

Case No. 20-50407

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS DEMOCRATIC PARTY; GILBERTO HINOJOSA; JOSEPH DANIEL CASCINO;
SHANDA MARIE SANSING; BRENDA LI GARCIA,

Plaintiffs - Appellees

v.

GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; RUTH HUGHS, TEXAS
SECRETARY OF STATE; KEN PAXTON, TEXAS ATTORNEY GENERAL,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

**BRIEF OF *AMICI CURIAE* CHRIS HOLLINS, HARRIS COUNTY CLERK;
FORT BEND COUNTY; DANA DEBEAUVOIR, TRAVIS COUNTY
CLERK; AND CAMERON COUNTY AND ITS ELECTION
ADMINISTRATOR, REMI GARZA, IN SUPPORT OF PLAINTIFFS-
APPELLEES AND THEIR MOTION TO EXPEDITE**

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Chris Hollins, Harris County Clerk; Fort Bend County; Dana DeBeauvoir, Travis County Clerk; and Cameron County and its Elections Administrator, Remi Garza, are all individuals and governmental entities with responsibilities for administering elections in Texas (the “Elections Administrators” or “the Counties”).¹ They each believe that unless access to vote by mail (“VBM”) is increased significantly, providing a safe election will be impossible because of the expected high volume of in-person voters this presidential year. The Elections Administrators submit this *amici* brief to advise this Court on the mechanics of election administration, particularly VBM procedures and safeguards, and the lessons learned to date from the primary run-off which ends today, July 14.

Chris Hollins is the interim County Clerk of Harris County, Texas. As County Clerk, he has the duty to administer elections in the largest county in the state with 2.4 million registered voters and a highly diverse electorate. He expects at least 1.5 million voters in November. Over the last few weeks, Harris County has become a new hot spot for COVID-19 cases, and even with its immense and world-renowned

¹ Depending on local options, the chief elections officer in a county is either the elected County Clerk or a quasi-independent Elections Administrator. *See* TEX. ELEC. CODE § 31.091. For convenience this brief refers to these officials as either “election administrators” or “election clerks.”

medical centers, hospitals are already becoming overwhelmed as the pandemic rages throughout the greater metropolitan area.

Fort Bend County, Texas, is the second-largest county by population in the Houston-metropolitan region and the tenth largest in Texas. Fort Bend County is one of the most diverse and fastest-growing counties in the country. The County's population has nearly tripled since 2000 while its Anglo population has decreased to 31%. Latinos account for approximately 25% of the County's population, African-Americans constitute 21%, East and South Asians also comprise 21%, and the remaining 2% identify as multi-racial.

Fort Bend County has not always been at the forefront of voting rights. In 2009, the United States sued Fort Bend County, principally asserting Voting Rights Act violations, and Fort Bend County entered into a consent decree agreeing, *inter alia*, to allow federal monitors to observe all elections, to implement training protocols, and to file comprehensive reports after each election with the Department of Justice. *See United States v. Fort Bend Cnty.*, No. 4:09-cv-01058 (S.D. Tex. Apr. 9, 2009); 52 U.S.C. § 10508 (present codification). Fort Bend County, therefore, joins with amici to advocate for the widest and easiest participation of its electorate possible under the law.

Dana DeBeauvoir is the County Clerk of Travis County, Texas, and has served for more than 35 years overseeing elections administration in the fifth largest County

in Texas. She has taken her elections administration expertise abroad as an advisor and observer to elections in then-emerging democracies in Bosnia, Kosovo, and South Africa. Travis County has a high percentage of registered voters and expects a high voter turnout in November of more than 500,000 votes.

Smaller than the other amici here, Cameron County is the thirteenth largest county in Texas in terms of population and the fifteen largest county in terms of registered voters with just over 200,000. Remi Garza is its elections administrator. Situated as the southernmost county in Texas bordering Mexico, Cameron County does not have the resources of an urban or suburban county either for running an election or for managing a public health crisis. Both its poverty rate and uninsured rate are near 30%.

The Election Administrators' brief reflects the prospective of the state's largest urban county, a rapidly growing, diversifying, and suburban county, a county clerk with decades of elections administration experience, and a border county with little margin of error for public health crises all with the desire and ability to accommodate increased VBM.

All parties have consented to the filing of this brief. *See* FED. R. APP. P. 29(a)(2). No party's counsel authored this brief in whole or in part; moreover, no party, party's counsel, or person contributed money to fund this brief's preparation or submission. *See* FED. R. APP. P. 29(a)(4)(E). Moreover, the undersigned counsels

of record certify that they have collaboratively authored this brief in whole, that they have endeavored to add novel arguments rather than merely recite those already advanced. 5th Cir. R. 29.2.

