

No. 20-0729

IN THE SUPREME COURT OF TEXAS

THE STATE OF TEXAS,
PETITIONER,

v.

CHRIS HOLLINS,
In His Official Capacity As Harris County Clerk,
RESPONDENT.

ON PETITION FOR REVIEW FROM THE
FOURTEENTH COURT OF APPEALS

**BRIEF OF THE DISTRICT OF COLUMBIA AND THE STATES OF
CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS,
MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA,
NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT,
AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF
DEFENDANT-RESPONDENT**

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STATEMENT OF INTEREST OF AMICI CURIAE

The District of Columbia and the States of California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, Vermont, and Virginia (collectively, “Amici States”) submit this brief as amici curiae in support of Harris County Clerk Chris Hollins. He plans to exercise his authority to “manage[]” and “conduct” mail-in voting by sending vote-by-mail applications to registered voters in Harris County. Tex. Elec. Code § 32.071; *see id.* §§ 83.001(c); 83.002(1). While “states generally play the primary decisionmaking role” in conducting elections, “the day-to-day implementation of election administration policy is still mostly handled by localities.” Karen L. Shanton, Cong. Rsch. Serv., R45549, *The State and Local Role in Election Administration: Duties and Structures* 7 (Mar. 4, 2019).¹ Indeed, States rely on local election officials to reasonably and diligently aid voters. As a result, there is considerable variation in election processes in jurisdictions across the country, and local election officials often bear responsibility for ensuring seamless election administration. Allowing them to do so—within the realm of reason, and as permitted by law—relieves States of the burden of micromanaging the franchise.

In response to the COVID-19 pandemic, Hollins announced that he would send vote-by-mail applications to all registered voters in Harris County ahead of the

¹ Available at <https://fas.org/sgp/crs/misc/R45549.pdf>.

November election. *Texas v. Hollins*, No. 14-20-627-cv, 2020 WL 5584127, at *1 (Tex. App. Sept. 18, 2020). Hollins’s draft mailer contained information about the eligibility criteria for voting by mail, instructions on how to vote by mail, and an application. *Id.* at *2. The State of Texas filed this lawsuit seeking to enjoin implementation of Hollins’s plan.

Like Harris, the Amici States have a powerful interest in maintaining their ability to respond to the coronavirus pandemic according to the needs of their residents. That includes adopting common-sense procedures tailored to their jurisdictions to prevent serious disruptions in the administration of the November election. Amici States, moreover, have a strong interest in protecting the ability of their local election officials to exercise their delegated authority in implementing States’ directives. For the machinery of democratic self-governance to function during emergencies like the coronavirus pandemic, states and localities *both* require flexibility to perform their assigned duties. Texas’s attempt to prevent voter outreach threatens Amici States’ critical—and sovereign—interest in making their democracies work.

ARGUMENT

I. Local Election Officials And States Require Flexibility To Ensure That Residents Can Vote Safely Amid The Ongoing Public Health Emergency.

Under our constitutional system, “States have a major role to play in structuring and monitoring the election process.” *Cal. Democratic Party v. Jones*,

530 U.S. 567, 572 (2000). But states cannot fulfill that role alone. To make democratic self-governance possible, states “vest considerable authority in localities to carry out basic tasks.” Heather K. Gerken, *The Democracy Index* 20 (2009). Hollins’s proposal to mail ballot applications to registered Harris County voters is consistent both with his assigned duties and similar policies adopted by state and local election administrators across the United States.

A. Both states and local administrators like Hollins need authority to tailor local elections in response to local conditions.

Our “hyperfederalized” system, where localities bear the responsibility to administer the nuts and bolts of elections, exists by design. Alec C. Ewald, *The Way We Vote: The Local Dimension of American Suffrage* 9 (2009). As Alexander Hamilton wrote at the time of the founding, “the regulation of elections for the federal government” falls “in the first instance[] to the local administrations” which, he predicted, “may be both more convenient and more satisfactory.” *The Federalist* No. 59, at 362-63 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Local needs differ vastly both between and within states. Because “jurisdictions vary dramatically in terms of the size of the voting population they serve,” David C. Kimball & Brady Baybeck, *Are All Jurisdictions Equal? Size Disparity in Election Administration*, 12 Election L.J. 130, 130 (2013), two localities coordinating the same election may need to administer it in ways that are “[w]orlds apart,” Nat’l Conf. of State Legis., *Worlds Apart: Urban and Rural Voting*, The Canvass 2-3 (Oct.

