No. 20-50867

In the United States Court of Appeals for the Fifth Circuit

TEXAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS; NATIONAL LEAGUE OF UNITED LATIN AMERICAN CITIZENS; LEAGUE OF WOMEN VOTERS OF TEXAS; RALPH EDELBACH; BARBARA MASON; MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES; TEXAS LEGISLATIVE BLACK CAUCUS,

Plaintiffs-Appellees,

v.

RUTH HUGHS, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE

Defendant-Appellant.

LAURIE-JO STRATY; TEXAS ALLIANCE FOR RETIRED AMERICANS; BIGTENT CREATIVE,

Plaintiffs-Appellees,

v.

RUTH HUGHS, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

EMERGENCY MOTION FOR STAY PENDING APPEAL AND TEMPORARY ADMINISTRATIVE STAY

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Certificate of Interested Persons

No. 20-50867

Texas League of United Latin American Citizens; National League of United Latin American Citizens; League of Women Voters of Texas; Ralph Edelbach; Barbara Mason; Mexican American Legislative Caucus, Texas House of Representatives; Texas Legislative Black Caucus,

Plaintiffs-Appellees,

v.

Ruth Hughs, in her official capacity as Texas Secretary of State

Defendant-Appellant.

Laurie-Jo Straty; Texas Alliance for Retired Americans; Bigtent Creative,

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Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellee, as a governmental party, need not furnish a certificate of interested persons.

/s/ Kyle D. Hawkins
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Introduction and Nature of Emergency

Late last night, merely four days before in-person early voting begins, the district court below enjoined the implementation and enforcement of a proclamation issued by Texas Governor Greg Abbott to broadly expand mail-in voting options prior to Election Day while maintaining safeguards to ensure electoral integrity. The proclamation is part of a series of executive orders advancing Texas's "response to a public health crisis." *In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020). Among other things, these orders propound public-health measures related to the election—including expanded opportunities for eligible voters to hand-deliver their mail-in ballots. Although the Texas Election Code normally disallows mail-in ballots to be hand-delivered before Election Day, Governor Abbott has invoked his authority under the Texas Disaster Act to suspend those limitations and allow eligible voters to hand-deliver mail-in ballots to their local county's designated office at any time over several weeks leading up to Election Day, thereby providing voters with unprecedented voting options.

Yet the district court below faulted Governor Abbott for not expanding voting options *even more*. The district court instead ordered the Texas Secretary of State to allow voters to return a mail-in ballot to *any* county annex or satellite location—not just a single office, as Governor Abbott determined would be prudent policy. The district court's injunction thus "usurp[s] the power of the governing state authority," "pass[es] judgment on the wisdom and efficacy" of the Governor's public policy decisions, *id.* at 783, and "openly defies" "the Supreme Court's repeated emphasis that courts should not alter election rules on the eve of an election." *Tex. All.*

for Retired Ams. v. Hughs, No. 20-40643, 2020 WL 5816887, at *1 (5th Cir. Sept. 30, 2020) (*TARA*) (granting stay pending appeal).

The district court's injunction rests on many of the same flaws that have recently led this Court to stay numerous election-related injunctions pending full review. *Id.*; *see Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020) (*TDP I*); *see also Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020) (granting stay); *A. Philip Randolph Inst. of Ohio v. LaRose*, No. 20-4063, slip op. (6th Cir. Oct. 9, 2020) (Ex. K) (same). It further exceeds the district court's jurisdiction: Plaintiffs lack standing, their claims against the Secretary are barred by sovereign immunity, and the district court had a duty to abstain under *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941). And in any event, Plaintiffs' claims fail on the merits because the Proclamation does not *implicate*, much less burden, the right to vote. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 89 (1969).

The Secretary therefore moves for an emergency stay pending appeal. Because mail-in voting is already underway, and because at least one county has already publicly proclaimed that it will not comply with the Governor's Proclamation (*see* Ex. L), **the Secretary respectfully requests a stay pending appeal no later than 9:00 a.m. on Tuesday, October 13. In addition, the Secretary respectfully requests an immediate administrative stay while the Court considers this motion.** *E.g.*, *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 2616080, at *1 (5th Cir. May 20, 2020); *In re Abbott*, 954 F.3d at 781.