ARGUMENT

The Elections Administrators submit this brief to describe the impossible circumstances they face not just from the COVID-19 pandemic but also the legal bind in which the State of Texas, the Secretary of State, and the Texas Supreme Court have placed them. Without this Court enforcing the Twenty-Sixth Amendment's plain terms to allow any qualified voter to access mail-in voting without regard to age, as a practical matter, the Elections Administrators will be unable to conduct the November election without endangering the lives and health of voters and election workers alike. While the legal issue before the Court is simple — the Twenty-Sixth Amendment's guarantee that the right to vote will not be denied or abridged on account of age — the implications of a failure to enforce that right are complex and severe. The Elections Administrators explain those implications in addition to the intricacies of conducting elections in Texas, as well as the substantial protections against potential voter fraud that already exist in Texas VBM laws. Dramatically increasing the ratio of voters who VBM is a crucial tool to spread out the curve of voter congregation during in-person voting so that social distancing and other safety measures may be effectively implemented to protect those voters who

wish to vote in person. The plain language of the Twenty-Sixth Amendment provides that opportunity.

The Elections Administrators agree that the Twenty-Sixth Amendment's prohibition on age-based voting restrictions require that all qualified voters be afforded the opportunity to VBM under the same conditions imposed on those 65 years of age or older. *See* TEX. ELEC. CODE § 82.003. The Elections Administrators additionally urge affirmance of the district court's preliminary injunction to facilitate the administrative ease the election, obviate controversies concerning vague penal statutes, and protect counties from potential lawsuits. Avoiding an entirely speculative threat to the election integrity cannot come at the price of voting rights and practical and safe voting access.

I. The primary run-off demonstrates the voters' intense interest in both voting and voting by mail this election year as turn-out and VBM applications have increased to historic levels.

The recent intense surge of COVID-19 cases in Texas raises the stakes of this Court's decision for the Elections Administrators and for Texas voters. In the last few weeks, Texas has catapulted to the stage of refrigerated morgues parked outside its hospitals much like New York City suffered earlier this year.² Hospitals across

² Jenny Deam and Zach Depart, *'Code blue': Texas COVID deaths higher than publicly reported – and spiking*, HOUSTON CHRON., July 11, 2020, <https://www.houstonchronicle.com/news/investigations/article/As-COVID-19-continues-to-slam-Houston-the-death-15400462.php>.

Texas are nearing or at capacity.³ The primary run off ending today with its low turnout relative to November provides a source of data both as to changes in voter behavior due to the pandemic and what elections practices will accommodate those changes.

Early voting turn-out has been extraordinarily high for the primary run-off as has the volumes of voters voting by mail rather than in person. The following chart illustrates this dramatic shift in voter behavior since the last presidential year and indicates where the November election turnout is headed:

	<u>Harris</u>		<u>Fort Bend</u>		<u>Travis</u>	
	2016	2020	2016	2020	2016	2020
Primary VBM	24,459	53,910	4,905	6,997	6,380	11,240
Primary In - Person Early Vote	110,368	198,837	39,406	66,766	93,468	144,237
Primary Run-off VBM	27,536	70,601	3,047	9,783	4,211	16,441
Primary Run-off Early Vote	23,098	108,837	5,389	48,130	8,626	81,553
General VBM	99,507		13,182		20,090	
General Early Vote	883,977		200,988		374,052	

³ Lauren Caruba, *'We're all fearful of what could happen': COVID deaths rise in San Antonio as hospitals are pushed to capacity*, SAN ANTONIO EXPRESS-NEWS, July 12, 2020, <https://www.expressnews.com/news/local/article/We-re-all-fearful-of-what-could-happen-15402124.php>; Sarah R. Champagne, *Ten out of 12 hospitals in Texas' Rio Grande Valley are now full*, TEX. TRIBUNE, July 4, 2020, <https://www.texastribune.org/2020/07/04/texas-coronavirus-rio-grande-valley-hospitals/>.

General E-Day	353,327		52,997		103,536	
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Overall, turnout is substantially higher than in the prior presidential year primary run-offs, and the Elections Administrators expect record voter interest and turn out in November.

VBM applications have likewise increased dramatically. For example, Fort Bend County’s requests totaled 14,785 for the primary runoff held today, which is only slightly less than the record 15,956 vote-by-mail requests set for the 2016 *general presidential* election.⁴ Fort Bend County has experienced a five-fold increase in percentage terms from the last primary runoff in a presidential-election year in 2016. The chart below summarizes the dramatic increase in VBM applications for the four jurisdictions comparing the counts to the last presidential election:

**Increase of VBM Application Requests
with Percent Increase Since the Primary**

	<u>Harris</u>		<u>Fort Bend</u>		<u>Cameron</u>	
	2016	2020	2016	2020	2016	2020
Primary VBM Applications	47,636	67,739	6,099	9,227	646	2743

⁴ The total number includes those who will be absent from the county for just the primary runoff as the absent-from-the-county VBM applications must occur before *each* election. See TEX. ELEC. CODE § 86.0015. For that reason, the primary number is usually slightly higher than the primary runoff number.