2014).² Although states often exercise their sovereign prerogative to prescribe voting procedures for all residents, crafting rules well-suited to every context can be challenging as states face a “one size does not fit all problem.” Presidential Comm’n on Election Admin., *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 9 (Jan. 2014) (internal quotation marks omitted).³ For elections to function smoothly, states *and* local election officials like Hollins require flexibility to make context-specific judgments tailored to local conditions. *See* Justin Weinstein-Tull, *Election Law Federalism*, 114 Mich. L. Rev. 747, 798 (2016).

Moreover, states benefit from the ability to delegate election implementation measures to local officials—as Texas plainly did here by giving Hollins the responsibility “for the management and conduct of” early voting under Texas Election Code Sections 32.071 and 83.001(a). If this Court required the state to do more to grant local officials authority—for example, by specifying every task they may undertake in detail—and that logic were applied more broadly, states would be overburdened and local officials would lose the flexibility they reasonably require. Such a mandate would undercut both state and local interests.

² Available at https://www.ncsl.org/Documents/legismgt/elect/Canvass_Oct_2014_No_52.pdf.

³ Available at https://www.eac.gov/sites/default/files/eac_assets/1/6/Amer-Voting-Exper-final-draft-01-09-14-508.pdf.

B. Numerous state and local election officials have reasonably implemented plans like Hollins’s.

Flexibility is essential in the run-up to any electoral contest, but it is particularly critical now during the COVID-19 pandemic. Despite the public health emergency, election experts “predict a high turnout in November” when “[a]s much as 70% of the 240 [million]-strong electorate is expected to vote.” *Covid-19 and An Atmosphere of Distrust Pose Grave Risks to America’s Election*, *The Economist* (Sept. 3, 2020).⁴ Election officials thus face the unique challenge of overseeing the democratic process while preventing transmission of the novel coronavirus. The effects of COVID-19, however, have varied significantly in both severity and timing for each state—and for each county. *See, e.g.*, W. Messner & S.E. Payson, *Variation in COVID-19 Outbreaks at the US State and County Levels*, 187 *Pub. Health* 15, 15 (2020) (noting that, as factors such as “biological determinants, demographic profiles, type of habitat, and socio-economic characteristics” vary across the United States, “there is likely to be considerable intra-country variation in the outbreak as well”). Given the disruption caused by COVID-19, 49% of registered voters expect to face difficulties casting a ballot this fall. *Pew Rsch. Ctr., Election 2020: Voters*

⁴ Available at <https://www.economist.com/briefing/2020/09/03/covid-19-and-an-atmosphere-of-distrust-pose-grave-risks-to-americas-election>.

Are Highly Engaged, but Nearly Half Expect to Have Difficulties Voting (Aug. 13, 2020).⁵

Confronted with this unprecedented challenge, states and localities have taken reasonable, context-specific steps to ensure that the pandemic will not disrupt their residents' ability to safely exercise their fundamental right to vote. Chief among these are forms of affirmative voter outreach, like Hollins's plan.

Some states, including Connecticut, Delaware, Illinois, Iowa, Maryland, Massachusetts, Minnesota, Nebraska, Wisconsin, and some counties in New Mexico will—like Hollins—mail applications for absentee ballots for the November election to all registered voters. *See* Conn. Off. of the Sec'y of the State, *Connecticut's Absentee Ballot Process*;⁶ H.B. 346, 150th Gen. Assemb. § 3 (Del. 2020); S.B. 1863, 101st Gen. Assemb. § 10 (Ill. 2020); Stephen Gruber-Miller, *Iowa Secretary of State Will Mail Ballot Request Forms to All Voters Before Fall Election*, Des Moines Reg. (July 17, 2020);⁷ Letter from Larry Hogan, Governor of Md., to Michael R. Cogan,

⁵ Available at <https://www.pewresearch.org/politics/2020/08/13/election-2020-voters-are-highly-engaged-but-nearly-half-expect-to-have-difficulties-voting>.

⁶ Available at <https://portal.ct.gov/SOTS/Election-Services/Voter-Information/Absentee-Ballot-Process> (last visited Sept. 23, 2020).

⁷ Available at <https://www.desmoinesregister.com/story/news/politics/2020/07/17/iowa-secretary-state-paul-pate-mail-absentee-ballot-request-form-registered-voters-covid-19-pandemic/5458727002/>.

