

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

TEXAS DEMOCRATIC PARTY, GILBERTO §
HINOJOSA, Chair of the Texas Democratic §
Party, JOSEPH DANIEL CASCINO, §
SHANDA MARIE SANSING, and §
BRENDA LI GARCIA §
Plaintiff, §

v. §

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

CIVIL ACTION NO.
5: 20-CV-00438-FB

**MEMORANDUM OF THE MEXICAN AMERICAN LEGISLATIVE
CAUCUS, TEXAS HOUSE OF REPRESENTATIVES AS AMICI
CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

INTRODUCTION

Amici is an official legislative caucuses of the Texas Legislature.

The Mexican American Legislative Caucus (MALC) was founded in 1973 in the Texas House of Representatives by a small group of lawmakers of Mexican American heritage for the purpose of strengthening their numbers and better representing a united Latino constituency across the state. MALC is the oldest and largest Latino legislative caucus in the United States. MALC and its members have sponsored and supported legislation that encourages voting and offers fair and equal opportunities to participate in the electoral process and has opposed the adoption of legislation that limits and suppresses the right to vote.

Purpose and Relevance of Amici Curiae Brief

The proposed amicus brief focuses on the substantial evidence of discriminatory impact of the State's mail ballot restrictions and therefore, the likelihood of success on Plaintiffs' claims as a result and on the irreparable injury likely to be felt by Texas voters as evidenced by the threats of the Texas Attorney General of criminal prosecutions on voters and third parties. The evidence and facts on these issues is relevant in the evaluation of the preliminary injunction standards, and weighs in favor of granting the injunction sought by Plaintiffs.

All of the parties have consented via email to the filing of this amicus brief in support of the Plaintiffs' Motion for Preliminary Injunction.

THEREFORE, the Mexican American Legislative Caucus prays that this Court allow and consider this amicus curiae brief in support of the Plaintiffs Preliminary Injunction Motion.

STANDARD OF REVIEW

To support a preliminary injunction, a party seeking a preliminary injunction must establish that: he is likely to succeed on the merits; that he is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his favor; and that an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

This brief will focus on the two of these factors: likelihood of success; and irreparable harm.

A. Plaintiffs Are Likely to Succeed on the Merits.

The first of the *Winter* factors asks whether the Plaintiffs are likely to succeed on the merits of their claims. Here the Plaintiffs have raised an array of claims upon which their lawsuit is grounded and upon which they are likely to succeed. Among them is the claim that

the manner in which the State of Texas has, through its Attorney General, has chosen to enforce the mail in ballot provisions makes the challenged provisions void for vagueness. *See* Dkt. 10, pp. 22-25. (Plaintiff’s Motion for Preliminary Injunction). Plaintiffs also assert that the interpretation of the mail ballot statutes by the Attorney General has a discriminatory impact on Plaintiffs and minority voters. *Id.* Plaintiffs are likely to succeed on these claims.

1. A plain reading of the Statute allows for mail voting from fear of the COVID 19.

Texas law sets out the rules for construing the meaning of state statutes. In analyzing a statute, a court must discern the meaning of the policy, and the focus must be exclusively or at least primarily on the words used. *See Boykin v. State*, 818 S.W.2d 782, 785–86 (Tex. Crim. App. 1991) (en banc). The principal rule of statutory construction is that the judiciary is to give effect to the intent of the legislature. *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999). Those specific, unambiguous provisions in the statute are the current law and should not be construed by a court to mean something other than what the plain words say unless there is an obvious error such as a typographical error that resulted in the omission of a word or absurdity. *See City of Amarillo v. Martin*, 971 S.W.2d 426, 428 n.1 (Tex. 1998); *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 135 (Tex. 1994) (Hecht, J., concurring). The court must declare and enforce the law as made by the legislature without regard to the policy or wisdom thereof or the disastrous or mischievous result it may entail. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). If the statute is clear and unambiguous, extrinsic aids and canons of construction are inappropriate, and the statute should be given its common, everyday meaning.

Similarly, under federal law, the United States Supreme Court has determined that in all statutory construction cases, courts should begin with the language of the statute. The first step “is

to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.” *Robinson v. Shell Oil Co.*, 519 U. S. 337, 340 (1997) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)). The inquiry ceases “if the **statutory** language is unambiguous and ‘the **statutory** scheme is coherent and consistent.’ ” 519 U. S., at 340.

Texas law allows voting by mail for registered voters who meet one of the qualifications stated in the Election Code. *See* Tex. Elec. Code Ch. 82. A voter is qualified to vote by mail if he (1) anticipates being absent from his county of residence on election day; (2) has an illness or other physical condition that disables him from appearing at the polling place; (3) is 65 or older; or (4) is confined in jail. Tex. Elec. Code §§ 82.001-4.