Primary Run-off VBM Apps.⁵	41,065	141,827	6,000	14,785	770	3655
Additional Apps. made after Primary	3,429	74,088	451	5,440	166	977
% Apps. increase	7.2%	109.4%	7.4%	59.0%	25.7%	35.6%
General Elec. VBM Apps.	115,293		15,956		5,766	

Typically, VBM requests do not increase much during the primary run off, but the pandemic appears to have changed that. Requests to vote in this year’s runoff have significantly outpaced such requests made in 2016 particularly for the groups most susceptible to coronavirus: seniors and the disabled. In 2016, 31.70% of the Fort Bend County disability requests came after the primary’s first round. In 2020, that number jumped to a whopping 88.41%. Even the 65-or-older crowd has dramatically increased. This year, 37.82% of seniors making a mail request occurred *after* the primary’s first round.

The Harris County Clerk chose to mail VBM applications to every registered voter aged 65 or older to increase the VBM ratio and protect the health of older Texans who are more susceptible to COVID-19’s more dangerous symptoms.⁶ This

⁵ The number of primary run-off requests exceeds the sum of the primary requests and the additional requests because of annual mail-in ballot requests which are available for age and “disability” voters. See TEX. ELEC. CODE § 86.0015.

⁶ Taylor Goldenstein, *Texas primary runoffs: Fiery Democratic race for U.S. Senate fuels record turnout*, HOUSTON CHRON., July 13, 2020, <https://www.houstonchronicle.com/politics/texas/article/Texas-primary-runoffs-Fiery-Democratic-race-for-15405013.php>.

outreach paid off and appears to have greatly increased the ratio of voters choosing VBM. For the top fifteen counties in terms of registered voters an average of 28.9 percent of Democratic primary voters and 25.6 percent of Republican primary voters voted by mail.⁷ Harris County had the second highest ratios at 40.7 percent and 58.8 percent respectively. With this higher use of VBM — even with the high turnout overall — the Counties were able to largely avoid lines during in-person early voting and long lines on Election Day and thus ensure adequate social distancing.

November, however, will be a different scenario given the much higher anticipated voter turnout.

II. The Elections Administrators are prepared to handle an increased VBM volume, and must have that increased volume to provide safe in-person voting in November.

The Texas VBM statutory scheme contains a myriad of protections against fraud that are completely unaffected by citizens under 65 voting by mail. While the Secretary of State, the Attorney General, and a recent Texas Supreme Court decision have this election headed toward trouble, the Elections Administrators prefer and are prepared to muster resources for a safe November election should this Court enforce voting rights to allow all ages of eligible voters to VBM.

⁷ See Sec. of State, *Primary Run-Off Election, Cumulative Totals, Through Close of Business July 10*, <https://earlyvoting.texas-election.com/Elections/getElectionDetails.do>. As mail-in ballots will continue to arrive and be processed through this week, these ratios will only increase from the data set as of July 10.

A. The Texas VBM system is complex and provides multiple methods to identify and expose any actual fraud.

For all practical purposes, Texas elections are administered by Counties. From registration to counting, the Counties implement the Texas Election Code subject to the guidance of the Secretary of State. *See* TEX. ELEC. CODE §§ 31.003, 31.004. The same is true for administration of voting by mail. Early voting — whether by personal appearance or by mail — is conducted under the aegis of the “early voting clerk.” TEX. ELEC. CODE § 83.001(a). The “early voting clerk” is, for purposes relevant to this appeal, a county official. *See* TEX. ELEC. CODE § 83.002. The early voting clerk reviews VBM applications, TEX. ELEC. CODE § 86.001, sends the approved applicants their ballots, TEX. ELEC. CODE § 86.004, and processes the ballots’ return, TEX. ELEC. CODE § 86.011.

Every VBM application and ballot undergoes a rigorous process before acceptance. Before receiving a ballot, an applicant must provide their name, address, and sign under penalty of perjury as a qualified and eligible voter within the meaning of Texas Election Code Section 11.001 (election’s residency requirements) and Section 11.002 (a citizen at least 18 years of age who has registered to vote). *See* TEX. ELEC. CODE § 84.001; SOS Vote-By-Mail Application Form. Chapter 86 of the Election Code then requires the early voting clerk to:

- (1) confirm or correct the applicant's voter registration number or county election precinct of residence on the application, TEX. ELEC. CODE § 86.001(d);
- (2) note on the list of registered voters that a ballot to be voted by mail was provided, *id.* § 86.001(g);
- (3) send the ballot in an official carrier envelope that contains the voter's name and date of election, *id.* § 86.002;
- (4) send the ballot to a verified address, *id.* § 86.003; and
- (5) only accept the ballot's return from the official carrier envelope (except when the voter returns it in person with identification or it is contained in another official carrier envelope of a person registered to vote at the same address), *id.* § 86.006(a), (a-1), (b) & (c).

