

No. 20-50407

**In the United States Court of Appeals
for the Fifth Circuit**

TEXAS DEMOCRATIC PARTY, GILBERT HINOJOSA, JOSEPH DANIEL
CASCINO, SHANDA MARIE SANSING, BRENDA LI GARCIA,
Plaintiffs-Appellees,

v.

GREG ABBOTT, GOVERNOR OF TEXAS, RUTH HUGHES, TEXAS
SECRETARY OF STATE, KEN PAXTON, ATTORNEY GENERAL OF
TEXAS,
Defendants-Appellants.

On Appeal from the U.S. District Court for the Western District of Texas
San Antonio Division

**OPPOSED MOTION FOR HEALTHCARE PROFESSIONALS TO FILE
BRIEF AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES**

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Counsel for Amici Curiae Healthcare Professionals

Pursuant to Federal Rule of Appellate Procedure 29, Fifth Circuit Rule 29, and this Court’s inherent authority, Amici Curiae, collectively referred to as “Healthcare Professionals,” respectfully move this Court for leave to file the attached brief in opposition to Defendants-Appellants’ Emergency Motion for Stay Pending Appeal and Temporary Administrative Stay. Amici have requested consent of all parties. Plaintiffs-Appellees granted consent to file this brief; however, despite this Court’s May 22, 2020 order setting a May 27, 2020 deadline for filing amici briefs, Defendants-Appellants opposes the request, taking the position that it is untimely.

INTEREST OF AMICI

Amici curiae include a collection of medical specialists and epidemiologists studying the effects and transmissions of COVID-19,¹ frontline physicians and nurses treating COVID-19 patients,² healthcare organizations,³ and physicians otherwise concerned for their patients.⁴ Amici are concerned with the

¹ Paolo Angelini, MD, and Catherine Troisi, PhD.

² Joseph Varon, MD, George D. Santos, MD, Ogadinma Obie, MD, Samara Bowen, MD, Ebony Rucker, MD, Maria McGee, and RN, and Jennifer Kuiper, RN.

³ Texas Physicians for Social Responsibility, and Doctors for America.

⁴ Ed Supkis, MD, Norman Chenven, MD, Ryan Allen, MD, Dona Kim Murphey, MD, Laurie Seremetis, MD, MPAff, Mary Ann Gonzales, MD, Margaret Kini, MD, Jonathan Kini, MD, Elliot J. Trester, MD, Liza Sanchez, MD, Ian Alward, MD, Kimberly Carter, MD, MPP, Greg Sheff, MD, Swati Avashia MD, FAAP, FACP, Balakumar Pandian MD, Sarah Buttrey MD, Naomi Hanser, MD, Lisa Doggett, MD, MPH, FAAFP, Donald Williams, MD, FAAP.

consequences of mass gatherings in the immediate and near future while the risk of transmission of COVID-19 continues to remain extremely high.

RELEVANCE OF AMICI CURIAE BRIEF

This appeal questions the constitutionality of attempts by Appellants to prohibit voting -by - mail under Texas state law by voters who seek to vote by mail in order to avoid the risk of exposure to the COVID-19 virus they would face if they were required to vote in person. The brief tendered by Amici provides insights from medical doctors and PhDs in the fields of epidemiology to give insight into the significant risks of increased infections that will necessarily follow wide-spread in-person voting, and by frontline medical providers to give insights on why COVID-19 is poses much greater risks than exposure to other viruses faced in the past, and of the devastating and often fatal consequences of exposure. Those positions are supported by other amici, including trade associations and individual doctors.

As this Court considers the questions presented by the parties, it should do so informed of the very likely consequences of the position urged by Appellees – the risks and consequences of exposing voters (the general population and individual patients that the medical providers would advise should avoid public settings such as polling stations) to the increased risk of contracting a devastating and too-often fatal virus. Moreover, certain amici whose duties may require them

to advise patients that they should avoid in-person voting seek to inform the Court of the concerns they face given explicit threats of potential criminal prosecution by the Texas Attorney General were they to do so.

Amici take the unusual step of seeking leave to file their brief in response to a motion to stay because of the time-sensitive nature of the stay order and how it affects the ability of doctors to timely advise their patients and for Texas voters to act upon such advice and make requests for mail ballots in time for the upcoming July election. Amici are submitting their amici curiae brief within the timeframe of forth in this Court's May 22, 2020 order, directing that "any further submissions by the parties or potential amici curiae, regarding the motion for stay pending appeal, are to be filed by May 27, 2020."

Accordingly, Amici Curiae respectfully request that this Court grant leave to file the accompanying amici curiae brief.

Dated: May 27, 2020

Respectfully submitted

By: /s/ Amy L Saberian

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), that the foregoing Motion for Leave:

- (1) Complies with Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 635 words; and
- (2) Complies with the typeface and type style requirements of Federal Rule of Civil Procedure 27(d)(1)(e), 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14 point font.

/s/ Amy L. Saberian
Amy L. Saberian, *Counsel for Amici Curiae*

CERTIFICATE OF SERVICE

I certify that on May 27, 2020, I electronically filed the Motion to Leave with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the Appellate CM/ECF filing system. I further certify that all participants in this case are registered CM/ECF users and that all service will be accomplished by the appellate CM/ECF system.

