

No. 20-50407

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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TEXAS DEMOCRATIC PARTY, ET AL.,

*Plaintiffs-Appellees,*

v.

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.,

*Defendants-Appellants,*

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On Appeal from the United States District Court for the  
Western District of Texas, San Antonio Division (No. 5:20-cv-00438-FB)

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**AMICI CURIAE BRIEF OF THE  
AMERICAN DIABETES ASSOCIATION, DISABILITY RIGHTS  
ADVOCATES, NATIONAL DISABILITY RIGHTS NETWORK, AND THE  
DISABILITY RIGHTS LEGAL CENTER  
IN SUPPORT OF NEITHER PARTY BUT IN SUPPORT OF  
AFFIRMANCE**

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July 6, 2020

## CERTIFICATE OF INTERESTED PERSONS

(1) No. 20-50407; *Texas Democratic Party, et al. v. Greg Abbott, Governor of Texas, et al.*

(2) The undersigned counsel of record certifies that the following listed persons and entities described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

**Amicus curiae:** The American Diabetes Association, Disability Rights Advocates, National Disability Rights Network, and Disability Rights Legal Center

**Plaintiffs-Appellees:** Texas Democratic Party, Gilbert Hinojosa, Chair of the Texas Democratic Party, Joseph Daniel Cascino, Shanda Marie Sansing, and Brenda Li Garcia

**Defendants-Appellants:** Greg Abbott, Governor of Texas, Ruth Hughs, Texas Secretary of State, Ken Paxton, Attorney General of Texas

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### **RULE 29(c)(5) STATEMENT**

Pursuant to Fed. R. App. P 29(c)(5), amici certify that: (A) no party's counsel authored this brief in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) no person—other than the amici, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

### **NOTICE OF CONSENT**

This brief is filed with the consent of all parties.

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## INTEREST OF *AMICI*<sup>1</sup>

The American Diabetes Association, Disability Rights Advocates, National Disability Rights Network, and Disability Rights Legal Center (collectively, “*Amici*”) are each interested in protecting the rights of those with disabilities. Consequently, *Amici* are interested in clarity from this Court concerning the preservation of the rights conferred by the Americans with Disabilities Act (ADA) for their members, clients, and constituents.

The American Diabetes Association (“Association”) is a nationwide, nonprofit, voluntary health organization founded in 1940 made up of persons with diabetes, healthcare professionals who treat persons with diabetes, research scientists, and other concerned individuals. The Association’s mission is to prevent and cure diabetes and to improve the lives of all people affected by diabetes. The Association is the largest non-governmental organization that deals with the treatment and impact of diabetes.<sup>2</sup> The Association reviews and authors the most authoritative and widely followed clinical practice recommendations, guidelines,

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<sup>1</sup> Counsel for each of the parties have consented to the filing of this brief. *Amici* certify that this brief was authored in whole by counsel for *Amici* and no part of the brief was authored by any attorney for a party. No party, nor any other person or entity, made any monetary contribution to the preparation or submission of this brief.

<sup>2</sup> The Association has over 485,000 general members, over 15,000 health professional members and over 1,000,000 volunteers.

and standards for the treatment of diabetes<sup>3</sup> and publishes the most influential professional journals concerning diabetes research and treatment.<sup>4</sup>

Among the Association's principal concerns is the equitable and fair treatment of people with diabetes. Three million Texans have diabetes, 600,000 of whom have undiagnosed diabetes,<sup>5</sup> greatly increasing their health risk. In most cases, disenfranchisement is the result not of malice toward those with diabetes, but rather, is a product of misinformation, stereotypes, or lack of attention. Thus, the Association aims to share information about diabetes, its relationship to COVID-19, and the effects of both on the lives of its Texas members to aid this Court in reaching its decision.

Disability Rights Advocates ("DRA") is a non-profit public interest center that specializes in high-impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA has long championed the rights of people with disabilities to vote privately and independently, including

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<sup>3</sup> American Diabetes Association: Standards of Medical Care in Diabetes 2020, *Diabetes Care* 43: Supp. 1 (2020).

<sup>4</sup> The Association publishes five professional journals with widespread circulation: (1) *Diabetes* (original scientific research about diabetes); (2) *Diabetes Care* (original human studies about diabetes treatment); (3) *Clinical Diabetes* (information about state-of-the-art care for people with diabetes); (4) *BMJ Open Diabetes Research & Care* (clinical research articles regarding type 1 and type 2 diabetes and associated complications); and (5) *Diabetes Spectrum* (review and original articles on clinical diabetes management).