The critical language here is: “(2) has an illness **or other physical condition** that disables him from appearing at the polling place”. (emphasis added). Read together with the election codes definition of “disability” makes the language clear. The definition of disability is a straightforward legal provision with obvious, unambiguous legislative intent: “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 (a). There are two operative parts to this definition. First, the voter must have “a sickness or physical condition”. Secondly, this condition or illness must prevent the voter from appearing at the polling place without needing personal assistance **or injuring the voter’s health**.

The State District Court in Austin, Texas found: “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.” Exhibit 4 to Dkt 10, (Plaintiff’s Preliminary Injunction

Motion, Exhibit 4, Temporary Injunction Order, p. 3).

2. The Texas Attorney General's interpretation of the mail ballot provisions makes the Texas law vague.

The Texas Attorney General has, contrary to the plain language of the statute and in spite of the Travis County District Court's Order, declared that such a reading of Texas law was unlawful **and criminal**. See Dkt. 10, pp. 23-24 (Plaintiff's Motion for Preliminary Injunction).

General Paxton is the chief law enforcement officer of the Texas Election Code provisions. His prosecutions and threats of prosecutions of alleged violations of those provisions present a real dilemma and create vagueness about what these statutes mean.

Therefore, it is likely that Plaintiffs will prevail on their claims.

3. The Texas Attorney General's interpretation of the mail ballot provisions discriminates against Latinos in violation of Section 2 of the Voting Rights Act.

The Plaintiffs also assert: "In the pandemic circumstances, General Paxton's interpretation of the vote by mail statutes results in racially discriminatory effects on racial minority's right to vote by decreasing turnout of racial minorities and increasing the percentage of the electorate that is Anglo." Dkt. 10, p. 30 (Plaintiffs' Motion for Preliminary Injunction).

The facts of this case show that Plaintiffs will succeed on this claim as well.

While the Plaintiffs frame this claim as a 14th Amendment claim, the claim implicates Section 2 of the Voting Rights Act.

Section 2 prohibits states or their political subdivisions from enacting voting standards, practices, and procedures "which result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301 (a). A violation of § 2 is established if, "based on the totality of circumstances," the challenged electoral process is "not equally open to participation by members of a [racial minority group] in that its members

have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 52 U.S.C. § 10301 (b). “The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and [majority] voters to elect their preferred representatives.” *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986); *see also Allen v. State Bd. of Elections* 393 U. S. 544, 566-67 (1969) (holding the language “voting qualifications or prerequisite to voting, or standard, practice, or procedure” was employed in § 2 in order to be “all-inclusive of any kind of practice” that might be used to deny citizens the right to vote).

Here the data is clear.

As General Paxton has interpreted and intends to enforce the mail provisions of the election code persons between the ages of 18 and 64 will not have the same access to vote by mail as will those over the age of 64.

In Texas, elections are, even today polarized along racial and ethnic lines. *See Perez v. Abbott*, 250 F. Supp. 3d 123, 146, 154, 164, 174 (W.D. Tex. 2017)(“Defendants stipulated during trial that racially polarized voting exists throughout Texas, other than in Nueces and Kleberg Counties”).

More to the point, as detailed in Plaintiffs’ Motion for Preliminary Injunction, limiting the availability of mail ballots to those younger than 65 years of age, disproportionately impacts voters of color. *See* Dkt. 10, pp. 12-13. Latinos are a younger population generally. So while Latinos are 39.6 compared to Anglos at 41.5%, of the general population, elderly Anglos outnumber elderly Latinos 3 to 1 and outnumber elderly African Americans 7 to 1.

Coupled with a long history of discrimination in voting and the lingering effects of that

discrimination as manifest in lower educational and socio-economic achievement, it is likely that Plaintiffs will also succeed on the merits of their claim that General Paxton's interpretation of Texas vote by mail laws will discriminate against minority voters in violation of the fourteenth amendment and Section 2 of the Voting Rights Act.

B. Plaintiffs Will Suffer Irreparable Injury

A state court agreed with the Plaintiffs and declared that because of the pandemic all voters were eligible to vote by mail. General Paxton declared that this was unlawful and criminal. Without injunctive relief, Plaintiffs will suffer irreparable harm because they will be forced to choose between voting and risking their health or their family's wellbeing. The State of Texas believes that allowing otherwise healthy voters to vote by mail because of the risk of transmission of COVID-19 is illegal. The "Hobson's Choice" offered by the Defendants is exactly that, no choice at all. Clearly, without this Court's intervention, Plaintiffs and voters across Texas will be irreparably injured.

As noted in one of Thomas Jefferson's historic truisms: "We do not have government by the majority. We have government by the majority who participate." The State Defendants efforts to limit those who can participate is of grave concern to MALC. Therefore, MALC offers this memorandum of law and facts to assist the court in its review of the request before it. MALC asks that Plaintiffs' Motion for Preliminary Injunction be granted.

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Respectfully submitted,

/s/ Jose Garza
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