/s/ Amy L. Saberian
Amy L. Saberian, *Counsel for Amici Curiae*

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to 5th Circuit Rule 29.2, Amici Curiae provide this supplemental statement of interested persons in order to fully disclose all persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 that 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.

Amici Curiae:

Doctors for America
Texas Physicians for Social Responsibility
Paolo Angelini, MD
Dona Kim Murphey, MD, PhD
Catherine Troisi, PhD
Joseph Varon, MD
George D. Santos, MD
Ogadinma Obie, MD,
Samara Bowen, MD
Ebony Rucker, MD
Maria McGee, RN
Jennifer Kuiper, RN
Ed Supkis, MD
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STATEMENT OF INTEREST

Amici Curiae include a collection of medical specialists and epidemiologists studying the effects and transmissions of COVID-19,¹ frontline physicians and nurses treating COVID-19 patients,² healthcare organizations,³ and physicians otherwise concerned for their patients.⁴ Amici Curiae are concerned with the consequences of group gatherings in the immediate and near future while the risk of transmission of COVID-19 continues to remain extremely high.

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INTRODUCTION AND SUMMARY OF ARGUMENT

“COVID-19” was something no one had heard of six months ago. As of today, more than 100,000 people in the U.S. have died from the new coronavirus.⁵ This disease, enigmatic and disruptive, is affecting nearly every aspect of society—it has affected how we shop, how we worship, and how we appear in court. We must now address how this disease affects our election process, specifically the Texas elections in July 2020 and November 2020. While this issue has unfortunately emphasized partisan lines, the novel coronavirus has no political affiliation. Similarly, decisions as to how to conduct public elections in a manner that protects society while respecting and preserving individual rights must be based on science and data, not partisan politics.

Amici Curiae (“Amici”) are healthcare professionals—many of whom are serving on the frontlines of this pandemic—and Texas healthcare organizations concerned about the spread of COVID-19.

Amici file this brief in support of Appellees’ position to defend the district court’s preliminary injunction, which found that Appellees met their burden to show a likelihood of success on their assertions of constitutional violations and ordered that “any eligible Texas voter who seeks to vote by mail in order to avoid

⁵ David Welna, *We All Feel At Risk: 100,000 People Dead From COVID-19 in the U.S.*, National Public Radio, Inc. (May 27, 2020) available at https://www.npr.org/2020/05/27/860508_864/we-all-feel-at-risk-100-000-people-dead-from-covid-19-in-the-u-s

transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances,”⁶ and to deny any further stay of that injunction order sufficiently in advance of the July 2020 election to allow for safe and orderly proceedings.

To protect the health of all voters, poll workers, and the community, it is essential to decrease the number of people gathering on election day—and that specifically includes minimizing the number of voters who vote at public polling places and increasing the number voters who vote remotely by mail-in ballots. As the district court concluded, voting by mail provides a safer alternative. By requesting a stay of this ruling, the State seeks to prevent election officials from adequately preparing to conduct the July 2020 election in a safe manner, and seeks to prevent voters across Texas, who are under 65, from taking the necessary advance steps to exercise their constitutional rights.

We are at a critical and fragile point during this pandemic in Texas. Cases of infection are still rising. There is still a high risk of a strong surge in COVID-19 cases in coming months. One of the few proven effective measures to reduce the spread of COVID-19 is to reduce or eliminate the number of group gatherings, particularly indoors. The State’s requested stay, necessarily curtailing mail-in ballot

⁶ See *Order Regarding Plaintiffs’ Motion for Preliminary Injunction* (May 19, 2020) [Dkt. 90], Case No. 5:20-c-00438-FB, *Texas Democratic Party, et al. v. Abbott, et al.*

options, puts voters, poll workers, and the community at risk. That result is not in the public interest. The requested stay should be denied.

ARGUMENT

I. COVID-19 presents serious health risks for voters and their communities at polling locations during this pandemic.

“COVID-19” is the official name announced by the World Health Organization for the disease that develops when a person contracts the SARS CoV-2 virus, a new coronavirus (“the virus” or “the coronavirus”), previously unidentified in the human population. Medical professionals, in Texas and all over the world are still learning more about the virus and COVID-19, including its effect on the human body and how it is transmitted. While there is more to learn, medical professionals have confirmed important information about the virus, its transmission, and its potentially severe impact on the human body, including for those under age 65.

A. COVID-19 aggressively transmits among people and on surfaces, especially in group gatherings.

While there has been much uncertainty surrounding COVID-19, one thing has been clear and true for months: group gatherings significantly increase the spread of COVID-19.⁷

⁷ *Coronavirus Disease 2019 (COVID-19) – How COVID-19 Spreads*, Centers for Disease Control and Prevention (reviewed May 22, 2020), available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html.

