

IN THE SUPREME COURT OF TEXAS

No. 20-0394

IN RE STATE OF TEXAS

ON PETITION FOR MANDAMUS

JUSTICE BOYD, concurring.

I agree with the Court that “a voter’s lack of immunity to COVID-19, without more, is not a ‘disability’ as defined by the Election Code.” *Ante* at _____. But I reach that result for different reasons. Reading the phrase “physical condition” within its statutory context, I conclude that it refers to a bodily state of being that limits, restricts, or reduces a person’s physical abilities. Under this reading, a person’s lack of immunity to COVID-19 can constitute a “physical condition” as the statute uses that phrase. 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. We cannot decide on this record whether any particular voter is eligible for mail-in voting under that standard. Fully expecting that the state’s election officials and voters will apply the eligibility statute as the Court construes it, I join the Court’s judgment denying the State’s petition for writ of mandamus.

* * *

The Texas Election Code permits a qualified voter who has a “disability” to vote early by mail. TEX. ELEC. CODE § 82.002. Section 82.002 includes two subsections, each providing a different description of “disability.” Under subsection (a), the voter must satisfy two requirements:

(1) the voter must have “a sickness or physical condition,” and (2) that sickness or physical condition must “prevent[] the voter from appearing at the polling place on election day without a likelihood of . . . injuring the voter’s health.” *Id.* § 82.002(a). Under subsection (b), “[e]xpected or likely confinement for childbirth on election day is sufficient” to qualify as a disability, without regard to subsection (a)’s requirements. *Id.* § 82.002(b). The parties focus in this case on subsection (a).

A. Physical condition

The parties dispute whether a voter’s lack of immunity to COVID-19 constitutes a “physical condition” that satisfies subsection (a)’s first requirement. The Court holds it does not because the phrase “physical condition” means not just a “physical state of being,” but a physical state of being that is “abnormal” or “distinguishing” and rises to the level of “incapacity.” *Ante* at _____. Because a lack of immunity to COVID-19 is not “abnormal,” “distinguishing,” or an “incapacity,” the Court concludes it cannot qualify as a “physical condition” under section 82.002(a). *Ante* at _____.

I reach a different conclusion on the meaning of “physical condition.” Because the Code does not define that phrase, we must apply its common, ordinary meaning unless the statutory context indicates that the statute uses the phrase to communicate a different meaning. *City of Fort Worth v. Rylie*, No. 18-1231, — S.W.3d —, 2020 WL 2311941, at *6 n.19 (Tex. May 8, 2020) (“When, as here, a statute does not define a term, we typically apply the term’s common, ordinary meaning, derived first from applicable dictionary definitions, unless a contrary meaning is apparent from the statute’s language.”). Although “physical condition” might

ordinarily refer generally to one’s bodily state of being, we must consider whether the statutory context requires a different meaning here. *Id.*¹

The textual context of the phrase “physical condition” in section 82.002(a) is both clear and illuminating. As indicated in its title, section 82.002 provides eligibility for mail-in voting to those who have a “disability.” TEX. ELEC. CODE § 82.002. Subsection (a) first requires that the voter have either a “sickness” or a “physical condition.” *Id.* § 82.002(a). It then requires that the sickness or physical condition “prevents” the voter from voting in person without a likelihood of injury to the voter’s health. *Id.* And subsection (b)’s alternative form of “disability” requires an expected or likely “confinement” for childbirth on election day. *Id.* § 82.002(b). Within this statutory context—defining “disability” to mean a “sickness” or “physical condition” that “prevents” or “confines”—I would hold that a “physical condition” under section 82.002(a) is not just *any* bodily state of being, but a bodily state that *limits, restricts, or reduces* the person’s physical abilities.²

The Court also rejects the idea that *every* bodily state of being qualifies as a “physical condition” under section 82.002(a). *Ante* at _____. In this respect, the Court and I disagree with JUSTICE BLAND, who would broadly construe “physical condition” to mean any “state of health or physical fitness” or “physical state of the body.” *Post* at _____. In my view, that construction applies the phrase’s common, ordinary meaning without considering whether the phrase carries a different

¹ See also *Ritchie v. Rupe*, 443 S.W.3d 856, 867 (Tex. 2014) (“[O]ur text-based approach to statutory construction requires us to study the language of the specific provision at issue, within the context of the statute as a whole, endeavoring to give effect to every word, clause, and sentence.”); *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014) (plurality op.) (“We thus begin our analysis with the statute’s words and then consider the apparent meaning of those words within their context.”).

