No. 14-20-00358-CV

In the Court of Appeals for the Fourteenth Judicial District Houston, Texas

STATE OF TEXAS,

Intervenor-Appellant,

v.

TEXAS DEMOCRATIC PARTY, ET AL.,

Appellees;

On Appeal from the
201st Judicial District Court, Travis County

INTERVENOR-APPELLANT'S RESPONSE TO APPELLEES PLAINTIFFS' AND INTERVENOR-PLAINTIFFS' VERIFIED MOTION FOR EMERGENCY RELIEF

TO THE HONORABLE FOURTEENTH COURT OF APPEALS:

In this action, Appellees have asked the judiciary to fundamentally rewrite Texas's rules regarding who may vote by mail. "It is beyond cavil that voting is of the most fundamental significance under our constitutional structure" because it is the right that secures all others. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted). It is equally clear, however, that "[e]lections are political matters," which fall peculiarly within the ambit of the Legislature; "courts may take jurisdiction of political matters only if the law has specifically granted such authority." *Johnson v. Williams*, No. 02-19-00089-CV, 2019 WL 6334689, at *2 (Tex. App.—Fort Worth Nov. 27, 2019, pet. filed) (mem. op.) (citing *Thiel v. Oaks*, 535 S.W.2d 1, 2

(Tex. App.—Houston [14th Dist.] 1976, no writ)). As the State explains in its opening brief, the trial court lacked jurisdiction in this case. Moreover, its sweeping temporary injunction does great damage to the State's obligations to make elections "fair and honest" and to bring "order, rather than chaos, [to] the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The Attorney General has tried to limit that damage by immediately filing an accelerated interlocutory appeal in the Third Court and by providing timely and accurate advice when asked by public officials about the impact of his appeal on the trial court's temporary injunction.

Appellants' position that the temporary injunction remains in place because the State did not seek the trial court's permission to exercise its statutory right to supersede is contrary to the plain language of the relevant statutes and contradicted by decades of case law. To the extent that the trial court's order somehow precluded the State from exercising its right to supersedeas, the Court should vacate that order as an abuse of discretion under Texas Rule of Appellate Procedure 24.4(a)(4). Appellees' alternative request for relief under Rule 29.3 is equally foreclosed by both the terms of the Rule and Texas Government Code section 22.004(i). Finally, Appellees' assertion that the 2017 amendment to Rule 24.2(a)(3) is unconstitutional depends on reading dicta from *In re State Bd. for Educator Certification*, 452 S.W.3d 802 (Tex. 2014), out of context. In that case, the Supreme Court was speaking of the need to preserve the *Legislature*'s traditional power to define the availability of supersedeas where it had not spoken to the particular issue. *Id.* at 809. The Legislature

has now spoken and provided state appellants with an automatic supersedeas right, which the State has opted to exercise.

Background

The State disagrees with certain factual assertions made in the background section of Appellees' motion ("Motion" or "Mot."). However, the State is providing a detailed account of the facts before the trial court in its opening brief. Because Appellees' motion implicates a procedural matter and not the underlying merits, an abridged statement of facts will be presented here to avoid burdening the Court.

On its face, this case turns on what appears to be a straightforward question of statutory construction: who falls within the definition of the term "disabled" for the purposes of determining eligibility to vote by mail? The Legislature provided 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.

Claiming a "desparate[] need" to know "what the existing law provides so that they can determine their conduct during the primary runoff period and the General Election," Plaintiffs Appellees ask for declaratory and injunctive relief to the effect that "any eligible voter, regardless of age and physical condition," may vote by mail to "hinder the known or unknown spread of a virus or disease." CR.8, 11. They originally sued both the Travis County Clerk and the Secretary of State. But, apparently recognizing that there was no jurisdiction over the Secretary, Plaintiffs nonsuited her within days of filing their complaint. CR.14-15.

The State intervened by and through its Attorney General to preserve two interests. *See* CR.16-23. *First*, "[a]s a sovereign entity, the State has an intrinsic right to enact, interpret, and enforce its own laws." *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015). The State intervened to protect that interest within the bounds of Travis County. CR.21. *Second*, the original petition was ambiguous about whether the petition challenged the constitutionality of section 82.002. CR.8. The Attorney General intervened to preserve his right to be heard under Texas Civil Practice and Remedies Code section 37.006(b) to the extent that Appellees *were* bringing such a claim. CR.22-23. Though the Travis County Clerk had primary responsibility to defend herself, intervention was necessary to preserve Texas's right to appeal an erroneous interpretation by the trial court. *Naylor*, 466 S.W.3d at 789. [1]

Following an evidentiary hearing on April 15, 2020, the trial court used the State's intervention to justify an order that is remarkable in its overreach. The court did not rule from the bench on April 15. He indicated that he was inclined to deny the State's plea to the jurisdiction and to grant some form of injunction. 2RR.190. The language of that injunction was still to be determined. 2RR.183, 192. Plaintiffs proposed an injunction that purported to enjoin the State from enforcing section

[1] As it happens, the Travis County Clerk had no interest in defending herself and seconded Appellees' request for a "description of the law's requirements" during the preliminary injunction hearing. *Compare* 2RR.164 (Chad Dunn for Appellees) *with* 2 RR 137:14-18 (Leslie Dippel for Travis County).

82.002 and did not explicitly specify its geographic scope.[2] The State objected to the proposed injunction as overbroad and unsupported. RR.937-39.

On April 17, the trial court issued its temporary injunction which requires Travis County, the State, and unspecified state actors to permit voters to vote by mail if they are disabled "as a result of the COVID-19 pandemic." CR.960. The court further purported to enjoin the State and state actors "from issuing guidance or otherwise taking actions . . . that would prohibit individuals from submitting mail ballots based on the disability category." CR.961. The court expressly denied the State's plea to the jurisdiction. CR.960. At no point during the proceedings in the trial court did Appellees seek or the trial court order counter-supersedeas under Texas Rule of Appellate Procedure 24.2(a)(3).

Recognizing the confusion that the trial court's temporary injunction would likely engender, the State filed an immediate notice of appeal, giving notice that further trial-court proceedings were stayed pursuant to Civil Practice and Remedies Code section 51.014(b). CR.964. The State's notice of appeal similarly advised that pursuant to Texas Civil Practice and Remedies Code section 6.001(b) and Texas Rule of Appellate Procedure 29.1(b), the temporary injunction was superseded. As Appellees acknowledge, the State's counsel conferred with counsel for Appellees regarding the status of the injunction following supersedeas. Mot. at 8. Rather than seek clarification or relief from a court of appeals, Appellee publicly took the position that the supersedeas was simply ineffective. *See* First Amended Complaint, *Texas*

[2] Because the original form of the proposed order is not in the record, a copy is attached hereto as Appendix Tab A.