The virus that causes COVID-19 spreads very easily and sustainably between people. Healthcare professionals know that the virus primarily spreads from person-to-person contact.⁸ As this is a respiratory illness, the virus is transferred through respiratory droplets produced when an infected person coughs, sneezes, or talks.⁹ These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs.¹⁰ Also, droplets can land on the hands of people nearby and can be then transferred to their respective mouths and noses.¹¹ The virus also spreads in a sustained manner, which means it goes from person-to-person without stopping.¹²

What makes this virus particularly elusive is that it can be spread by people with no discernible symptoms. Increasingly, the scientific evidence confirms that COVID-19 is spread by people who are presymptomatic or asymptomatic, *i.e.* not showing symptoms. COVID-19 has a long incubation period, up to 14 days, making it “more likely” an infected person will spread the virus prior to showing any

⁸ *Coronavirus Disease 2019 (COVID-19) – Frequently Asked Questions*, Centers for Disease Control and Prevention (reviewed May 24, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#How-COVID-19-Spreads>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See Eunha Shim, Amna Tariq, Wongyeong Choi, Yiseul Lee, Gerardo Chowell, *Transmission potential and severity of COVID-19 in South Korea*, INT’L J. OF INFECTIOUS DISEASES (March 18, 2020), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7118661/> (recognizing sustained transmission).

symptoms.¹³ In comparison, the incubation period for flu is usually 1-4 days.¹⁴ Additionally, some infected persons may never show any symptoms, yet still be able to spread the disease to others.¹⁵

Moreover, the virus may be spread in ways other than person-to-person contact. As the Centers for Disease Control (“CDC”) has recognized “[i]t may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes.”¹⁶ While this is not the primary manner in which the virus is thought to spread, it is a possible route of transmission.¹⁷ The State has incorrectly stated that “the Center for Disease Control updated its guidance to state that COVID-19 is ‘not spread easily’ through

¹³ See Jake Ellison, *COVID-19: UW study reports ‘staggering’ death toll in US among those infected who show symptoms*, UW NEWS (May 18, 2020), available at <https://www.washington.edu/news/2020/05/18/covid-19-uw-study-reports-staggering-death-rate-in-us-among-those-infected-who-show-symptoms/>.

¹⁴ See Alicia Budd, MPH; Lenee Blanton, MPH; Lisa Grohskopf, MD; Angela Campbell, MD; Vivien Dugan, PhD; David E. Wentworth, PhD; Lynnette Brammer, MPH, *Manual for the Surveillance of Vaccine – Preventable Diseases – Chapter 6: Influenza*, Centers for Disease Control and Prevention (reviewed November 10, 2017), available at <https://www.cdc.gov/vaccines/pubs/surv-manual/chpt06-influenza.html>.

¹⁵ See Nathan W. Furkawa, John T. Brooks, Jeremy Sobel, *Emerging Infectious Diseases – Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*, Centers for Disease Control and Prevention (Vol. 26, No. 7- July 2020, May 4 2020), available at https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article.

¹⁶ See *Coronavirus Disease 2019 (COVID-19) – How COVID-19 Spreads*, Centers for Disease Control and Prevention (reviewed May 22, 2020), available at https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html.

¹⁷ See *supra* n. 7.

touching contaminated surfaces.”¹⁸ As addressed by CDC spokesman Benjamin Haynes, the CDC’s transmission language has not changed:

COVID-19 spreads mainly through close contact from person to person. While it may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or possibly their eyes, this is not thought to be the main way the virus spreads.¹⁹

Because it is highly contagious, COVID-19 is readily transmitted at group gatherings. As early as March 15, 2020, the CDC recognized that events and gatherings contribute to the spread of COVID-19.²⁰ The CDC and the scientific community continue to recognize the grave dangers of COVID-19 transmission in any gatherings, including smaller events, or clusters, that have the potential to be

¹⁸ Reply in Support of Motion to Stay at 4.

¹⁹ See Bill Chappell, Allison Aubrey, *The Coronavirus Crisis – CDC Advice on Surface Spread of COVID-19 ‘Has Not Changed,’ Agency Says*, National Public Radio (May 22, 2020), available at <https://www.npr.org/sections/coronavirus-live-updates/2020/05/22/861193550/advice-on-surface-spread-of-covid-19-has-not-changed-cdc-says>; CDC Newsroom – *CDC updates COVID-19 transmission webpage to clarify information about types of spread*, Centers for Disease Control and Prevention (reviewed May 23, 2020), available at <https://www.cdc.gov/media/releases/2020/s0522-cdc-updates-covid-transmission.html>.

²⁰ *Coronavirus Disease 2019 (COVID-19) – Get Your Mass Gatherings or Large Community Events Ready – Interim Guidance for Coronavirus Disease 2019 (COVID-19)*, Centers for Disease Control and Prevention (reviewed May 7, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html>; see also *Morbidity and Mortality Weekly Report (MMWR) – Geographic Differences in COVID-19 Cases, Deaths and Incidence – United States, February 12-April 7, 2020*, Centers for Disease Control and Prevention (April 17, 2020), available at https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e4.htm?s_cid=mm6915e4_w (noting Louisiana has had a higher cumulative incidence and greater increase in cumulative incidence of COVID-19 cases than other states in the South based on Mardi Gras which occurred prior to the common cancellation of group gatherings).

“superspreaders.”²¹ “Clusters have also occurred aboard ships and at nursing homes, meatpacking plants, ski resorts, churches, restaurants, hospitals, and prisons. Sometimes a single person infects dozens of people, whereas other clusters unfold across several generations of spread, in multiple venues.”²² And while “[s]uperspreading events exist in many infectious diseases...with Covid-19... they are especially dangerous because the virus has a longer period of incubation in which patients show no symptoms but can infect others.”²³

Polling places on election day, even where social distancing and other precautions are put into place, are indoor gatherings with the potential to become sources of community spread. In a study published by the National Academy of

²¹ See Thomas R. Frieden, Christopher T. Lee, *Emerging Infectious Diseases – Identifying and Interrupting Superspreading Events – Implications for Control of Severe Acute Respiratory Syndrome Coronavirus 2*, Centers for Disease Control and Prevention (Vol. 26, No. 6-June 2020, March 18, 2020), available at https://wwwnc.cdc.gov/eid/article/26/6/20-0495_article. In a similar vein, this Court, through its general orders, suspending mail operations at the Clerk’s office and canceling in-person oral arguments, recognizes the import of limiting in-person, indoor gatherings. See Docket 2020-3, General Orders 1-4.