Chairman, State Bd. of Elections (July 8, 2020);⁸ 2020 Mass. Stat. ch. 115, § 6(d)(1)-(2); Press Release, Off. of the Minn. Sec’y of State, *Secretary Simon Announces Statewide Mailing to Encourage Vote from Home* (Sept. 16, 2020);⁹ *All Nebraska Voters to Receive Early Ballot Request Application*, 1011 NOW (Aug. 19, 2020);¹⁰ Morgan Lee, *New Mexico Pushes Forward with Emergency Voting Reforms*, ABC News (Aug. 18, 2020);¹¹ Edward Fitzpatrick, *Rhode Island Will Send Mail Ballot Applications to All Voters for the Nov. 3 Election*, Boston Globe (Sept. 11, 2020);¹² Press Release, Wis. Elections Comm’n, *Wisconsin Voting Deadlines and Facts for November 2020*, at 2 (Aug. 20, 2020).¹³ Other jurisdictions, such as California, the District of Columbia, Nevada, New Jersey, and Vermont, plan to mail ballots for the

⁸ Available at https://governor.maryland.gov/wp-content/uploads/2020/07/Letter-to-SBE_November-Election.pdf.

⁹ Available at <https://www.sos.state.mn.us/about-the-office/news-room/secretary-simon-announces-statewide-mailing-to-encourage-vote-from-home>.

¹⁰ Available at <https://www.1011now.com/2020/08/19/nebraska-voters-to-receive-early-ballot-request-application>.

¹¹ Available at <https://abcnews.go.com/Health/wireStory/mexico-pushes-forward-emergency-voting-reforms-72455283>.

¹² Available at <https://www.bostonglobe.com/2020/09/11/metro/rhode-island-will-send-mail-ballot-applications-all-voters-nov-3-election/>.

¹³ Available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-08/NR%20Elections%20-%20Absentee%20Voting%20Facts%20for%20November%202020%2008-20-20.pdf>.

2020 general election to all active registered voters.¹⁴ See A.B. 860, 2019-2020 Reg. Sess. § 2 (Cal. 2020); D.C. Bd. of Elections, *Vote Safe DC*;¹⁵ A.B. 4, 80th Leg., 32nd Special Sess. §§ 15-16 (Nev. 2020); A.B. 4475, 2020-2021 Reg. Sess. § 2 (N.J. 2020); Vt. Off. of the Sec’y of State, First Statewide Elections Directive (July 20, 2020).¹⁶ And several are exploring new, innovative ways to keep voters informed amid the uncertainty of the pandemic: the District of Columbia has launched a multi-platform public awareness campaign; Massachusetts has authorized localities to use a “ - ” call to inform residents of polling place changes; and Ohio has turned to YouTube to reach voters. See Press Release, D.C. Bd. of Elections, *DC Board of Elections Kicks off Vote Safe DC Campaign* (May 11, 2020);¹⁷ 2020 Mass. Stat. ch. 45, § 1(b); Ohio Sec’y of State, *Ohio is Voting by Mail*, YouTube (Apr. 8, 2020).¹⁸

¹⁴ These states are in addition to those that have mailed ballots to voters in prior elections and will do so for the November election, including Colorado, Hawaii, Oregon, Utah, and Washington. Nat’l Conf. of State Legis., *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options* (Sept. 21, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

¹⁵ Available at <https://www.dcboe.org> (last visited Sept. 22, 2020).

¹⁶ Available at <https://sos.vermont.gov/media/hxgjjdkb/secretary-of-state-s-first-2020-statewide-election-procedures-directive.pdf>.

¹⁷ Available at <https://www.dcboe.org/CMSPages/GetFile.aspx?guid=31e9a569-e949-4e21-85a6-e460794f8499>.

¹⁸ Available at <https://www.youtube.com/watch?v=gYliBlyROxo&feature=youtu.be>.

Altogether, these numerous measures reflect the considered judgment of states and localities seeking to preserve their residents' access to the franchise while protecting the health and safety of their communities in the face of a global pandemic. Indeed, jurisdictions across the political spectrum have adopted such policies, underscoring the reasonableness of conducting voter outreach through mail during a public health crisis. *See* May Wong, *New Research on Voting by Mail Shows Neutral Partisan Effects*, Stan. Inst. for Econ. Pol'y Res. (Apr. 16, 2020).¹⁹ Far from constituting partisan, *ultra vires* overreach, Hollins's comparatively modest plan is precisely the sort of common-sense response election officials are implementing across the country.