Once a voter submits a mail-in ballot, the Early Voting Ballot Board ("EVBB") goes to work. *See* TEX. ELEC. CODE § 87.001. This bi-partisan committee of citizens who are compensated with a modest sum process the ballots by:

- Determining if the carrier envelope has been properly executed,
- Reviewing the voter's signature on the carrier envelope to ensure it matches that on the VBM application,
- Making sure the voter's VBM application states a legal ground for VBM;
- Making sure the voter is in fact registered to vote; and

- Ensuring the ballot was mailed to the proper address among other tasks.

TEX. ELEC. CODE § 87.041(b). Only when the EVBB has determined the ballot meets these requirements will it accept the ballot for counting. TEX. ELEC. CODE § 87.041(a), (c).⁸ Then the ballots are separated from the envelopes and prepared for counting. TEX. ELEC. CODE § 87.042; *see also* Tex. Sec. of State, *Processing and Counting Early Voting by Mail Ballots*, Elec. Adv. No. 2020-20, July 2, 2020. To ensure voters do not vote twice, a “poll book” is kept electronically where election workers note when a ballot has been issued to a voter whether by mail or in person. TEX. ELEC. CODE §§ 63.003, 86.001(g), 87.122(a). If a voter who applied for and received a mail-in ballot then wishes to vote in person, the voter must surrender that ballot, and documentation is kept. TEX. ELEC. CODE § 84.032(c).

These processes are among the many provisions in Texas law designed to protect the integrity of voting. The district court’s injunction does not challenge any of them. Neither do Appellees or the Elections Administrators. After all, “[b]allot integrity is undoubtedly a worthy goal.” *Veasey v. Abbott*, 830 F.3d 216, 238 (5th Cir. 2016) (en banc). Rather, requiring the **additional** step of investigating already qualified and eligible voters⁹ is the subject of this challenge. The Texas Supreme

⁸ This rigorous statutory scheme ensures that any anomaly — whether fraud or mistake — is easy to identify.

⁹ A “qualified” voter is a voter who is 18, a citizen, and registered to vote. TEX. ELEC. CODE § 11.002. An “eligible” voter is a qualified voter who satisfies the requirements, such as residency, for a particular election in a particular jurisdiction. TEX. ELEC. CODE § 11.001.

Court has rightly noted that elections clerks do not have the authority to question an eligible voter's declaration that they qualify under a VBM ground. *In re State*, No. 20-0394, 2020 WL 2759629, at *11 (Tex. May 27, 2020). The Attorney General's expansive view of "fraud" as to such a voter warrants correction by this Court.

The Election Code's criminal enforcement provisions are likewise numerous. While the State maintains that it will be harmed if more voters are allowed to VBM, the State never explains why voters over 65 years old do not pose such a threat or such a less dire threat than voters under 65 voting by mail. Nor does the State explain why increased VBM will cause "voter fraud." Moreover, the Attorney General's "voter fraud" prosecution toolbox is more than full.¹⁰ The preliminary injunction affects none of these numerous penal statutes.

B. The State's guidance for conducting in-person voting safely is inadequate.

The State of Texas has not stemmed COVID-19's spread, nor allowed local election authorities to protect voters. The Governor's recent face mask order

¹⁰ See TEX. ELEC. CODE § 273.021 (grants the Attorney General the power to prosecute any criminal offense under the Election Code); *see also* TEX. ELEC. CODE §§ 61.008 (unlawfully influencing voter); 64.012 (prohibits illegal voting such as voting when not eligible, voting more than once, impersonating another voter, marking ballot without permission of voter); 64.036 (unlawfully assisting voter); 276.012 (unlawfully engaging in organized election fraud); 276.013 (election fraud). The Attorney General also has VBM-specific tools. See TEX. ELEC. CODE §§ 86.010 (unlawfully assisting voter voting by mail), 84.0041 (prohibits *knowingly* providing false information on an application for ballot by mail); 86.0051 (prohibits another from depositing mail ballot in the mail for the voter); 86.0052 (prohibits compensating another for depositing mail ballots in the mail on behalf of another person); 86.0105 (prohibits compensating another for assisting voter voting by mail); 276.010 (unlawfully buying and selling ballot materials).

exempted voters, voter assistants, poll watchers, and election workers from the requirement that face masks be worn in indoor commercial and public spaces or outdoor spaces where social distancing is not possible. Gov. Greg Abbott, Exec. Order GA-29, July 2, 2020, at 2.

While the Secretary of State (“SOS”) has issued multiple advisories for running an election during the pandemic,¹¹ they offer an unsettling amount of prohibitions of safety measures compared to mandatory safety measures for in-person voting. According to the SOS, election workers cannot:

- Ask voters about their health history or whether they have been exhibiting symptoms including, presumably, whether they have been exposed to COVID recently, or check their temperature, Tex. Sec. of State, *Voting in Person During COVID-19*, Elec. Adv. No. 2020-19, June 18, 2020, at 6, 12 [SOS Adv. No. 2020-19];
- Refuse a voter or poll watcher who is actively displaying known-COVID symptoms, *id.* at 7, 10;

¹¹ SOS Adv. No. 2020-20; Tex. Sec. of State, *Voting in Person During COVID-19*, Elec. Adv. No. 2020-19, June 18, 2020, <https://www.sos.state.tx.us/elections/laws/advisory2020-19.shtml>; Tex. Sec. of State, *Health Protocols for Voters*, May 26, 2020, <https://www.sos.state.tx.us/elections/forms/health-protocols-for-voters.pdf>; Tex. Sec. of State, *COVID-19 (Coronavirus) Voting and Election Procedures*, Elec. Adv. No. 2020-14, Apr. 6, 2020, <https://www.sos.state.tx.us/elections/laws/advisory2020-14.shtml>.