²² Kai Kupferschmidt, Why do some COVID-19 patients infect many others, whereas most don’t spread the virus at all?, *SCIENCE MAGAZINE* (May 19, 2020), available at <https://www.sciencemag.org/news/2020/05/why-do-some-covid-19-patients-infect-many-others-whereas-most-don-t-spread-virus-all>.

²³ See Bojan Pancevski, *Superspreader Events Offer a Clue on Curbing Coronavirus*, *THE WALL STREET JOURNAL* (updated May 24, 2020), available at <https://www.wsj.com/articles/superspreader-events-offer-clue-on-curbing-coronavirus-11589977873>; see also Lea Hamner, MPH; Polly Dubbel, MPH; Ian Capron; Andy Ross, MPH; Amber Jordan, MPH; Jaxon Lee, MPH; Joanne Lynn; Amelia Ball; Simranjit Narwal, MSc; Sam Russell; Dale Patrick; Howard Leibrand, MD, *Morbidity and Mortality Weekly Report (MMWR) - High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice Skagit County, Washington, March 2020*, Centers for Disease Control and Prevention (March 15, 2020), available at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e6.htm>.

Sciences, the Academy found that one minute of loud speech was enough to produce thousands of droplets that remain airborne for about twelve minutes, potentially able to infect anyone in the area.²⁴ Other studies have shown that “virus-laden aerosols, particles smaller than droplets, can levitate for hours after being released in indoor spaces.”²⁵ This poses a serious threat throughout Texas as each polling location becomes a possible cluster site with the potential to become a “superspreader,” infecting countless numbers of Texas voters, and their family members, friends, co-workers, and others with whom they may come into contact.²⁶

B. Voters under the age of 65 face serious health injuries from COVID-19.

All humans, regardless of age, are susceptible to contracting and spreading the virus, can possibly develop the disease COVID-19, and can potentially experience serious life-threatening issues and potentially die from the disease. For those who contract the disease, the deterioration from mild symptoms to severe life-

²⁴ Valentyn Stadnytskyi, Christina E. Bax, Adriaan Bax, Philip Anfinrud, *The airborne lifetime of small speech droplets and their potential importance in SARS-CoV-2 transmission*, PNAS (May 13, 2020) available at <https://www.pnas.org/content/early/2020/05/12/2006874117>; see also *supra* n.22.

²⁵ See *supra* n.22.

²⁶ A recent study supports that election sites—even when precautions such as social distancing are taken—can cause a significant spread of COVID-19. In a study by the University of Wisconsin and Ball State University, researchers found a “statistically and economically significant association” between in-person voting and the spread of Covid-19 weeks after the election. Chad D. Cotti, Bryan Engelhardt, Joshua Foster, Erik T. Nesson and Paul Niekamp, *The Relationship between-In Person Voting, Consolidated Polling Locations, and Absentee Voting on Covid-19: Evidence from the Wisconsin Primary*, NBER Working Paper Series, Working Paper 27187 (May 2020), available at <https://www.nber.org/papers/w27187>.

threatening issues can be extremely sudden, including individuals under the age of 65 and otherwise in good health. As more data about the virus emerges, the highest attack rates are in persons 19-64 years old.²⁷

The Amici recognize that the data reflects the elderly are more susceptible to the disease. But more and more young people are in ICUs or dying from COVID-19.²⁸ As Amici Dr. Troisi, a Ph.D epidemiologist, testified at the temporary injunction hearing in Travis County, two out of five people hospitalized with COVID-19 are between the ages of 20 and 44.²⁹ Those who survive may still suffer devastating health consequences, including heart disease and neurologic damage.

²⁷ See Allison James, DVM, PhD; Lesli Eagle; Cassandra Phillips; D. Stephen Hedges, MPH; Cathie Bodenhamer; Robin Brown, MPAS, MPH; J. Gary Wheeler, MD; Hannah Kirking, MD, *Morbidity and Mortality Weekly Report (MMWR) - High COVID-19 Attack Rate Among Attendees at Events at a Church – Arkansas, March 2020*, Centers for Disease Control and Prevention (March 22, 2020), available at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6920e2.htm> (“Among 92 attendees at a rural Arkansas church during March 6–11, 35 (38%) developed laboratory-confirmed COVID-19, and three persons died. Highest attack rates were in persons aged 19–64 years (59%) and ≥65 years (50%). An additional 26 cases linked to the church occurred in the community, including one death.”). As Amici Dr. Varon has stated in a declaration in the Texas Supreme Court matter (Cause No. 20-0394, *In re State of Texas*), “The majority of the 33,000 people we have tested who are positive are young people (19-54 years of age). Of my patients who are COVID-19 positive who require admission to the hospital, 80% are people of color.”