Democratic Party v. Abbott, 5:20-CV-00438-FB (W.D. Tex. Apr. 20, 2020), ECF No. 9 (accusing General Paxton of conspiracy and voter intimidation).

The result of Appellees' litigation strategy and out-of-court conduct has been confusion across the State. The Attorney General, who is empowered to issue opinions interpreting existing law, Tex. Gov't Code §§ 402.042-.043, received a number of questions about the effect of the trial court's order and who will be allowed to vote by mail, *cf.*, Mot. Ex. B. He ultimately concluded that it was necessary to issue the letter guidance attached to Appellees' Motion. Mot. Ex. A. In that letter, he opined that the Election Code does not permit otherwise healthy individuals to vote by mail on the grounds of fear of COVID-19. *Id.* at 1-2. Moreover, he opined that the injunction was superseded (albeit without going into the details of the Texas Rules of Appellate Procedure). *Id.* at 2-3. The Attorney General's letter did not threaten to prosecute anyone who disagreed with him. *Contra* Mot. 10. Far from it. General Paxton's guidance stated—correctly—that encouraging someone to vote by mail when that person is not eligible to do so carries potential criminal penalties. Mot. Ex. A. at 2. He further explained—again correctly—that "whether specific activity constitutes an offense under these provisions will depend on the facts and circumstances of each individual case." *Id.*

ARGUMENT

When and how governmental appellants may supersede a trial court's order or judgment pending appeal is "a policy question peculiarly within the legislative sphere." *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 482 (Tex. 1964) (orig. proceeding). The Texas Legislature has chosen to allow governmental appellants to

supersede trial-court orders and judgments as a matter of right. *See* Tex. Civ. Prac. & Rem. Code § 6.001(a), (b). And the Legislature recently reaffirmed that right and provided that *no* rule of procedure may give a trial court discretion to deny supersedeas to a governmental appellant except under limited circumstances not applicable here. Tex. Gov't Code § 22.004(i); *see also* Tex. R. App. P. 24.2(a)(3). Because the State validly exercised that right when it filed its notice of appeal, there is no basis to enforce the preliminary injunction. To the extent that the trial court's decision *not* to require a counter-supersedeas bond can be read to be a counter-supersedeas order, it was contrary to established law and must be vacated.

I. The Trial Court's Order Is Superseded in Full.

A. The Order is superseded as to the State.

1. The State exercised its statutory right to supersede the temporary injunction.

For well over a century, the law has been clear that the State's notice of appeal stays the effect of the trial court's injunction against the State. "Since 1838, the State and its departments have been exempt from filing a bond to appeal an adverse judgment." *In re State Bd. for Educator Certification*, 452 S.W.3d at 804; *see also Tex. Educ. Agency v. Hous. ISD* ("*TEA*"), No. 03-20-00025-CV, 2020 WL 1966314, at *1 (Tex. App.—Austin Apr. 24, 2020, no pet. h.) (stating that "a judgment debtor is entitled to supersede a judgment or an interlocutory order, and thus defer its enforcement while pursuing an appeal"). "Before 1984 the State's right to suspend a final judgment during appeal was close to absolute." *In re State Bd. for Educator Certification*,

411 S.W.3d 576, 577 (Tex. App.—Austin 2013, org. proceeding) (Jones, C.J., concurring). This is "because the law in effect before 1984 had only one prerequisite for suspending any final judgment: filing a supersedeas bond." *Id.* "This single prerequisite applied not only to judgments for the recovery of money or property, but also to 'other judgments.'" *Id.* And the State was (and is) entitled to supersedeas without bond.

In 1984, the rules were amended to give the trial court discretion whether to allow a supersedeas bond when the judgment did not involve money, property, or foreclosure. *See id.* Under the new rule, the trial court could decline to permit the judgment to be superseded if the party opposed to the state appellant posted its own bond deemed sufficient to "secure the defendant in any loss or damage occasioned by any relief granted if it is determined on final disposition that such relief was improper." *Id.* That bond is what we now refer to as "counter-supersedeas."

For thirty years between 1984 and 2014, the interplay between this new rule and the longstanding state exemption from a bond created uncertainty and split appellate authorities regarding whether a trial court had discretion to deny supersedeas to a state defendant entitled to automatic supersedeas upon perfecting an appeal. *See id.* at 578. In December 2014, the Texas Supreme Court resolved this question by holding that trial courts had discretion, under Rule 24.2(a)(3), to deny supersedeas to state defendant-appellants upon request and sufficient bond posted by the plaintiff-appellee. *In re State Bd. for Educator Certification*, 452 S.W.3d at 803.

In response to this ruling, the 85th Texas Legislature passed House Bill 2776, which directed the Texas Supreme Court to "adopt rules to provide that 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." Tex. Gov't Code § 22.004(i). On April 12, 2018, the Texas Supreme Court amended Rule 24.2 of the Texas Rules of Appellate Procedure to provide:

> 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 except in a matter arising from a contested case in an administrative enforcement action.

Tex. Supreme Ct., Order Adopting Amendments to Tex. R. App P. 24.2, Misc. Docket No. 18-9061, 43 Tex. Reg. 2633 (Apr. 12, 2018) (emphasis added); Tex. R. App. P. 24.2(a)(3) (effective May 1, 2018). As a result, any discretion that the trial court *may* have had to award Appellees relief has been legislatively eliminated.

The Third Court, whose law applies to this appeal, recently addressed the State's supersedeas right in a case where the trial court awarded a temporary injunction to halt allegedly *ultra vires* actions. *TEA*, 2020 WL 1966314. In that case, the court traced the long history of supersedeas in the State of Texas, *id.* at *3, and examined its purpose "to preserve the status quo of the matters in litigation as they existed before the issuance of the judgment from which appeal is taken." *Id.*at *1. The court acknowledged that while "Rule 24.2(a)(3) governs the supersedeas issue in [an] interlocutory appeal," "if appellant is entitled to supersede without security by filing a notice of appeal, perfecting appeal from [an] interlocutory order suspends [the] challenged order." *Id.* (citing Rule 29.1(b)).

