the application, operation, and interpretation of [the Elections] code and of the election laws[,]” and with “prepar[ing] detailed and comprehensive written directives and instructions relating to and based on this code and the

election laws” to guide elections administrators, county clerks, and other local officials tasked with administering elections. Tex. Elec. Code § 31.003. The role of elections administrators and county clerks such as Defendant Callanen is not to interpret the provisions of the Elections Code but to administer elections in accordance with interpretations of the Elections Code provided by the Secretary of State.

12. On April 2, 2020, the Secretary of State issued guidance to local elections administrators that advised them to prepare for a higher volume of vote-by-mail applications than usual but did not indicate whether voters would be eligible to vote by mail solely to avoid the risk of coronavirus exposure presented by voting in person. Docket nos. 1-3 at 3; 9 at ¶¶ 26-31. After being named as a Defendant in the related state court litigation, the Secretary of State initially declined to take any position regarding the interpretation of Chapter 82—preferring to leave that interpretation to county and local officials—and was dismissed from the case. Days later, the State of Texas, through the Attorney General’s Office, filed a Petition in Intervention to rejoin the litigation, citing the state’s “strong interest in the efficient administration of its elections and in consistent application of its election laws across its 254 counties.” Docket no. 1-2 at 6. The Attorney General’s Office went on to oppose Plaintiffs’ request for preliminary injunctive relief in the state court case, and to affirmatively assert that fear of contracting COVID-19 is insufficient to qualify a voter to submit their ballot by mail.

13. Lacking clear guidance from the Secretary of State, the Bexar County Commissioners Court requested that the Bexar County Criminal District Attorney’s Office render an opinion regarding the interpretation of Section 82.002 within the context of the COVID-19 pandemic. That opinion, which was presented to the Bexar County Commissioners Court on May 14, concluded—as did Judge Sulak in the state court proceedings—that the absence of immunity against COVID-

19 is a “physical condition” within the meaning of Section 82.002, and that this condition presents a likelihood of injuring a voter’s health during in-person voting by placing them at risk of exposure to an ongoing, potentially fatal pandemic against which, unlike other conditions, there is no herd immunity. Exhibit A.

14. However, the ultimate and controlling determination of who is eligible to vote by mail during the COVID-19 pandemic must come from the Secretary of State and the courts, not from local officials. Plaintiffs have not alleged that Bexar County or Administrator Callanen have misinterpreted or misapplied state law or infringed upon any federally protected right. Plaintiffs are therefore not entitled to injunctive relief against Bexar County or any County official.

C. Enjoining Local Elections Officials Is Not Necessary to Provide Effective Statewide Relief

15. Presumably, Elections Administrator Callanen and Travis County Clerk DeBeauvoir have been included as Defendants in this case for the practical purpose of ensuring that they have notice of any relief afforded by this Court so that they may administer elections in their counties in accordance with this Court’s orders. Nevertheless, these practical considerations cannot substitute for the requirement that a party seeking the extraordinary remedy of binding another party to a preliminary injunction must first establish that they are likely to prevail on a legally cognizable claim against the party to be bound. Moreover, it is unnecessary: Under existing state law, Administrator Callanen and other local elections administrators and county clerks administer elections—including processing requests to vote by mail—in accordance with the Secretary of State’s guidance interpreting the Elections Code. Regardless of whether local elections administrators are named as Defendants or are subject to any preliminary injunction that may be entered by this Court, they administer elections on the local level in accordance with the

interpretations of the Elections Code supplied by the Secretary of State—including any revision or withdrawal of those instructions that may be ordered by this Court. Indeed, the preliminary injunction order entered by the state court in the related case included only a single county-level elections official—Travis County Clerk Dana DeBeauvoir—but nonetheless provided effective relief across local jurisdictions statewide because it enjoined the State “from issuing guidance . . . that would prohibit individuals from submitting mail ballots based on the disability category of eligibility or that would suggest that individuals may be subject to penalty solely for doing so” and required the state to “circulate a copy of this Court’s Order to the Election Official(s) in every Texas County.” Docket no. 10-4 at 6.