²⁸ See World Health Organization - COVID-19 Virtual Press Conference 3 April, 2020, World Health Organization (April 3, 2020), available at https://www.who.int/docs/default-source/documents/covid-19-virtual-press-conference-transcript-3-april-2020.pdf?sfvrsn=43e2f2f3_6 (p.10).

²⁹ Amici Dr. Troisi was a witness for the Plaintiffs in Cause No. D-1-GN-20-001610, *Texas Democratic Party, et al. v. Hughes*, in the 201st District Court of Travis County, Texas. Her testimony is a part of the record in the pending Texas Supreme Court case, No. 20-0394 *In re State of Texas*.

The “Accessible Dashboard Data” prepared by the Texas Department of State Health Services and posted on its website reported on May 26, 2020 that 56.9% of confirmed cases in Texas involved individuals 49 years or younger and only 17% involve individuals 65 and older.³⁰ And in Travis County, the numbers are more startling: As of May 26, 2020, sixty-six percent of reported cases involve individuals 49 and younger.³¹

C. This is not “just the flu.”

The coronavirus is very different than influenza. Both are viruses and both cause respiratory illness, but that is where the similarity ends. Most people are able to develop and maintain a natural protective immune response to the flu, which is common and seasonal. Additionally, because of widespread and economical access to effective flu vaccines, people can voluntarily obtain some level of immunity to the flu virus. Lastly, the flu is more treatable than COVID-19. Medications like oseltamivir (Tamiflu™) and zanamivir (Relenza™) are generally safe and readily available options that reduce duration and severity for those at high risk of complications from the flu.

³⁰ See *Texas COVID-19 Data*, Texas Department of State Health Services (updated May 26, 2020), available at <https://dshs.texas.gov/coronavirus/additionaldata/> (Excel spreadsheet available at Accessible Dashboard Data hyperlink found on that page).

³¹ See *COVID-19 Surveillance, Travis County, TX*, City of Austin (updated May 26, 2020), available at <https://austin.maps.arcgis.com/apps/opstdashboard/index.html#/39e4f8d4acb0433baae6d15a931fa984>.

Yet none of these are present for the coronavirus: as far as we know, most people do not have a natural immunity, there is no vaccine, and there are no FDA-approved or universally accepted antiviral medications that can be used to lessen the effects of the COVID-19. Even for those who have been infected by the virus, it is not yet clear if they have an immunity to acquiring the disease again. It is highly unlikely that any of these circumstances will change before the July 2020 election, at a minimum.

While both the flu and coronavirus can cause respiratory illness, acute respiratory issues caused by the flu develop gradually. Those suffering from COVID-19 are susceptible to acute respiratory problems at a much more rapid rate. COVID-19 can have a savage effect on the human body's organs, including the lungs, and can trigger a rapid downward progression that doctors are at a loss to slow or prevent. A COVID-19 patient can rapidly progress from being able to breathe on his or her own to having severe breathing problems that require intubation. The coronavirus does not only affect the lungs, but also can damage the liver, cause blood clots, and impair a person's mental state.

COVID-19 is much more deadly than the flu. While some uncertainty remains about the exact case fatality rate, a new study by the University of Washington published on May 5, 2020 shows "The national rate of death among people infected with the novel coronavirus — SARS-CoV-2 — that causes COVID-19 and who

show symptoms is 1.3%. . . . The comparable rate of death for the seasonal flu is 0.1%."³²

D. The measures proposed by the State are insufficient to protect voters, poll workers, and the community at-large from the spread of COVID-19.

In support of its motion for stay and its claim that public polling places are safe during this pandemic, the State attached a declaration of Mr. Bruce Sherbet explaining his proposed safety measures for Collin County (“Collin County safety measures”) in the July 2020 election—the election directly impacted by this Court’s decision on the State’s motion for stay.³³ Mr. Sherbet states that Collin County will employ “similar measures” to those of the other Texas counties in July 2020.³⁴ Additionally, on May 26, 2020, the Texas Secretary of State released the minimum recommended health protocols for all voters in Texas.³⁵ The minimum recommendations explicitly recognize that “[t]he virus that causes COVID-19 can

³² Anurban Basu, PhD, MS, *Estimating The Infection Fatality Rate Among Symptomatic COVID-19 Cases In The United States*, Health Affairs (May 7, 2020), available at https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2020.00455?utm_campaign=covid19fasttrack&utm_medium=press&utm_content=basu&utm_source=mediaadvisory&.

³³ See *Appellant’s Emergency Motion for Stay Pending Appeal and Temporary Administrative Stay*, Exhibit O (“Exhibit O”).

³⁴ Exhibit O at 3.

³⁵ *Health Protocols for Voters and Health Protocols for Elections*, Texas Secretary of State (visited May 27, 2020), available at <https://www.sos.texas.gov/elections/forms/health-protocols-for-voters.pdf>.

be spread to others by infected persons who have few or no symptoms” and “[t]he virus that causes COVID-19 is still circulating in our communities.”³⁶

These county-proposed safety measures and the State’s health protocols, however, are inadequate to prevent the spread of COVID-19 at public polling places. Namely, these plans 1) fail to fully incorporate basic standards of practice, 2) make no provision for screening or addressing voters who arrive at the polling place that refuse to comply with recommendations or who are ill, and 3) fail to acknowledge the scarcity of PPE (personal protective equipment), cleaning products, and temporary poll workers willing to take on additional responsibilities at the polls.