II. There Is No Evidence That Providing Applications To Vote By Mail Will Result In Widespread Fraud.

The trial court did not abuse its discretion in denying the motion for a temporary injunction because Texas failed to establish that it will suffer “a probable, imminent, and irreparable injury” absent such an injunction. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). Texas alleges that Hollins's plan will confuse voters about their eligibility to vote by mail and thereby induce them to commit voter fraud. Texas Br. 29. However, courts have rejected similar claims as overly speculative, and the experiences of states that have conducted previous elections by

¹⁹ Available at <https://siepr.stanford.edu/news/new-research-voting-mail-shows-neutral-partisan-effects>.

mail reveal no evidence that expanding access to mail-in voting results in widespread fraud. Indeed, the likelihood of fraud is particularly low in this case, where Hollins plans to mail only applications, not actual ballots, to registered voters.

A. Other courts have rejected similar claims of potential fraud as overly speculative.

Courts in other jurisdictions have rejected claims premised on anticipated voter fraud as being insufficiently concrete or overly speculative. For example, some courts have found that plaintiffs lacked standing to challenge plans to expand access to voting by mail because they failed to establish concrete and particularized injuries. *See, e.g., Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-cv-1445, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) (finding that plaintiffs lacked standing to challenge a Nevada law directing election officials to mail ballots to all active registered voters for the general election because their “alleged injury of vote dilution [was] impermissibly generalized and speculative” (internal quotation marks omitted)); *Martel v. Condos*, No. 5:20-cv-131, ECF No. 15 at 10 (D. Vt. Sept. 16, 2020) (finding that plaintiffs lacked standing to challenge the Vermont Secretary of State’s plan to mail ballots to all registered voters for the general election because they had not suffered a cognizable injury); *see also Paher v. Cegavske*, No. 3:20-cv-243, 2020 WL 2089813, at *5 (D. Nev. Apr. 30, 2020) (finding that plaintiffs lacked standing to challenge the Nevada Secretary of State’s plan to mail absentee ballots to all active registered voters for the primary election

because their “purported injury of having their votes diluted due to ostensible election fraud” was not “concrete” or “particularized”).

Other courts, like the trial court here, have determined that plaintiffs challenging the expanded use of mail-in ballots were not entitled to preliminary injunctive relief because they failed to establish irreparable harm. *See, e.g., Cook Cnty. Republican Party v. Pritzker*, No. 20-cv-4676, 2020 WL 5573059, at *5 (N.D. Ill. Sept. 17, 2020) (finding that plaintiff was not entitled to preliminary injunction because its claim that Illinois’s expansion of voting by mail would increase voter fraud and thereby dilute the Republican vote was entirely “speculative”). Given that Hollins plans to mail only *applications* for mail-in ballots, not actual ballots, to Harris County voters, Texas’s alleged injury is even more speculative in comparison.

B. States that previously have provided mail-in ballots have not experienced widespread voter fraud.

These recent decisions are consistent with evidence that expanding access to mail-in ballots does not invite rampant voter fraud. Five states—Colorado, Hawaii, Oregon, Utah, and Washington—already have all-mail voting systems, in which “every registered voter receives a ballot in the mail.” Nat’l Conf. of State Legis., *Elections Go to Court*, The Canvass (Sept. 2020).²⁰ None of these states has encountered widespread voter fraud since shifting to mail-in ballots. Wendy R.

²⁰ Available at <https://www.ncsl.org/research/elections-and-campaigns/the-canvass-september-2020.aspx>.

Weiser & Harold Ekeh, *The False Narrative of Vote-by-Mail Fraud*, Brennan Ctr. for Just. (Apr. 10, 2020).²¹

For example, Oregon, the first state to adopt all-mail voting, “has sent out more than 100 million mail-in ballots since 2000, and has documented only about a dozen cases of proven fraud.” Ed. Bd., *The 2020 Election Won’t Look Like Any We’ve Seen Before*, N.Y. Times (Mar. 21, 2020).²² Similarly, Washington State announced that, out of 3.1 million votes cast in 2018, it had referred 142 cases, or 0.004 percent, to local election officials on suspicion of improper voting. Elise Viebeck, *Miniscule Number of Potentially Fraudulent Ballots in States with Universal Mail Voting Undercuts Trump Claims About Election Risks*, Wash. Post (June 8, 2020).²³ A Washington Post analysis of data collected by Colorado, Oregon, and Washington identified only 372 “possible cases of double voting or voting on behalf of deceased people out of about 14.6 million votes cast by mail in the 2016 and 2018 general elections.” *Id.* That amounts to a rate of just 0.0025 percent. *Id.* In the same way, data collected by the Heritage Foundation from the five states with

²¹ Available at <https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud>.

