



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 21, 2020

Hon. Steven T. Mnuchin
Secretary
United States Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20220

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Dear Secretary Mnuchin:

I write to alert you to potential abuse by Harris County, Texas¹ of federal financial assistance made available under the 2020 Coronavirus Aid, Relief and Economic Security Act (CARES Act). On April 28, 2020, Harris County's executive body, the Harris County Commissioners Court, voted for \$12 million in new funding for mail-in ballots. According to testimony before the Commissioners Court, those funds would pay for up to two million mail-in ballots, more than the total number of votes cast in Harris County in both the 2016 and 2018 general elections. Given that fact, the vast majority of new ballots funded by the Commissioners Court almost certainly would be provided to persons ineligible to vote by mail under Texas law. During debate on the measure, multiple public officials indicated an intent that the \$12 million would be paid for with federal dollars disbursed under the CARES Act. Other Texas counties appear poised to follow Harris County's lead. We ask that the Department of Treasury scrutinize its award of CARES Act funding to Harris County in light of its stated intent to use that funding to violate state election law. We additionally ask that the Department consider clarifying that local governments that receive CARES Act funding directly from the Department must use those funds in a way that comports with state law.

Through the CARES Act, the federal government has provided various mechanisms for state, local, and tribal governments to access federal financial assistance to cope with the COVID-19 outbreak. Among those mechanisms is the Coronavirus Relief Fund (CRF). Monies disbursed from the CRF may be used to cover "necessary expenditures" incurred due to the public health emergency with respect to COVID-19, were not accounted for in the budget most recently approved as of March 27, 2020 for the State or local government, and were incurred between March 1, 2020 and December 30, 2020.² A local governmental unit, such as a county, is eligible to receive direct payment of CRF monies if the unit has a population that exceeds 500,000. Harris

¹ Harris County contains Texas's largest city, Houston.

² Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 5001, 134 Stat. 281, 501 (2020).

County, which has a population far in excess of 500,000, was awarded \$425,942,656.10 in direct CRF funding.³

Local governmental units in Texas, like Harris County, may try to apply CRF funds to unbudgeted expenses associated with increased use of mail-in ballots for the upcoming July runoff and November general elections. Texas allows voters to cast ballots by mail only in limited circumstances. The Texas Election Code currently allows a voter to cast a ballot by mail (1) if the voter will be absent from his or her county of residence on election day and during the early voting period; (2) if the voter is disabled because he or she has a sickness or physical condition that prevents the voter from voting in-person on election day without the likelihood of needing personal assistance or of injuring the voter's health; (3) if the voter is over 65 years of age on election day; or (4) if the voter is confined in jail serving a misdemeanor sentence, or pending trial or appeal in certain cases.⁴ The State Legislature chose to limit mail-in ballots and to promote in-person voting to curb fraud and abuse.⁵

Since the outbreak of the COVID-19 pandemic, this limited mail balloting system has come under legal assault by various partisan groups and individuals. One of the claims advanced by these groups is that a voter may claim a "disability" that qualifies the voter to vote by mail if the voter is susceptible to infection by COVID-19 or wishes to engage in social isolation or distancing to protect public health in response to COVID-19. Our office has refuted that erroneous position in multiple court filings and two open letters sent to a state representative and to all county election officials, respectively.⁶ In those filings and communications, we have affirmed the proper textual interpretation of the disability provision to require an actual sickness or physical condition, and not mere concern or worry about contracting a virus or a desire to promote public health, in order to qualify a voter to cast a mail ballot. Notwithstanding those efforts, a Travis County district court in Austin, Texas entered an injunction ordering the Travis County clerk to provide a mail-in ballot to any voter who requests one due to COVID-19, in direct contravention of the Texas Election Code.⁷ In addition, a federal district court in San Antonio also entered an injunction directing that any eligible voter can apply for, receive and cast an absentee ballot during the "pendency of pandemic circumstances."⁸ The Texas Supreme Court entered an emergency stay against the

³ United States Department of the Treasury, Payments to States and Eligible Unites of Local Governments, <https://home.treasury.gov/system/files/136/Payments-to-States-and-Units-of-Local-Government.pdf> (last visited May 18, 2020).

⁴ See Tex. Elec. Code §§ 82.001-.004.