As described in Mr. Sherbet’s affidavit, Collin County does not promise compliance with accepted, published standards. Instead, Mr. Sherbet appears to have addressed only selected portions of required methods, omitting significant portions of the State of Texas Protocols, CDC Recommendations and OSHA Guidance.³⁷

³⁶ *Health Protocols for Voters and Health Protocols for Elections*, Texas Secretary of State (visited May 27, 2020), available at <https://www.sos.state.tx.us/elections/forms/health-protocols-for-voters.pdf> at 1, 4.

³⁷ The following accepted published guidelines, policies, and procedures set a minimum standard for public facilities:

- *COVID-19 - Control and Prevention*, United States Department of Labor, Occupational Safety and Health Administration (OSHA) (visited May 26, 2020), available at <https://www.osha.gov/SLTC/covid-19/controlprevention.html#health>;
- *Coronavirus Disease 2019 (COVID-19) - Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Base Transmission*, Center for Disease Control and Prevention (reviewed April 3, 2020) available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>;
- *Coronavirus Disease 2019 (COVID-19) - Cleaning and Disinfection for Community Facilities*, Center for Disease Control and Prevention (reviewed April 14, 2020) available

Without clear acceptance and implementation of these standards, the county safety measures are merely aspirational. Instead of relying on these standards, according to Mr. Sherbet's declaration, the effectiveness of Collin County's own, limited safety measures will be evaluated *only after the runoff*, making the runoff a virtual experiment for improved safety for the general election.³⁸

Importantly, neither the county safety measures nor the State's protocols include any procedures for dealing with the anticipated issues that put poll workers and other voters at risk, such as actively screening voters who are ill or feverish for possible COVID-19 infection and enforcing the use of protective masks on voters themselves who refuse to comply with safety guidelines governing polling places.³⁹

at <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>;

- *Coronavirus Disease 2019 (COVID-19) - Cleaning and Disinfecting Your Facility*, Center for Disease Control and Prevention (reviewed April 14, 2020) available at <https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html>;
- *Coronavirus Disease 2019 (COVID-19) - Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)*, May 2020, Center for Disease Control and Prevention (reviewed May 5, 2020) available at https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html; and
- John Hellerstedt, MD, Commissioner, *Opening the State of Texas Protocols for All Employers*, Texas Department of State Health Services (May 5, 2020), available at <https://www.dshs.texas.gov/coronavirus/docs/opentx/AllEmployers.pdf>.

³⁸ See Appellant's Emergency Motion for Stay Pending Appeal and Temporary Administrative Stay, Exhibit O at 2.

³⁹ News accounts are all-too common about incidents occurring when individuals refuse to comply with orders, rules, or policies requiring the use of masks in public settings. See, e.g., Sharon Terlep, *Stores Stress Over How to Handle a Customer Who Won't Wear a Mask*, THE WALL

Poll workers are not given the authority to turn away ill voters or voters who refuse to wear masks—at best they can “encourage” voters to follow protocols.⁴⁰

Further, the State’s minimum protocols for voters are little more than an unenforceable recommendation to voters. There are no mandatory requirements for voters, only a request to follow the list “to the extent feasible;” thus the “checklist” is an inadequate substitute for a safety protocol.⁴¹ These protocols do not even make wearing masks, by voters and poll workers, mandatory, despite the clear recommendations by the CDC to prevent the spread of the virus through respiratory droplets.⁴² And the protocols concerning “self-screening” by voters are highly problematic because they fail to recognize presymptomatic and asymptomatic carriers of the virus.

Amici have additional concerns as well about the county safety measures and State protocols:

- Poll workers are not the highly-trained infection control professionals found in hospitals and other medical facilities. Moreover, the State

STREET JOURNAL (May 16, 2020), available at <https://www.wsj.com/articles/stores-stress-over-how-to-handle-a-customer-who-wont-wear-a-mask-11589621403>

⁴⁰ *Health Protocols for Voters and Health Protocols for Elections*, Texas Secretary of State (visited May 27, 2020), available at <https://www.sos.texas.gov/elections/forms/health-protocols-for-voters.pdf> at 5-7.

⁴¹ *Id.* at 2.

⁴² *Coronavirus Disease 2019 (COVID-19) - Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Base Transmission*, Center for Disease Control and Prevention (reviewed April 3, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>

protocols for elections state that disinfection should occur, but provide no guidance on how to properly disinfect sensitive equipment.

- Because COVID-19 is most commonly transmitted through respiratory droplets, the proposed protections are inadequate to sanitize the respiratory droplets that hang in the air for several minutes, particularly in enclosed spaces.
- It is unclear how the necessary amount of infection control supplies would be available to routinely disinfect all polling areas throughout all voting periods; and whether it would be possible to hire an adequate number of poll workers and sufficiently train them about how to perform these important activities. Rather, the State’s minimum protocol seems to rely heavily on voters bringing their own supplies and PPE, which are in limited supply.
- The same applies for access to hand-washing facilities in polling places. Not all polling places will have bathrooms available or convenient enough to expect voters and poll workers to hand wash often enough. Moreover, the bathrooms themselves may be too small for people to socially distance, creating another hazard and another bottleneck for voters waiting in line.
- These proposals still do not account for human error. Masks must be worn correctly, which many non-healthcare professionals fail to do. And the proposed social distancing practices recommended are simply not sufficiently reliable with large numbers of people—such as when voters stand in long lines to vote. There are no enforcement mechanisms for government officials to consistently enforce social distancing measures in public places.
- The reality is that people will not comply with social distancing guidelines when they wait in long lines in polling stations.⁴³

