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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

**No. 20-0401**

# In the Supreme Court of Texas

In re State of Texas,
*Relator.*

On Petition for Writ of Mandamus
to the Fourteenth Court of Appeals, Houston

## RELATOR'S OPPOSED EMERGENCY MOTION FOR TEMPORARY RELIEF

To the Honorable Supreme Court of Texas:

Yesterday afternoon, a court of appeals effectively denied the State's right to supersede automatically an adverse trial-court order. Its order enjoins the Attorney General and other state actors from enforcing voting rules designed to prevent voter fraud. Both the trial court's injunction and the appellate court's refusal to allow the State to supersede that injunction are unlawful. And if allowed to stand, they will cause the State and its executive-branch officials immediate and irreparable harm. Mandamus relief is therefore warranted, as set out in the State's petition accompanying this motion. The Court should enter an emergency order staying the court of appeals' May 14 order while it evaluates that mandamus petition. The State requests an order granting emergency relief today, May 15, 2020.

There is little doubt that immediate emergency relief is warranted. The trial court's injunction enjoins *every* Texas official from "issuing guidance or otherwise

taking actions" to (1) prevent counties from providing or accepting unlawful mail-in ballots or (2) prohibit individuals from voting by mail even when the Legislature has said they may not. MR.0212. That breathtaking order not only prevents the Attorney General from carrying out his sworn duty to prosecute election fraud associated with unlawful mail-in ballots, Tex. Elec. Code § 273.021(a), but it prevents the Texas Governor, Secretary of State, Attorney General, and *every* other executive-branch official from even *speaking*—that is, "issuing guidance"—about who is eligible to vote by mail, and who is not.

The Texas Legislature and this Court together have guaranteed the State the power to supersede this unlawful injunction pending appeal. *See* Tex. Civ. Prac. & Rem. Code § 6.001(a), (b); Tex. Gov't Code § 22.004(i); Tex. R. App. P. 24.2(a)(3). This guarantee is unambiguous: "[w]hen the judgment debtor is the state, . . . the trial court *must* permit a judgment to be superseded." Tex. R. App. P. 24.2(a)(3) (emphasis added). Yet the court of appeals flouted that guarantee. The result is intolerable. This Court should enter a stay forthwith to prevent irreparable harm to the State.

## Background

As explained in the accompanying mandamus petition, the Legislature has allowed a voter to vote by mail if he suffers from a "disability"—that is, a "sickness or physical condition"—that "prevents" him "from appearing at the polling place on election day." Tex. Elec. Code § 82.002(a). In late March, several organizations and voters filed a lawsuit aimed at expanding voting by mail to all Texans. MR.0148-

59. They asked the court to declare that "any eligible voter, *regardless of age and physical condition*," may vote by mail "if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease." MR.0154 (emphasis added). The State intervened to protect the integrity of Texas law. MR.0171-90, 0196-0206.

The trial court granted the plaintiffs' request. It issued a sweeping temporary injunction prohibiting the State and all its agents from "issuing guidance or otherwise taking actions that would prevent Counties from" allowing anyone to vote by mail, and from "issuing guidance or otherwise taking actions . . . 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." MR.0212, App. C at 5. And it ordered the State to "publish a copy of [its] Order on the appropriate agency website and circulate a copy . . . to the election official(s) in every Texas County." *Id.*

The State immediately filed a notice of interlocutory appeal, which superseded the temporary injunction by operation of law. *See* Tex. R. App. P. 29.1(b). Yesterday, however, the court of appeals ordered "that the trial court's temporary injunction remains in effect until disposition of this appeal." MR.0491-93, App. A at 2 (citing Tex. R. App. P. 29.3; *Tex. Educ. Agency v. Hous. ISD*, No. 03-20-00025-CV, 2020 WL 1966314, at *5 (Tex. App.—Austin Apr. 24, 2020, order)). Chief Justice Frost dissented. MR.0497-0512, App. B.

