No. ___

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

PETITION FOR WRIT OF MANDAMUS

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"App." refers to the appendix to this petition. "MR" refers to the mandamus record.

Statement of the Case

Nature and Course of the Underlying Proceeding: Plaintiffs sued the Travis County Clerk and Secretary of State seeking a declaration interpreting section 82.002 of the Election Code. Plaintiffs asserted that, due to the coronavirus outbreak, all Texas voters necessarily have a sickness or physical condition that disables them from voting at the polls during the 2020 election cycle. *E.g.*, MR.0154, 0172-73. They sought declaratory and injunctive relief compelling the Travis County Clerk to perform her duties consistent with their interpretation of the statute. MR.0155, 0187-88. They obtained a temporary injunction. App. Tab C. Within a half hour, the State filed a notice of appeal that automatically superseded the injunction. MR.0214. In the court of appeals, Appellees filed a "verified motion for emergency relief," arguing that the temporary injunction remained in force—despite the supersedeas—and alternatively asking the court to reinstate the temporary injunction under Texas Rule of Appellate Procedure 29.3 or 29.4. The State filed its opening brief on May 11. MR.0415-90.

Respondent: The Honorable Fourteenth Court of Appeals, Houston

Respondent's Challenged Action: The court of appeals rejected appellees' theory that the trial court's order remained in effect following the State's notice of appeal. *Cf.* App. Tab A (Poissant, J., joined by Zimmerer J.). But, relying on *TEA v. Houston ISD*, No. 03-20-00025-CV, 2020 WL 1966314, at *5 (Tex. App.—Austin Apr. 24, 2020, no pet. h.) (per curiam) (*HISD*), the court granted appellees a temporary order under Texas Rule of Appellate Procedure 29.3 allowing the injunction to go into force. *Id.* at 2 Chief Justice Frost dissented. App. Tab B The interlocutory appeal remains pending and is scheduled to be fully briefed by June 12. *See* No. 14-20-00358-CV, Order issued May 12, 2020. MR.513-14.

Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.002(a).

Issue Presented

The Texas Legislature has guaranteed the right of governmental appellants to supersede trial-court orders and judgments pending appeal. *See* Tex. Civ. Prac. & Rem. Code §§ 6.001(a)-(b); Tex. Gov't Code § 22.004(i). As the court of appeals panel unanimously recognized, Texas exercised that right by quickly filing a notice of interlocutory appeal. In the intervening four weeks, its officials have acted upon that supersedeas to ensure the integrity of Texas elections, including by issuing guidance to local election officials and seeking relief in this Court when that guidance was ignored.

The issue presented is whether the court of appeals' order allowing the trial court's temporary injunction to go into effect during the pendency of the interlocutory appeal, which denies the State its statutory right to supersedeas, is an abuse of discretion for which the State has no adequate remedy by appeal.

To the Honorable Supreme Court of Texas:

The Texas Legislature has guaranteed governmental appellants the right to supersede a trial court's order or judgment pending appeal except under limited circumstances not present here. This case shows why. Among the State's most profound interests is protecting the integrity of its elections. To advance that interest, the Texas Legislature requires almost every voter to vote by personal appearance at a designated polling place, where trained poll workers confirm the voter's identity before issuing him a ballot. The trial court, however, issued an order that effectively allowed all Texans to claim a disability based on fear of contracting COVID-19. The State immediately filed an accelerated interlocutory appeal, superseding that injunction.

The court of appeals reaffirmed that the State's notice of appeal superseded the trial court's order. But the court created the judicial equivalent of Schrödinger's cat by exercising its supposed inherent authority to order that the trial court's injunction go *into* effect on May 14, 2020. The court's ruling is not only wrong, but it will irreparably harm Texas's preparations for the fast-approaching July 14 elections. It further confuses the situation highlighted by the State in its petition for a writ of mandamus filed on May 13, 2020; has broad implications for appellate practice; and introduces uncertainty for state actors and those who litigate against them. This Court should act quickly to protect the State's statutory right to supersedeas and its sovereign right to enforce its election laws.

Statement of Facts

In the court of appeals, the State provided a detailed account of the facts that required it to intervene to protect the integrity of Texas Elections. An abridged version is presented here.

I. State Officials Are Working Diligently to Protect the Safety of In-Person Voting as Required by State Law.

Texas law has long required most voters to vote in person, either on Election Day, Tex. Elec. Code ch. 64, or during an early voting period prescribed by the Legislature, *id.* § 82.005. The Legislature deliberately chose this policy to curb fraud and abuse. *See McGee v. Grissom*, 360 S.W.2d 893, 894 (Tex. App.—Fort Worth 1962, no writ) (per curiam). Texas law allows voters to vote by mail under four limited circumstances: (1) the voter anticipates being absent from the county; (2) a disability prevents the voter from appearing at the polling place; (3) the voter is 65 or older; or (4) the voter is confined in jail. Tex. Elec. Code §§ 82.001-.004.

The Governor is "responsible for meeting . . . the dangers to the state and people presented by disasters." Tex. Gov't Code § 418.011(1). To that end, the Governor has taken numerous actions to safeguard Texas during the coronavirus pandemic, including to protect in-person voting. *See* MR.0001-0139. On May 11, the Governor expanded the period of in-person early voting for all July 14 elections. MR.0137-38. His order doubles the number of days for early voting from ten days to twenty. *Id.*; *see* Tex. Elec. Code §§ 85.001(a)-(b).

II. The Travis County District Court's Temporary Injunction

In the underlying case, a handful of voters and interest groups seek to fundamentally rewrite these laws and to expand voting by mail to all Texans based on an alleged fear of contracting COVID-19. MR.0148-57. 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." MR.0154 (emphasis added).

The trial court obliged. On April 17, it issued a temporary injunction declaring:

> [V]oting in person while the virus that causes COVID-19 is still in general circulation presents a likelihood of injuring [a voter's] 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.

App. Tab C at 4. It purported to prohibit the State—which had intervened to protect the integrity of Texas law, MR.0160-70, 0196-97—from "issuing guidance or otherwise taking actions that would prevent Counties from accepting and tabulating any mail ballots received from voters" who claim disability based on fear of contracting COVID-19. App. Tab C at 5.

The State immediately filed a notice of interlocutory appeal, MR.0214-19, superseding the temporary injunction. Tex. R. App. P. 29.1(b); *see* App. Tab A 2-3; Tab B 2 (Frost, C.J., dissenting). A divided panel of the Fourteenth Court, however, ordered that the injunction go into effect on May 14, 2020 pursuant to Rule 29.3. App. Tab A at 2-3.

III. The Temporary Injunction Is Contributing to Widespread Confusion as State and Local Officials Prepare for July's Elections.

Notwithstanding that the temporary injunction was superseded, counsel for the plaintiffs repeatedly proclaimed that the temporary injunction remained in effect.

In response to the "public confusion" caused by the Travis County lawsuit, the Attorney General provided guidance to county election officials on May 1, 2020. MR.0143-45. "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," he explained. MR.0156. He further explained that the Travis County lawsuit "does not change or suspend these requirements." MR.0144-45; *see also* MR.0140-42. Certain plaintiffs then accused the Attorney General of voter intimidation in federal court. *See Tex. Democratic Party v. Abbott*, No. 5:20-cv-00438-FB (W.D. Tex.).