16. More fundamentally, focusing any remedy the Court finds appropriate on the manner in which state and local elections officials process applications to vote by mail or mail ballots would be misguided. Local elections officials such as Defendant Callanen evaluate the facial sufficiency of applications to vote by mail—but the application form, which was developed by the Secretary of State, does not permit voters to describe or even identify the basis of their eligibility to vote by mail under Section 82.002 beyond checking a box marked “disability.” The Election Code does not authorize local elections officials to investigate or adjudicate the sufficiency of a voter’s claim of eligibility to vote by mail, but provides that the local elections administrator “shall provide an official ballot to the applicant as provided by this chapter” unless it is facially evident from the application that the voter is not eligible. Tex. Elec. Code § 86.001. Should this Court determine that preliminary injunctive relief is warranted, it may afford that relief on a uniform, statewide basis by enjoining the Secretary of State. Since neither local nor state officials are in a position to detect the basis for any particular application to vote by mail, any such relief presumably would

be focused on the public guidance that is issued to voters regarding who is eligible to apply, not to the manner in which local officials process those applications.

CONCLUSION

17. Defendant Bexar County Elections Administrator Jacque Callanen is not the subject of any claim asserted by Plaintiff or any wrongful act alleged in Plaintiff's Original or First Amended Complaint. Entry of preliminary injunctive relief against her—which requires that Plaintiff show they are likely to prevail on the merits of a claim against her—is therefore not appropriate.

WHEREFORE, PREMISES CONSIDERED, Defendant Bexar County Elections Administrator Jacque Callanen prays that this Court decline to enter preliminary injunctive relief against her or Bexar County.

Respectfully Submitted,

JOE GONZALES
Bexar County Criminal District Attorney

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CERTIFICATE OF SERVICE

I do hereby certify on the 14th day of May, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which provided electronic service upon all parties.

/s/ Robert Green
ROBERT D. GREEN



JOE D. GONZALES
BEXAR COUNTY CRIMINAL DISTRICT ATTORNEY
PAUL ELIZONDO TOWER
101 W. NUEVA
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May 12, 2020

To: The Hon. Nelson W. Wolff; Hon. Sergio "Chico" Rodriguez; Hon. Kevin A. Wolff; Hon. Tommy Calvert; and Hon. Justin Rodriguez

From: Joe D. Gonzales, Bexar County Criminal District Attorney

RE: **Interpretation of the Definition of a Disability for Purposes of Section 82.002 of the Texas Election Code.**

You have requested an opinion regarding the eligibility of Bexar County voters to vote by mail under the disability provision contained in Section 82.002 of the Texas Election Code during the ongoing COVID-19 pandemic. Your question contains two significant components which will each be addressed in turn: First, the scope of the definition of "disability" contained in Section 82.002 of the Texas Election Code; and second, whether and to what extent various COVID-19-related physical conditions, including the physical condition of lacking COVID-19 immunity, might qualify as a disability for purposes of Section 82.002 in light of recent guidance from the Texas Attorney General.¹

I. Background

A. State Court Litigation

In March, the Texas Democratic Party and several party officials and individual voters filed suit in Travis County.² In that action, plaintiffs sued the Secretary of State and the County Clerk

¹ This opinion should not be construed as advice regarding whether or not any particular individual has a qualifying disability for purposes of Section 82.002 of the Texas Elections Code or whether they should in fact submit an application to vote by mail.