<sup>5</sup> Centers for Disease Control and Prevention, U.S. Diabetes Surveillance System, Diagnosed Diabetes, Total, Adults with Diabetes, Number, Texas <https://gis.cdc.gov/grasp/diabetes/DiabetesAtlas.html#>; Timothy M. Dall et al., *The Economic Burden of Elevated Blood Glucose Levels in 2017 Diagnosed and Undiagnosed Diabetes, Gestational Diabetes Mellitus, and Prediabetes*, 42 *DIABETES CARE* 9 (September 2019).

in *California Council of the Blind v. County of Alameda*, 985 F. Supp. 2d 1229 (N.D. Cal. 2013) and *Disabled in Action v. New York State Board of Elections*, 752 F.3d 189 (2d Cir. 2014).

The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

The Disability Rights Legal Center (DRLC) is a nonprofit legal organization founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle with ignorance, prejudice, insensitivity, and lack of legal protections in their endeavors to achieve fundamental dignity and respect. DRLC assists people with disabilities in obtaining equality of opportunity and

maximizing independence via the benefits and protections guaranteed under the Americans with Disabilities Act, the Rehabilitation Act of 1973, the Individuals with Disabilities Education Act, the Unruh Civil Rights Act, and other state and federal laws. DRLC is widely acknowledged as a leading disability public interest organization and it participates in various *amici curiae* efforts in cases affecting the rights of people with disabilities.

As 501(c)(3) organizations, *Amici* do not support or oppose any party or candidate for political office. *Amici's* interest in this matter is limited to (1) seeking clarity for people with disabilities concerning whether they may vote by mail and (2) ensuring people with disabilities are able to vote in a safe manner.

In this brief, *Amici* seek to demonstrate that under the status quo, Texans who have certain types of disabilities are unsure whether they can legally vote by mail and are fearful of voting in person because of the serious, additional risk the coronavirus poses due to their disability status. Thus, Texans with disabilities would benefit from this Court's provision of clarity. Without clarification concerning the relationship of the Texas Supreme Court's order to federal law, Texans with disabilities, in many cases, are likely to be disenfranchised.

In accordance with F.R.A.P. 29(a)(6) *Amici* submit this brief on behalf of no party, but in support of affirmance of the lower court's ruling.

## SUMMARY OF ARGUMENT

*Amici* support affirmance of the lower court’s ruling because it encompasses the relief that *Amici* seek, but write to supply the Court with information concerning the specific concerns of those more vulnerable due to their disabilities. Texans with disabilities have rights under federal law—The Americans with Disabilities Act (ADA)—which relate to but were not addressed by the Texas Supreme Court.<sup>6</sup> These rights conferred by federal law include the right to reasonable modifications in state and local government programs, such as voting by mail during a global pandemic that threatens their lives. State law allows Texans with *certain* disabilities to vote by mail, Tex. Elec. Code § 82.002, and while *Amici* take no position on the proper interpretation of who may vote by mail by reason of disability under the Texas Election Code or the Texas Supreme Court’s decision, the fact remains that Texans have additional rights under the ADA. And, there are some who may not qualify to vote by mail under Texas law who would nevertheless be entitled to reasonable modifications under the ADA.

As a result, *Amici* seek clarity in light of that decision and the Attorney General’s public, interpretive statements of the law that were focused on the narrow question of whether lack of immunity from COVID-19 should be considered a

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<sup>6</sup> The Texas Supreme Court did not err in not addressing the Americans with Disabilities Act, as no question relating to the ADA was presented to that court.

disability. These discussions contain language that may confuse and chill voters who have disabilities from exercising their rights under state or federal law.

*Amici* request this Court either affirm the lower court's ruling, which would allow all voters to vote by mail, or, in the alternative, in a reversal, clarify that the reversal of the District Court's order interpreting who qualifies to vote by mail by reason of disability under the Texas Election Code does not preclude any claims brought by Texans under the Americans with Disabilities Act.