As the State has explained in its petition for writ of mandamus filed on May 13, numerous county officials have broadcast their intent to follow the Travis County District Court's temporary order—even though it was superseded on appeal, and even though it is premised on an erroneous interpretation of the law. *See* Pet. for Writ of Mandamus, No. 20-0632. Many clerks provide mail-in ballots to qualified applicants beginning 45 days before the election. For the July 14 elections, that is May 30. *See* Tex. Elec. Code §§ 86.004(a)-(b). Once they begin sending out ballots to unqualified voters, it will be practically impossible to protect the integrity of Texas's July 14 elections. The court of appeals' order, and the temporary injunction it reinstates, will hinder the State in its efforts to protect its elections.

Summary of the 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. *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 present here. Tex. Gov't Code § 22.004(i). This supersedeas right is also reflected in this Court's recent amendment to Rule 24. *See* Tex. R. App. P. 24.2(a)(3). The State exercised that right when it filed its notice of appeal.

Although the court of appeals correctly recognized that the trial court's order was superseded, it abused its discretion by ordering the trial court's injunction to go into effect during the pendency of the appeal. The court of appeals side-stepped the supersedeas framework established by the Legislature and this Court and erroneously concluded that it had the power to make an independent judgment about whether temporary relief may be ordered against the State pending appeal. And its order failed to give due regard to the rights of the State and the people its officials serve.

As the dissenting justice correctly noted (App. Tab B at 13-14), procedural rules like Rule 29.3 do not allow appellate courts to abrogate statutory rights. *In re Geomet Recycling LLC*, 578 S.W.3d 82, 87-88 (Tex. 2019) (orig. proceeding). Nor do courts

have inherent authority to disregard legislative limits on their power when, as here, no constitutional or vested property right is at stake. *See Morath v. Sterling City ISD*, 499 S.W.3d 407, 412-13 (Tex. 2016) (plurality op.). Because the State has no adequate appellate remedy, this Court should grant mandamus relief and vacate the court of appeals' order.

Standard of Review

To obtain mandamus relief, a relator must show that the respondent abused its discretion and no adequate appellate remedy exists. *See In re Turner*, 591 S.W.3d 121, 124 (Tex. 2019) (orig. proceeding). A court abuses its discretion if it "fails to correctly analyze or apply the law." *See In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (orig. proceeding) (per curiam). This original proceeding turns exclusively on the interpretation of statutes and court rules, a matter subject to de novo review. *See Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 132 (Tex. 2019); *In re City of Dickinson*, 568 S.W.3d 642, 645-46 (Tex. 2019) (orig. proceeding).

Argument

I. The Legislature Has Validly Guaranteed the Right of Governmental Appellants to Supersede Trial-Court Judgments and Orders.

The Legislature has made the policy decision that a governmental appellant's notice of appeal supersedes a trial court's order. Any doubt about that was removed by a recent addition to the Government Code and the corresponding amendment to the Rules of Appellate Procedure. This Court should ensure that lower courts comply with that legislative directive, particularly in a case like this where the order is written so broadly that it prevents the State not only from enforcing criminal laws,

but also from speaking on issues of public importance, providing guidance on the content of state law to nonparties, and arguably even preventing the State from exercising its right to petition this Court for redress.

A. A governmental party's notice of appeal automatically supersedes an adverse order or judgment.

As this Court has recognized, Texas Civil Practice and Remedies Code section 6.001 gives governmental appellants a right to supersede without bond. *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."); *accord In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (orig. proceeding) (per curiam). The Legislature has also expressly recognized that section 6.001 grants a right to supersedeas. Tex. Gov't Code § 22.004(i) (referring to "*the right* of an appellant under [section 6.001(b)(1)] to supersede a judgment or order on appeal" (emphasis added)).

B. The Legislature recently clarified that no rule of procedure gives a court discretion to deny supersedeas to a governmental appellant except under limited circumstances not present here.

When it comes to judgments that are "for something other than money or an interest in property," Rule 24 generally allows the trial court to "decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court." *Id.* R. 24.2(a)(3). Although this Court at one point granted trial courts discretion to apply that rule in cases involving the State, *see State Bd. for Educator Certification*, 452 S.W.3d at 809, subsequent legislation confirms that procedural rules may not trump the State's substantive right to supersede adverse judgments.

The Legislature's response to *State Board for Educator Certification* confirms as much. It directed this Court to "adopt rules to provide that *the right* of an appellant under [section 6.001] 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) (emphases added). This Court responded to that legislative directive by amending Rule 24.2 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 Texas Rule of Appellate Procedure 24.2, Misc. Docket No. 18-9061, 43 Tex. Reg. 2633 (Tex. Apr. 12, 2018) (emphasis added); Tex. R. App. P. 24.2(a)(3) (effective May 1, 2018).

This Court's holding in *State Board for Educator Certification* has thus been abrogated by statute. Any rule—including Rule 24 and Rule 29—that purports to limit a governmental appellant's right to supersede a trial court's judgment or order would directly contravene the Legislature's command. And the amendment to Rule 24.2(a)(3) negates any discretion trial courts may have formerly had to deny a governmental appellant's right to supersede a trial-court judgment or order. The one exception crafted by the Legislature—a matter arising from a contested case in an administrative enforcement action—does not apply here. *HISD*, 2020 WL 1966314, at *3; *see* App. Tab A at 2 (applying *HISD*).

C. Rule 24.2(a)(3) is constitutionally sound.

Appellees have argued that the portion of Rule 24.2(a)(3) that requires courts to allow governmental appellants to supersede judgments or orders violates the Texas Constitution's separation of powers. Though the majority did not reach the question, the dissent correctly rejected this argument. App. Tab B at 14-16.

Appellees relied 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. That expression of concern, however, was dicta because the Court held that the former version of Rule 24 *did* give trial courts discretion to deny supersedeas to governmental appellants. *Id.* at 809. And it was expressed before the Legislature definitively addressed the issue by directly affirming governmental appellants' right to supersedeas. Tex. Gov't Code § 22.004(i).

There is nothing surprising or unusual about statutory restraints on trial-court authority; this Court has recognized "[f]or well over 150 years" that the Legislature can "limit judicial review of executive actions." *Morath*, 499 S.W.3d at 412 (plurality op.) (citing *Keenan v. Perry*, 24 Tex. 253, 261 (1859)). For instance, the Texas Constitution expressly guarantees the Legislature's authority to vest exclusive jurisdiction in administrative agencies, effectively precluding judicial review of agency decisions. Tex. Const. art. V, § 8 (noting that "other law" may confer exclusive jurisdiction on an "administrative body"). While "[j]udicial review of claimed violations of constitutional rights and infringement of vested property rights cannot be foreclosed," "in other instances the Legislature may make an executive's actions final." *Morath*, 499 S.W.3d at 412-13 (plurality op.).

Just as the Legislature can insulate executive actions from judicial review altogether, it can also provide that, when a trial court enjoins executive action, the governmental appellant may supersede that injunction pending appeal. Tex. Gov't Code § 22.004(i). And this Court properly implemented that legislative decision by amending Rule 24.2(a)(3).

This Court should decline to take the extraordinary step of declaring a statute or 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 . . . may supersede judgments of trial courts." *Ammex*, 381 S.W.2d at 482.

II. The Court of Appeals Abused Its Discretion in Ordering that the Trial Court's Injunction Go Into Effect.

As the court of appeals correctly recognized, the State superseded the trial court's injunction when it filed its notice of appeal, deferring enforcement of the order pending resolution of that appeal. But the divided court of appeals created mass confusion and effectively denied the State's right to supersedeas by ordering that the trial court's injunction take effect after nearly a month. It had no authority to do so. The majority relied on a procedural rule and its purported inherent authority, but neither authorizes the order.