2. The State's supersedeas right is not contingent upon requesting leave from the trial court.

Appellees do not really dispute the State's right to supersede the injunction. They assert instead that the State needed to ask permission to exercise its right to supersede the injunction from the trial court *even though* the trial court had no discretion to deny it. Mot. 11-12. This argument is foreclosed by both the text of the Texas Rules of Appellate Procedure and decades of case law.

a. In support of this argument, Appellees point to language in Texas Rule of Appellate Procedure 24.2(a)(3) to the effect that the "trial court must set" the type of security and that the "trial court must permit a judgment to be superseded." Appellees' textual argument runs afoul of one of the most basic rules of statutory construction: that "the judicial interpreter [is] to consider the entire text, in view of its structure and logical relation of its many parts." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 167 (2012) (stating that there is "[p]erhaps no interpretative fault" that "is more common"). Appellees have cherrypicked quotations from the part of Rule 24 describing how a supersedeas bond is to be calculated. They skip over the first sentence of Rule 24, which says that the rules regarding the payment of a supersedeas bond—including Rule 24.2(a)(3)—apply only "[u]nless the law or these rules provide otherwise." Tex. R. App. P. 24.1(a). Since 2018, the rules have indisputably said otherwise.

But even before this recent change to the rules, Rule 29.1 "provide[d] otherwise." Tex. R. App. P. 24.1(a). Rule 29.1 governs when a temporary injunction will be suspended pending appeal. As the more specific rule, it governs over the more

general provision of Rule 24—particularly in light of the Legislature's 2017 decision to reinforce the State's automatic right to supersedeas. *See generally Harris Cty. Appraisal Dist. v. Tex. Workforce Comm'n*, 519 S.W.3d 113, 122 (Tex. 2017) ("If there is an irreconcilable conflict between a general provision and a specific provision, the specific provision will ordinarily prevail unless the general provision is the later enactment and the manifest intent is that the general provision prevail.").

Rule 29.1 recognizes two distinct routes to supersede an interlocutory order: (1) superseding the order "in accordance with [Rule] 29.2"; or (2) superseding by filing a notice of appeal. By incorporating Rule 29.2, the first option explicitly contemplates situations in which a "trial court may permit an order" to be superseded under certain conditions. Tex. R. App. P. 29.2. The second option makes no reference to Rule 29.2, to the trial court, or to the need for permission. This difference is presumed to have been intentional. *E.g.*, *Guarantee Mut. Life Ins. Co. v. Harrison*, 358 S.W.2d 404, 407 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.); Scalia & Garner, *supra*, at 170 ("[A] material variation in terms suggests a variation in meaning.").

Contrary to Appellees' assertion, this interpretation does *not* render the discretion provided to trial courts in Rule 24.2 "superfluous." Mot. 12. The rule against surplusage requires that, to the extent possible, every term in a statute be given practical effect. Scalia & Garner, *supra*, at 174-75. There is no requirement that all procedural rules, which are designed to cover a wide variety of scenarios, be applicable or given effect in every lawsuit. Rule 24 is a general provision that applies to cases involving both private and governmental parties. In cases involving private parties, a judgment debtor will need to ask the trial court for permission to supersede and set

a bond. Tex. R. App. P. 24.2(a)(3), 29.1(a), 29.2. By contrast, when the State is the judgment debtor, it may supersede the judgment as a matter of right by filing a notice of appeal. *Id.* R. 24.2(a)(3), 29.1(b). Far from rendering either section surplusage, this reading obeys the rule that when two provisions appear to conflict, they are to be read—to the extent possible—to coexist. *State ex rel. Best v. Harper*, 562 S.W.3d 1, 10 (Tex. 2018), *as corrected on denial of reh'g* (Dec. 21, 2018) (citing Tex. Gov't Code § 311.026(a) ("If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.")).

b. The State's reading is also confirmed by decades of case law—including when the courts' discretion to reject supersedeas was at its height. "Since the State was exempt from having to file a supersedeas bond, the filing of a notice of appeal was sufficient to automatically suspend any judgment." *In re State Bd. for Educator Certification*, 411 S.W.3d 576, 577 (Tex. App.—Austin 2013, org. proceeding) (Jones, C.J., concurring).[3] That is, "as a general rule, a [state appellant's] appeal, when perfected, automatically supersedes the trial court's judgment, and that suspension remains in effect until all appellate rights are exhausted." *In re Long*, 984 S.W.2d 623, 635 (Tex. 1999) (per curiam). This general rule has been applied consistently and with very few exceptions. *E.g.*, *Tex. Health & Human Servs. Comm'n v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 625 (Tex. App.—Austin 2013, no pet.) ("[T]he May injunction order was automatically superseded by virtue of section 6.001 of the

[3] Because this appeal was originally filed in the Third Court, this Court is bound by that decision. *Vega v. State*, No. 14-10-00318-CR, 2011 WL 882329, at *1 (Tex. App.—Houston [14th Dist.] Mar. 15, 2011, no pet.) (mem op.); Tex. R. App. P. 41.3.

civil practice and remedies code."); *Enriquez v. Hooten*, 857 S.W.2d 153, 154 (Tex. App.—El Paso 1993, no writ) (per curiam) ("[T]he appeal when perfected automatically supersedes the judgment of the trial court.").[4]

And, even when courts *had* discretion to deny the State's supersedeas, the burden was not (as Appellees suggest) on the State to request supersedeas. Instead, courts consistently held that it was the burden of the party opposing the State's statutory right to make a "request to the trial court to avoid or undo this supersedeas" as well as to "offer to post a bond for that purpose." *Tex. Health & Human Servs. Comm'n*, 399 S.W.3d at 625 n.4. The Supreme Court first recognized that a court might be allowed to order potential relief from a supersedeas under the 1984 rule in *Long*, 984 S.W.2d at 626. At that time, the Court held, there were two options by which a party could "s[eek] denial of suspension of the injunction": a request for supersedeas under the precursor to Rule 24.2(a)(3) or the issuance of an early mandate under the precursor to Rule 18.1(c). *Id.* Because the party opposing the state appellant in that case "did neither," the state official "was not obligated to comply with the injunction until the appeals were final and mandate issued." *Id.*; *see also,*

[4] *See also, e.g.*, *City of Rio Grande City, Texas v. BFI Waste Servs.*, 511 S.W.3d 300, 305 (Tex. App.—San Antonio 2016, no pet.); *In re Munk*, No. 11-15-00124-CV, 2015 WL 3534123, at *1 (Tex. App.—Eastland June 5, 2015, no pet.) (mem. op.) (per curiam); *Tex. Liquor Control Bd. v. Jones*, 378 S.W.2d 898, 905 (Tex. App. Austin 1964); *Mossman v. Banatex, L.L.C.*, 440 S.W.3d 835, 838 (Tex. App.–El Paso 2013) (op. on motion); *City of San Antonio v. Clark*, 554 S.W.2d 732, 733 (Tex. Civ. App.—San Antonio 1977, no writ).

e.g., *In re Dallas Area Rapid Transit*, 967 S.W.2d 358, 360 (Tex. 1998) (orig. proceeding) (per curiam) (holding that it was an abuse of discretion to deny supersedeas when opposing party "did not file, or offer to file, security as a judgment creditor").