Statement of Facts

I. The COVID-19 Emergency Prompts Governor Abbott's Unprecedented Expansion of Early Voting.

The coronavirus pandemic represents a "public health crisis of unprecedented magnitude." *In re Abbott*, 954 F.3d at 787. Texas law charges the Governor with "meeting" the "dangers to the state and people presented" by such a crisis, Tex. Gov't Code § 418.011(1), and allows him to issue executive orders and proclamations with the "force and effect of law," *id.* § 418.012.

In responding to the COVID-19 disaster, the Governor has taken numerous actions to protect public health. As relevant here, on July 27, the Governor issued a proclamation extending early voting for the November general election. Ex. B. The Governor found that "in order to ensure that elections proceed efficiently and safely . . . it is necessary to increase the number of days in which polling locations will be open" so "that officials can implement appropriate social distancing and safe hygiene practices." Ex. B at 2. The July 27 Proclamation suspended section 85.001(a) of the Texas Election Code to allow "early voting by personal appearance [to] begin on Tuesday, October 13, 2020." *Id.* at 3. The Proclamation also suspended section 86.006(a-1) "to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early[-]voting clerk's office prior to and including on election day." *Id.*

Before the July 27 Proclamation, voters could cast a mail-in ballot in one of two ways: (1) mail it in; or (2) hand-deliver it "in person to the early voting clerk's office only while the polls are open on election day." Tex. Elec. Code § 86.006(1)-(2), (a-

1). Voters choosing the latter option must present a valid form of identification along with the marked ballot. *Id.* § 86.006(a-1).

The vast majority of Texas voters are not eligible to vote by mail, *see* Tex. Elec. Code §§ 82.001 *et seq.*, and the small subset who are eligible usually rely on the postal service to deliver their marked ballot. This case thus involves only a small subset of voters who are eligible to vote by mail and could rely on the postal service yet simply prefer to hand-deliver their marked ballot.

II. The Governor Clarifies His Earlier Proclamation.

While many counties have only one location at which mail-in ballots may be hand-delivered, several counties, including Harris, Travis, and Fort Bend, recently announced plans to open multiple mail-in ballot delivery locations at satellite offices or annexes. But it soon became clear that these counties would not provide adequate election security, including poll watchers, at these annexes. Ex. D ¶ 14. These inconsistencies impede the uniform conduct of the election and introduce a risk to ballot integrity, such as by increasing the possibility of ballot harvesting. *See* Tex. Elec. Code § 33.051.

To address these disparate and potentially dangerous practices, the Governor issued a proclamation on October 1, 2020, to clarify that the suspension of section 86.006(a-1) applies only if the county (1) provides a single designated delivery location, which (2) can be monitored by poll watchers. Ex. C at 4. The Governor's Proclamations add substantially more time in which eligible voters can hand-deliver mail-in ballots leading up to Election Day, and do not address or affect what the Election Code allows on Election Day itself.

III. The District Court Holds that By Modifying His Own Order Expanding Early Voting, the Governor Has Abridged the Right to Vote.

Immediately following the October 1 Proclamation, several organizational and individual plaintiffs brought two lawsuits challenging the Proclamation under a variety of state- and federal-law theories.[1] The Individual Plaintiffs are three registered voters. Ex. E ¶ 16, Ex. F ¶¶ 22-23. The Organizational Plaintiffs include non-profit organizations who describe their missions as including promoting civic engagement through the election process. Ex. E ¶¶ 17-18; Ex. F ¶ 10-21.

Plaintiffs do not claim that the Constitution requires multiple drop-off sites—or any sites. *E.g.*, Ex. G at 15 n.14. And none challenge the poll-watcher requirement. Instead, they claim that the Governor's clarification to his unprecedented expansion of voters' options to return marked ballots prior to Election Day has burdened their right to vote and violated the Equal Protection Clause of the Fourteenth Amendment. Ex. E ¶¶ 56-71. Plaintiffs sought declaratory and injunctive relief that election officials should be permitted to decide the number of locations "at their discretion." *Id.* at 19.

The district court consolidated the *LULAC* and *Straty* matters for purposes of a preliminary injunction hearing on October 8. Late last night, the district court issued a consolidated preliminary injunction in both cases. The order enjoins the Secretary "from implementing or enforcing the following paragraph on page 3 of the October 1 Order: '(1) the voter delivers the marked mail ballot at a single early voting clerk's office location that is publicly designated by the early voting clerk for the

[1] A third lawsuit raising state-law claims is pending in state court. Ex. H.

return of marked mail ballots under Section 86.006(a-1) and this suspension.'" Ex. A at 46.