A. Defendants' notice of appeal superseded the trial court's order.

Rule 29 recognizes that perfecting an appeal from an interlocutory order suspends the order if the appellant is entitled to supersede the order without security by filing a notice of appeal. Tex. R. App. P. 29.1(b). The State is entitled to supersede a

trial-court order without security. *See* Tex. Civ. Prac. & Rem. Code § 6.001(b)(1). Therefore, when the State filed its notice of appeal, it automatically superseded the temporary injunction. *See Long*, 984 S.W.2d at 625. The court of appeals properly acknowledged this fact and that the trial court's order was superseded. *Cf.* App. Tab A at 3 (ordering relief under 29.3); *accord* Tab B 2 (Frost, J., dissenting).

B. Procedural rules do not allow appellate courts to abrogate substantive statutory rights.

As discussed above in Part I, the Legislature has made the policy decision that governmental appellants have the right to supersede trial-court orders and judgment pending appeal. That right is enshrined in Civil Practice and Remedies Code section 6.001 and Government Code section 22.004(i). The court of appeals' temporary order under Rule 29.3 ignores that right by ordering the temporary injunction—which it recognizes has not been in force—to go into effect for the remainder of the appeal. That result improperly allows a procedural rule to frustrate a right guaranteed to the State and hopelessly muddles the effectiveness of actions that the Attorney General has taken since he exercised that right.

This Court recently addressed the relationship between procedural rules and statutory rights in *Geomet*. In that case, Geomet took an interlocutory appeal from the trial court's denial of a motion to dismiss. 578 S.W.3d at 86. That appeal trigged an automatic stay of all trial-court proceedings. *Id.* While the appeal was pending, Geomet's opponent "filed a motion in the court of appeals requesting the stay be lifted so the trial court could entertain [its] request for a temporary injunction and its motion for contempt." *Id.* The court of appeals lifted the statutory stay, and

Geomet filed a mandamus petition in this Court challenging the court of appeals' order. *Id.*

This Court noted that the statute contained no exceptions to the automatic stay and explained that "[c]ourts cannot add equitable or practical exceptions to [the statute] that the legislature did not see fit to enact." *Id.* at 87. The Court rejected the argument that Rule 29.3 authorized the court of appeals to lift the stay, confirming that "procedural rules cannot authorize courts to act contrary to a statute." *Id.* at 88. And this limitation on Rule 29.3 applies even when an appellate court believes that acting contrary to a statute is "necessary to protect the parties' rights." *Id.*

The court of appeals in this case relied on Rule 29.3 to do what the *Geomet* Court said must not be done: allow a procedural rule to trump a statute. The Legislature has commanded that *no* rule may allow a court to grant counter-supersedeas against the State. Tex. Gov't Code § 22.004(i). Yet the court of appeals acted contrary to the statute, and therefore abused its discretion, by issuing an order that effectively denies the State its right to supersede the temporary injunction. *Id.*

C. When no constitutional or vested property right is at issue, appellate courts have no inherent authority to override the Legislature's supersedeas decisions.

In *HISD*, the case on which the court of appeals majority relied, the Third Court concluded that it had "inherent judicial power" to "preserve the parties' rights until disposition of the appeal." 2020 WL 1966314, at *5. In that case, the court further concluded that "the Legislature's statutory directive in Government Code

Section 22.004(i) cannot prevent" the exercise of that authority. *Id.* The court was mistaken, for two reasons.

First, *HISD* incorrectly reasoned that courts must have the power to review and enjoin executive action. *Id.* But, as discussed above in Part I.C, both this Court and the Texas Constitution recognize that the Legislature can restrict the judiciary's control of executive action. *See Morath*, 499 S.W.3d at 412 (plurality op.) (citing Tex. Const. art. V, § 8); *see also Hous. Mun. Emps. Pension Sys. v. Ferrell*, 248 S.W.3d 151, 158 (Tex. 2007). The Court has recognized an exception when a constitutional right or vested property right is at issue. *See Morath*, 499 S.W.3d at 412 (plurality op.). This case does not involve such a claim because (1) there is no constitutional or property right to vote by mail, *McDonald v. Bd. of Elec. Comm'n of Chi.*, 394 U.S. 802, 807 (1969); and (2) Appellees have disclaimed any constitutional claims in this litigation, MR.256. The State's ability to supersede the trial court's injunction therefore raises no constitutional concerns.

HISD's reliance on *Geomet* was misplaced. In *Geomet*, the Court did not hold that Rule 29.3 always allows an appellate court to issue temporary orders to preserve parties' rights. And any allusions the Court made to theoretical constitutional problems were purely dicta because, as the court of appeals in *HISD* acknowledged, the *Geomet* Court did not reach any constitutional question. *See Geomet*, 578 S.W.3d at 89; *HISD*, 2020 WL 1966314, at *5.

Moreover, *Geomet* is distinguishable. It involved only private companies and therefore did not require the Court to address the balance of power between the executive and judicial branches of government. *See* 578 S.W.3d at 85. *Geomet* also

implicated the courts' inherent contempt power, "an essential element of judicial independence and authority." *Id.* at 89 (quoting *In re Sheshtawy*, 154 S.W.3d 114, 124 (Tex. 2004) (orig. proceeding)). In contrast, the judicial power at issue here—the ability to control executive action during the pendency of an appeal—is subject to limitation by the Legislature. *See supra*, Part I.C. *Geomet* does not mean an appellate court may *always* issue an order under Rule 29.3 when necessary to preserve parties' rights. Such an interpretation would significantly infringe on the powers of the legislative and executive branches.

Second, the court of appeals erroneously assumed that it was possible "to preserve the parties' rights until the disposition of th[e] appeal." *HISD*, 2020 WL 1966314, at *6. As in *HISD*, the Fourteenth Court's order preserved the rights of only one party—the appellees. This Court has recognized that "[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); *see also Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). This principle exists not to benefit the State of its officials, but to protect the rights of the 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 (1992) (discussing why state sovereignty is protected).

In a zero-sum situation like this, it is not possible to preserve all rights alleged by the parties. That is why, as this Court has recognized, supersedeas poses a policy question about whose rights will receive preference pending appeal. *See Ammex*, 381 S.W.2d at 482. And, by guaranteeing governmental appellants the right to supersede trial-court orders, the Legislature has definitively instructed courts to give

precedence to the sovereign's rights. This Court should honor that policy decision and refuse to allow the court of appeals to circumvent the Legislature's will by achieving through Rule 29.3 what it could not achieve through counter-supersedeas.

Moreover, this Court has implemented the Legislature's supersedeas decisions within a framework of interconnected rules. *See* Tex. R. App. P. 24, 29. The court of appeals discarded the framework and assigned to itself, rather than the Legislature, the authority to decide whether the temporary injunction would bind the State during appeal. App. Tab A at 2-3. This Court should enforce the supersedeas system created by this Court and the Legislature and prevent lower appellate courts from using Rule 29.3 as an end-run around limitations on their power. Otherwise, litigants will face uncertainty about whether the supersedeas rules and case law interpreting them—or the appellate court's independent judgment—will govern their case.

III. The State Has No Adequate Appellate Remedy.

The court of appeals' Rule 29.3 order is relevant only while the interlocutory appeal is pending. Once the appeal is, the question of supersedeas will be moot, and the State will have been denied an important right guaranteed by the Legislature—a right it desires to exercise, not on its own behalf, but on behalf of all citizens who care about the integrity of elections. No matter the outcome of the appeal, the denial of that right will be an injustice that cannot be cured by further legal action.

IV. This Court Should Act Quickly to Protect the 2020 Elections and the State's Supersedeas Right.

Because of the court of appeals' Rule 29.3 order, the State is not able to serve one of its most important functions: to safeguard the integrity of Texas elections.