² The same group of Plaintiffs have also filed a separate lawsuit in the United States District Court for the Western District of Texas, San Antonio Division, in which they have named Governor Abbott, Secretary of State Hughs, Travis County Clerk DeBeauvoir, and Bexar County Elections Administrator Jacque Callanen as Defendants. A hearing on Plaintiffs' request for a temporary injunction is set for May 15, 2020. Another group of Plaintiffs have filed a second federal lawsuit contending that Chapter 82 violates the Twenty-Sixth Amendment by limiting eligibility to vote by mail only for voters below the age of 65. No Bexar County official or entity is named as a defendant in that case.

of Travis County, seeking a declaration that, under Chapter 82 of the Texas Election Code any eligible voter, regardless of age and physical condition, could request, receive and have counted, a mail-in ballot. Following an evidentiary hearing on April 15, State District Court Judge Tim Sulak issued a preliminary injunction order on April 17. In his order, Judge Sulak found that an absence of COVID-19 immunity is a “physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of . . . injuring the voter’s health” within the meaning of Section 82.002. Judge Sulak then enjoined the State of Texas and Travis County Clerk Dana DeBeauvoir from issuing guidance or otherwise taking actions that would prevent Counties from accepting and tabulating any mail ballots received from voters who apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic. The Attorney General’s Office, representing the State of Texas, opposed Plaintiffs’ preliminary injunction request, and hours after the written injunction was issued, filed its Notice of Appeal.

B. Attorney General Guidance and Threat of Criminal Prosecution

The Honorable Stephanie Klick, Chair of the Committee on Elections for the Texas House of Representatives requested guidance from the Attorney General on the interpretation of Section 82.002 of the Texas Election Code. Responding to her request, the Attorney General’s Office provided an “informal letter of legal advice offered for the purpose of general guidance” finding that “fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Election Code for purposes of receiving a ballot by mail.” On May 1, the Attorney General issued additional guidance in a letter to County Judges and local elections officials. The letter instructed that “public officials shall not advise voters who lack a qualifying sickness or physical condition to vote by mail in response to COVID-19” and stated that “third parties [who] advise voters to apply for a ballot by mail for reasons not authorized by the Election Code, including fear of contracting COVID-19 without an accompanying qualifying disability” may be subject to criminal penalties under Sections 84.0041 and 276.013 of the Election Code.

II. Relevant Law

The Election Code provides that qualified voters are eligible to vote by mail if they are 65 years of age or older; are confined to a jail but do not have a felony conviction; if they anticipate being absent from their County of residence on election day; or, pertinent to this analysis, if they meet the requirements of Section 82.002, captioned “disability.” Section 82.002 provides that:

A qualified voter is eligible for early voting by mail if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter’s health.

TEX. ELEC. CODE § 82.002.

Importantly, the Election Code provides that the Secretary of State—not the Attorney General, County Commissioners, or the County Judge—is responsible for “obtain[ing] and

maintain[ing] uniformity in the application, operation, and interpretation of [the Elections] code and of the election laws[,]" and for "prepar[ing] detailed and comprehensive written directives and instructions relating to and based on this code and the election laws" to guide elections administrators, county clerks, and other local officials tasked with administering elections. TEX. ELEC. CODE § 31.003. Attorney General Paxton has noted in a previous formal AG opinion that "[t]he Texas Secretary of State is the entity tasked with administering and applying section 82.002." Tex. Attn'y Gen. Op. No. KP-009 (2015). To date, the Secretary of State has not publicly issued guidance regarding the interpretation of Section 82.002 within the context of the COVID-19 pandemic but has left the matter to the determination of local officials in consultation with local legal counsel.

As of the date of this opinion, the Attorney General has issued guidance addressing only the narrow question of whether the mental state of being fearful of contracting COVID-19 alone is a qualifying disability under Section 82.002. In that guidance, the Attorney General determined that it is not. However, present Attorney General guidance does not preclude nor does it address whether and to what extent other conditions which increase the risk of contracting COVID-19 may qualify as a disability for purposes of Section 82.002, including the physical condition of lacking COVID-19 immunity.