The Supreme Court reiterated this position *In re State Bd. for Educator Certification*, 452 S.W.3d 802, upon which Appellees heavily rely. It stated:

> "The State has a valid statutory right to a supersedeas without filing a bond upon perfecting its appeal by giving proper notice. Unless a contrary intention is made known to the Court, *the State's notice of appeal operates as a supersedeas*."

Id. at 805 (quoting *Ammex*, 381 S.W.2d at 482, 485 (emphasis added)). Far from imposing a duty on the State, *In re State Board for Educator Certification* further recognizes that "the State's notice of appeal *automatically* suspends enforcement of a judgment." *Id.* at 804. The question it that case was whether the trial court exceeded its discretion by issuing—at the appellee's request—an "order[] 'pursuant to Rule 24.2(a)(3) of the Texas Rule of Appellate Procedure, that any appeal taken of this Judgment . . . will not supersede this Judgment during the pendency of such appeal'"—in other words, a counter-supersedeas order. *Id.* at 803. The Supreme Court concluded that it did not.

TEA, which Appellees also cite, presented the same fact pattern: a party who wanted to avoid supersedeas *asked* for relief pursuant to Rule 24. 2020 WL 1966314, at *1. The question was whether it was an abuse of discretion for the trial court to grant that request. Because *TEA* was decided *after* the recent amendment, the Third Court unsurprisingly concluded that it was an abuse of discretion. *Id.* at *3, *6. That

is, the appellees could not counter-supersede the governmental appellant's automatic right to supersede the trial court's temporary injunction.

McNeely v. Watertight Endeavors, Inc., No. 03-18-00166-CV, 2018 WL 1576866 (Tex. App.—Austin Mar. 23, 2018, no pet.) (per curiam), also does not disturb the well-established rule that a party opposing supersedeas must request relief. Assuming it was correctly decided, *McNeely* was almost immediately abrogated when Rule 24 was amended to remove the trial-court discretion that was the basis for the Third Court holding, and it has never been applied since. Appellees cite no authority for the notion that a decision about an out-of-date statute trumps the plain language of the rules or decades of precedent that the burden was on Appellees to seek relief from supersedeas.

Moreover, the case is distinguishable. Appellees rely heavily on this case, unlike in *TEA* and *In re State Board for Educator Certification*, the Third Court opinion in *McNeeley* does not reflect whether counsel specifically requested counter-supersedeas, only that the trial court ordered a counter-supersedeas bond. *Cf. id.* at *1 (omitting reference to such an order). Assuming that counsel did not specifically make that request, the circumstances were highly unusual and somewhat irregular. Specifically, the appellants "initially represented to [the appellee] that their position was that 'the limited injunction temporarily suspends'" the challenged action. *Id.* at *1. In other words, the city suggested that its appeal would *not* supersede the trial court's judgment. Only after the plaintiff-appellee paid a bond to secure the temporary injunction, served the injunction, and tried to take advantage of it did the City argue the temporary injunction was superseded by its interlocutory appeal. *Id.* Under

those circumstances, which in many ways resemble judicial estoppel, the Third Court held that the trial court implicitly exercised its discretion under Rule 24.3 by ordering and accepting a counter-supersedeas bond. *Id.* at 2. Again, the Third Court has never applied *McNeeley* outside these circumstances (probably because it is no longer good law).

Those circumstances do not exist here: The State filed its notice of appeal within half an hour of an appealable order being issued, and it has consistently maintained that the order was superseded. *Compare* CR.963 (4:09 PM), *with* CR.957 (3:39 PM).

Here, in contrast to all of the authority that they cite, Appellees neither sought relief under Rule 24 nor paid a counter-supersedeas bond.[5] Moreover, even if Appellees had sought relief, the trial court could not have granted it. The State was entitled to supersede the temporary judgment as a matter of right and without preclearance from the trial court. And it did so. CR 963-64.

3. The Court lacks authority to create an exception to the rules and should not do so to excuse Appellees from their choice not to seek relief from supersedeas.

This Court should not adopt a new rule requiring that the State to ask the trial court for relief that the trial court lacks discretion to deny. As discussed above, there is no textual basis for such a rule. There is also no logic behind requiring the State to

[5] Appellees' suggestion (at 15 & n.6) that the State waived its objection to counter-supersedeas or the absence of a bond is without merit. Appellees never asked for counter-supersedeas, and the draft temporary injunction left the bond amount blank. *See* Appx. Tab A. The State was thus not on notice of anything related to supersedeas to which to object.

file and the courts to process motions that the relevant court will have no choice but to grant. Tellingly, the only legal authority of any type to which Appellees can point (at 16) is *Irving v. State*, No. 14-18-00056-CR, 2019 WL 470263 (Tex. App.—Houston [14th Dist.] Feb. 7, 2017, pet. ref'd) (mem. op., not designated for publication), a criminal case that has nothing to do with supersedeas. The discussion of Rule 21.4(a) to which Appellees refer is a footnote in which the court observes that the State did not object to the timeliness of the defendant's motion for a new trial and discusses the effect of the State's failure to preserve that objection on a claim of ineffective assistance of counsel. *Id.* at *2 n.3. To the extent Appellees assert that the State failed to preserve its supersedeas right, they are wrong. How objections are preserved varies depends on the context. As discussed above, cases spanning many decades show that the State both preserves and exercises its right to automatic supersedeas by filing a notice of appeal.

B. The Order was also superseded as to Travis County.

The State's notice of appeal also superseded the Order as to Travis County. Citing *City of Rio Grande City v. BFI Waste Services*, 511 S.W.3d 300 (Tex. App. – San Antonio 2016, pet. denied), Appellees assert (at 11) that the Order is not superseded as to Travis County because Travis County has not filed a notice of appeal. As an initial matter, that assertion has little if any bearing on the current motion: Appellees are not trying to enforce the Order against Travis County. Moreover, their position is wrong for two reasons.

First, it is inconsistent with the text of the rules. Rule 29.1 states that "[p]erfecting an appeal from *an order* granting interlocutory relief does not suspend *the order*

appealed from unless . . . the appellant is entitled to supersede *the order* without filing a notice of appeal." (emphasis added). Here, there was only one order. The State appealed that order, and that order is superseded.