The confusion engendered by the trial court's order and the plaintiffs' out-of-court conduct is significant. The State recently had to petition this Court to require five county officials to obey the Election Code. *In re State of Texas*, No. 20-0394 (Tex. May 13, 2020). As the State explained in that petition, those officials are urging voters to apply to vote by mail even when those voters do not meet the Legislature's test for eligibility to do so. Every day that passes, more applications are submitted, and it becomes increasingly challenging to disentangle voters who meet the statutory definition of "disabled" from those who do not. Under the Fourteenth Court's ruling, the State's petition was entirely proper because the injunction was not in effect when that petition was filed. Is litigating that action now forbidden because it is an "action[] that would prevent Counties from accepting and tabulating any mail ballots received from voters"? App. Tab C at 5. On what authority does the Fourteenth Court purport to strip this Court of jurisdiction to hear a case properly filed? It does not say.

And that is far from the only outcome of the Fourteenth Court's ruling. Each day, the Legislature's will is continuously thwarted—not only because the State is denied its supersedeas right, but also because state officials are prevented from enforcing the Election Code. They cannot even speak about the law the Legislature passed or provide guidance to non-parties. And additional harms will occur if the Court does not act soon and allow the State to supersede the injunction.

This issue is larger than any one case or state agency. The interaction between supersedeas law and Rule 29.3 is also at issue in *HISD*, which is pending in the Third Court of Appeals. In that case, the court of appeals' order remains in effect pending

the outcome of the State's petition for a writ of mandamus, which will be filed today, denying the Commissioner of Education the ability to ensure that Houston's school system is run for the benefit of students and not administrators.

Governmental appellants' ability to supersede trial-court injunctions is a question of great significance to the State, the lower courts, and any party involved in litigation with or against the State. This Court should reaffirm that ability against judicial encroachment by ordering that no procedural rule can abrogate the State's statutory right to supersedeas, and that courts may not disregard the Legislature's policy decisions regarding how supersedeas will operate in Texas.

Prayer

The Court should grant the petition for writ of mandamus and vacate the Rule 29.3 order.

Respectfully submitted.

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Mandamus Certification

Pursuant to Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this petition and that every factual statement in the petition is supported by competent evidence included in the appendix or record. Pursuant to Rule 52.3(k)(1)(A), I certify that every document contained in the appendix is a true and correct copy.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Service

On May 15, 2020, this document was served on Chad Dunn, lead counsel for Plaintiffs-Appellees, via chad@brazillanddunn.com; Joaquin Gonzalez, lead counsel for Plaintiff-Intervenors-Appellees, via Joaquin@texascivilrightsproject.org; and Sherine Thomas and Leslie Dippel, counsel for Defendant Dana DeBeauvoir, via sherine.thomas@traviscountytx.gov and leslie.dippel@traviscountytx.gov.

/s/ Kyle D. Hawkins
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Certificate of Compliance

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/s/ Kyle D. Hawkins
Kyle D. Hawkins

No. ___

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

APPENDIX

Tab

Tab A: Order, *State v. Texas Democratic Party*, No. 14-20-00358-CV (Tex. App.—Houston [14th Dist.] May 14, 2020)

ACCEPTED
14-20-00358-CV
FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS
5/14/2020 11:36 AM
CHRISTOPHER PRINE
CLERK

Motion Granted in Part; Order and Dissent to Order filed May 14, 2020.

In The

Fourteenth Court of Appeals

NO. 14-20-00358-CV

STATE OF TEXAS, Appellant

V.

TEXAS DEMOCRATIC PARTY, GILBERTO HINOJOSA, IN HIS CAPACITY AS CHAIRMAN OF THE TEXAS DEMOCRATIC PARTY, JOSEPH DANIEL CASCINO, SHANDA MARIE SANSING, ZACHARY PRICE, LEAGUE OF WOMEN VOTERS OF TEXAS, LEAGUE OF WOMEN VOTERS OF AUSTIN AREA, WORKERS DEFENSE ACTION FUND, AND MOVE TEXAS ACTION FUND, Appellees

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On Appeal from the 201st District Court
Travis County, Texas
Trial Court Cause No. D-1-GN-20-001610

ORDER

On May 5, 2020, appellees Texas Democratic Party, Gilberto Hinojosa, in his capacity as Chairman of the Texas Democratic Party, Joseph Daniel Cascino, Shanda Marie Sansing, Zachary Price, League of Women Voters of Texas, League

of Women Voters of Austin Area, Workers Defense Action Fund, and MOVE Texas Action Fund filed an emergency motion pursuant to Texas Rules of Appellate Procedure 29.3 and 29.4, asking this court to either enforce the trial court's temporary injunction or to issue an order that the trial court's injunction remains in effect to preserve the parties' rights until the disposition of the appeal.

Texas Rule of Appellate Procedure Rule 29.3 states "When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security." Tex. R. App. P. 29.3.

In *Tex. Educ. Agency v. Houston Indep. Sch. Dist.*, No. 03-20-00025-CV, 2020 WL 1966314, at *5 (Tex. App.—Austin Apr. 24, 2020, order), the Austin Court of Appeals held that, pursuant to our appellate jurisdiction in an interlocutory appeal, Texas Rule of Appellate Procedure 29.3 provides a mechanism by which we may exercise the scope of our authority over parties, including our inherent power to prevent irreparable harm to parties properly before us. (citing *In re Geomet Recycling, LLC*, 578 S.W.3d 82, 90 (Tex. 2019) ("We find no reason to doubt that the court of appeals had the authority to make orders protecting EMR against irreparable harm using Rule 29.3.")).

We conclude that under the circumstances presented here, where appellees allege irreparable harm, under the binding authority of the Austin Court, we must exercise our inherent authority under Rule 29.3. [1] We conclude that such a temporary order is necessary in this case to preserve the parties' rights. Accordingly, we grant

[1] The Texas Supreme Court ordered the Third Court of Appeals to transfer this case to our court. Under the Texas Rules of Appellate Procedure, "the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court." Tex. R. App. P. 41.3.

appellees' motion for temporary orders under Rule 29.3 and order that the trial court's temporary injunction remains in effect until disposition of this appeal. No security is required from appellees because the State has not shown that it will incur monetary damages as a result of the injunction. *See* Tex. R. App. P. 29.3.

/s/ Margaret "Meg" Poissant

Margaret "Meg" Poissant
Justice

Panel consists of Chief Justice Frost and Justices Zimmerer and Poissant (Frost, C.J., dissenting).

Publish.

Tab B: Dissent from Order, *State v. Texas Democratic Party*, No. 14-20-00358-CV (Tex. App.—Houston [14th Dist.] May 14, 2020)

Motion Granted in Part; Order and Dissent to Order filed May 14, 2020.

In The

Fourteenth Court of Appeals

NO. 14-20-00358-CV

STATE OF TEXAS, Appellant

V.