Pursuant to Rule 8, the Secretary asked the district court to stay any injunction pending appeal. *Straty* ECF No. 34 at 34; *LULAC* ECF No. 34 at 34. The district court did not act on—and thus implicitly denied—that request. Because time is of the essence, the Secretary now moves this Court for a stay pending appeal and a temporary administrative stay. *See* Fed. R. App. P. 8(a)(2).

Statement of Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the district court granted a preliminary injunction; and under the collateral order doctrine of 28 U.S.C. § 1291 because the district court denied the Secretary's motion to dismiss on the ground of sovereign immunity.

Argument

The Secretary is entitled to a stay because (1) she is likely to succeed on the merits; (2) she will suffer irreparable harm absent a stay; (3) Plaintiffs will not be substantially harmed by a stay; and (4) the public interest favors a stay. *See Nken v. Holder*, 55 U.S. 418, 426 (2009).

I. The Secretary Is Likely to Succeed on Appeal.

The Secretary is likely to succeed on appeal for at least four reasons: (1) the district court impermissibly altered election rules on the eve of an election; (2) the district court lacked jurisdiction; (3) the district court should have abstained in light of

parallel state litigation; and (4) Plaintiffs failed to meet their burden of proof to be entitled to such extraordinary relief.

A. The district court impermissibly altered election rules on the eve of an election.

Just ten days ago, in *TARA*, this Court reaffirmed the bedrock principle that district courts may not "interfere[] with state election laws on the eve of an election," and when they do so, the Secretary has necessarily "made a strong showing that she is likely to succeed on the merits of her appeal." 2020 WL 5816887, at *2 (citing *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205, 1207 (2020), and *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). And a district court's violation of that principle makes a stay pending appeal warranted without any additional showing of error. As *TARA* explained: "[W]e need not reach [standing, sovereign immunity, and the merits] because the Secretary has made a strong showing that she is likely to succeed on the merits of her appeal on the argument that the district court improperly interfered with state election laws on the eve of an election." 2020 WL 5816887, at *2.

Indeed, *TARA* has already rejected as "deeply flawed," *id.*, the exact reasoning the district court relied on below. The district court admitted (at 33) that its "injunction to reinstate the ballot return centers does potentially cause confusion," yet believed such confusion was "outweighed by the increase in voting access." The *TARA* district court said the same thing. *See Tex. All. for Retired Americans v. Hughs*, 5:20-CV-128, 2020 WL 5747088, at *16 (S.D. Tex. Sept. 25, 2020) (finding "the fundamental political right to vote" outweighs any "confusion" created by an

injunction because the district court "must react to burdens imposed on Constitutional rights, especially during this public health crisis"). And this Court summarily rejected that reasoning for overlooking binding Supreme Court authority and downplaying the possibility of confusion. 2020 WL 5816887, at *3.

The district court's "injunction openly defies the Supreme Court's instruction, discussed above, not to interfere with state election laws on the eve of an election." *Id.* at *2. That is sufficient reason to grant a stay. *See id.*[2]

B. The district court lacked jurisdiction.

1. Plaintiffs lack standing.

The injunction is also improper because Plaintiffs have not clearly shown they have standing to sue. To invoke federal jurisdiction, a plaintiff must show (1) an actual or imminent injury in fact, that (2) is fairly traceable to the defendant's conduct, and (3) is likely to be redressed by a favorable decision. *NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010). Because this is a preliminary injunction, Plaintiffs must make a "clear showing" that they have standing. *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017).

Plaintiffs' alleged injuries are neither traceable to the Secretary's conduct nor redressable by the injunction below. The Secretary does not enforce the Election

[2] It is no answer to suggest the Governor's October 1 Proclamation changed the status quo. Elected officials must have leeway in a public-health disaster to weigh competing concerns regarding costs and benefits and make policy decisions in real time. Federal courts may not override those sensitive policy choices, *In re Abbott*, 954 F.3d at 786, especially not on the eve of an election, *TARA*, 2020 WL 5816887, at *3.

Code writ large and does not enforce section 86.006(a-1) in particular. *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972). Local early-voting clerks do, Tex. Elec. Code § 83.001, and refusal to comply may be prosecuted by local prosecutors. Tex. Gov't Code §§ 418.012, 418.016. The Secretary similarly does not enforce the Governor's Proclamations. Ex. C at 3 (requiring only that Secretary "take notice" and "transmit" Proclamation to local authorities).[3].