² Because a “physical condition” must be *physical*, an emotional limitation—including concern or fear of contracting a disease—does not constitute a physical condition under section 82.002(a).

meaning in light of its statutory context. Under JUSTICE BLAND’S construction, lacking immunity would always constitute a “physical condition,” but so would having immunity, as they both describe a “physical state of the body.” Then, of course, everyone would have a “physical condition,” and subsection (a)’s first requirement would actually require nothing at all. We could delete subsection (a)’s requirement (a “sickness or physical condition”) and retain its second requirement (a likelihood of injury to health) and the statute’s meaning would not change.

After properly rejecting that construction, however, the Court relies on an alternative dictionary definition to conclude that section 82.002(a) requires a physical condition that is “abnormal” or “distinguishing.” *Ante* at _____. I find nothing in the statutory context to suggest or support this meaning. In light of the statutory context, this construction is over-inclusive because it encompasses conditions that have nothing to do with “disabilities” that “prevent” or “confine” a person’s activities. A person with a lengthy handle-bar mustache, for example, might have an “abnormal” and “distinguishing” physical condition, but not the type that fits within the context of conditions that prevent or confine a person’s physical abilities.

At the same time, the Court’s construction is also under-inclusive because it excludes physical conditions that prevent or confine a person’s abilities merely because other people have the same physical condition. If, for example, the world had been struck with a virus far more contagious and aggressive than COVID-19, such that ninety-nine percent of all Texans were infected and adversely affected, they would all suffer from a “sickness,” even if the sickness was not then abnormal or distinguishing. In the same way, ninety-nine percent of the voting population may have a “physical condition” under the statute, even though that condition is not abnormal or

distinguishing. Contextually, the phrase “physical condition” speaks to conditions that involve a lack of ability that prevents and confines, not to normality, numbers, or percentages.

Relying on the dictionary definition of “disability,” the Court concludes that a physical condition under section 82.002(a) must be an “incapacity,” as well as abnormal or distinguishing. *Ante* at _____. But if the legislature wanted to require an “incapacity,” it could have just said the voter must have a “disability” since, according to the Court, the common, ordinary meaning of “disability” is “incapacity.” *Ante* at _____. Instead, the legislature described two specific types of qualifying “disabilities”; the phrase “physical condition” serves as just the first requirement for one of those types. *See* TEX. ELEC. CODE § 82.002(a), (b). The second requirement for that type of disability is that the person’s physical condition “prevents the voter from appearing at the polling place on election day without a likelihood of . . . injuring the voter’s health.” *Id.* § 82.002(a). Subsection (a)’s second requirement describes the required nature or level of limitation (which falls far short of “incapacity,” as the Court uses that term), while its first requirement (a “sickness or physical condition”) describes what must cause that limitation.

Construing the phrase within its statutory context, I would hold that a “physical condition” under section 82.002(a) is a bodily state of being that limits, restricts, or reduces a person’s abilities. It does not include every bodily state of being, but it includes more than just abnormal or distinguishing conditions that incapacitate a person. Under this construction—to use the Court’s example—being “too tired to drive to a polling place,” *ante* at _____, *could* qualify as a “physical condition” under section 82.002(a) because that physical condition could limit, restrict, or reduce the person’s physical abilities. And for the same reason, so could a lack of immunity to COVID-

19. But even when it does, the person satisfies only the first requirement for claiming a disability that makes the person eligible to vote early by mail.