- Refuse a voter, voting assistant, or poll watcher who refuses to wear a mask or honor social distancing measures, *id.* at 6-7, 10, 11, 12;
- Require voters to bring their own stylus or writing instrument although elections administrators may encourage them to do so. *Id.* at 8.

When faced with a voter who *actively displays* COVID symptoms during in-person voting, the SOS advises local election authorities to:

- Offer a disposable mask and/or gloves and ask the voter to wear the mask in consideration of the health and safety of other voters and election workers;
- Remind the symptomatic voter of the option to vote curbside; or
- Give the symptomatic voter priority in voting as they would a disabled voter, *see* TEX. ELEC. CODE § 63.0015.

Id. at 7. The SOS does not explain what the election worker who assists the COVID-contagious curbside voter should do aside from hope their personal protective equipment works adequately.

Should a mask-less poll watcher crowd a voter being assisted while voting, the SOS limits election workers' ability to protect that voter and assistant only suggesting that a face shield or some other divider be provided to the poll watcher.

Id. at 11. The SOS stresses that it is a criminal offense to prevent a watcher from observing an activity he or she is "entitled to observe." *Id.* at 10, 11 (citing TEX.

ELEC. CODE § 33.061). The SOS offers no guidance as to what “entitled to observe” means in the context of the resurgence of the pandemic and the danger a mask-less poll watcher poses to voters and election workers. Finally, as with COVID-infected voters, the SOS leaves election workers powerless to refuse a poll watcher who is *actively displaying* COVID symptoms but refuses to leave. *Id.* at 10. Instead, the SOS advises election workers to ask poll watchers to self-screen or ask the appointing party to send a replacement. *Id.* These conditions the SOS expects election workers to endure are all the more startling given that presiding judges at polling places have the power of a district judge to enforce order and preserve the peace but the SOS chose not to highlight or explain the scope of that power in its advisory. *See* TEX. ELEC. CODE § 32.075(c); SOS Adv. No. 2020-19.

These concerns about in-person voting safety are not hypothetical. Approximately two dozen of the Counties’ election workers have already tested positive for, exhibited symptoms of, or been exposed to COVID-19 and been sent home. The more voters whom the State requires to vote in person, the more likely a polling place could become a vector for contagion. In addition, the SOS Advisory sets a low bar for COVID-19 diagnosed workers to return to work suggesting they do once three days have passed since any fever resolved, symptoms have improved, and ten days have passed since the onset of symptoms. *Id.* at 5. This criteria makes no allowance at all for workers who have had known exposure to COVID-19, and

thus may be infected, contrary to the CDC recommendation that anyone who has been in close contact with COVID-19 should self-quarantine for fourteen days after exposure.¹²

C. Particularly given the Texas Supreme Court opinion on the meaning of “disability” the Elections Administrators and voters critically need a prompt resolution of the Twenty Sixth Amendment issue.

The Texas Supreme Court’s decision in *In re State* elucidating the definition of “disability” as a vote by mail excuse only complicates matters. *See generally*, 2020 WL 2759629. While a voter may decide whether they qualify for “disability” and “take into consideration aspects of [their] health and [] health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail” a mere lack of immunity is not enough. *Id.* at *10. The court held that the Legislature has “placed in the hands of the voter the determination of whether in-person voting will cause a likelihood of injury due to a physical condition” but this is “subject to a correct understanding of the statutory definition of ‘disability.’” *Id.* at *10, 11. Moreover, the Court found “likelihood” to mean a probability, and that contacting COVID-19 was “highly improbable” for the general population. *Id.* at *10 (apparently confusing ease of contagion with likelihood of symptom severity).

¹² CDC, *When You Can be Around Others After You Had or Likely Had COVID-19*, updated May 26, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html>.

The Texas Supreme Court’s opinion did not help clarify the law in a changing pandemic environment and created more ambiguity for voters — as the American Diabetes Association and disability rights organizations’ amicus brief rightly notes — and for those who advise them like the Elections Administrators here. Under the decision, it is unclear what conditions qualify. For example, does a diabetic have to be actively ill or if their medical condition is under control would they still have to vote in person? The Texas Supreme Court’s opinion leaves voters who guess wrong whether their medical condition and current likelihood of contracting COVID-19 qualifies as a “disability” subject to criminal penalties. In addition, the opinion does nothing for those voters who are exposed to COVID-19 and know they should quarantine to protect the health of others and help stem the spread of the pandemic.