## ARGUMENT

### **I. PEOPLE WITH CHRONIC CONDITIONS, SUCH AS DIABETES, ARE AT INCREASED RISK FOR SERIOUS ILLNESS AND DEATH FROM COVID-19**

People with underlying health conditions are at a higher risk for death and severe disease from COVID-19 than people without these conditions. *In re State of Texas*, No. 20-0394, 2020 Tex. LEXIS 452 at \*3 (Tex. May 27, 2020); CDC COVID-19 RESPONSE TEAM, MORBIDITY & MORTALITY WEEKLY REPORT, PRELIMINARY ESTIMATES OF THE PREVALENCE OF SELECTED UNDERLYING HEALTH CONDITIONS AMONG PATIENTS WITH CORONAVIRUS DISEASE 2019 — UNITED STATES, FEBRUARY 12–MARCH 28, 2020, at 382 (Mar. 31, 2020), <http://dx.doi.org/10.15585/mmwr.mm6913e2> [hereinafter Preliminary Estimates]. The CDC has released data surrounding outcomes for COVID-19 patients throughout the pandemic. While the risks posed by COVID-19 increase as patients

age, people with chronic conditions of *all* ages face higher risks; the most recent data shows that those who have an underlying condition are six times more likely to be hospitalized and twelve times more likely to die than those without an underlying condition. *See* CDC COVID-19 RESPONSE TEAM, MORBIDITY & MORTALITY WEEKLY REPORT, CORONAVIRUS DISEASE 2019 CASE SURVEILLANCE — UNITED STATES, JANUARY 22–MAY 30, 2020, at 763, Table 3 (June 19, 2020), <http://dx.doi.org/10.15585/mmwr.mm6924e2> [hereinafter January–May Case Surveillance]. In *every* age bracket, the rate of hospitalization and death is higher for those with chronic conditions than for those without. *Id.*

For people with diabetes specifically, the risk of serious illness and death is high. The CDC lists people with type 2 diabetes as being at increased risk for serious illness from COVID-19 and includes people with type 1 diabetes in the “might be at increased risk” category. Centers for Disease Control and Prevention, *People Who Are at Higher Risk for Severe Illness*, <https://tinyurl.com/y9chuzkm> (last updated June 25, 2020). This higher risk is substantiated by CDC’s early research, which indicated that 26% of patients hospitalized due to COVID-19 had diabetes. *See* Preliminary Estimates at Table 1. One study found that the presence of diabetes quintuples the risk of death. Bruce Bode et al., *Glycemic Characteristics and Clinical Outcomes of COVID-19 Patients Hospitalized in the United States*, J. OF DIABETES SCI. AND TECH., at Page 6, Figure 3, <https://glytecsystems.com/wp->

content/uploads/JDST-Glytec-Covid-Research.pdf. Another study covering nearly the entire population of the U.K. found that people with diabetes made up *one-third* of COVID-19 related deaths. Emma Barron et al, *Type 1 and Type 2 Diabetes and COVID-19 Related Mortality in England: a Whole Population Study*, United Kingdom National Health Service (NHS), May 19, 2020, at 2, <https://www.england.nhs.uk/wp-content/uploads/2020/05/valabhji-COVID-19-and-Diabetes-Paper-1.pdf> (awaiting peer review and publication). As these studies illustrate, diabetes has rapidly emerged as a major comorbidity for COVID-19 severity.

The growing body of medical literature depicts the grim reality that people with diabetes face if they contract the coronavirus. For this reason and others, the CDC has concluded that its findings “highlight the continued need for community mitigation strategies, especially for vulnerable populations.” *See* January–May Case Surveillance at 764.

## **II. BECAUSE OF THE RISKS TO THEIR HEALTH, THE AMERICAN DIABETES ASSOCIATION’S MEMBERS ARE FEARFUL OF VOTING IN PERSON**

Richard C. Vanglish is a 64-year-old registered voter who resides in Carrollton, Texas.<sup>7</sup> Mr. Vanglish lives with Type 1 diabetes and knows that he is at

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<sup>7</sup> Mr. Vanglish’s birthdate is 11/21/1955 and thus will not be age 65 until after the November general election. As a result, he will not be eligible to vote by mail under Tex. Elec. Code § 82.003.

increased risk for serious illness and death if he were to contract the coronavirus. As a result, he is fearful of voting in person in this fall's general election. Mr. Vanglish is currently exercising extensive precautions in his everyday life. He tries not to leave his home if he can avoid it. He hasn't been to visit his doctor. If he must visit a store, he uses curbside pickup, vulnerable population shopping hours, and leaves if he notices that there are too many people in the store or that people aren't wearing masks. When walking outside, he crosses the street if someone is walking on the same side that he is. Since early March, he has only allowed one person in his home and that was to receive medical assistance. Recently, he attended a funeral via Zoom because he wasn't comfortable travelling or attending in person. Mr. Vanglish does not want to have to choose between risking his life and exercising his civic duty.