²² Available at <https://www.nytimes.com/2020/03/21/opinion/sunday/coronavirus-vote-mail.html>.

²³ Available at https://www.washingtonpost.com/politics/minuscule-number-of-potentially-fraudulent-ballots-in-states-with-universal-mail-voting-undercuts-trump-claims-about-election-risks/2020/06/08/1e78aa26-a5c5-11ea-bb20-ebf0921f3bbd_story.html.

universal voting by mail found only 29 cases of fraudulent votes attempted by mail and 24 cases of duplicative voting or absentee ballot fraud out of nearly *50 million* general election votes cast between 1982 and 2019. Elaine Kamarck & Christine Stenglein, *Low Rates of Fraud in Vote-by-Mail States Show the Benefits Outweigh the Risks*, Brookings (June 2, 2020) (reproducing data from the Heritage Foundation’s database).²⁴ This evidence illustrates that, contrary to plaintiff’s speculations, fraudulent voting by mail as a general matter is extremely rare.

C. The likelihood of fraud is especially remote in this case because Hollins plans to mail voters only applications, not actual ballots.

Given that there is no evidence that states that send mail-in ballots to all registered voters experience significant voter fraud, Texas’s claim that sending mere *applications* to vote by mail will induce fraud is all the more speculative. In this case, Hollins plans to send registered Harris County voters a mailer featuring red sirens and bold, red lettering instructing the voter to read the directions before applying for a mail ballot. *Hollins*, 2020 WL 5584127, at *2. The mailer outlines the categories of voters who are eligible to vote by mail, clarifying—again, in bold, red lettering—that fear of contracting COVID-19 by itself is not sufficient to qualify

²⁴ Available at <https://www.brookings.edu/blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risk>. The Heritage Foundation notes that its database is not “exhaustive or comprehensive.” Heritage Found., *A Sampling of Recent Election Fraud Cases from Across the United States*, <https://www.heritage.org/voterfraud/#choose-a-state> (last visited Sept. 24, 2020).

to vote by mail. *Id.* Keith Ingram, the Director of Elections for the Texas Secretary of State, conceded that “for most voters,” the information contained in the mailer was “sufficient” to determine whether they are eligible to apply for a mail-in ballot. *Id.* at *4 (internal quotation marks omitted). Thus, for Texas’s fear to be realized, a voter would have to disregard the explicit instructions on the mailer and submit an application *knowing* that he is ineligible to vote by mail in order to commit a crime. Tex. Elec. Code § 84.0041(a)(1) (making it a felony for a person to “knowingly provide[] false information on an application for ballot by mail”). This chain of events is simply too attenuated to establish that Texas is likely to suffer irreparable harm absent a temporary injunction.

Nor is there any reason to believe that Texas residents are more likely to engage in voter fraud than residents of other states. Data collected by the Heritage Foundation indicates that between 2005 and 2019, Texas documented only 35 cases of voter fraud involving the fraudulent use of absentee ballots, 17 of which resulted in criminal convictions. Heritage Found., *supra*.²⁵ As a result, the court of appeals properly concluded that Texas’s alleged injury is “at best speculative” and that a temporary injunction is not warranted. *Hollins*, 2020 WL 5584127, at *4.

²⁵ Select “Texas” from Refine by State dropdown and select “Fraudulent Use of Absentee Ballots” from Refine by Type of fraud dropdown.

PRAYER

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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I certify that on September 25, 2020, this brief was served electronically on Kyle Hawkins, lead counsel for the appellant, via kyle.hawkins@oag.texas.gov, and Susan Hays, lead counsel for the appellee, via hayslaw@me.com.

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I further certify that this brief complies with the type-volume limitation in Texas Rule of Appellate Procedure 9.4(i)(2)(B) because Microsoft Word reports that it contains 3,026 words, excluding exempted parts.

/s/ Emma Lomax
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