B. Likelihood of injury to health

Because section 82.002(a) includes a second requirement, merely having a sickness or physical condition does not constitute a “disability” that makes a person eligible for early mail-in voting. Subsection (a) also requires that the person’s physical condition be so severe or substantial that it creates a “likelihood” that voting in person would require personal assistance or would injure the voter’s health. The Court is incorrect to read my opinion as concluding that “a lack of immunity alone could . . . be a likely cause of injury to health from voting in person.” *Ante* at _____. Subsection (a) requires not just a sickness or physical condition, but also circumstances that create a likelihood that, in light of that sickness or physical condition, voting in person would injure the person’s health.

Consistent with our precedent, I would hold that the term “likelihood” refers to a “probability,” as opposed to a mere “possibility.” *See JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 836 (Tex. 2018) (explaining that a court’s error in excluding evidence is “likely harmful” if “it probably caused the rendition of an improper judgment”); *State v. K.E.W.*, 315 S.W.3d 16, 23 (Tex. 2010) (“‘Likelihood’ connotes more than mere possibility or conjecture and is synonymous with ‘probability.’”). And the Court agrees. *See ante* at _____.

But the Court suggests that voters who lack immunity to COVID-19 but have no other “sickness or physical condition” could never satisfy section 82.002(a)’s second requirement because “contracting COVID-19 in general is highly improbable.” *Ante* at _____. Although it may be true that, statistically, any particular person “in general” is not likely to contract COVID-19,

section 82.002(a) does not consider such generalities. Under section 82.002(a), the question is whether a voter who has a sickness or physical condition faces a likelihood of injury to health at a specific particular place and time—“the polling place on election day.” TEX. ELEC. CODE § 82.002(a). 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.

This limited record is simply insufficient to answer that question as to any particular voter.³ Even if I could consider the many conflicting scientific studies and anecdotal reports I have read or read about, I simply don’t know whether any particular person’s lack of COVID-19 immunity would prevent that person from voting in person at the polling place on election day without facing the probability that doing so will injure the person’s health. Nor do I know whether or how the safety and sanitation measures our state’s election authorities are implementing will affect that level of risk. We simply cannot answer those questions on this limited record.

³ A group of healthcare professionals and institutions that submitted an amicus curiae brief asserts that “the rate of transmission likely to result from a mass congregation cannot be quantified precisely.” They also submitted the declaration of a medical doctor, however, who asserts that voters will in “reasonable medical probability” face “a likelihood of injuring their health, if they appear at a polling place on Election Day,” creating a “likelihood of injuring their own health at an open polling place where people congregate, even with all, good faith attempts to control massing.” Even if we accepted this declaration as undisputed fact, however, it does not and cannot speak to the specific circumstances any particular voter will experience at the polling place on election day.

We can confirm, however, that merely having a physical condition, including a lack of immunity to COVID-19, does not constitute a disability or make one eligible to vote early by mail under section 82.002(a). Instead, subsection (a) requires that the person’s physical condition create a probability that voting in person will injure the person’s health. The law leaves it to the voters to make that determination for themselves, *see ante* at ____, but they must make that determination based on the statute’s requirements.

C. Mandamus relief

Finally, I agree with the Court’s denial of the State’s request for mandamus relief. Up to this point, the State and the Respondents (and others) have engaged in a legitimate disagreement over the meaning of section 82.002(a). Now that the Court has resolved that issue, Respondents, like the voters and other election officials, must accept and abide by the statute’s restrictions as the Court construes it. Voters 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. And although, as the State acknowledges, election officials have no responsibility to question or investigate a ballot application that is valid on its face, they are not free to advise or instruct voters to ignore or violate the statute’s requirements. But because I share the Court’s confidence that Respondents will “comply with the law in good faith,” *ante* at ____, I join its judgment denying the State’s petition.

Jeffrey S. Boyd
Justice

Opinion delivered: May 27, 2020