TEXAS DEMOCRATIC PARTY, GILBERTO HINOJOSA, IN HIS CAPACITY AS CHAIRMAN OF THE TEXAS DEMOCRATIC PARTY, JOSEPH DANIEL CASCINO, SHANDA MARIE SANSING, ZACHARY PRICE, LEAGUE OF WOMEN VOTERS OF TEXAS, LEAGUE OF WOMEN VOTERS OF AUSTIN AREA, WORKERS DEFENSE ACTION FUND, AND MOVE TEXAS ACTION FUND, Appellees

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On Appeal from the 201st District Court
Travis County, Texas
Trial Court Cause No. D-1-GN-20-001610

D I S S E N T T O O R D E R

Appellees Joseph Daniel Cascino, Shanda Marie Sansing, Texas Democratic Party, Gilberto Hinojosa in his capacity as Chairman of the Texas Democratic Party, Zachary Price, League of Women Voters of Texas, League of Women Voters of Austin Area, Workers Defense Action Fund, and MOVE Texas Action Fund

(collectively the "Cascino Parties") filed an emergency motion asserting that (1) this court should enforce under Texas Rule of Appellate Procedure 29.4 the trial court's temporary injunction against appellant the State of Texas based on the State's alleged open defiance of the temporary injunction, an injunction that the Cascino Parties claim has not been superseded and thus remains in effect, or (2) if this court were to conclude that the temporary injunction has been superseded, then they urge this court to grant emergency relief under Texas Rule of Appellate Procedure 29.3 and this court's inherent power by ordering that the trial court's temporary injunction remains in effect, which the Cascino Parties claim is necessary to preserve their rights until the court disposes of this appeal. All of the alleged conduct that the Cascino Parties claim violated the injunction occurred after the State of Texas filed its notice of appeal. The State's filing of the notice of appeal automatically superseded the temporary injunction. Therefore, this court should deny the Cascino Parties' motion for Rule 29.4 relief.

The relief that the Cascino Parties seek under Rule 29.3 and this court's inherent power conflicts with the Legislature's determination that the State automatically supersedes an order or judgment by filing a notice of appeal and that courts cannot countermand the State's ability to supersede unless the case arises from a contested case in an administrative-enforcement action. The Legislature's statutes in this subject area and Texas Rule of Appellate Procedure 24.2(a)(3) do not violate the Texas Constitution's separation-of-powers provision. Because this court cannot use Rule 29.3 or its inherent power to nullify Texas statutes, this court should deny the Cascino Parties' request for relief under Rule 29.3 and the court's inherent power.

Because the majority does not address the request for Rule 29.4 relief and grants the request for relief under Rule 29.3 and the court's inherent power, I respectfully dissent.

The trial court's injunction

On April 17, 2020, the trial court granted a temporary injunction (the "Injunction") in which it ordered the following:

- Defendant Dana DeBeauvoir, in her official capacity as the Travis County Clerk and Election Administrator ("DeBeauvoir"), her agents, servants, employees, representatives, and all persons or entities of any type whatsoever acting in 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 for the reason that the applications were submitted based on the disability category.
- DeBeauvoir, her agents, servants, employees, representatives, and all persons or entities of any type whatsoever acting in 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 for the reason that the ballots were submitted based on the disability category.
- DeBeauvoir, the State of Texas, and their agents, servants, employees, representatives, and all persons or entities of any type whatsoever acting in concert with them or acting on their behalf are enjoined from issuing guidance or otherwise taking actions that would prevent "Counties"[1] 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 for the reason that the ballots were submitted based on the disability category.
- DeBeauvoir, the State of Texas, and their agents, servants, employees, representatives, and all persons or entities of any type whatsoever

[1] The term "Counties" in the trial court's temporary injunction was not a defined term.

> acting in 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.

The State of Texas filed a notice of interlocutory appeal.

DeBeauvoir did not file an interlocutory appeal from the Injunction. Thirty minutes after the trial court signed the Injunction, the State of Texas filed a notice of interlocutory appeal, perfecting its appeal from the Injunction. In the notice, the State of Texas stated that pursuant to Civil Practice and Remedies Code section 6.001 and Texas Rule of Appellate Procedure 29.1(b) the filing of the State's notice of appeal superseded the Injunction.

The Cascino Parties are not entitled to relief under Rule 29.4.

In their emergency motion, the Cascino Parties take issue with the State of Texas's statement in the notice of appeal. They assert that for the State to supersede the Injunction the State must seek to supersede the Injunction in the trial court under Rule of Appellate Procedure 24. The Cascino Parties assert that because the State did not do so, the Injunction has never been superseded and remains in effect. The Cascino Parties do not allege that the State of Texas violated the Injunction during the thirty-minute period between the trial court's signing of the Injunction and the State's filing of its notice of appeal. Instead, the Cascino Parties assert that the Attorney General of the State of Texas violated the Injunction by issuing a May 1, 2020 letter.

The Cascino Parties assert that Rule 24.2(a)(3) required the State to request that the Injunction be superseded, pointing to the following language: "When the judgment is for something other than money or an interest in property, the trial court

must set the amount and type of security that the judgment debtor must post."[2] Though this sentence addresses the procedure for superseding a judgment under Rule 24 by providing alternate security ordered by the trial court, nothing in Rule 24 states that the rule stands as the exclusive means for superseding a judgment. To the contrary, the first sentence of Rule 24.1 provides that "[u]nless the law or these rules provide otherwise, a judgment debtor **may** supersede the judgment by: [the four means of superseding under Rule 24]."[3] Thus, under its unambiguous language, Rule 24 does not prevent a judgment debtor from superseding an order or judgment under another rule or statute.[4]

Texas Rule of Appellate Procedure 29.1 provides that "[p]erfecting an appeal from an order granting interlocutory relief does not suspend the order appealed from unless: (a) the order is suspended in accordance with [Rule] 29.2; or (b) the appellant is entitled to supersede the order without security by filing a notice of appeal."[5] Under Rule 29.2, the trial court may permit an order granting interlocutory relief to be superseded under Rule 24 pending an appeal from the order.[6] Thus, under Rule 29.1, an interlocutory appeal does not suspend the order from which an appeal is taken unless (1) the trial court allows the appealing party to supersede the order under Rule 24, or (2) the appellant is entitled to supersede the order without security by filing a notice of appeal.[7] Under the plain text of Rule 29.1, if the State of Texas is entitled to supersede the Injunction without security by filing a notice of appeal,

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[2] Tex. R. App. P. 24.2 (a)(3).

[3] Tex. R. App. P. 24.1 (emphasis added).

[4] *See* Tex. R. App. P. 24.

[5] Tex. R. App. P. 29.1.

[6] Tex. R. App. P. 29.2.

[7] *See* Tex. R. App. P. 29.1.

then the State of Texas need not take any action under Rule 24 to supersede the Injunction.[8]

Under Civil Practice and Remedies Code section 6.001, the Legislature provides that "[a] governmental entity or officer listed in Subsection (b) may not be required to file a bond for court costs incident to a suit filed by the entity or officer or for an appeal or writ of error taken out by the entity or officer. . . ."[9] This provision applies to the State of Texas, a department of the State of Texas, and the head of a department of the State of Texas.[10] Under the plain text of this statute and long-standing Texas precedent interpreting this statute and its predecessors, the State of Texas is entitled to supersede an interlocutory order or final judgment without security by filing a notice of appeal.[11] So, under Rule 29.1, the State's perfection of an appeal from the Injunction superseded the Injunction.[12]

In 1984, the Supreme Court of Texas amended the predecessor rule to Rule 24.2(a)(3) to provide that the trial court may decline to permit a judgment debtor to supersede a judgment if the plaintiff filed a bond or deposit fixed by the court in such an amount as would secure the defendant in any loss or damage occasioned by any relief granted if it was determined on final disposition that such relief was

[8] *See id*.

[9] Tex. Civ. Prac. & Rem. Code § 6.001(a) (West, Westlaw through 2019 R.S.).

[10] Tex. Civ. Prac. & Rem. Code § 6.001(b) (West, Westlaw through 2019 R.S.).

[11] *See* Tex. Civ. Prac. & Rem. Code § 6.001; *In re State Board for Educator Certification*, 452 S.W.3d 802, 805–06 (Tex. 2014); *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 754 & n.19 (Tex. 2005); *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 480–81 (Tex. 1964).