⁵ See *McGee v. Grissom*, 360 S.W.2d 893, 894 (Tex. App.—Fort Worth 1962, no write) (per curiam).

⁶ 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>; Letter from Attorney General Paxton to Representative Stephanie Klick (April 14, 2020), available at <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-voting-mail-based-disability-reserved-texans-actual-illness-or-medical-problem-rendering>.

⁷ Order on Application for Temporary Injunctions and Plea to the Jurisdiction, *Tex. Democratic Party v. DeBauvevoir*, No. D-1-GN-20-001610, Travis Cty. Dist. Ct. (Apr. 17, 2020).

⁸ Order Regarding Plaintiffs' Motion for Preliminary Injunction, *Tex. Democratic Party v. Abbott*, No. SA-20-CA-438-FB, W.D. Tex. (May 19, 2020) at 9.

Travis County order,⁹ and the Fifth Circuit administratively stayed the federal district court's order.¹⁰

Notwithstanding our efforts, several election officials in major Texas metropolitan areas have adopted the mistaken logic of the Travis County district court in supporting universal access to mail-in ballots. For instance, the Dallas County Commissioners Court voted for a resolution to allow any Dallas County voter who wishes to vote a mail ballot to do so by checking the "disability" box on the mail ballot application.¹¹ The Commissioners Court voted 4-1 on May 5 to adopt that resolution.¹² Similarly, on May 4, the El Paso County Commissioners Court voted unanimously to approve the county attorney's filing of an amicus brief supporting the Democratic Party's lawsuit to expand mail balloting. Both counties have been awarded significant CARES Act funds.¹³

One particularly egregious example is action taken by the Harris County Commissioners Court to expand mail-in balloting. At its April 28 meeting, the Commissioners Court took up a request by the county clerk for additional funding for voting by mail following the COVID-19 outbreak. The Commissioners Court devoted substantial time to debate the measure.¹⁴ One commissioner noted that federal money received by Harris County could be used to expand mail balloting.¹⁵ The clerk's office later confirmed that \$12 million would allow the county to "process" 2 million ballots by mail.¹⁶ By way of comparison, approximately 1.34 million votes were cast in Harris County in the 2016 general election, and approximately 1.20 million votes were cast in the 2018 general election.¹⁷ The question on the funding was called and the vote was 3-2 in favor.¹⁸

Harris County will violate state election law using federal funds if it follows through on its plan to send mail-in ballots to voters based on their putative concern for COVID-19. The same holds true for any other Texas county that opts to use federal funds received from the CRF to finance unlawful mail-in ballot initiatives. As a matter of law and logic, a county cannot claim that spending federal funds to violate state law is a necessary expense incurred due to COVID-19.

⁹ Order Granting Emergency Motion for Temporary Relief, *In re State of Tex.*, No. 20-0401, Tex. Sup. Ct. (May 15, 2020).

¹⁰ Temporary Stay Order, *Tex. Democratic Party v. Abbott*, No. 20-50407, 5th Cir. (May 20, 2020) (per curiam).

¹¹ Dallas County Commissioners Court, Order No. 2020-0412 (May 5, 2020).

¹² Dallas County Commissioners Court, Meeting Agenda for May 5, 2020, available at <https://dallascounty.civicweb.net/Portal/MeetingInformation.aspx?Id=581> (last accessed on May 18, 2020).

¹³ El Paso County Commissioners Court, Meeting Minutes for May 4, 2020, available at <https://elpaso.novusagenda.com/AgendaPublic/> (last accessed on May 18, 2020).

¹⁴ A video recording of the Court's debate is at <https://harriscountytexas.newswagit.com/videos/56616>. Debate and testimony on the mail ballot measure begins at the 3:53:33 mark and continues through the 5:51 mark.

¹⁵ See *id.* at 4:21:50; see also *id.* at 4:14:15-4:17:10 (testimony that CRF funds would be available to pay for an expansion of mail-in ballots).

¹⁶ See *id.* at 5:25-5:30.

¹⁷ See *id.* at 5:32.