⁴³ “Voters wait in line to cast their ballots in the Wisconsin presidential primary election at Marshall High School in Milwaukee on April 7. (Tannen Maury/EPA-EFE/Shutterstock)” – as reported by The Washington Post here: Richard H. Pildes, Charles Stewart, III, *The Wisconsin primary had extraordinarily high voter turnout*, THE WASHINGTON POST (April 15, 2020) available at <https://www.washingtonpost.com/politics/2020/04/15/wisconsin-primary-had-extraordinarily-high-voter-turnout/>



Notably, the county-proposed safety measures and State minimum protocol ignore the first recommendation by the CDC for election officials to “[e]ncourage mail-in methods of voting if allowed in the jurisdiction” as part of “encourage[ing] voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations.”⁴⁴ Increasing options for voters, such as mail-in ballots, allows for a reduction in crowd-size at the polls, which in turn reduces the direct contact of voters with each other and with poll workers both in and outside of the polling locations. And scientists and medical professionals consistently have determined that such reductions in person-to-person contact prevents the spread of COVID-19.

⁴⁴ *Coronavirus Disease 2019 (COVID-19) - Recommendations for Election Polling Locations – Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)*, Centers for Disease Control and Prevention (updated March 27, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

E. Amici’s concerns are specifically tied to the harrowing circumstances of this time related to the 2020 election cycle.

Amici are not partisan; they include members on both sides of the aisle. They have no stake in the outcome of any particular candidate or in any particular election. Instead, they have serious concerns about the health risks posed by in-person voting at this specific time; these concerns do not extend to all foreseeable elections. Rather, the position of Amici is based on the unique circumstances of this pandemic and where Texas currently finds itself: the virus is continuing to spread throughout our communities, but we have no comprehensive testing or tracking system and no viable vaccine or treatment protocol for the most severe symptoms. The position and concerns of healthcare professionals on these issues may evolve with the circumstances, including if any of those circumstances change.

Importantly, however, it is extremely unlikely any of these circumstances will change before the July 2020 election. Thus it is critical that the district court’s injunction be allowed to take effect and remain in place to protect the voters and the community from the spread of COVID-19 at this time.

II. The State’s interpretation of Texas law, restricting mail-in ballots during the COVID-19 pandemic, severely burdens the right to vote of those under 65.

All voters, including those under 65, who are forced to vote in-person are placed at risk of contracting COVID-19, a risk not shared by voters over the age of 65 who may freely elect to vote by mail. They thus have undue burdens placed upon

their exercise of their constitutional right to vote. This undue burden is particularly severe for healthcare workers and the African-American and Latino communities.

A. *Healthcare Workers.*

- 1. Because frontline workers have significant exposure to COVID-19, they face the choice to protect the community or vote in-person.**

For most frontline doctors, nurses, and other healthcare personnel, COVID-19 presents a Hobson's choice: (1) vote in-person, knowing they are potentially exposing all people around them to COVID-19 based on their own repeated exposure to the virus; or (2) do not vote at all. This is an unreasonable and unnecessary burden on our frontline healthcare workers.

Significant numbers of frontline healthcare workers in Texas are under the age 65, meaning they do not have a blanket opportunity to request a mail-in ballot under the State's interpretation of the [Texas Election Code section 82.002](#). But, more than the average voter, these healthcare workers risk exposing other voters and poll workers to COVID-19 based on their own frequent and extensive exposure to COVID-19, including exposure to patients with severe COVID-19 symptoms requiring hospitalization and intubation. Indeed, because of their exposure and the risk of spreading the virus even when they have no symptoms, healthcare workers

across the country are isolating themselves from their own families and communities.⁴⁵

The State's interpretation of the Election Code would require healthcare workers who want to exercise their right to vote to reject the very safety precautions they know to be essential to protect our society and to vote in person, and will put at grave risk many in the communities these healthcare workers have dedicated themselves to protect.

2. Frontline workers, for the sake of themselves, their families, and the other patients they treat, should not be required to take an additional risk of exposure via in-person voting.

Frontline healthcare workers under the age 65, who are already exposing themselves to the virus for their work, should not be forced to vote in person and risk contracting COVID-19 from polling places. Healthcare workers are already contracting the virus at an alarming rate.⁴⁶ When they do contract COVID-19, they are unable to treat patients. Allowing them to vote by mail although they are under

⁴⁵ In fact, Amici Dr. Obie, one of the emergency medicine doctors currently treating COVID-19 patients, is working in COVID-19 "hot spot" El Paso, Texas although she is a resident of the Houston area. See Eleanor Dearman, *COVID-19 pandemic: El Paso exempted from Gov. Greg Abbott's latest business reopenings*, EL PASO TIMES (May 18, 2020), available at <https://www.elpasotimes.com/story/news/politics/2020/05/18/el-paso-exempted-governors-expansion-business-reopenings/5213398002/>. She is separated from her home by over 700 miles.

⁴⁶ *Morbidity and Mortality Weekly Report (MMWR) - Characteristics of Health Care Personnel with COVID-19 – United States, February 12-April 9, 2020*, Centers for Disease Control and Prevention (April 17, 2020), available at <https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e6.htm> (As of April 15, 2020, 9,300 U.S. health care workers contracted COVID-19 and 27 have died. The median age of the infected workers is 42.)