[12] *See* Tex. R. App. P. 29.1; *In re State Board for Educator Certification*, 452 S.W.3d at 805–06; *Neeley*, 176 S.W.3d at 754 & n.19; *Ammex Warehouse Co.*, 381 S.W.2d at 480–81.

improper.[13] This rule change raised the potential issue of whether a trial court had discretion under this rule to decline to permit a governmental entity to supersede a judgment, even though the entity had the right to supersede a judgment automatically by filing a notice of appeal.[14]

In *In re Long*, the Supreme Court of Texas stated that, "as a general rule," the state's perfection of appeal "automatically supersedes the trial court's judgment, and that suspension remains in effect until all appellate rights are exhausted."[15] In that case, the court stated that the filing of a notice of appeal "operated as a supersedeas bond."[16] The high court noted that the plaintiffs could have invoked the predecessor to Rule of Appellate Procedure 24.2(a)(3) and asked the trial court to decline to permit the judgment to be superseded, but the plaintiffs in that case did not do so.[17] Thus, the *Long* court suggested that a trial court might have discretion under the predecessor rule to Rule 24.2(a)(3) to deny an appealing governmental entity the ability to supersede the judgment, but the high court did not have to address that point in its holding.[18]

In *In re State Board for Educator Certification*, the supreme court addressed that issue for the first time and held that under Texas cases and Rule 25.1(h)[19] a

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[13] *See In re State Board for Educator Certification*, 452 S.W.3d at 806, n.22.

[14] *See id.* at 805–06.

[15] 984 S.W.2d 623, 625 (Tex. 1999).

[16] *Id.* at 626.

[17] *Id.*

[18] *See id.*

[19] Rule 25.1(h), the analogue to Rule 29.1(b) in the context of appeals from final judgments, provides as follows: "The filing of a notice of appeal does not suspend enforcement of the judgment. Enforcement of the judgment may proceed unless: (1) the judgment is superseded in

governmental entity's notice of appeal automatically suspends enforcement of the judgment.[20] If the filing of a notice of appeal were enough to suspend the judgment under Rule 25.1(h) or Rule 29.1, there would seem to be no reason for a governmental entity to seek to supersede a judgment under Rule 24, and the "counter-supersedeas" language in Rule 24.2(a)(3) appears only to apply to an appellant seeking to supersede a judgment under Rule 24.1(a)(4) based on the security found to be adequate by the trial court under Rule 24.2(a)(3). Even so, the *In re State Board for Educator Certification* court determined that even though the filing of a notice of appeal by a governmental entity automatically suspends enforcement of the judgment, the judgment creditor still may ask the trial court to exercise its discretion under Rule 24.2(a)(3) to "decline supersedeas if the judgment creditor posts security."[21] Under this holding a judgment creditor may offer to post the security ordered by the trial court and ask the trial court to "decline supersedeas" under Rule 24.2(a)(3) as to a judgment against a governmental entity, even though the governmental entity already superseded the judgment by perfecting appeal and even though the governmental entity never sought to supersede the judgment under Rule 24.[22] Though Rule 24.2(a)(3) says, "the trial court may decline to permit the judgment to be superseded," the *In re State Board for Educator Certification* court effectively held that the trial court has discretion under this rule to declare that a judgment that already had been superseded would no longer be superseded if the judgment creditor posted the security specified by the trial court.[23] The supreme

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accordance with Rule 24, or (2) the appellant is entitled to supersede the judgment without security by filing a notice of appeal." Tex. R. App. P. 25.1(h) (footnote omitted).

[20] *See In re State Board for Educator Certification*, 452 S.W.3d at 804–09.

[21] *Id*. at 808.

[22] *See id*.

[23] *See id*.

court premised this holding on the judgment creditor offering to post the security the trial court ordered and asking the trial court to "decline supersedeas" under Rule 24.2(a)(3) as to a judgment against a governmental entity.[24] In today's case, the Cascino Parties did not offer to post the security, nor did they ask the trial court to "decline supersedeas" under Rule 24.2(a)(3) as to the Injunction.

The Texas Legislature did not look favorably upon the supreme court's reconciliation of Rules 25.1(h) and Rule 24.2(a)(3) and the resulting ability of a trial court to decline supersedeas as to an order or judgment against the State of Texas, a department of the State of Texas, or the head of a department of the State.[25] In 2017, the Legislature decided to abrogate the *In re State Board for Educator Certification* holding as to those parties, except as to contested cases in administrative enforcement actions.[26] The Legislature required that "[t]he supreme court shall 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. Counter-supersedeas shall remain available to parties in a lawsuit concerning a matter that was the basis of a contested case in an administrative enforcement action."[27] In response, the supreme court amended Rule 24.2(a)(3) to add the following sentence: "When the judgment debtor is the state, a department of this state, or the head of a department of this state, the trial

[24] *See id.*

[25] *See* Tex. Gov't Code Ann. § 22.004(i) (West, Westlaw through 2019 R.S.).

[26] *See id.*

[27] *Id.*

court must permit a judgment to be superseded except in a matter arising from a contested case in an administrative enforcement action."[28]

Today's case does not involve a matter arising from a contested case in an administrative enforcement action. Thus, under the plain text of Rule 24.2(a)(3) and Government Code section 22.004(i), the Injunction is not subject to counter-supersedeas under Rule 24.2(a)(3), and under *In re State Board for Educator Certification* and prior cases, the State of Texas's perfection of appeal automatically superseded the Injunction.[29] Even if, contrary to these authorities, the Cascino Parties had the ability to "counter-supersede" the Injunction by offering to post the security ordered by the trial court and asking the trial court to "decline supersedeas" under Rule 24.2(a)(3), the Cascino Parties never offered to do so and never sought this relief under Rule 24.2(a)(3).

The Cascino Parties interpret *In re State Board for Educator Certification* as holding that the governmental entity's notice of appeal does not automatically supersede the judgment and that the governmental entity must ask the trial court to supersede the judgment. The *In re State Board for Educator Certification* court did not pronounce either holding.[30] Instead, if the Cascino Parties wanted to counter-supersede the Injunction, they had to offer to post the security ordered by the trial court and ask the trial court to "decline supersedeas" under Rule 24.2(a)(3).[31] Their failure to do so did not prejudice them because the trial court had no discretion to "decline supersedeas" under the current version of Rule 24.2(a)(3), given that the

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[28] Tex. R. App. P. 24.2(a)(3).

[29] *See* Tex. Gov't Code Ann. § 22.004(i); Tex. R. App. P. 24.2(a)(3); *In re State Board for Educator Certification*, 452 S.W.3d at 804–09; *Ammex Warehouse Co.*, 381 S.W.2d at 480–81.

[30] *See In re State Board for Educator Certification*, 452 S.W.3d at 804–09.

[31] *See id.*

case does not fall within the exception (involving a matter arising from a contested case in an administrative enforcement action).[32]

For the foregoing reasons, the State of Texas's filing of a notice of appeal superseded the Injunction. From that point to the present, the Injunction has been superseded.[33] Because all of the alleged violations of the Injunction occurred after the State of Texas filed the notice of appeal superseding the judgment, this court need not address whether the State of Texas violated the Injunction or go forward with a proceeding to enforce the Injunction under Rule 29.4.[34] This court should deny the Cascino Parties' request for relief under Rule 29.4.

The Cascino Parties are not entitled to relief under Rule 29.3 or the court's inherent power.