Voters are already indicating that COVID-19 is a reason they are seeking to vote by mail. The images below are from VBM applications the Harris County Clerk received where voters applying for a mail-in ballot under the “disability” category indicated COVID factored into their decision:

REASON YOU ARE APPLYING FOR AN EARLY BALLOT:

- 65 years or over
- DISABILITY covid
- Out of the county on Election Day
- In jail but otherwise eligible

5	Reason for Voting by Mail:	<input checked="" type="checkbox"/> = COVID-19
	<input type="checkbox"/> 65 years of age or older. (Complete Box #6a)	
	<input checked="" type="checkbox"/> Disability. (Complete Box #6a)	
	<input type="checkbox"/> Expected absence from the county. (Complete Box #6b and Box #8) You will receive a ballot for the upcoming election <u>only</u>	
	<input type="checkbox"/> Confinement in jail. (Complete Box #6b) You will receive a ballot for the upcoming election <u>only</u>	

One elaborated but only to state the voter's request:

Due to COVID-19, I
would like to be
able to vote by mail
for May & Nov elections.
If possible.
Thank you.

These notations are completely unclear whether they mean a voter has COVID-19, thinks they have COVID-19 but cannot get a test, is at high risk for severe COVID-19 symptoms because of underlying conditions, has been exposed to COVID-19 and is self-quarantining, or simply does not want to be exposed to COVID-19. Yet the Texas Supreme Court decision leaves voters under 65 vulnerable to an investigation for “fraud.”

While the State Defendants like to claim their efforts are all about stamping out “voter fraud,” they fail to explain what about more Texans voting by mail constitutes “illegal” voting or “fraud.” The Elections Code, however, does explain what constitutes an “illegal vote” — one “that is not legally countable.” *See* TEX. ELEC. CODE §§ 221.001, 221.003(b). An “illegal vote” is a criminal offense *only if*

a person:

- (1) votes or attempts to vote in an election in which the person knows the person is not eligible to vote;
- (2) knowingly votes or attempts to vote more than once in an election;
- (3) knowingly votes or attempts to vote a ballot belonging to another person, or by impersonating another person; or
- (4) knowingly marks or attempts to mark any portion of another person's ballot without the consent of that person, or without specific direction from that person how to mark the ballot.

TEX. ELEC. CODE § 64.012(a). A “qualified voter” is “eligible to vote by mail” if the voter is “disabled.” TEX. ELEC. CODE § 82.002(a). But the fact that a voter may not be “eligible” to VBM does not make the voter ineligible to vote at all. *See* TEX. ELEC. CODE § 64.012(a).

Likewise, in election contests a vote is not “illegal” unless a person voted in an election in which the person was not eligible to vote. TEX. ELEC. CODE § 221.003. In other words, the *manner* in which the person voted does not make the “vote” “illegal” for contest-purposes even if it was cast the wrong way. In contrast, a vote may not be counted where: a voter votes twice; outside of his or her jurisdiction; where the voter is underage; or marks another person's ballot. *See* TEX. ELEC. CODE § 64.012(a).

D. Increased VBM will not be disruptive, but a failure to do so will be a threat to public health and safety.

The Elections Administrators have deployed a variety of methods to handle the increased VBM ratio including hiring extra workers and purchasing high-speed scanners to handle an increased volume. While mail-in ballots require more resources to accept and process than in-person votes, with adequate planning and shifting resources the Elections Administrators can easily accommodate the shifts in voter behavior that are already occurring.

The Tarrant County GOP has submitted an amicus brief supported by a declaration from its EVBB Presiding Judge claiming that its members are “volunteers” and could not possibly handle the volume of increased VBM. Decl. of Kelly Roberson at ¶¶ 6-10. This is incorrect. EVBB members are not “volunteers”; they are compensated just as are other election workers. TEX. ELEC. CODE § 87.005. Moreover, the EVBBs are not limited in size, but instead have a minimum size. *See* TEX. ELEC. CODE § 87.002. The Counties can and many already have prepared for expanded VBM by expanding their EVBBs. In fact, Cameron and Travis Counties have already doubled the size of theirs. Harris and Fort Bend Counties plan significant expansion as well.