Deirdre Murphy is a 48-year-old registered voter living in San Antonio. Ms. Murphy also lives with Type 1 diabetes. Voting is important to Ms. Murphy—from the age of 18, she has voted in nearly every election in which she was eligible to vote. Because her diabetes puts her at greater risk for serious illness if she were to contract the coronavirus, Ms. Murphy has been exercising additional caution in her routine activities. She has avoided ordering takeout or food delivery. She only shops in a very small grocery store that is using numerous public health measures (such as limiting the number of people inside at any given time) and she only shops during off-peak hours. Ms. Murphy is fearful of voting in person in the upcoming election.

In part, she is concerned about the touch screen systems that have been recently employed in Texas and uncertain about poll workers' ability to adequately clean them between each use. She would like to vote by mail, but is afraid at the prospect of facing criminal prosecution over her own interpretation of whether she qualifies to vote by mail due to her diabetes and increased risk of serious illness from COVID-19.

Ms. Murphy is aware of the ADA and her rights to reasonable modifications pursuant to that law, but her knowledge comes from her position as a highly involved Advocate with the American Diabetes Association. In her capacity as an Advocate, she has spoken to many groups of people with diabetes about their rights and has encountered many Texans who were completely unaware of the existence of the ADA and/or that they had rights under the federal law, as people with diabetes.

### **III. SEPARATELY FROM THE QUESTION OF STATE STATUTORY CONSTRUCTION, THE STATE OF TEXAS MUST PROVIDE VOTERS WITH DISABILITIES REASONABLE MODIFICATIONS UNDER FEDERAL LAW**

#### **A. The ADA requires state government programs, such as County Election Administrators, to provide reasonable modifications to voters with disabilities.**

The ADA (42 U.S.C. §§ 12101, *et seq.*) is a comprehensive civil rights law enacted to provide “a clear and comprehensive national mandate for the elimination of discrimination” against individuals with disabilities. 42 U.S.C. § 12101(b)(1). Title II of the ADA applies to any “public entity,” 42 U.S.C. § 12132, which is

defined to include any state or local government, and any of their departments, agencies, or instrumentalities. 42 U.S.C. § 12131(1). After decades of deliberation and investigation into the need to address discrimination against persons with disabilities, both Houses of Congress passed the ADA by large majorities. *Tennessee v. Lane*, 541 U.S. 509, 516 (U.S. 2004). In enacting the ADA, Congress found that discrimination against people with disabilities persists in critical areas of our country, including voting. *See* 42 U.S.C. § 12101(a)(3).

Title II also provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. As a program or activity of a state or local entity, voting is covered by Title II of the ADA. *See National Organization on Disability v. Tartaglione*, No. 01-cv-1923, 2001 WL 1231717, at \*4 (E.D. Pa. Oct. 11, 2001); *California Council of the Blind v. County of Alameda*, 985 F. Supp. 2d 1229, 1235 (N.D. Cal. 2013); *Disabled in Action v. Bd. of Elections in City of New York*, 752 F.3d 189 (2d Cir. 2014). The Department of Justice, as the enforcing agency of Title II, takes the same position. *See, e.g.*, Investigation of Harris County at [www.ada.gov/harris\\_count\\_lof.htm](http://www.ada.gov/harris_count_lof.htm).

As the Supreme Court guides in *Tennessee v. Lane*, “it is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II

against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.” 541 U.S. at 524–25 (discussing a pattern of unequal treatment in the administration of public programs such as voting, and citing its earlier decision in *Bd. of Trs. v. Garrett*, 531 U.S. 356, 371, n.7 (2001) which acknowledged an “overwhelming majority” of examples in the administration of public programs and services).

The Department of Justice’s Title II implementing regulations reinforce the statute’s mandate of non-discrimination. Among other things, those regulations state that “a public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(7). *See also Tennessee v. Lane*, 541 U.S. 509, 536 (2004); *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011) (en banc) (“As the Supreme Court stated in *Tennessee v. Lane*, Title II imposes an ‘obligation to accommodate,’ or a ‘reasonable modification requirement.’”); *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 454 n.11 (5th Cir. 2005) (“Title II of the ADA requires public entities to (1) make ‘reasonable modifications to rules, policies, or practices’”); *Patterson v. Kerr County*, No. SA-05-CA-0626-RF, 2007 WL 2086671, at \*7 (W.D. Tex. July 18, 2007) (“Because the regulation requires modifications that are ‘necessary to avoid discrimination on the basis of disability,’ liability does not depend on evidence of purposeful discrimination”).