The Cascino Parties assert in the alternative that if this court were to conclude that the Injunction has been superseded, this court should grant emergency relief under Rule of Appellate Procedure 29.3 and this court's inherent power by ordering that the Injunction remains in effect, an action the appellees claim is necessary to preserve their rights until the disposition of this appeal.[35] The Cascino Parties assert that a recent published order from the Third Court of Appeals is binding precedent

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[32] *See* Tex. Gov't Code Ann. § 22.004(i); Tex. R. App. P. 24.2(a)(3); *In re State Board for Educator Certification*, 452 S.W.3d at 804–09.

[33] *See* Tex. Gov't Code Ann. § 22.004(i); Tex. R. App. P. 24.2(a)(3); *In re State Board for Educator Certification*, 452 S.W.3d at 804–09; *Neeley*, 176 S.W.3d at 754 & n.19; *Ammex Warehouse Co.*, 381 S.W.2d at 480–81.

[34] ***See*** Tex. R. App. P. 29.4.

[35] Texas Rule of Appellate Procedure Rule 29.3 states that "[w]hen an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security." Tex. R. App. P. 29.3.

on this issue.[36] The majority agrees that this published order binds this court and grants the requested relief.[37]

The supreme court ordered this appeal transferred to this court from the Third Court of Appeals. Under the Texas Rule of Appellate Procedure 41.3, this court must decide the appeal in accordance with the Third Court of Appeals's precedent under principles of stare decisis if this court's decision otherwise would have been inconsistent with the Third Court of Appeals's precedent.[38] Under principles of stare decisis, the Third Court of Appeals's published order in *Texas Education Agency v. Houston Independent School District* is not on point and so would not bind this court even if this court were the Third Court of Appeals. The *Texas Education Agency* court "conclude[d] that under the particular circumstances presented here, where the appellee alleges irreparable harm from ultra vires action that it seeks to preclude from becoming final, to effectively perform our judicial function and to preserve the separation of powers, we must exercise our inherent authority and use Rule 29.3 to make orders to prevent irreparable harm to parties that have properly invoked [our] jurisdiction in an interlocutory appeal."[39] Thus, the Third Court of Appeals based that order on the "particular circumstances presented" and the appellee's allegation of irreparable harm from ultra vires action that it sought to preclude from becoming final.[40] In today's case, the Cascino Parties do not seek relief based on ultra vires action that they seek to preclude from becoming final; so, under stare decisis principles, the published order in *Texas Education Agency* is not a binding precedent

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[36] *See Texas Education Agency v. Houston Indep. Sch. Dist*., No. 03-20-00025-CV, 2020 WL 1966314, at *4–6 (Tex. App.—Austin Apr. 24, 2020) (published order).

[37] *See id.*

[38] Tex. R. App. P. 41.3.

[39] *See Texas Education Agency*, 2020 WL 1966314, at *6 (internal quotations omitted).

[40] *See id.*

for today's case.[41]

Under Texas statutes and binding precedent from the Supreme Court of Texas, the State of Texas has a statutory right to supersede the Injunction by filing a notice of appeal, and the State invoked that right in its notice of appeal.[42] By granting the Cascino Parties' request for relief under Rule 29.3 and decreeing that "the trial court's temporary injunction remains in effect until disposition of this appeal,"[43] this court takes action that conflicts with the State of Texas's statutory right to supersede the Injunction by filing a notice of appeal. Under binding supreme-court precedent, because the State's notice of appeal automatically superseded the Injunction, the Injunction has not been in effect since April 17, 2020.[44] Yet, today the majority orders that the Injunction "remains in effect," thus indicating that the Injunction has been in effect since April 17, 2020, when under binding statutes and precedent, it has not.[45]

When a rule of procedure conflicts with a statute, the statute prevails.[46] A court cannot exercise an inherent power in a manner that conflicts with an applicable

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[41] *See id.*; Tex. R. App. P. 41.3.

[42] *See* Tex. Civ. Prac. & Rem. Code § 6.001(b); Tex. Gov't Code Ann. § 22.004(i); *In re State Board for Educator Certification*, 452 S.W.3d at 804–09; *Neeley*, 176 S.W.3d at 754 & n.19; *Ammex Warehouse Co.*, 381 S.W.2d at 480–81.

[43] *Ante* at 3.

[44] *See* Tex. Civ. Prac. & Rem. Code § 6.001(b); Tex. Gov't Code Ann. § 22.004(i); *In re State Board for Educator Certification*, 452 S.W.3d at 804–09; *Neeley*, 176 S.W.3d at 754 & n.19; *Ammex Warehouse Co.*, 381 S.W.2d at 480–81.

[45] *See* Tex. Civ. Prac. & Rem. Code § 6.001(b); Tex. Gov't Code Ann. § 22.004(i); *In re State Board for Educator Certification*, 452 S.W.3d at 804–09; *Neeley*, 176 S.W.3d at 754 & n.19; *Ammex Warehouse Co.*, 381 S.W.2d at 480–81.

[46] *See Univ. of Tex. Health Science Ctr. at Houston v. Rios*, 542 S.W.3d 530, 538 (Tex. 2017).

statute.[47] By using its inherent power and Rule 29.3 to grant a temporary order that reinstates and revives an injunction that has been superseded for the past month, the majority violates applicable statutes and goes against high-court cases applying them.[48] Because this action is not a proper use of Rule 29.3 or the court's inherent power, this court should deny the Cascino Parties' request for relief under Rule 29.3 and the court's inherent power.[49]

The Cascino Parties assert that the supreme court's 2018 amendment to Rule 24.2(a)(3) violated the Texas Constitution's separation-of-powers provision by giving the State of Texas, a department of the State, and the head of a department of the State an unqualified right to supersede an order or judgment on appeal.[50] The Cascino Parties cite *In re State Board for Educator Certification* for this proposition, but based on the court's holding that Rule 24.2's counter-supersedeas provisions applied to the governmental entity in that case, the *In re State Board for Educator Certification* court did not rule on any constitutional issue.[51] Though the *In re State Board for Educator Certification* court suggested in obiter dicta that there might be separation-of-powers issues with the State's argument, the court did not say that a separation-of-powers violation would occur if a plaintiff had no ability under Rule

[47] *See Ashford v. Goodwin*, 131 S.W. 535, 538 (Tex. 1910).

[48] *See* Tex. Civ. Prac. & Rem. Code § 6.001(b); Tex. Gov't Code Ann. § 22.004(i); *In re State Board for Educator Certification*, 452 S.W.3d at 804–09; *Neeley*, 176 S.W.3d at 754 & n.19; *Ammex Warehouse Co.*, 381 S.W.2d at 480–81.

[49] *See Rios*, 542 S.W.3d at 538; *Ashford*, 131 S.W. at 538.

[50] *See* Tex. Const. art. II, § 1. As noted above, the high court added the following language to Rule 24.2(a)(3): "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."

[51] *See In re State Board for Educator Certification*, 452 S.W.3d at 804–09.

24.2(a)(3) to seek counter-supersedeas against a governmental entity.[52] What is binding on this court is the supreme court's statements that (1) "[w]e see nothing in this exemption statute [exempting the State of Texas and other governmental entities from having to post a bond to supersede a judgment] which is repugnant to any constitutional provision"[53]; (2) "[t]he Legislature was well within its constitutional boundaries in providing that the State and the heads of its departments are exempt from giving bond when they elect to supersede a judgment of a trial court"[54]; and (3) "[i]t may be that litigants' substantive rights would be better protected by allowing enforcement of a trial court's judgment pending appeal. . . However, 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."[55]

The Legislature did not violate the Texas Constitution's separation-of-powers provision in determining that counter-supersedeas should not be allowed in appeals by the State of Texas except in cases arising from a contested case in an administrative-enforcement action.[56] Nor did the supreme court violate the Texas Constitution's separation of powers in promulgating the 2018 revision to Rule 24.2

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[52] *See id*. at 808–09.