Second, even if the State could not ordinarily supersede the application of an order to another party, it can do so here because extending that supersedeas to Travis County is necessary to protect the State's right to supersede the injunction under the facts and circumstances of this case. As Appellees acknowledge (*e.g.*, at 20-21 (citing *TEA*)), "[t]he purpose of supersedeas is to preserve the status quo of the matters in litigation as they existed before the issuance of the judgment from which an appeal is taken." *TEA*, 2020 WL 1966314, at *1. Appellees interpret the "status quo" to mean what the trial court ordered. "In the context of injunctions, however, status quo" has long meant "'the last, actual, peaceable, non-contested status which preceded the pending controversy.'" *Id.* (quoting *Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 576-77 (Tex. App.—Austin 2000, no pet.)).

In this instance, the status quo does *not* include allowing voters in Travis County to vote by different rules than voters elsewhere in the State. Plaintiff-Intervenors acknowledged in their petition in intervention that healthy individuals were not allowed to vote by mail before the lawsuit and that they were seeking to "extend the option to vote by mail to all registered voters." CR.49.[6] Both Plaintiffs and the County reiterated this position in the trial court when they stated that they needed

[6] *See also* Tessa Berenson, *Eric Holder: Here's How the Coronavirus Should Change U.S. Elections—For Good*, TIME, Apr. 14, 2020, https://time.com/5820622/elections-coronavirus-eric-holder/.

the trial court to issue the injunction in order to "reduce the demand" for in-person voting. 2RR.38, 142. Before this lawsuit, the same rule applied across the State. Tex. Elec. Code § 31.003. And preserving that uniformity was a key reason the State intervened. CR.21. This Court cannot preserve the State's interest in the status quo without holding that the Order is superseded as to Travis County as well as the State.

BFI Waste Services is not to the contrary. In that case, the trial court enjoined a city, city officials, and a group of private entities from taking actions inconsistent with a particular garbage company's exclusive franchise. 511 S.W.3d at 305. Contrary to Appellees' description, all of the parties appealed; the only question was whether the private parties had to pay a bond or whether they could take advantage of the City's automatic supersedeas—which, incidentally, the court of appeals described as "automatic." *Id.* The court decided not "to allow the private party appellants to supersede the order without security," but only after considering particular circumstances of the case, and determining that doing so would not "negate[] the City's rights or fail[] to preserve the status quo." *Id.* Because allowing the temporary injunction to apply in Travis County *would* "negate" the State's right to supersede, *id.*, the Order is superseded as to both the City and the State.

C. To the extent that the trial court purported to deny the State supersedeas, the Court should vacate that order as an abuse of discretion.

To the extent that the Court agrees with Appellees (at 15) that the trial court implicitly granted counter-supersedeas under *McNeely* when it set a $0 bond, the

Order was as an abuse of discretion. The Court should vacate any such counter-supersedeas order under Texas Rule of Appellate Procedure 24.4(a).

Assuming the trial court could "determin[e] whether to permit suspension of enforcement" of the temporary injunction (and it cannot), the State may seek review of that determination "by motion filed in the court of appeals with jurisdiction or potential jurisdiction over the appeal from the judgment in the case." *Id.* R. 24.4(a)(4). This motion "must be heard at the earliest practicable time." *Id.* R. 24.4(d). This Court reviews the trial court's order for an abuse of discretion. *See Mason v. Mason*, No. 03-17-00546-CV, 2018 WL 1420217, at *1 (Tex. App.—Austin Mar. 6, 2018, no pet.) (order) (per curiam); *AME & FE Invs., Ltd. v. NEC Networks, LLC*, 582 S.W.3d 294, 297 (Tex. App.—San Antonio 2017, pet. denied). "But a trial court has no discretion in determining what the law is or applying law to facts." *Pressley v. Casar*, 567 S.W.3d 327, 333 (Tex. 2019) (per curiam) (quotation marks omitted); *accord Brubaker v. Brubaker*, No. 03-18-00273-CV, 2019 WL 6205518, at *2 (Tex. App.—Austin Nov. 21, 2019, no pet. h.) (mem. op.).

In this instance, the trial court had no discretion to deny the State supersedeas. As discussed above, after recent amendments to the Texas Government Code and the Rules of Appellate Procedure, it is pellucidly clear that "[w]hen 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 except in a matter arising from a contested case in an administrative enforcement action." Tex. R. App. P. 24.2(a)(3). As this matter indisputably did *not* arise from a contested case in an administrative enforcement action, the trial court lacked discretion to order counter-

supersedeas. Thus, to the extent that merely setting a $0 bond even could be deemed a counter-supersedeas order, that order must be vacated as an abuse of discretion.

II. The Court Should Deny Appellees' Alternative Request for Relief Under Rule 29.3.

Appellees ask, in the alternative, that this Court order the temporary injunction to remain in place pursuant to Rule 29.3. But the State's statutory right to supersede the temporary injunction cannot be trumped by procedural rules. And even if this Court were to assume the authority to keep the injunction in place, it should decline Appellees' invitation to do an end-run around the entire supersedeas framework constructed by the Legislature and the Texas Supreme Court.

A. Rule 29.3 does not authorize this Court to deny the State's right to supersede the temporary injunction.

Contrary to Appellees' assertion (at 17), Rule 29.3 does not provide this Court with freewheeling "equitable powers" to overcome the State's supersedeas based purely on a "showing [of] a probable right of recovery and that absent relief [Appellees] would suffer irreparable harm." Instead, Rule 29.3 provides limited authority, "[w]hen an appeal from an interlocutory order is perfected," to "make any temporary orders necessary to preserve the parties' rights until disposition of the appeal." Tex. R. App. P. 29.3. Importantly, the Texas Supreme Court recently and unanimously held that Rule 29.3 does *not* enable a court of appeals to lift the automatic stay guaranteed by Texas Civil Practice and Remedies Code section 51.014(b). *See In re Geomet Recycling LLC*, 578 S.W.3d 82, 88 (Tex. 2019) (orig. proceeding). The Court explained that "procedural rules cannot authorize courts to act contrary to a

statute" and that a court may not invoke Rule 29.3 to deny a party "its statutory right." *Id.*

That principle applies here. As discussed above, the State has a statutory right to supersedeas. *See* Tex. Civ. Prac. & Rem. Code § 6.001(a); *In re State Bd. for Educator Certification*, 452 S.W.3d at 804. To the extent there was ever any doubt, the Legislature has now made that right abundantly clear. Tex. Gov't Code § 22.004(i) (directing the Texas Supreme Court to "adopt rules to provide that *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*") (emphases added). And, in the same section directing the Supreme Court to protect the government's supersedeas rights, the Legislature also provided that the Court does not have the authority to nullify statutory rights through procedural rules. *Id.* § 22.004(a) ("The supreme court has the full rulemaking power in the practice and procedure in civil actions, *except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant*." (emphasis added)).