Likewise, the State’s litany of allegedly impossible tasks should VBM be increased are incorrect and demonstrate a lack of understanding of current election practices. *See* State’s Br. at 36-37. First, action by this Court is not now and need

not be in the near future at “the last minute.” The last day to apply for a ballot by mail for the general election is October 23, and the Elections Administrators will begin to mail out ballots to eligible voters on September 19. ROA.841 (key election dates). Harris County (which contends with the most languages utilized by voters) prints mail-in ballots on demand personalized to that individual voter so multiple languages do not pose an obstacle. Texas law also already provides for safeguards against unscrupulous voter assistants whether in-person or by mail. TEX. ELEC. CODE §§ 64.031-.037, 86.010. Voters’ addresses are checked both by the election clerk at the application stage and by the EVBB at the ballot stage. TEX. ELEC. CODE §§ 86.003, 87.041. Finally, voter IDs are checked when a mail-in ballot is returned in person. TEX. ELEC. CODE §§ 63.0101, 86.006(a-1). Indeed, to accommodate what is sure to be the largest increase in VBM given its population, Harris County will be accepting in-person delivery of mail-in ballots at eleven locations where formally designated and trained election clerks will be checking IDs, keeping sign-in sheets as occurs at in-person voting, and keeping the ballots separate and secure.¹³

Holding the November election without allowing eligible voters under 65 who desire to VBM to do so creates multiple problems. First and foremost, crowds, lines,

¹³ See TEX. ELEC. CODE §§ 1.007, 63.010(a-1), 83.032, 86.006(a-1), (e); Tex. Sec. of State, *New Laws and Procedures for ABBMs due to passage of HB 1927*, Elec. Adv. No. 2015-10, Sept. 15, 2015; Harris County Clerk Chris Hollins Announces Vote by Mail Drop-Off Locations, July 13, 2020, https://www.harrisvotes.com/PressReleases/Vote%20By%20Mail%20Drop-off_en-US.pdf.

and the resulting increased risk of exposure to COVID-19. Crowd and line length will be exacerbated by the loss of the time-saving straight-ticket voting method in Texas especially in Harris County with its ballots' enormous length. ROA.825-26, 831.

Recruiting an adequate number of election workers is becoming an increasing challenge as COVID-19 surges. Some jurisdictions had to close polling sites during the primary run-off because of a worker shortage prompted by avoiding exposure to COVID-19 and concerns about potential confrontations with voters who refuse to wear a mask.¹⁴ Similarly, securing an adequate number of polling places has been a challenge. Typically, grocery stores, schools, and nursing homes serve as polling places. However, many public and private buildings are not large enough for social distancing. Additionally, many public and private entities are already taxed by trying to ensure their own operations are safe and, understanding their own responsibilities to ensure public health, they cannot be stretched further by inviting hundreds or thousands of voters into their spaces.

¹⁴ Jackie Wang, *Election Day Voting Locations Reduced by 8 After Workers Bow Out*, RIVARD REPORT, July 11, 2020, <https://therivardreport.com/election-day-locations-shrink-by-8-voting-sites-after-workers-bow-out/>; Anna M. Tinsley, *Two Election Day polling sites in Tarrant will be closed; workers worried about COVID*, FORT WORTH STAR TELEGRAM, July 10, 2020, <https://www.star-telegram.com/news/coronavirus/article244145002.html>.

III. The Texas VBM statutory scheme enforces categorical exclusions with unconstitutionally vague penal codes for which the State Defendants disclaim responsibility.

Affirming the district court on Twenty Sixth Amendment grounds provides two additional important benefits to the Counties. First, it obviates controversies concerning vague penal statutes. Second, it protects the Counties from suits.

A. Penal Statutes enforcing VBM eligibility are unconstitutionally vague and may create conflict between an elected District Attorney and the Attorney General.

As with all statements to a governmental official under penalty of perjury, perjury in a VBM application constitutes a criminal offense. TEX. ELEC. CODE § 84.0041(a)(1). As discussed, *supra*, whether a voter is entitled to apply to vote by mail based on disability is now the voter’s decision because “[t]he elected officials have placed in the hands of the voter the determination of whether in-person voting will cause a likelihood of injury due to a physical condition.” *In re State*, 2020 WL 2759629, at *11.

The 1876 Texas Constitution bifurcated the State’s judicial power by vesting such into one Supreme Court and one Court of Criminal Appeals. TEX. CONST. art. 5, § 1. A penal statute must define the criminal offense “‘with sufficient definiteness that ordinary people can understand what conduct is prohibited’ [and] ‘in a manner that does not encourage arbitrary and discriminatory enforcement.’” *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (quoting *Skilling v. United States*, 561

U.S. 358, 402-03 (2010)). The Texas Supreme Court’s definition of “disability” renders a § 84.0041(a) prosecution based on the voter’s lack of entitlement to a “disability” ballot void for vagueness. Exacerbating this problem, the Texas Legislature upgraded the offense to a felony in 2017. Act of Aug. 11, 2017, 85th Leg., 1st C.S., ch. 1, 2017 Tex. Gen. Laws 4493, 4494 (upgrading from Class A misdemeanor to state jail felony) (codified TEX. ELEC. CODE § 84.0041(b)) (“2017 Act”).

The 2017 Act additionally added predicate conduct for the now-felony-level offense of “Fraudulent Use of Application for Ballot by Mail” including criminalizing “intentionally cause[ing] false information to be provided on an application for ballot by mail.” *Id.* at 4496 (codified TEX. ELEC. CODE § 84.0041(a)(2), (3) & (4)). Vagueness in the context of speech, such as when election officials answer voters’ questions about VBM, “raises special First Amendment concerns because of its obvious chilling effect on free speech.” *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997). “The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.” *Id.* at 872. “Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.” *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965). *Monell v.*

Dep't of Social Servs., 436 U.S. 658 (1978)The 2017 Act turns what could have been a useful prosecutorial tool to ensure mail-in-ballot integrity into theatre.