## Argument

A temporary stay is warranted when the Court reaches "the tentative opinion that relator is entitled to the relief sought" and "the facts show that relator will be prejudiced in the absence of such relief." *Republican Party of Tex. v. Dietz*, 924 S.W.2d 932, 932-33 (Tex. 1996) (per curiam) (citing former Tex. R. App. P. 121). The Court's Members have further indicated that temporary stays are appropriate to allow the Court a "meaningful opportunity to consider" relevant issues "upon less hurried deliberation." *Del Valle ISD v. Dibrell*, 830 S.W.2d 87, 87-88 (Tex. 1992) (Cornyn, J., joined by Hecht, J., dissenting); *cf. June Medical Servs., L.L.C. v. Russo*, 139 S. Ct. 661 (2019) (ordering a temporary stay because "the Justices need[ed] time to review the[ stay-related] filings"). The U.S. Supreme Court has observed that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).*

Here, the State satisfies both *Dietz* considerations. The State is entitled to the relief sought because the court of appeals has denied it a right the Legislature has unambiguously conferred. And the State will be prejudiced in the absence of a stay

* The U.S. Supreme Court routinely enters temporary stays while considering important filings. *See, e.g.*, *Trump v. Mazars USA, LLP*, 140 S. Ct. 581 (2019) (temporary stay of seven days); *June Medical Servs*, 139 S. Ct. 661 (six days); *In re Grand Jury Subpoena*, 139 S. Ct. 914 (2019) (16 days); *In re United States*, 139 S. Ct. 452, 453 (2018) (13 days); *In re Dep't of Commerce*, 139 S. Ct. 16 (2018) (13 days).

because both it and its executive officials will be precluded from enforcing core provisions of the Texas Election Code with an election date fast approaching.

## I. The State Has Demonstrated That It Is Entitled to Mandamus Relief.

The first *Dietz* consideration—whether the State has demonstrated a "tentative" right to the relief it seeks, *see* 924 S.W.2d at 932-33—is easily met here. The Legislature and this Court together have conferred on the State the right to unilaterally supersede adverse judgments. The court of appeals denied that right. In so doing, it flouted the Legislature's will and abused its discretion in a way that leaves the State without any appellate remedy. *See In re Turner*, 591 S.W.3d 121, 124 (Tex. 2019) (orig. proceeding); *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (orig. proceeding) (per curiam). Its decision merits mandamus relief.

The State's petition for writ of mandamus, filed concurrently with this emergency application for temporary relief, demonstrates the ways in which the court of appeals abused its discretion. As the petition explains, Texas Civil Practice and Remedies Code section 6.001 gives governmental appellants a right to supersede without bond. *See* Pet. 7 (citing *In re State Bd. for Educator Certification*, 452 S.W.3d 802, 804 (Tex. 2014) (orig. proceeding) ("In effect, the State's notice of appeal *automatically* suspends enforcement of a judgment."); *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding) (per curiam)). The Texas Rules of Appellate Procedure leave no doubt that "[w]hen the judgment debtor is the state, . . . the trial court *must* permit a judgment to be superseded." Tex. R. App. P. 24.2(a)(3) (emphasis added); *see also* Pet. 7-8. This Court has further explained that procedural rules may not be used to abrogate statutory substantive rights. *See* Pet. 11-12. The court of appeals thus clearly

erred in holding that the procedural mechanism of Rule 29.3 may operate to effectively deny the State's guaranteed right to supersede an adverse judgment. *See id.* at 12-15.

The petition also demonstrates that the State has no adequate appellate remedy and that mandamus relief is necessary. *See id.* at 15-17. The court of appeals' Rule 29.3 order remains in effect only while the State's appeal of the temporary injunction is pending. Once the appeal is decided, the question of supersedeas will be moot. *See id.* In the meantime, the State will be denied its right to supersede the trial court's injunction—and the State and its executive officials will be required to comply with that injunction for the duration of the appeal. *See id.* That contravenes the Legislature's intent.

## II. The State and Its Executive Officials Will Be Prejudiced Absent a Stay.

The State satisfies the second *Dietz* consideration because it will be "prejudiced in the absence of" a stay. 924 S.W.2d at 932-33. In particular, the State and its officials will be forced to endure a patently overbroad injunction that prohibits them from enforcing—or even speaking about—core provisions of the Texas Election Code mere weeks before an election.

**A.** The State is irreparably harmed whenever it is prevented from "enforce[ing] its duly enacted [laws]" while lawsuits are resolved. *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 441 (Tex. App.—Austin 2018, pet. filed) (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018)). That is the case here. The trial

court's injunction precludes the Attorney General from wielding the power to enforce the provisions of the Texas Election Code set out in section 273.021(a).