65 unquestionably would protect the community's health and preserve their right to vote.

B. *Disparate impact on diverse communities.*

The Amici, based on their scientific and medical knowledge, agree with the position of Appellees and other amici that the disparate impact of COVID-19 on communities of color presents an additional undue burden on members of those communities by requiring that they vote in-person if they are under the age of 65. While the danger of in-person voting to voters' health is great, the danger to people of color is even greater than the general population because people of color, regardless of whether or not they have a preexisting medical condition, are at exceedingly higher risk for the development of severe and lethal COVID complications.⁴⁷

⁴⁷ See Samantha Artiga, Rachel Garfield, Kendal Orgera, *Coronavirus (COVID-19) – Communities of Color at Higher Risk for Health and Economic Challenges due to COVID-19*, KFF (April 7, 2020) available at <https://www.kff.org/coronavirus-covid-19/issue-brief/communities-of-color-at-higher-risk-for-health-and-economic-challenges-due-to-covid-19/>; see also Sean McMinn, Audrey Carlsen, Bret Jaspers, Ruth Talbot, Stephanie Adeline, *In Large Texas Cities, Access To Coronavirus Testing May Depend On Where You Live*, National Public Radio (May 27, 2020), available at <https://www.npr.org/sections/health-shots/2020/05/27/862215848/across-texas-black-and-hispanic-neighborhoods-have-fewer-coronavirus-testing-sit>.

III. The State’s position chills the First Amendment Rights of Healthcare Professionals who are duty-bound to give their patients honest and accurate advice.

In the face of the COVID-19 pandemic, it is all the more important that healthcare providers advise patients on how to minimize the risk of exposure to the COVID-19 virus while conducting day-to-day activities. Some doctors may advise patients of precautions that should be taken (minimize public outings, taking protective measures, etc.). And others may advise particular patients that, given their susceptibility to the virus, they should avoid any group gatherings, including a polling location. Under such circumstances, healthcare providers not only have the right to so advise their patients, they have the duty to do so.

General Paxton has taken the position that fear of contracting COVID-19 does not constitute a “disability” or a “sickness” or “condition” that would authorize a voter to apply for a ballot to vote by mail. Further, General Paxton has publicly stated that “[t]o the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.001.”

These statements place healthcare providers in reasonable fear that if they fulfill their medical duties and advise their patients to avoid public polling sites and instead apply for a mail-in ballot, they will potentially be subject to criminal prosecution. This fear is not contrived—it derives directly from the Attorney

General's own statements making such a threat. And the fear is imminent as voters seek medical advice from their healthcare providers in anticipation of deadlines that must be satisfied in order to vote by mail in the upcoming July 2020 election.

A stay of the district court's order exacerbates these concerns because as long as the stay is in place, healthcare providers face peril of prosecution by complying with their duties to advise their patients, who need answers immediately to meet deadlines for requesting mail-in ballots in time. The Amici thus urge this Court to dissolve the stay pending appeal so they may continue to provide advise to their patients that they are duty-bound to provide without the fear of criminal prosecution.

CONCLUSION

For the reasons described above, the Amici maintain that the stay requested by the State is not in the public interest. What *is* in the public interest is the protection of the health of all voters, poll workers, and the community, which can be achieved by decreasing the number of people gathering on election day through increased numbers of voters who vote at public polling places and increasing the number voters who vote remotely by mail-in ballots. A voter's ability to utilize this option, as both a medically-safe and lawful means of exercising one's constitutional right to vote, should be protected.

Dated: May 27, 2020

Respectfully submitted

By: /s/ Amy L. Saberian

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), that the foregoing *Brief for Amici Curiae Healthcare Professionals in Support of Plaintiffs-Appellees*:

- (1) Complies with Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,753 words; and
- (2) Complies with the typeface and type style requirements of Federal Rule of Civil Procedure 27(d)(1)(e), 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14 point font.

/s/ Amy L. Saberian _____
Amy L. Saberian
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CERTIFICATE OF SERVICE

I certify that on May 27, 2020, I electronically filed the *Brief for Amici Curiae Healthcare Professionals in Support of Plaintiffs-Appellees* with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the Appellate CM/ECF filing system. I further certify that all participants in this case are registered CM/ECF users and that all service will be accomplished by the appellate CM/ECF system.

/s/ Amy L. Saberian _____
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FIFTH CIRCUIT
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May 28, 2020

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No. 20-50407 Texas Democratic Party, et al v. Greg
Abbott, Governor of TX, et al
USDC No. 5:20-CV-438

Dear Ms. Saberian,

The following pertains to your amici brief electronically filed on
May 28, 2020.

The brief is lacking the Statement pursuant to FRAP 29(a)(4)(E).

Note: Once you have prepared your sufficient brief, you must electronically file your 'Proposed Sufficient Brief' by selecting from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary. The certificate of service/proof of service on your proposed sufficient brief **MUST** be dated on the actual date that service is being made. Also, if your brief is sealed, this event automatically seals/restricts any attached documents, therefore you may still use this event to submit a sufficient brief.

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in cursive script, appearing to read "Mary Frances Yeager".

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Mary Frances Yeager, Deputy Clerk
504-310-7686

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