To adopt Appellees' view would be to vitiate the State's statutory right to supersedeas in any case involving a temporary injunction. By definition, when a trial court grants a temporary injunction, it has concluded that the plaintiff has "shown a probable right of recovery and that absent relief [that plaintiff] would suffer irreparable harm." Mot. 17. Those are two of the three elements that a plaintiff must show to obtain a temporary injunction. *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 437 (Tex. App—Austin 2018, pet. filed). If that "burden is not discharged as to any

one element," that plaintiff "is not entitled to extraordinary relief." *Dall. Anesthesiology Assocs., P.A. v. Tex. Anesthesia Grp., P.A.*, 190 S.W.3d 891, 898 (Tex. App.—Dallas 2006, no pet.). If merely satisfying that burden was sufficient to justify relief from supersedeas, it would eviscerate the Legislature's decision to guarantee the State an automatic right to supersede a temporary injunction.

The Third Court has recently held that, notwithstanding the Legislature's actions, appellate courts have the inherent power to grant relief from supersedeas if doing so is necessary to preserve a party's right to seek appeal (and therefore the court's jurisdiction). *TEA*, 2020 WL 1966314, at *5. The State respectfully disagrees with the Third Court's reasoning and reserves the right to seek further review of that rule both in *TEA* itself and in the current action.

Even assuming *TEA* was correctly decided, it does not control here. The Third Court was careful to limit its holding to "th[e] situation" currently in front of the court. *TEA*, 2020 WL 1966314, at *5. Specifically, that case involved an administrative action that, if consummated, would not be subject to administrative review. *Id.* Appellees have alleged nothing of the sort here: For the reasons the State discusses in its opening brief, Appellees have sought judicial clarification of the Election Code, not an order stopping any violation of state law. Moreover, there is no allegation that Appellees will be denied any right to appeal if the supersedeas were allowed to go into effect. At most, they have alleged and attempted to show that they will have to wait until a later date to register to vote by mail. That is not the type of supposedly irreparable harm that the *TEA* plaintiffs alleged and that the *TEA* court held justified a judicially created exception to the "Legislature's statutory directive . . . that the

State's right to supersede a judgment is not subject to counter-supersedeas under Rule 24.2(a)(3) or any other rule." 2020 WL 1966314, at *5.

B. Even if the Court has the authority to grant Appellees' request for relief under Rule 29.3, it should decline to exercise that authority.

Even if this Court did have authority under Rule 29.3—or some latent spring of inherent judicial authority that "is not derived from legislative grant or a specific constitutional provision," *id.*—to order that the trial court's temporary injunction remain in effect during interlocutory appeal, it should still deny Appellees' request. Throughout this case, Appellees have tried to portray their claim as about the fundamental right to vote. It is not. The State does not dispute that the right to vote is indeed precious, but federal law recognizes that the right to vote *does not include* a right to vote by mail. *See McDonald v. Bd. of Elec. Comm'n of Chi.*, 394 U.S. 802, 807 (1969). Voting by mail is a benefit established by the Legislature. *See id.*

Though Appellees want to exercise that privilege, they are not the only individuals whose rights are at issue in this appeal. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (quotation marks omitted). And that harm is not an abstract injury to some disembodied concept. Courts do not protect the State's "intrinsic right to enact, interpret, and enforce its own laws" for the benefit of the State as an entity, or even state officials. *Naylor*, 466 S.W.3d at 790. Instead, courts protect the ability of State to enforce its laws to protect the rights of its citizens in whose name, on whose behalf, and at whose direction those laws were created. *Cf. New York v. United States*, 505 U.S. 144, 181, 112 S. Ct.

2408, 2431, 120 L. Ed. 2d 120 (1992) ("State sovereignty is not just an end in itself," but "secures to citizens the liberties that derive from the diffusion of sovereign power."). When an appellate court refuses to allow the State to enforce its law pending appeal, all citizens suffer.

To balance these competing interests, the Legislature and the Texas Supreme Court have crafted a detailed framework for requesting and obtaining supersedeas and counter-supersedeas. This framework, embodied in such provisions as section 6.001, Rule 24, and Rule 29, represents a careful balancing of legal, policy, and equitable considerations. Were this Court to accept Appellees' invitation to make an end-run around this entire framework and effectively grant Appellees the counter-supersedeas they could not otherwise obtain, the Court would upset this balance and arrogate to itself sole discretion over when supersedeas is appropriate.

The Court should decline Appellees' invitation. Under any circumstance, supersedeas involves a set of policy decisions that fall uniquely within "the legislative sphere." *Ammex Warehouse*, 381 S.W.2d at 482. Here, the Legislature's exclusive control over supersedeas is doubly important 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. Whether in-person voting is the best policy to avoid fraud is something about which reasonable people could disagree. Commission on Federal Election Reform, *Building Confidence in U.S. Elections* 36, 46-47 (2005). But it is a policy that Texas has consistently maintained for more than fifty years and through numerous changes in the partisan makeup of the statehouse. *McGee v. Grissom*, 360 S.W.2d

893, 894 (Tex. App.—Fort Worth 1962, no writ) (per curiam). That choice should be respected, particularly while the State exhausts its appeals.

III. Rule 24.2(a)(3) Is Not Unconstitutional.

Finally, Appellees are incorrect to argue (at 24-26) that Rule 24.2(a)(3) violates the separation of powers when it requires lower state courts to allow state appellants to supersede temporary injunctions. Appellees appear to mount a facial challenge to the rule relying on statements made in *State Board for Educator Certification* expressing concerns about the State's entitlement to supersedeas. *See* 452 S.W.3d at 808. Appellees further assert that, because the State "subjected itself to the jurisdiction of a co-equal branch of the government," it would violate the separation of powers to allow the State to defer enforcement of the trial court's subsequent order. Their argument fails for three reasons.

First, the language from *State Board* upon which Appellees rely was dicta. The Texas Supreme Court held that the former version of Rule 24 *did* give trial courts discretion to deny supersedeas to governmental appellants—its decision did not depend on constitutional principles. *Id.* at 809. The Supreme Court has never been asked to review the constitutionality of the new Rule 24 outside the rulemaking process itself. If anything, the Court should infer that the Supreme Court believes that the new rule *is* constitutional because it created the rule less than three years ago. Tex. Gov't Code § 22.004(a) ("The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.").