III. Analysis

Section 82.002 does not provide a definition for several of the terms used to describe those who might be eligible to vote by mail based on a disability, including the words "sickness," "physical," or "condition." The Texas Supreme Court has instructed that when interpreting a statute, we should look to the plain language and should construe the text in light of the statute as a whole. *Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 59 (Tex. 2019). The plain language of a statute is the most reliable guide to legislative intent. *Id.* (internal citation omitted). Statutory terms should bear their common, ordinary meaning, unless the text provides a different meaning or the common meaning leads to an absurd result. *Id.* (citation omitted). In the guidance issued this year and in a prior formal opinion regarding Chapter 82, the Attorney General relied on dictionary definitions to determine the common meaning of those undefined terms. Attorney General Paxton has noted in a previous opinion that "[t]he plain language of section 82.002 does not require that a person satisfy any specific definition or standard of "disability" outside of the Election Code in order to qualify to vote by mail." Tex. Attn'y Gen. Op. No. KP-009 (2015).

Considering the common meaning of the term "condition," the Attorney General's informal analyses relied on a single dictionary definition to determine that "condition" should be construed to mean "an illness or medical problem." The Attorney General's analyses did not consider any other dictionary definitions of the term "condition," and instead focused its analysis on the distinction between the mental condition of fearing COVID-19 exposure and the requirement that a qualifying condition under Section 82.002 be "physical" in nature. Other common dictionary definitions of the term "condition" include "a state of being[,]" Merriam Webster Online Dictionary, available at <https://www.merriam-webster.com/dictionary/condition>; "[t]he particular mode or state of being of a person or thing[,]" "[s]tate of health[,]" or "[t]he current circumstances[,]" The American Heritage Dictionary of the English Language, 277 (New Coll. Ed. 1981); "a particular mode of being of a person or thing; existing state; situation with

respect to circumstances” or “state of health[,]” Dictionary.com, *available at* <https://www.dictionary.com/browse/condition?s=t>; or “[a] state of being; an essential quality or status[,]” Black’s Law Dictionary (11th ed. 2019). Based on these definitions, we determine that the common meaning of the term “condition” is not limited to an ailment or problem, but includes the state of being of an individual’s body.

As a straightforward matter of statutory interpretation, a court is likely to conclude that the definition of “disability” contained in Section 82.002 is broad enough to include any number of qualifying disabilities, including one we consider here—the absence of immunity against a particular known pathogen.³ In pertinent part, Chapter 82 provides that a qualified voter “is eligible for early voting by mail if the voter has a . . . physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of . . . injuring the voter’s health.” To address the precise question raised, the absence of immunity against COVID-19 is itself a “condition”—i.e. a ‘state of health or being’ or an ‘essential quality’—that relates to a voter’s physical body. Absent that immunity, in-person voting, which would likely require the voter to stand in line with other voters, interact with multiple elections workers who have interacted with numerous other voters, and use a shared touchscreen to cast a ballot, presents a reasonable likelihood of exposing the voter to the extremely aggressive COVID-19 virus—exposure that unquestionably could injure the voter’s health and can even prove fatal in some cases.⁴ As a result, such a voter would therefore be eligible to vote by mail under Section 82.002 of the Texas Election Code.

Ultimately, however, it is the voter who must decide whether they believe they are eligible to vote by mail. The form that voters use to apply to vote by mail and request that a ballot be sent to them—a form that was developed by the Secretary of State—does not require voters to describe or even identify the basis of their eligibility to vote by mail under Section 82.002 beyond checking a box marked “disability.” The Election Code does not authorize local elections officials to investigate or adjudicate the sufficiency of a voter’s claim of eligibility to vote by mail, but provides that the local elections administrator “shall provide an official ballot to the applicant as provided by this chapter” unless it is facially evident from the application that the voter is not eligible. TEX. ELEC. CODE § 86.001.

