



Michael Columbo, Partner
Dhillon Law Group Inc.
177 Post Street, Suite 700
San Francisco, CA 94108
mcolumbo@dhillonlaw.com

October 4, 2023

The Honorable Greg Abbott
Governor of Texas
1100 San Jacinto Blvd.
Austin, TX 78711

Re: The Need to Amend the Texas Constitution to Preserve Citizen Voting in Texas

Dear Governor Abbott,

I am writing on behalf of Americans for Citizen Voting (<https://onlycitizens.vote/>) to urge you to support an amendment to the Texas Constitution clarifying that a voter in Texas state elections must be a United States citizen.

This amendment is needed because Article VI, Sections 1-2 of the Texas Constitution do not clearly prohibit noncitizens from voting. Specifically, Article VI provides that one who is a United States citizen is qualified to vote but does not state that noncitizens are prohibited from voting. Although the Texas Election Code currently expressly prohibits noncitizens from voting, it could be amended relatively easily by a future legislature to permit noncitizen voting. Further, the Texas Attorney General has the authority to conduct investigations into Election Code violations, but the power to seek injunctions or mandamus is dependent upon a cooperative registrar or Secretary of State making a proper referral. In a city where local leaders are inclined to permit noncitizen voting, they could block the Attorney General's ability to enforce the Election Code.

Enshrining a provision in the Texas constitution clearly prohibiting non-citizen voting would be much more difficult to remove by a future legislature and could more effectively encourage home-rule cities to preserve the right to vote for Texas citizens.

BACKGROUND

Texas law contains provisions in both the Constitution and the Election Code defining who is qualified to register to vote in Texas elections.

The Arguably Ambiguous Texas Constitution

Article VI, Section 1 of the Texas Constitution prevents the following classes of persons from voting:

- (1) persons under 18 years of age;
- (2) persons who have been determined mentally incompetent by a court, subject to such exceptions as the Legislature may make; and
- (3) persons convicted of any felony, subject to such exceptions as the Legislature may make.

Notably absent from the above disqualification provisions are persons who are not United States citizens.

TEX. CONST. art. VI, § 1. As to who is qualified to vote, the Texas Constitution only states:

- (a) Every person subject to none of the disqualifications provided by Section 1 of this article or by a law enacted under that section who is a citizen of the United States and who is a resident of this state shall be deemed a qualified voter . . .

TEX. CONST. art. VI, § 2.

By only saying that citizens *are* qualified voters if not otherwise in a disqualified class listed in section 1, Article VI does not foreclose the possibility that other persons can also be deemed to be qualified. To illustrate the logic of this point, saying that a car shall qualify as a vehicle does not preclude the possibility that there are other machines, such as a truck or bus, that also qualify as vehicles. So, too, saying citizens are qualified to vote does not preclude that noncitizens may be qualified to vote as well.

This concern is magnified by the existence of home-rule cities in Texas. Under the Texas Constitution, home-rule city charters grant broad powers to act in any way not inconsistent with the Texas Constitution or laws passed by the Legislature. *See* TEX. CONST. art. XI, § 5. “Home-rule cities possess the full power of self-government and look to the Legislature not for grants of power, but only for limitations on their power.” *Dallas Merchant’s & Concessionaire’s Ass’n v. City of Dallas*, 852 S.W.2d 489, 490-91 (Tex. 1993). Home-rule city charters, applying to cities with populations greater than 5,000, are generally interpreted “as a whole[,]” and Texas courts will harmonize their “various provisions as far as possible[,]” considering “every word, phrase, and expression as if each had been deliberately chosen and used for a purpose.” *Hammond v. City of Dallas*, 712 S.W.2d 496, 498 (Tex. 1986). “[A] home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute.” *Dallas Merchant’s*, 852 S.W.2d at 491.

But for a subject matter to be preempted, Texas law must speak with “unmistakable clarity.” *See Id.* Although the better reading of the Texas Constitution is certainly that it requires citizenship to vote, it is possible that a court could interpret it as not speaking with the unmistakable clarity necessary to prevent Texas’s largest home-rule cities from amending their charters or adopting practices that allow noncitizens to vote.

The Texas Election Code

By statute, Chapter 11 of the Texas Election Code makes clear that “to be eligible to vote in an election in this state, a person must . . . [be] a United States citizen.” Texas Elec. Code §§ 11.001-11.002. Similarly, Chapter 13 of the Texas Election Code states “[t]o be eligible for registration as a voter in this state, a person must . . . be a United States citizen.” Texas Elec. Code. §13.001(a)(2). In order for these code sections to be effective, however, they must be enforced by a prosecuting agency. Unfortunately, local jurisdictions who choose to violate this provision may also be able to block its enforcement by the Attorney General.