Second, Appellees are wrong that by intervening to defend the proper interpretation of State law, the State has "submitted" itself to the judgment of a co-equal branch. As the State explains in its opening brief, the Legislature decides both when the State may be hailed into court *and* when it may be subject to an injunction. In this instance, the Legislature has specifically provided that the Attorney General may intervene in an action on behalf of the State to be heard on the proper interpretation and validity of state law *without* waiving sovereign immunity. *See* Tex. Civ. Prac. & Rem. Code § 37.006(b); Tex. Gov't Code § 402.010(d).[7]

Third, the separation of powers concern addressed in the *In re State Board for Educator Certification* dicta was *not* the Court's ability to review the Executive's actions. To the contrary, the Texas Supreme Court has recognized "[f]or well over 150 years" that the Legislature can "limit judicial review of executive actions." *Morath v. Sterling City ISD*, 499 S.W.3d 407, 412-13 (Tex. 2016) (plurality op) (collecting cases). "This principle was added to the Texas Constitution in 1985." *Id.*. Following this amendment, the "Legislature's power to limit judicial review of executive action" extends to all claims except "violations of constitutional rights and infringement of vested property rights." *Id.* (citing *inter alia In re Office of Att'y Gen.*, 456 S.W.3d 153, 157 (Tex.2015) (describing principle as "well settled")). This case does not involve such a claim because (1) there is no constitutional or property right to

[7] Indeed, in many ways, the Legislature's ability to control the State's right to supersedeas is a component of its ability to control the State's sovereign immunity. By guaranteeing a right to supersede a temporary injunction, the Legislature has effectively concluded that the State may not be liable until its appeals have been exhausted.

vote by mail, *McDonald*, 394 U.S. at 807; and (2) Appellees have disclaimed any constitutional claims in this litigation, 3RR.37.

In re State Board for Educator Certification's dicta is consistent with this rule because at the time it was decided, Legislature had not yet definitively spoken to the Executive's right to supersede a judgment pending appeal. *In re State Board for Educator Certification*, 451 S.W.3d at 808-09. Now, the Legislature has definitively weighed in on the issue by directly affirming the right of state appellants to supersede trial-court judgments and orders. Tex. Gov't Code § 22.004(i). Far from entitling Appellees to relief, the separation of powers deprives the court of any "right to engraft upon the statute any conditions or provisions not placed there by the legislature." *In re Geomet Recycling*, 578 S.W.3d at 86-87 (quotation marks omitted).[8] As Appellees have brought no constitutional challenge to the new rule, the Court should decline to take the extraordinary step of declaring a rule of appellate procedure unconstitutional. This is especially true because "when and how supersedeas should be allowed is a policy question peculiarly within the legislative sphere and the Legislature has determined that the State and certain political subdivisions thereof may supersede judgments of trial courts." *Ammex Warehouse*, 381 S.W.2d at 482.

[8] *In re Geomet Recycling LLC* recognized that under some, limited circumstances Rule 29.3 may allow the Court to order relief. 578 S.W.3d at 89. Those circumstances do not exist for the reasons discussed above at 24-26.

Prayer

The Court should deny the motion to enforce the temporary injunction, which has been superseded. To the extent the Court concludes that the trial court ordered counter-supersedeas, the Court should vacate that order as an abuse of discretion under Rule 24.4(a)(4). The Court should also deny Appellees' alternative request for relief under Rule 29.3 and grant the State any other relief to which it is entitled.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Ryan L. Bangert
Deputy First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Kyle D. Hawkins
Solicitor General

Matthew H. Frederick
Deputy Solicitor General

/s/ Lanora C. Pettit
Lanora C. Pettit
Assistant Solicitor General
State Bar No. 24115221
lanora.pettit@oag.texas.gov

Counsel for State of Texas

Certificate of Service

On May 11, 2020, this document was served electronically on Chad Dunn, lead counsel for Plaintiffs, via chad@brazillanddunn.com, and on Joaquin Gonzalez, lead counsel for Plaintiff-Intervenors, via Joaquin@texascivilrightsproject.org.

/s/ Lanora C. Pettit
Lanora C. Pettit

No. 14-20-00358-CV

In the Court of Appeals for the Fourteenth Judicial District Houston, Texas

STATE OF TEXAS,

Intervenor-Appellant,

v.

TEXAS DEMOCRATIC PARTY, ET AL.,

Appellees.

On Appeal from the
201st Judicial District Court, Travis County

APPENDIX

Tab A: Proposed Order

No. D-1-GN-20-001610

TEXAS DEMOCRATIC PARTY, et. al	§	IN THE DISTRICT COURT
	§	
	§	
Plaintiffs,	§	
	§	
and	§	
	§	
ZACHARY PRICE, LEAGUE OF WOMEN VOTERS OF TEXAS, LEAGUE OF WOMEN VOTERS AUSTIN AREA, MOVE TEXAS ACTION FUND, WORKERS DEFENSE ACTION FUND,	§	TRAVIS COUNTY, TEXAS
	§	
	§	
Intervenor-Plaintiffs,	§	
	§	
v.	§	
	§	
DANA DEBEAUVOIR	§	
	§	
Defendant,	§	
	§	
and	§	
	§	
STATE OF TEXAS	§	
	§	
Intervenor.	§	201st JUDICIAL DISTRICT

Proposed Order

On this day came to be considered the Plaintiffs' and Intervenor-Plaintiffs' Applications for Temporary Injunction as well as the State of Texas' Plea to the Jurisdiction. The Court, having considered the applications and pleas along with the supporting and opposing briefing and the applicable law cited therein, evidence presented, arguments of counsel, and the pleadings on file in this case, is of the opinion:

1) The State of Texas' Plea to the Jurisdiction should be DENIED; and,

2) Plaintiff's and Intervenor-Plaintiffs' applications for a Temporary Injunction should be GRANTED.