The district attorneys associated with these four Counties have not prosecuted the above-referenced 2017 Act's predicates nor know of a prosecution thereunder. The Texas Constitution provides that the County Attorneys (and District Attorneys as directed by statute) "shall represent the State in all cases in the District and inferior courts in their respective counties." TEX. CONST. art. 5, § 21. By contrast, the Attorney General's express constitutional mandate is to represent the State in the Supreme Court of Texas, in any court regarding private corporations, and provide legal advice to the State's executive officers "when requested by them." TEX. CONST. art. 4, § 22. Nevertheless, the Legislature empowered the Attorney General to "prosecute a criminal offense prescribed by the election laws of this state," TEX. ELEC. CODE § 273.021(a), and commandeer county and district attorneys for these purposes, TEX. ELEC. CODE § 273.022. Affirming the district court on Twenty Sixth Amendment grounds has the salutary effect of obviating this court's further inquiry into Texas's unique form of government and division of prosecutorial labor.

B. Counties face potential liability for State Defendants' constitutional mistakes.

The State Defendants assert Eleventh Amendment immunity under *Ex Parte Young*, 209 U.S. 123 (1909), and its progeny. State's Br. at 15-19. This assertion naturally concerns the Counties to which responsibility could be ascribed for

violations of federal law. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). Though the Counties enjoy robust defenses in § 1983 actions, the burden of defending such suits is another motivation for this brief's filing.

The State Defendants' assertion of immunity is bereft of merit. It necessarily denies that the State Defendants have "the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." *Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) (en banc) (plurality op.). The Attorney General can prosecute an election-related criminal offense and coerce the elected County and District Attorneys to do his bidding. TEX. ELEC. CODE §§ 273.021(a), 273.022.¹⁵

State Defendants' invoke *Okpalobi*, but such provided women a private tort remedy against doctors performing their individual abortion. 244 F.3d at 409. State Defendants' reliance on *City of Austin v. Paxton* is also misplaced. 943 F.3d 993, 1002 (5th Cir. 2019). The City launched a preemption challenge to a state statute prohibiting it from requiring landlords to accept federal housing vouchers in line with the federal program's statutory purpose. 943 F.3d at 996–97. The issue here is the constitutionality of a provision of the Texas Election Code. As that is the very

¹⁵ Since the Attorney General's constitutional authority is to provide the Governor and Secretary of State with legal advice "when requested by them," TEX. CONST. art. 4, § 22, the Governor's and Secretary of State's involvement in this suit is a constitutional predicate to that of the Attorney General's.

action typified by *Ex Parte Young*, the State Defendants' logic is not reassuring to the entities that would have to defend any consequent *Monell* actions.

* * *

The Twenty Sixth Amendment's language is clear. Just as the Election Administrators could not force women of color to stand in 100 degree heat to wait to vote while inviting white male voters to cut in line and step into the air conditioning, the State cannot force millennials and the middle aged to vote in person while senior citizens can vote from the safety of their homes. The partisan rancor that has erupted around mail-in voting has done nothing but disrupt the planning for the November election and is a grave disservice to voting rights and public health. Voters need to know they will access to safe ways to vote in November elections. Election administrators need to know clear rules for conducting elections during the pandemic as soon as possible so they may plan accordingly. Effectively implementing social distancing at in-person locations depends on having more voters VBM so that the curve of voter congregation can be spread out. Otherwise, there will be simply too many bodies to move through too few spaces in too little time.

CONCLUSION

The Elections Administrators respectfully request that this Court affirm the lower court's judgment as to the Twenty Sixth Amendment so that any eligible voter who wishes to may vote by mail.

DATED: JULY 14, 2020

RESPECTFULLY SUBMITTED,

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SIGNATURE CERTIFICATION

By and through their counsel of record, *Amici* have agreed to the joint filing of this brief. I, hereby, certify that I received the permission of the above-designated counsel of record to affix their electronic signature to this instrument.

/s/ Susan Hays
SUSAN HAYS

CERTIFICATE OF ELECTRONIC COMPLIANCE

I certify that (1) the required privacy redactions have been made, 5th. Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses. I will mail the correct number of paper copies of the foregoing document to the Clerk of the Court when requested.

/s/ Susan Hays
SUSAN HAYS

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMIT

I certify that this document complies with (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts exempted by FED. R. APP. P. 32(f), this document contains 6,478 words; (2) 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 it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word for Mac.

/s/ Susan Hays
SUSAN HAYS

CERTIFICATE OF SERVICE

I, Susan Hays, certify that today, July 14, 2020, a copy of this Amicus Brief was served upon all counsel of record via ECF.

/s/ Susan Hays
Susan Hays