**B. Those who qualify to vote by mail by reason of disability under the Texas Election Code are different from those with a qualifying disability under the Americans with Disabilities Act.**

The Texas Election Code allows certain voters to vote by mail by reason of disability. The Texas Election Code states, “A qualified voter is eligible for early voting by mail if the voter has 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.” Tex. Elec. Code § 82.002. The Texas Supreme Court issued an opinion interpreting this provision of the law as not inclusive of those who lacked immunity to COVID-19. *In re State*, No. 20-0394, 2020 Tex. LEXIS 452, at \*2.

The definition of disability under the ADA is different and applies to vote by mail as an activity of a state or local government regardless of what else the term means under Texas law. The ADA defines disability as: (1) a physical or mental impairment that substantially limits one or more major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102.

The ADA, as amended,<sup>8</sup> (ADAAA) also includes various explanations and rules of construction applicable to its disability definition, including, among other

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<sup>8</sup> The ADA’s definition of disability was significantly expanded by the ADA Amendments Act of 2008. 29 C.F.R. Part 1630 App., § 1630.2(g). *See also Norton v. Assisted Living Concepts, Inc.*, 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011).

things: (1) that the definition is to be broadly construed, 42 U.S.C. § 12102(4)(A); (2) that disability is to be assessed without regard to mitigating measures such as medications, prosthetics, hearing aids, or other devices, 42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. § 1630.2(j)(1)(vi); (3) that major life activities are now defined as including the operation of major bodily functions, 42 U.S.C. § 12102(2)(B); and (4) that for conditions that are episodic or in remission, disability is assessed in the condition's active state, 42 U.S.C. § 12102(4)(D); 29 C.F.R. § 1630.2(j)(1)(vii).

In addition, major life activities now “include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 U.S.C. § 12102(2)(A). The regulations repeat this list, but also add sitting, reaching, and interacting with others. 29 C.F.R. § 1630.2(i)(1)(i).

### **Broad Construction:**

The statute commands that the disability definition “be construed ... in favor of broad coverage ... to the maximum extent permitted by the terms” of the ADAAA, 42 U.S.C. § 12102(4)(A). This means “as broadly as its text permits.” *Summers v. Altarum Institute, Corp.*, 740 F.3d 325, 330 (4th Cir. 2014). *See also Patton v. eCardio Diagnostics LLC*, 793 F. Supp. 2d 964, 968 (S.D. Tex. 2011) (“Under the ADAAA, the Court is required to construe the term ‘disability’ broadly

and to provide coverage to the maximum extent possible under the ADA.”). Giving the disability definition its broadest construction requires that each element of that definition—including “major life activity” and “major bodily function”—also be construed as broadly as possible.

**Disability is Assessed Without Regard to Mitigating Measures:**

The statute states that “the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.” 42 U.S.C. § 12102(4)(E)(i); 29 C.F.R. § 1630.2(j)(1)(vi). *See also Rohr v. Salt River Project Agricultural Improvement and Power District*, 555 F.3d 850, 861–862 (9th Cir. 2009) (“Impairments are to be evaluated in their unmitigated state, so that, for example, diabetes will be assessed in terms of its limitations on major life activities when the diabetic does not take insulin injections or medicine and does not require behavioral adaptations such as a strict diet.”); *E.E.O.C. v. Burlington Northern & Santa Fe Ry. Co.*, 621 F. Supp. 2d 587, 593 n.3 (W.D. Tenn. June 3, 2009) (prosthetics no longer considered).

**Major Life Activity Includes Major Bodily Functions:**

The ADAAA defines “major life activities” to include “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. § 12102(2)(B).

## **An Episodic Condition Must Be Assessed In Its Active State:**

The ADAAA explicitly states that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity *when active.*” 42 U.S.C. § 12102(4)(D). (emphasis added). Under the plain language of the statute, disability is determined by an individual’s limitations during a flare-up, when the symptoms are at their worst.