In addition, the Court FINDS:

1) Joseph Daniel Cascino and Shanda Marie Sansing are registered voters in Travis County who seek to vote by mail by claiming a disability due to the COVID-19 epidemic;

2) The Texas Democratic Party (TDP) is one of the two largest political parties in the United States with members in Travis County, who are registered voters and are eligible to apply to vote by mail due to COVID-19. The TDP and its chair, Gilberto Hinojosa, are the administrators of the July 14, 2020 run-off election. The interest that the TDP and its Chair seeks to protect through this suit are germane to the organization's purpose. TDP and its members are harmed by the lack of clarity in the election law at issue in this case;

3) Intervenor-Plaintiff Zachary Price is a registered voter in Travis County who seeks to vote by mail by claiming a disability due to the COVID-19 pandemic;

4) Intervenor-Plaintiffs League of Women Voters of Texas, League of Women Voters Austin Area, and Workers Defense Action Fund are membership organizations with members who are registered voters throughout the State of Texas, including in Travis County, and who are eligible to vote by mail due to COVID-19 but would not otherwise be eligible to vote by mail outside of the COVID-19 pandemic. The interests that these organizations seek to protect through this suit are germane to their purpose. The organizations and their members are harmed by the lack of clarity in the election law at issue in this case. Additionally, Intervenor-Plaintiffs League of Women Voters of Texas, League of Women Voters Austin Area, Workers Defense Action Fund, and Move Texas Action Fund have suffered and are suffering direct injury to their organizations;

5) The individual Plaintiffs and Intervenor-Plaintiffs are injured by the uncertainty in the law as to whether they are lawfully permitted to request a ballot by mail for elections in which they reasonably believe they may be at risk to contract COVID-19; absent clarity, they face either risk to their health or the threat of prosecution and having their ballots not counted and/or rejected;

6) COVID-19 is a global respiratory virus that poses an imminent threat of disaster, to which anyone is susceptible and which has a high risk of death to a large number of people and creates substantial risk of public exposure because of the disease's method of transmission;

7) The risk of transmission of COVID-19 during in-person voting is high for the July 14, 2020 Run-Off election and all subsequent elections for this year. The harm caused by transmission of COVID-19 during in-person voting on the one hand and not being able to cast a ballot that is counted on the other is imminent, irreparable, and seriously damaging;

8) The Run-Off Elections are scheduled to be held on July 14, 2020. Ordinarily, without adjusting other laws, Election Clerks and Election Administrators require at least 74 days to prepare for an election. 74 days from July 14, 2020 is May 1, 2020;

9) Plaintiffs will suffer immediate, irreparable injury without an injunction prohibiting Defendant from denying mail ballot applications based on the disability caused by COVID-19 because they will be forced to either vote in-person and risk transmission of a deadly illness or lose their ability to vote entirely;

10) Tex. Elec. Code § 273.081 specifically provides, "A person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring." Although the standard set by statute is lower than the typical standard for granting a temporary injunction, Plaintiffs and Plaintiff Intervenors' evidence meets both standards and an injunction should issue;

11) The oral testimony, exhibits and witness declarations have been accepted into evidence without objection. I have carefully viewed the testimony and reviewed the documentary evidence in making the factual findings herein;

12) Based on the medical testimony and evidence I have received, it is reasonable for voters to expect that COVID-19 will continue to be in circulation without a vaccine or herd immunity through the elections this year and limited or statewide government imposed social distancing will likewise continue through the elections this year, especially with regard to large public gatherings as occur at polling places. Furthermore, even to the extent there is easing of social distancing, it will still be a public health risk to attend larger gatherings such as those associated with voting at polling places because without a vaccine or herd immunity, communities will remain susceptible to surges in infection rates. Moreover, the medical evidence shows that voters and these Plaintiffs and Intervenor-Plaintiffs are reasonable to conclude that voting in person while the virus that causes COVID-19 is still in general circulation presents a likelihood of injuring their health, and any voters without established immunity meet the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code § 82.002.

13) Voters and these Plaintiffs are reasonable to worry about the legality of their applications for ballots by mail given the uncertainty created, at least in part, from the lack of clear guidance from other state leadership. Voters should not have to guess at whether they are complying with the law in requesting a mail ballot and put themselves at risk of criminal liability.

14) Time is of the essence and election administrators as well as the TDP must have clarity without delay so that election preparations can be made.

15) Plaintiffs and Intervenor-Plaintiffs are likely to prevail on the merits of at trial; and

16) Plaintiffs and Intervenor-Plaintiffs have no other adequate remedy at law.

It is therefore, ORDERED that the State of Texas's Plea to the Jurisdiction is denied. The State Petitioned to Intervene in this case. The Court has jurisdiction. The issues are ripe, the Plaintiffs and Intervenor-Plaintiffs' are currently suffering and will continue to suffer injury in the absence of a Court ruling.

It is further, ORDERED that, between now and entry of final judgment in this case:

(1) Travis County Defendant and her agents, servants, employees, representatives, and all person or entities of any type whatsoever acting concert with them or acting on their behalf are enjoined from rejecting any mail ballot applications received from registered voters who use the disability category of eligibility as a result of the COVID-19 pandemic;

(2) Travis County Defendant and her agents, servants, employees, representatives, and all person or entities of any type whatsoever acting concert with them or acting on their behalf are enjoined from refusing to accept and tabulate 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;

(3) Travis County Defendant and Intervenor-Defendant Texas and their agents, servants, employees, representatives, and all person or entities of any type whatsoever acting concert with them or acting on their behalf are enjoined 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;

(4) Travis County Defendant and Intervenor-Defendant Texas and their agents, servants, employees, representatives, and all person or entities of any type whatsoever acting concert with them or acting on their behalf are enjoined from issuing guidance or otherwise taking actions during all elections affected by the COVID-19 pandemic, 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

(5) Intervenor-Defendant Texas, acting through the appropriate state agency, shall publish a copy of this Court's Order on the appropriate agency website and circulate a copy of this Court's Order to the election official(s) in every Texas County.

It is further ORDERED that all Parties shall appear before this Court on July 20, 2020 at __ AM/PM for a status conference on the continued propriety of this Temporary Injunction Order.

It is further ORDERED that for this Temporary Injunction Order to be effective under the law, cash bond in the amount of $ _____ shall be required of the PLAINTIFFS and filed with the District Clerk of Travis County, Texas. The Clerk of Court shall forthwith issue a writ of Temporary Injunction in conformity with the law and terms of this Order. Once effective, this Order shall remain in full force and effect until final Judgment in the trial on this matter.

The Court ORDERS a final trial in this matter to begin _____ , 2020 at _____ AM/PM.

SIGNED April _____, 2020

_____
Judge Presiding

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Cecilia Hertel on behalf of Lanora Pettit
Bar No. 24115221
cecilia.hertel@oag.texas.gov
Envelope ID: 42873327
Status as of 05/11/2020 11:12:58 AM -05:00

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Lanora Pettit	24115221	lanora.pettit@oag.texas.gov	5/11/2020 11:03:07 AM	SENT
Cecilia Hertel		cecilia.hertel@oag.texas.gov	5/11/2020 11:03:07 AM	SENT
Chad Wilson Dunn	24036507	chad@brazilanddunn.com	5/11/2020 11:03:07 AM	SENT
Joaquin Gonzalez	24109935	joaquinrobertgonzalez@gmail.com	5/11/2020 11:03:07 AM	SENT
Joaquin Gonzalez		joaquin@texascivilrightsproject.org	5/11/2020 11:03:07 AM	SENT