

IN THE SUPREME COURT OF TEXAS

No. 20-0394

IN RE STATE OF TEXAS

ON PETITION FOR MANDAMUS

Argued May 20, 2020

JUSTICE GUZMAN, joined by JUSTICE LEHRMANN and JUSTICE BUSBY, concurring.

The Texas Election Code permits qualified voters to vote by mail if the voter has a “disability,” which the Legislature defines as “a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter’s health.”¹ The parties dispute whether lack of immunity to the COVID-19 virus, by itself, constitutes a “disability” that enables all Texas voters without such immunity to vote by mail. Today, the Court unanimously answers that question “no.”² The legal

¹ TEX. ELEC. CODE § 82.002(a). The Code also provides that “[e]xpected or likely confinement for childbirth on election day is sufficient cause to entitle a voter to vote [by mail] under Subsection (a),” *id.* § 82.002(b), but that provision is not at issue in this mandamus proceeding.

² *Ante* at 21 & 24 (“[L]ack of immunity to COVID-19 is not itself a ‘physical condition’ that renders a voter eligible to vote by mail within the meaning of § 82.002(a).”); *post* at 1 (Boyd, J., concurring) (“[A] person’s lack of immunity to COVID-19 can constitute a ‘physical condition’ But even when it does, the voter is not eligible to vote early by mail unless, because of the voter’s physical condition, voting in person will probably injure the voter’s health.”); *post* at 1 (Bland, J., concurring) (“The Texas Election Code does not permit all Texas voters who lack immunity to the COVID-19 virus to vote by mail.”).

reasoning may differ among the writings,³ but the Court is unified in holding that: (1) vote by mail is not available based solely on lack of immunity to COVID-19;⁴ (2) fear of contracting a disease is not a physical condition;⁵ (3) “likelihood” of “injuring the voter’s health” means injury is probable;⁶ and (4) voters can take their health and health history into consideration in determining whether to request a vote-by-mail ballot.⁷ In the final analysis, every member of the Court reaches

³ See *ante* at 20-21 (lack of COVID-19 immunity is not a physical condition under the statute because it is not “an abnormal or at least distinguishing state of being”); *post* at 1 (Boyd, J., concurring) (under section 82.002(a) a “physical condition” means a “bodily state of being that limits, restricts, or reduces a person’s physical abilities,” which may include lack of immunity, but such condition is a “disability” only to the extent injury is probable based on that condition and other factors); *post* at 1, 6-8 (Bland, J., concurring) (lack of immunity to COVID-19 is a “physical condition” under the statute but whether it is a “disability” under the Election Code requires a probability that the condition would result in injury, depending on health and environmental circumstances unique to each individual).

⁴ *Ante* at 2 (“We agree . . . that a voter’s lack of immunity to COVID-19, without more, is not a ‘disability’ as defined by the Election Code.”); *post* at 5-6 & 8 (Boyd, J., concurring) (lack of immunity to COVID-19 may, but does not necessarily, constitute a “physical condition” or give rise to a “likelihood” of injury; accordingly, “[v]oters who claim to have a disability under section 82.002(a) *merely* because they lack immunity to COVID-19 or have a fear or concern about contracting the virus would do so in violation of the statute”); *post* at 1 (Bland, J., concurring) (“Lack of immunity to the COVID-19 virus will not, for all voters, create a likelihood that in-person voting will injure their health.”).

⁵ *Ante* at 20 (“The parties agree that this excludes mental or emotional states, including a generalized fear of a disease.”); *post* at 3 n.2 (Boyd, J., concurring) (“Because a ‘physical condition’ must be *physical*, an emotional limitation—including concern or fear of contracting a disease—does not constitute a physical condition.”); *post* at 6 (Bland, J., concurring) (“[T]he statutory definition eliminates anything *not* physical from consideration—thus, a generalized fear of contracting COVID-19 or some non-physical reason does not entitle a voter to apply for a mail-in ballot based on a disability.”).

⁶ *Ante* at 21 (observing “that ‘likelihood’ means a probability”); *post* at 6 (Boyd, J., concurring) (“[T]he term ‘likelihood’ refers to a ‘probability,’ as opposed to mere ‘possibility.’” (citing *JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 836 (Tex. 2018), and *State v. K.E.W.*, 315 S.W.3d 16, 23 (Tex. 2010)); *post* at 8 (Bland, J., concurring) (observing the Court has defined “likelihood” as meaning “probably” (citing *K.E.W.*, 315 S.W.3d at 23)).

⁷ *Ante* at 2, 22 (“The decision to apply to vote by mail based on a disability is the voter’s, subject to a correct understanding of the statutory definition of ‘disability[.]’”; “We agree . . . a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of disability. We disagree that lack of immunity, by itself, is one of them.”; and “[E]lection officials have no responsibility to question or investigate a ballot application that is valid on its face.”); *post* at 7 (Boyd, J., concurring) (“Whether a person’s sickness or physical condition creates a ‘likelihood’ that voting in person ‘at the polling place on election day’ will cause injury to the person’s health depends on innumerable factors, including the nature of the person’s sickness or physical condition, the person’s health history, the nature and level of the risk that in-person voting would pose in light of the particular sickness or physical condition, the adequacy of safety and sanitation measures implemented at and near the polling place to reduce that risk, and the level of caution the voter exercises.”); *post* at 7 & 8 (Bland, J., concurring) (“When coupled with the voters’ health history and the level of active infection in the voter’s community, a lack of immunity may or may not lead the voter to conclude that in-person

the same result for essentially the same reason: lack of immunity to the COVID-19 virus, in and of itself, does not constitute a disability under section 82.002(a) of the Election Code; rather, whether a voter is eligible to vote by mail ultimately depends on the voter’s own assessment of his or her individual health status. Though we disagree over how the legislatively enacted eligibility provisions may be construed,⁸ our discourse and debate here, as in every case, reflects the importance of the rights at issue⁹ and “diligent and honest efforts” to resolve “hard and fine questions of law.”¹⁰

With the salient points distilled and clarified—and with full confidence that voters and the State’s elected officials will comply with the law—I join the Court’s opinion denying mandamus relief.¹¹

Eva M. Guzman
Justice

OPINION DELIVERED: May 27, 2020

voting is likely to injure the voter’s health. . . . [T]he plain text of the Election Code makes clear that it is the voter—not an election official—who determines whether a ‘physical condition’ will cause a ‘likelihood’ that voting in person will injure the voter’s health.”).

⁸ See *Worsdale v. City of Killeen*, 578 S.W.3d 57, 77 (Tex. 2019) (“[R]easonable minds often disagree about how a statute may reasonably be construed.”).

⁹ Alexander Hamilton, *The Papers of Alexander Hamilton*, Vol III, pp. 544-45, Harold C. Syrett, ed. (New York, Columbia Univ. Press, 1962) (“A share in the sovereignty of the state, which is exercised by the citizens at large, in voting at elections is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law.”).

¹⁰ See Hon. Neil M. Gorsuch, *Law’s Irony*, 37 HARV. J.L. & PUB. POL’Y, 743, 752-53 (2014).

¹¹ *Ante* at 22-24.