Thus, for example, a person with a seizure disorder is assessed during a seizure,<sup>9</sup> a person with hypertension is assessed during a blood-pressure spike,<sup>10</sup> episodic back pain is assessed when there is a flare-up,<sup>11</sup> and people are assessed

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<sup>9</sup> See, e.g., *Olsen v. Capital Region Medical Center*, 713 F.3d 1149, 1154 (8th Cir. 2013) (“It is undisputed that Olsen was disabled, because Olsen suffered from seizures which, while occurring, incapacitated her and prevented her from performing her job duties.”); *Karatzas v. Herricks Union Free Sch. Dist.*, No. 15-CV-2888(ADS)(AKT), 2017 WL 3084409, at \*11–12 (E.D.N.Y. July 18, 2017); *Hargett v. Fla. Atl. Univ. Bd. of Trustees*, 219 F. Supp. 3d 1227, 1237 (S.D. Fla. 2016); *Reinacher v. Alton & S. Ry. Co.*, 203 F. Supp. 3d 958, 965 (S.D. Ill. 2016); *Son v. Baptist Healthcare Affiliates, Inc.*, No. 3:14-CV-337-GNS, 2015 WL 5305235, at \*4 (W.D. Ky. Sept. 10, 2015); *Moore v. Marriott Int’l, Inc.*, 2014 WL 5581046, at \*6–7 (D. Ariz. Oct. 31, 2014). See also 29 C.F.R. Part 1630 App., § 1630.2(j)(1)(vii) (“It is thus expected that individuals with impairments that are episodic or in remission (e.g., epilepsy . . .) will be able to establish coverage if, when active, the impairment or the manner in which it manifests (e.g., seizures) substantially limits a major life activity.”) (quoting legislative history).

<sup>10</sup> See, e.g., *Gogos, supra*, 737 F.3d at 1173.

<sup>11</sup> See, e.g., *Jones v. Honda of Am. Mfg., Inc.*, No. 3:13-cv-167, 2015 WL 1036382, at \*10 (S.D. Ohio Mar. 9, 2015); *Green v. Teddie Kossof’s Salon & Day Spa*, No. 13-c-6709, 2015 WL 5675463, at \*4 (N.D. Ill. Sept. 24, 2015) (“When Green’s lumbar radiculopathy flares, pain radiates across her hip and down her legs. The condition also causes numbness and gives Green ‘trouble walking, standing for long periods, sitting for long periods, [and] sleeping.’ These limitations on Green’s major life activities are sufficient for the court to find that her lumbar radiculopathy qualifies as a disability.”) (citation omitted); *Canevari v. Itoh Denki U.S.A., Inc.*, No. 3:15-CV-1449, 2017 WL 4080548, at \*6–8 (M.D. Pa. July 24, 2017), *report and recommendation adopted*, 2017 WL 4077394 (M.D. Pa. Sept. 14, 2017). See also 29 C.F.R. Pt. 1630 App. § 1630.2(j)(1)(vii) (“The legislative history provides: ‘This . . . rule of construction thus rejects the reasoning of the courts in [pre-ADAAA] cases like *Todd v. Academy Corp.* [57 F. Supp. 2d 448, 453 (S.D. Tex. 1999)] where the court found that the plaintiff’s epilepsy, which resulted

during an asthma attack,<sup>12</sup> episodic inflammation,<sup>13</sup> or during a flare-up of fibromyalgia.<sup>14</sup>

The difference is notable. The result is that there are voters who may not be permitted to vote by mail by reason of disability under the Texas Election Code who would nevertheless qualify under the ADA and consequently be entitled to a reasonable modification. The ADA applies equally to individuals, regardless of age.

**C. Many individuals with disabilities are at increased risk for serious illness as a result of COVID-19.**

The CDC concludes that people with certain underlying medical conditions face a higher risk of severe health impacts should they contract COVID-19. The CDC lists these underlying medical conditions to include the following:

- People with chronic kidney disease
- People who have COPD (chronic obstructive pulmonary disease)
- People who are immunocompromised from solid organ transplants
- People who have obesity ((body mass index [BMI] of 30 or higher)

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in short seizures during which the plaintiff was unable to speak and experienced tremors, was not sufficiently limiting, at least in part because those seizures occurred episodically.”).

<sup>12</sup> See, e.g., *Ali v. Hogan*, 9:12-cv-0104, 2013 WL 5466302, at \*7 (N.D.N.Y. Sept. 30, 2013).