To punish and deter violations of the Election Code, Texas statutes contain numerous provisions requiring voter registrars and the Secretary of State to report election law offenses to the Attorney General. *See* Texas Elec. Code. § 15.028 (“If the registrar determines that a person who is not eligible to vote registered to vote or voted in an election, the registrar shall, within 72 hours . . . execute and deliver to the attorney general, the secretary of state, and the county or district attorney having jurisdiction . . . an affidavit stating the relevant facts.”); *id.* at § 31.006(a) (“If . . . the secretary of state determines that there is reasonable cause to suspect that criminal conduct [involving an election] occurred, the secretary shall promptly refer the information to the attorney general.”).

Section 273.001 of the Election Code describes the Attorney General’s, as well as the county or district attorney’s, investigative powers:

- (a) If two or more registered voters of the territory covered by an election present affidavits alleging criminal conduct in connection with the election to the county or district attorney having jurisdiction in that territory, the county or district attorney shall investigate the allegations. If the election covers territory in more than one county, the voters may present the affidavits to the attorney general, and the attorney general shall investigate the allegations.

(b) A district or county attorney having jurisdiction or the attorney general may conduct an investigation on the officer's own initiative to determine if criminal conduct occurred in connection with an election.

(c) On receipt of an affidavit [from a registrar], the county or district attorney having jurisdiction and, if applicable, the attorney general shall investigate the matter.

(d) On referral of a complaint from the secretary of state under Section 31.006, the attorney general may investigate the allegations.

Id. at § 273.001(a)-(d).

But while the Texas Attorney General has the authority to conduct investigations, the power to seek injunctions or mandamus regarding election law violations depends upon a registrar or Secretary of State making a proper referral of an alleged issue. As the chief election officer of the State of Texas, the Secretary of State may also take appropriate action, including through the Attorney General, to stop certain election law abuses. *Id.* at § 31.005(b)-(c). Section 273.081 likewise allows “[a] person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code” to seek “appropriate injunctive relief to prevent the violation from continuing or occurring.”

Unfortunately, the Texas Court of Criminal Appeals invalidated the Attorney General’s independent powers to unilaterally prosecute violations of the Election Code in *State v. Stephens*, 663 S.W.3d 45 (Tex. Crim. App. 2021). There, the Court of Criminal Appeals held that “[b]ecause Texas Election Code section 273.021 delegates to the Attorney General a power more properly assigned to the judicial department, we conclude that the statute [allowing the Attorney General to prosecute a criminal offense proscribed by Texas election laws] is unconstitutional.” *Id.* at 47. “Absent the consent and deputization order of a local prosecutor or the request of a district or county attorney for assistance, the Attorney General has no authority to independently prosecute criminal cases in trial courts.” *Id.* at 56.

Accordingly, so long as *State v. Stephens* is good law, it could prevent the Attorney General from prosecuting election law violations, including rogue municipalities that allow noncitizens to vote.

The Need to Amend the Texas Constitution to Prevent Amendment of the Election Code

While the Election Code provisions limit voter registration and voting to citizens, they can be more readily changed by a future legislature than a constitutional provision. Article XVII, Section 1(a) of the

Texas Constitution provides a more onerous way to change the Texas Constitution as compared to passing simple legislation in the Legislature:

the Legislature, at any regular session, or at any special session when the matter is included within the purposes for which the session is convened, may propose amendments revising the Constitution, to be voted upon by the qualified voters for statewide offices and propositions, as defined in the Constitution and statutes of this State The proposal for submission must be approved by a vote of two-thirds of all the members elected to each House, entered by yeas and nays on the journals.

TEX. CONST. art. XVII, § 1(a). If the Texas Constitution disqualified noncitizens from voting, “the Legislature is without power to restrict or extend these requirements.” See *Ramsay v. Wilhelm*, 52 S.W.2d 757, 760 (Tex. App.—Austin 1932, writ ref’d).

Accordingly, enshrining a provision disqualifying noncitizens from voting in the Texas Constitution mitigates the concern a future legislature will amend the Election Code to qualify noncitizens to vote.

* * * *

Given the importance of this issue and the fact that the Attorney General cannot prosecute Election Code violations himself, Americans for Citizen Voting respectfully requests that you support legislation to amend the Texas Constitution to clarify that noncitizens cannot vote in any Texas elections.

Respectfully,



Michael A. Columbo
Partner, The Dhillon Law Group, Inc.