[53] *Ammex Warehouse Co.*, 381 S.W.2d at 481.

[54] *Id*. at 482.

[55] *Id.*

[56] *See* Tex. Const. art. II, § 1; Tex. Gov't Code Ann. § 22.004(i); *In re Dean*, 393 S.W.3d 741, 748 (Tex. 2012); *General Servs. Com'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 599–600 (Tex. 2001); *Ammex Warehouse Co.*, 381 S.W.2d at 481–82.

under Texas Government Code section 22.004(i).[57]

Because the Cascino Parties have not shown themselves entitled to the relief they seek under Rule 29.3 and this court's inherent power, this court should deny this part of the Cascino Parties' motion.

Conclusion

The majority errs in failing to address the Cascino Parties' request for relief under Rule 29.4 and in granting relief under Rule 29.3 and the court's inherent power without first determining whether the Injunction has been superseded. In any case, the court errs in granting relief under Rule 29.3 and the court's inherent power because granting that relief conflicts with Texas statutes. The court should deny the Cascino Parties' emergency motion in its entirety.

/s/ Kem Thompson Frost
Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Zimmerer and Poissant (Poissant, J., majority).

Publish

[57] *See* Tex. Const. art. II, § 1; Tex. Gov't Code Ann. § 22.004(i); Tex. R. App. P. 24.2(a)(3); *In re Dean*, 393 S.W.3d at 748; *General Servs. Com'n*, 39 S.W.3d at 599–600; *Ammex Warehouse Co.*, 381 S.W.2d at 481–82.

Tab C: Temporary Injunction,
***Texas Democratric Party v. Debeauvoir*,**
No. D-1-GN-20-001610
(201st Judicial Dist. Apri. 17, 2020)

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

Order on Application for Temporary Injunctions and Plea to the Jurisdiction

On April 15, 2020, came on to be heard 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) Plaintiffs' 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 interests that the TDP and its Chair seek 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 and the probable lack of uniformity in its application throughout the State;

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 and the probable lack of uniformity in its application throughout the State. 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 from this lack of clarity and the probable lack of uniformity in its application throughout the State.

5) Intervenor State of Texas has stated its "strong interest in the uniform, consistent application of its election laws" while also stating that "each early-voting clerk [throughout the State] is responsible for determining whether an application to vote by mail complies with all requirements." And, the evidence reveals that the Secretary of State has advised those election officials that they "may have a need to modify certain voting procedures ... [and] may want to consider seeking a court order to authorize exceptions to the voting procedures outlined in certain chapters of the Texas Election Code."

6) 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;

7) 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;

8) 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;

9) 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;

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

11) 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;

12) The oral testimony, exhibits and witness declarations have been accepted into evidence. I have carefully viewed the testimony and reviewed the documentary evidence in making the factual findings herein;

13) Based on the 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 that 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 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.

14) 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.

15) 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.

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

17) 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 in 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 for the reason that the applications were submitted based on the disability category;

(2) Travis County Defendant and her agents, servants, employees, representatives, and all person or entities of any type whatsoever acting in 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 for the reason that the ballots were submitted based on the disability category;

(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 for the reason that the ballots were submitted based on the disability category;

(4) Travis County Defendant and Intervenor-Defendant Texas and their agents, servants, employees, representatives, and all person or entities of any type whatsoever acting in 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 27, 2020 at 2:00 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 $0 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 August 10, 2020 at 9:00 AM.

SIGNED April 17, 2020.

THE HONORABLE TIM SULAK
JUDGE PRESIDING

Tab D: Tex. Gov't Code § 22.004(i)

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 2. Judicial Branch (Refs & Annos)
Subtitle A. Courts
Chapter 22. Appellate Courts
Subchapter A. Supreme Court

V.T.C.A., Government Code § 22.004

§ 22.004. Rules of Civil Procedure

Effective: September 1, 2017
Currentness

(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.

(b) The supreme court from time to time may promulgate a specific rule or rules of civil procedure, or an amendment or amendments to a specific rule or rules, to be effective at the time the supreme court deems expedient in the interest of a proper administration of justice. The rules and amendments to rules remain in effect unless and until disapproved by the legislature. The clerk of the supreme court shall file with the secretary of state the rules or amendments to rules promulgated by the supreme court under this subsection and shall mail a copy of those rules or amendments to rules to each registered member of the State Bar of Texas not later than the 60th day before the date on which they become effective. On receiving a written request from a member of the legislature, the secretary of state shall provide the member with electronic notifications when the supreme court has promulgated rules or amendments to rules under this section.

(c) So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that is repealed or modified in any way. The list has the same weight and effect as a decision of the court.

(d) The rules of practice and procedure in civil actions shall be published in the official reports of the supreme court. The supreme court may adopt the method it deems expedient for the printing and distribution of the rules.

(e) This section does not affect the repeal of statutes repealed by Chapter 25, page 201, General Laws, Acts of the 46th Legislature, Regular Session, 1939, on September 1, 1941.

(f) The supreme court shall adopt rules governing the electronic filing of documents in civil cases in justice of the peace courts.

(g) The supreme court shall adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. The rules shall provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the motion to dismiss. The rules shall not apply to actions under the Family Code.

<Text of (h) effective until September 1, 2020>

(h) The supreme court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions. The rules shall apply to civil actions in district courts, county courts at law, and statutory probate courts in which the amount in controversy, inclusive of all claims for damages of any kind, whether actual or exemplary, a penalty, attorney's fees, expenses, costs, interest, or any other type of damage of any kind, does not exceed $100,000. The rules shall address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions will be expedited in the civil justice system. The supreme court may not adopt rules under this subsection that conflict with a provision of:

(1) Chapter 74, Civil Practice and Remedies Code;

(2) the Family Code;

(3) the Property Code; or

(4) the Tax Code.

<Text of (h) effective September 1, 2020>

(h) The supreme court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions. The rules shall apply to civil actions in district courts, county courts at law, and statutory probate courts in which the amount in controversy, inclusive of all claims for damages of any kind, whether actual or exemplary, a penalty, attorney's fees, expenses, costs, interest, or any other type of damage of any kind, does not exceed $100,000. The rules shall address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions will be expedited in the civil justice system. The supreme court may not adopt rules under this subsection that conflict with other statutory law.

<Text of (h-1) effective September 1, 2020>

(h-1) In addition to the rules adopted under Subsection (h), the supreme court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000. The rules shall balance the need for lowering discovery costs in these actions against the complexity of and discovery needs in these actions. The supreme court may not adopt rules under this subsection that conflict with other statutory law.

(i) The supreme court shall 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. Counter-supersedeas shall remain available to parties in a lawsuit concerning a matter that was the basis of a contested case in an administrative enforcement action.

Credits

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 297, § 1, eff. Aug. 28, 1989; Acts 2001, 77th Leg., ch. 644, § 1, eff. June 13, 2001; Acts 2007, 80th Leg., ch. 63, § 1, eff. May 11, 2007; Acts 2011, 82nd Leg., ch.

203 (H.B. 274), §§ 1.01, 2.01, eff. Sept. 1, 2011; Acts 2011, 82nd Leg., ch. 906 (S.B. 791), § 1, eff. Sept. 1, 2011; Acts 2017, 85th Leg., ch. 868 (H.B. 2776), § 1, eff. Sept. 1, 2017; Acts 2019, 86th Leg., ch. 696 (S.B. 2342), § 1, eff. Sept. 1, 2020.

V. T. C. A., Government Code § 22.004, TX GOVT § 22.004
Current through the end of the 2019 Regular Session of the 86th Legislature

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