<sup>13</sup> See, e.g., *Isley v. Aker Philadelphia Shipyard, Inc.*, 275 F. Supp. 3d 620, 627–28 (E.D. Pa. 2017) (“According to Isley, when his condition flares up, he experiences . . . severe chest pain, shortness of breath, and light-headedness. Isley plausibly asserts that these symptoms leave him in acute discomfort, thereby substantially limiting major life activities . . . [and the sporadic nature of Isley’s costochondritis does not foreclose a finding of disability.”); *Negron v. City of New York*, No. 10-cv-2757, 2011 WL 4737068, at \*12 (E.D.N.Y. Sept. 14, 2011) (inflammation of hand).

<sup>14</sup> See, e.g., *Howard v. Pennsylvania Dept. of Public Welfare*, No. 11-1938, 2013 WL 102662, at \*11–12 (E.D. Pa. Jan. 9, 2013).

- People with serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies
- People with sickle cell disease
- People with Type 2 diabetes

The CDC concludes that people might be an increased risk for severe illness from COVID-19 if they have the following conditions:

- Asthma (moderate-to-severe)
- Cerebrovascular disease
- Cystic Fibrosis
- Hypertension or high blood pressure
- Immunocompromised state from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines
- Neurologic conditions, such as dementia
- Liver disease
- Pregnancy
- Pulmonary fibrosis (having damaged or scarred lung tissues)
- Smoking
- Thalassemia (a type of blood disorder)
- Type 1 diabetes<sup>15</sup>

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<sup>15</sup> Centers for Disease Control and Prevention, People of Any Age  
[https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html) (last visited June 26, 2020.)

The CDC's list applies to individuals of all ages, and not just to individuals over 65.

**D. For these individuals, voting by mail is a reasonable modification required by the Americans with Disabilities Act.**

Although Texas currently allows voting by mail for reasons of disability through its own statute, Title II of the ADA offers an independent right to reasonable modification to any individual with a disability. Under the ADA, extending an already existing vote by mail method to those with chronic health disabilities during a global pandemic is a reasonable modification.

Medical experts have advised that maintaining social distance and minimizing contact with others is a key way to prevent an infection of COVID-19. In light of the potentially deadly<sup>16</sup> consequences of contracting COVID-19, many people with disabilities must avoid activities that put them at an increased risk, such as in-person voting. In-person voting necessarily involves being around other people who may be ill with COVID-19. In order to mitigate that risk, voters with disabilities which place them at greater risk for serious illness and death from COVID-19 are entitled reasonable modifications, such as vote by mail, so that they can have equal access as individuals without disabilities who are not at an increased risk. An opportunity

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<sup>16</sup> As of June 30, 2020, CDC reports 2,581,229 confirmed cases of COVID-19 cases in the United States, resulting in 126,739 known deaths. Centers for Disease Control and Prevention, Cases in the U.S., <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited June 30, 2020).

to vote that requires people with disabilities to risk their lives is not “as effective as” or “equal to” the opportunity granted to others without disabilities. 28 C.F.R. §§ 35.130(b)(1)(ii), 35.160(a)(1). *See also Lane*, 541 U.S. at 514; *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1134–35 (9th Cir. 2012); *Thill v. Olmsted Cnty.*, No. 08-cv-4612, 2010 U.S. Dist. LEXIS 87215, at \*7 (D. Minn. Aug. 24, 2010) (“Title II of the ADA does not leave a person with disabilities who manages to crawl up a courthouse’s steps with no remedy for the courthouse’s inaccessibility.”).

Reasonable modifications to ensure equal access to voting include modifications to the voting process and the vote by mail system. *See Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 509 (4th Cir. 2016) (Finding that an online ballot marking tool offered to non-disabled voters using the vote by mail system must also be offered to voters with disabilities as a reasonable modification); *Hindel v. Husted*, 875 F.3d 344, 345 (6th Cir. 2017) (Finding that the Secretary of State had an obligation to offer an accessible online ballot marking tool as a reasonable modification where the tool did not already exist).

The Equal Employment Opportunity Commission has recognized the need for reasonable accommodations in the employment context for employees who are at an increased risk if he or she contracts COVID-19. If an employee discloses a disability that puts him or her at increased risk of complications from COVID-19, the employee is entitled to a reasonable accommodation if needed. Transcript of March

27, 2020 *Outreach Webinar* (EEOC), Question 17. See also EEOC’s *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, § II.C (“Generally, the ADA requires employers to provide reasonable accommodations for known limitations of applicants and employees with disabilities.”); *id.*, § II (“Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.”).