¹⁸ See *id.* at 5:50. On May 7, the Harris County Clerk, Diane Trautman, announced she would not send a mail ballot to all eligible Harris County voters. Erin Anderson, *Harris County's Top Election Official Resigns Amid Mail-Ballot Controversies*, Texas Scorecard (May 11, 2020), at <https://texasscorecard.com/houston/harris-countys-top-election-official-resigns-amid-mail-ballot-controversies/>. She subsequently resigned on May 9 due to health concerns. The status of mail balloting in Harris County remains in flux, but there is no indication that the Commissioners Court has abandoned plans to expand mail balloting for the coming elections.

In addition to breaking state law, spending federal funds to haphazardly expand Texas's mail-in ballot system is not a thoughtful response to the problems created by COVID-19. The State of Texas already offers mail-in ballots to many of those in high-risk groups—including those 65 and over and those with actual disabilities. Moreover, the State of Texas has taken significant steps to make in-person voting safe for those who do not qualify to vote by mail without ignoring state law intended to prevent election fraud and abuse. The July 14, 2020 elections were initially set to be held in May, but were rescheduled by gubernatorial suspension in response to COVID-19.¹⁹ Subsequently, on May 11, 2020 Governor Abbott exercised his statutory emergency powers²⁰ to expand the period of in-person early voting for all July 14 elections.²¹ His order doubles the number of days for early voting from ten days to twenty, allowing for greater social distancing and reduced wait times.²² In addition, the Texas Secretary of State has issued an advisory to election officials explaining that the Secretary would, in short order, provide detailed recommendations for protecting health and safety of voters and workers at the polls. Given these timely actions by Texas officials, a radical upending of Texas voting law and practice on the eve of two important elections is not needed to mitigate the effects of COVID-19.

The tie between COVID-19 and the drive to expand mail-in balloting is further attenuated when viewed against the backdrop of recent efforts to change Texas election law. In 2019, several bills were filed in the Texas Legislature to expand early voting by mail to any qualified voter.²³ This pre-existing effort has only been continued through the recent COVID-19 litigation. Moreover, many of the same groups seeking to expand mail-in balloting in court also have sued to make other changes to Texas election law, such as forcing Texas to enable straight-ticket voting;²⁴ overturning Texas's decades-old law governing the ordering of candidates on ballots;²⁵ striking down a Texas law reforming the abusive use of "temporary" and "mobile" early polling places;²⁶ and challenging election integrity rules, including signature match and postmark requirements for mail ballots.²⁷ This flood of litigation seeks to use COVID-19 as a pretext to judicially overhaul Texas's election system on the eve of a presidential election. Viewed in this context, the Harris County Commissioner Court's push to expand mail-in balloting is merely a continuation of a long-standing goal to revamp Texas election law.

We respectfully ask the Department to scrutinize its award of CARES Act funding to Harris County in light of the County's stated intent to use federal funding in violation of state law, and to the extent possible, seek return of any amounts improperly spent on efforts to promote illegal mail-in voting. We also ask that the Department make clear that a condition of its award of CRF funds to local governmental units is that they use the money in a manner that complies with state law.

¹⁹ Proclamation by the Governor of the State of Texas (Mar. 18, 2020).

²⁰ See Tex. Elec. Code § 418.011(1).

²¹ Proclamation by the Governor of the State of Texas (May 11, 2020), available at <https://gov.texas.gov/news/post/governor-abbott-issues-proclamation-regarding-july-4th-early-voting-for-special-runoff-elections>.

²² See Tex. Elec. Code § 85.001(a)-(b).

²³ Examples of such legislation during the 86th Session include HB 325, HB 1104, and SB 164, all of which can be accessed at www.capitol.state.tx.us.

²⁴ *Bruni v. Hughs*, No. 5:20-cv-00035 (S.D. Tex.).

²⁵ *Miller v. Hughs*, No. 1:19-cv-01071 (W.D. Tex.).

²⁶ *Tex. Democratic Party v. Hughs*, No. 1:19-cv-01063 (W.D. Tex.).

²⁷ *Lewis v. Hughs*, No. 5:20-cv-00577 (W.D. Tex.).

Without implementing adequate protections against unlawful abuse of mail-in ballots, the Department could be cast in a position of involuntarily facilitating election fraud.

Sincerely,

A handwritten signature in blue ink that reads "Ken Paxton". The signature is fluid and cursive, with the first name "Ken" and last name "Paxton" clearly legible.

KEN PAXTON
Attorney General of Texas