The trial court has effectively precluded the enforcement of laws designed to prevent election fraud. A prohibition on enforcing these laws is among the most severe sovereign harms a State can experience. *See id.*; *see also State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015) (discussing the State's sovereign power to "enact, interpret, and enforce its own laws").

**B.** Not only has the trial court forbidden state officials to *enforce* anti-fraud laws, but state officials may not even *speak* about those laws. According to the trial court, the Attorney General may not "issu[e] guidance" that would "prohibit individuals from submitting mail ballots," even as to individuals who are not eligible for mail ballots. MR.0212. If a State is irreparably harmed when it cannot enforce its laws, *Tex. Ass'n of Bus.*, 565 S.W.3d at 441, it follows that the State is similarly harmed when its executive officials may not even speak about those laws. *See Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208-09 (Tex. 1981).

Indeed, "issuing guidance" to county election officials is a core part of the Attorney General's job. *See* Tex. Gov't Code §§ 402.042-.043. And his speech, like the speech of the Governor and Texas's other elected officials, is protected by the First Amendment. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 443 (2015) (holding that an elected official's speech "about public issues . . . commands the highest level of First Amendment protection"). The trial court's injunction threatens not only the State's sovereign interests, but the constitutional rights of executive officers. *See id.* That is irreparable injury. *Iranian Muslim Org.*, 615 S.W.2d at 208-09.

As set out in more detail in the accompanying mandamus petition, the State expects to hold an election on July 14, less than two months from today. And the general election is not far behind. The Court should not allow the State's executive officials to be gagged leading up to those dates.

**C.** Finally, the injunction's vast overbreadth adds to the prejudice it inflicts. The temporary injunction's targets include the State of Texas and all its "agents, servants, employees, representatives, and all persons or entities of any type whatsoever acting [in] concert with [it] or acting on [its] behalf." MR.0212. That encompasses thousands of State officers and employees. And the trial court insists that these individuals are bound not only in Travis County—where this lawsuit arose—but every county in the State. That breadth alone requires a stay and, ultimately, vacatur. *See In re Abbott*, 954 F.3d 772, 786 n.19 (5th Cir. 2020).

The injunction's terms are themselves overbroad. Any injunction must be "specific in terms" and "describe in reasonable detail . . . the act or acts sought to be restrained." Tex. R. Civ. P. 683. And equitable principles hold that relief cannot be broader than necessary to remedy the injury alleged. *See, e.g.*, *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 620 (5th Cir. 2013). The injunction says that the State (and all its agents) are "enjoined from *issuing guidance* or otherwise *taking actions* . . . that would" "prohibit Counties" from issuing or counting mail ballots or "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." MR.0212. The phrase "taking actions" is so vague as to be almost limitless. Indeed, if read literally, it could prohibit any state official from seeking redress from this

Court. The State should not be forced to guess what the trial court meant under penalty of contempt.

## Prayer

The Court should grant this motion and stay the Fourteenth Court of Appeals' May 14, 2020, temporary relief order pending the Court's resolution of the State's petition for writ of mandamus.

Respectfully submitted.


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## Certificate of Conference

Pursuant to Texas Rule of Appellate Procedure 52.10(a), I certify that counsel for relator notified Chad Dunn, lead counsel for Real Party in Interest Plaintiffs, and Joaquin Gonzalez, lead counsel for Real Party in Interest Plaintiff-Intervenors, as well as Leslie Dippel, counsel for Dana Debeauvoir, that Relator's motion for emergency relief would be filed today. Counsel stated that the Real Parties in Interest oppose the temporary stay requested by Relator.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

## Certificate of Service

On May 15, 2020, this document was served electronically on Chad Dunn, lead counsel for Real Party in Interest Plaintiffs, via chad@brazillanddunn.com; on Joaquin Gonzalez, lead counsel for Real Party in Interest Plaintiff-Intervenors, via Joaquin@texascivilrightsproject.org; and on Leslie Dippel, lead counsel for Real Party in Interest Dana DeBeauvoir via Leslie.Dippel@traviscountytx.gov.

/s/ Kyle D. Hawkins
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/s/ Kyle D. Hawkins
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