Other federal agencies have also reiterated the need to grant reasonable accommodations to individuals with disabilities during the COVID-19 pandemic. See *HUD Statement of Fair Housing and COVID-19*, March 20, 2020. (“Housing providers are required to make reasonable accommodations that may be necessary to deliver housing and services to persons with disabilities affecting major life activities.”); See also *Ensuring Civil Rights During the COVID-19 Response*, FEMA Civil Rights Bulletin, April 9, 2020. Voters with disabilities who under normal circumstances may be able to vote in-person without an accommodation may need to vote by mail as an accommodation to prevent potentially severe or fatal consequences of contracting COVID-19. The Secretary of State and Counties have an obligation to provide this reasonable modification under the ADA.

#### **IV. VOTERS WITH DISABILITIES NEED THIS COURT TO SUPPLY CLARITY**

The Texas Supreme Court’s opinion and the Attorney General’s guidance concerning Texas voters with disabilities have focused on whether the Texas

Election Code allows voters who lack immunity to COVID-19 to vote by mail by reason of disability. *See, e.g., In re State*, No. 20-0394, 2020 Tex. LEXIS 452, at \*2; Letter Guidance to Representative Stephanie Klick, Attorney Gen. of Texas (April 14, 2020) <https://tinyurl.com/y87sow5o> [hereinafter *Letter to Rep. Klick*]; Press Release, Attorney Gen. of Tex., AG Paxton Advises County Officials to Avoid Misleading the Public on Vote by Mail Laws (May 1, 2020) <https://tinyurl.com/y7ep3rtn> [hereinafter *May 1 Press Release*]. That question has been clearly resolved in the negative. *In re State*, No. 20-0394, 2020 Tex. LEXIS 452, at \*2.

However, neither the Texas Supreme Court's opinion nor the Attorney General have addressed the rights of Texans with disabilities under federal law (the Americans with Disabilities Act). There are voters with disabilities that place them at much greater risk of experiencing serious illness than the general public if they contract the coronavirus who may not, but for the coronavirus, qualify to vote by mail. Voters fitting this description, such as voters with diabetes, are entitled to reasonable modifications under the ADA. As discussed in Section III, *supra*, this includes reasonable modifications to the vote by mail system.

Both the Texas Supreme Court's decision and the Attorney General's public statements have included language that are likely to confuse voters with disabilities and chill the exercise of their rights. *See In re State*, No. 20-0394, 2020 Tex. LEXIS

452, at \*26 (stating “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” but that lack of immunity to coronavirus by itself is not one of them, and not discussing which disabilities *would* qualify a voter); *Letter to Rep. Klick* at 3 (threatening criminal prosecution); Press Release, Attorney Gen. of Tex., AG Paxton Asks Texas Supreme Court to Stay Order Expand-ing Mail-In Voting (May 15, 2020) <https://tinyurl.com/ycdxfevb> (referring to the disability category as intended to aid those with “true disabilities or sicknesses”); Petition for Writ of Mandamus at 12, *In re State of Texas*, No. 20-0394 (Tex. May 15, 2020) (“Fear of exposure to a virus does not make a *healthy* voter eligible to vote by mail based on ‘disability.’”) (emphasis added); *May 1 Press Release* (stating that mail in ballots are only for those who are “legitimately ill”); Letter to County Judges and County Election Officials, Attorney Gen. of Tex. (May 1, 2020) <https://tinyurl.com/ybza77bx> (“To the extent that a fear of contracting COVID-19, *without more*, could be described as a condition, it would at most amount to an emotional condition and not a physical condition as required by the Election Code to vote by mail”).

Because of this chilling language, this Court should be clear in the language it uses, should it reverse the District Court’s order pertaining to voting by mail by reason of disability under the Texas Election Code. Texas voters with disabilities

need clarity on whether they are permitted to vote by mail. Consequently, this Court should recognize the ADA, and clarify that the reversal of the District Court's order concerning who may vote by mail by reason of disability under the Texas Election Code does not preclude any claims brought by Texans under the ADA.

### CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should affirm the lower court's ruling.

Respectfully submitted,

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July 6, 2020

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) and FED. R. APP. P. 29(d), because this brief contains 5,826 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word software, in Times New Roman 14-point font in text, and Times New Roman 12-point font in footnotes.

Respectfully submitted,

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LIA SIFUENTES. DAVIS

## CERTIFICATE OF SERVICE

I certify that on this 6<sup>th</sup> day of July, 2020, a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent, by operation of the ECF system, to all counsel of record:

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