



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 12, 2020

To: County Judges and County Election Officials

Re: Ballot by Mail Based on Disability

I write to update you on recent decisions by the Texas Supreme Court and the U.S. Court of Appeals for the Fifth Circuit supporting previous guidance by the Office of Attorney General concerning the meaning of “disability” in Texas’s ballot-by-mail statute. First, on May 27, 2020, the Texas Supreme Court held that a voter may not claim a “disability” for the purpose of casting a ballot by mail merely because the voter lacks immunity to COVID-19. Second, on June 4, 2020, the Fifth Circuit found that the State likely would prevail on its argument that the Election Code’s ballot-by-mail provisions are consistent with the Equal Protection Clause and the Twenty-Sixth Amendment to the United States Constitution. Following these decisions, on June 9, 2020, the Texas Democratic Party and other groups and plaintiffs moved to dismiss their state court lawsuit.

Consistent with those decisions and this Office’s prior guidance, public officials shall not advise voters who lack a qualifying sickness or physical condition to vote by mail in response to COVID-19 based on disability status. Moreover, to the extent third parties advise voters to apply for a ballot by mail for reasons not authorized by the Election Code, those third parties could be subject to criminal sanctions.

Discussion

On May 1, 2020, this Office provided guidance to public officials to correct misconceptions about the availability of ballots by mail in light of the COVID-19 epidemic.¹ Inaccurate statements by public officials and private groups, as well as misreporting by the media, incorrectly informed voters that anyone who wished to avoid in-person voting because of fear of contracting COVID-19 could claim disability status and receive a ballot by mail regardless of whether that voter would need personal assistance to vote in-person or risk injuring their health because of a sickness or physical condition. This Office advised that based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code for purposes of receiving a ballot by mail.²

¹ See Letter from Attorney General Paxton to County Judges and County Election Officials (May 1, 2020), available at <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-advises-county-officials-avoid-misleading-public-vote-mail-laws>

² See TEX. ELEC. CODE § 82.002(a).

Two recent court decisions uphold and support that guidance. The first decision, issued by the Texas Supreme Court, echoed the interpretation of “disability” set forth in the guidance.³ The Court concluded that “a lack of immunity to COVID-19 is not itself a ‘physical condition’ for being eligible to vote by mail within the meaning of § 82.002(a).”⁴ The Court observed that the Texas Legislature “has very deliberately limited voting by mail to voters in specific, defined categories,” including those “who have a ‘disability.’”⁵ The Court noted that the parties agreed that “disability,” which covers those with a “sickness or physical condition preventing in-person voting without a likelihood of harm to the voter’s health,” “excludes mental or emotional states, including a generalized fear of a disease.”⁶ Turning to the dictionary, the Court found that the term “physical condition” includes an “abnormal or at least distinguishing state of being.”⁷ The Court continued: “A lack of immunity to COVID-19, though certainly physical, is not an abnormal or distinguishing condition.”⁸

The Texas Supreme Court’s ruling ended any dispute about whether lack of immunity to COVID-19 or a resulting fear of contracting the virus constitutes a “disability” under the Election Code. Recognizing that fact, the Texas Democratic Party and other challengers moved to dismiss their state-court lawsuit on June 9, 2020.

Following the Texas Supreme Court’s ruling, the U.S. Court of Appeals for the Fifth Circuit addressed and rejected constitutional challenges to the Texas ballot-by-mail statute. The Fifth Circuit stayed the order of a federal district court, finding that the State of Texas likely would prevail on its argument that the Election Code’s mail-in ballot provisions are consistent with the United States Constitution. The Fifth Circuit held that the emergence of COVID-19 “has not suddenly obligated Texas to do what the Constitution has never been interpreted to command, which is to give everyone the right to vote by mail.”⁹ Moreover, the Court observed that “[b]ecause the Texas Supreme Court has interpreted ‘disability’ not to include lack of immunity to [COVID-19], it is a crime to encourage voters to indicate that they are disabled merely because they lack immunity.”¹⁰

Conclusion

Taken together, these court decisions solidify this Office’s prior guidance that a ballot by mail is not available based purely on lack of immunity to COVID-19 or based on a desire to engage in social distancing to avoid exposure to the virus. Furthermore, we reiterate our prior guidance that to the extent third parties advise voters to apply for a ballot by mail for reasons not authorized by the Election Code, including fear of contracting COVID-19 without an accompanying

³ The Fifth Circuit found that this Office’s interpretation of “disability” “now has been vindicated by the state’s highest court.” *Tex. Democratic Party v. Abbott*, --- F.3d ----, 2020 WL 2982937, at *15 (5th Cir. June 4, 2020).

⁴ *In re State*, --- S.W.3d ----, 2020 WL 2759629, at *10 (Tex. May 27, 2020).

⁵ *Id.* at *9.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* The Court did not issue a writ of mandamus against the five county officials involved in the lawsuit because it was “[c]onfident that elections officials will comply” with its opinion concerning the meaning of “disability” in in section 82.002. *Id.* at *11.

⁹ *Tex. Democratic Party*, 2020 WL 2982937, at *14.

¹⁰ *Id.* at *15.

qualifying disability, such activity could subject those third parties to criminal sanctions imposed by the Texas Election Code.¹¹ Consistent with that guidance, the Texas Supreme Court observed that the “decision to apply to vote by mail based on a disability is the voter’s, *subject to a correct understanding of the statutory definition of ‘disability.’*”¹² Section 84.0041 of the Election Code prohibits any person from deliberately misleading a voter about the meaning of “disability”—such as by suggesting that a voter may merely “check the disability box” for any reason—and thereby causing the voter to submit false information on an application for ballot by mail. Similarly, Section 276.013 prohibits a person from causing a voter to obtain a ballot “under false pretenses,” or from causing an intentionally misleading statement on an application for ballot by mail. Of course, as we previously advised, whether specific activity constitutes an offense under these provisions will depend upon the facts and circumstances of each individual case.

Sincerely,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style with a large initial "K".

KEN PAXTON
Attorney General of Texas

¹¹ See TEX. ELEC. CODE § 84.0041 (providing that a person commits an offense if the person “intentionally causes false information to be provided on an application for ballot by mail”); *id.* § 276.013 (a person commits election fraud if the person knowingly or intentionally causes a ballot to be obtained under false pretenses, or a misleading statement to be provided on an application for ballot by mail).

¹² *In re State*, 2020 WL 2759629, at *10 (emphasis added).