IV. Criminal Prosecution

Notably, Attorney General Paxton has suggested that he may prosecute voters who apply to vote by mail solely on the basis of the COVID-19 pandemic, or third parties who advise them

³ Current guidance from the Centers for Disease Control and Prevention (CDC) cautions that older adults and people of any age who have serious underlying medical conditions might be at an even higher risk for severe illness as a result of COVID-19. According to the CDC, at-risk conditions might include those with chronic lung disease or moderate to severe asthma, serious heart conditions, immunocompromised individuals (including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications), severe obesity (body mass index [BMI] of 40 or higher), diabetes, chronic kidney disease undergoing dialysis, and those with liver disease: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>

⁴ As of May 7, 2020, the United States has had approximately 1,219,066 confirmed cases of COVID-19 with 73,297 deaths reported according the Centers for Disease Control and Prevention: <https://www.cdc.gov/covid-data-tracker/index.html>

to do so. Section 84.0041 of the Election Code provides that a person commits a state jail felony if they “knowingly provide[] false information on an application for ballot by mail” or “intentionally cause[] false information to be provided on an application for ballot by mail[.]” Section 276.013 provides that a person commits an offense—generally a class A misdemeanor—if they “knowingly or intentionally make[] any effort to” “cause a voter to become registered, a ballot to be obtained, or a vote to be cast under false pretenses” or “cause any intentionally misleading statement, representation, or information to be provided . . . on an application for ballot by mail[.]”

There is little case law interpreting Sections 84.0041 or 276.013. Section 84.0041 was substantially amended by 2017 legislation, and Section 276.013 was added in its entirety by the same Act. However, both statutes appear to target individuals who attempt to commit election fraud by making false statements of fact on vote-by-mail applications, rather than voters who apply to vote by mail based on a good faith belief that they are eligible to do so. Additionally, the Penal Code establishes an affirmative defense against criminal liability where the person “reasonably believed the conduct charged did not constitute a crime and that he acted in reasonable reliance upon . . . a written interpretation of the law contained in an opinion of a court of record[.]” Tex. Pen. Code § 8.03(b)(2). To date, only one court has interpreted Section 82.002 within the context of the COVID-19 pandemic—and it rejected the OAG’s narrow interpretation of vote-by-mail eligibility, though the application of that opinion is widely debated. Finally, any prosecution of public officials based on their public statements about eligibility to vote by mail within the context of the COVID-19 pandemic could have First Amendment implications. *See generally Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490, 499 (5th Cir. 2020). Nevertheless, the Attorney General unquestionably wields substantial discretion to pursue a prosecution related to what he believes to be violation of the Election Code’s criminal provisions, even though it might ultimately prove meritless or unsuccessful.

V. Summary

After a review of relevant authorities and application of law to the facts, it is the opinion of the Bexar County Criminal District Attorney’s Office that a court could conclude that the definition of a “disability” as set out in Section 82.002 might include any number of physical conditions as a result of the increased risk presented to voters as a result of COVID-19. Further, the lack of COVID-19 immunity itself may constitute a physical condition that creates a reasonable likelihood that in-person voting during the ongoing COVID-19 pandemic could injure a voter’s health. Such voters would therefore be eligible to vote by mail under Section 82.002 of the Texas Election Code.

Since applications to vote by mail do not require the applicant to identify the basis of their eligibility under Section 82.002, and only requires the voter to state that a qualifying condition exists, this conclusion does not alter the manner in which the Bexar County Elections Administrator should process applications to vote by mail. If an otherwise qualified voter submits an application for a ballot by mail on the basis of a “disability,” elections officials should process the request without further inquiry.

The subject of voter eligibility to vote by mail during the COVID-19 pandemic is currently being litigated in both state and federal court. That litigation will hopefully soon result in guidance for the general public, in the form of court orders, regarding who is eligible to apply to vote by mail. Until then, the issue will remain unresolved and subject to debate.

JOE D. GONZALES
CRIMINAL DISTRICT ATTORNEY
OF BEXAR COUNTY, TEXAS



A handwritten signature in blue ink, reading "Joe D. Gonzales", is written over a horizontal line. The signature is stylized and cursive.