Because the district court's injunction against the Secretary does not impact Plaintiffs' alleged injuries, it exceeds the district court's jurisdiction.

Plaintiffs also lack standing to sue the local defendants, who are not adverse parties. Plaintiffs want the local officials to have more "discretion." Ex. E at 19. They "are not arguing that the Constitution requires any individual county to provide multiple ballot return locations," Ex. G at 15 n.14, so local compliance with the Proclamation is not the source of any injury they claim.

2. Plaintiffs' claims are barred by sovereign immunity.

The Secretary is also likely to show that the preliminary injunction is barred by sovereign immunity. "[T]he principle of state-sovereign immunity generally precludes actions against state officers in their official capacities, subject to an established exception: the *Ex parte Young* doctrine." *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (citation omitted). *Ex parte Young* applies only

[3] *See also In re Hotze*, No. 20-0739, 2020 WL 5934190 (Tex. Oct. 7, 2020) (Blacklock, J., concurring); Tex. Gov't Code § 418.173; State of Texas Emergency Management Plan at 9 (Feb. 2020), https://tdem.texas.gov/wp-content/uploads/2019/08/2020-State-of-Texas-Basic-Plan_WEBSITE_05_07_gs.pdf.

when the defendant enforces the challenged statute in violation of federal law. The Secretary's "general duty"—if any—"to see that the laws of the state are implemented" is insufficient. *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quotation marks omitted). Instead, the named defendant must have "the particular duty to enforce the statute in question *and* a demonstrated willingness to exercise that duty." *Id.* (emphasis added).

Sovereign immunity thus bars Plaintiffs' claims against the Secretary because she neither implements nor enforces either section 86.006(a-1) or gubernatorial proclamations. *See supra* pp. 8-9. Moreover, even if the Secretary *could* enforce section 86.006(a-1), that would not satisfy *Ex parte Young*. As this Court recently emphasized, even where a state official "has the authority to enforce" a law, a plaintiff must further allege that the state official "is likely to" enforce the law in a way that would "constrain" the plaintiff. *City of Austin v. Paxton*, 943 F.3d 993, 1001-02 (5th Cir. 2019). Far from showing that the Secretary is likely to enforce this order, Plaintiffs assert that the Secretary has previously advised local election officials that mail-in ballots could be returned to any early-voting clerk office, which is what Plaintiffs want. Ex. E at 19; Ex. F at 20. Any contrary advice or requirement comes not from the Election Code but from the October 1 Proclamation, which the Governor wrote and which imposes no duties on the Secretary.

C. The district court should have abstained under *Pullman*.

Because the validity of the October 1 Proclamation is currently being litigated in Texas state court, the district court should have held off on issuing any injunction. *Pullman* abstention is warranted where a case presents (1) "an unclear issue of state

law" that (2) "if resolved, would make it unnecessary for [the Court] to rule on the federal constitutional question." *Moore v. Hosemann*, 591 F.3d 741, 745 (5th Cir. 2009) (alteration omitted). "The second factor is flexible—it is satisfied if the constitutional questions will be substantially modified, or otherwise presented in a different posture." *TDP I*, 961 F.3d at 397 (cleaned up).

Both requirements are met here. The Governor's authority under Texas state law to issue the October 1 Proclamation is currently the subject of a pending challenge in Texas state court, Ex. H, and a hearing is set on a requested temporary injunction on Tuesday, October 13, Ex. I. This lawsuit challenges whether the October 1 Proclamation exceeds the Governor's statutory authority or the Texas Constitution. Ex. H. If the state court were to enjoin the challenged provision, its ruling would put Plaintiffs' claims "in a different posture," *TDP I*, 961 F.3d at 397 & n.13, if not moot them entirely. The Secretary is thus likely to show this is "a textbook case for *Pullman* abstention." *Id.* at 417-18 (Costa, J., concurring); *see also id.* at 418 ("Plaintiffs' main push back against all of this is to argue that *Pullman* does not apply to voting rights cases. But we have applied *Pullman* to First and Fourteenth Amendment challenges in the related context of election disputes.").

D. Plaintiffs failed to show a likelihood of success on the merits.

The district court concluded that Plaintiffs are likely to succeed on their undue-burden and equal-protection claims, but the Secretary is likely to show the opposite on appeal. Plaintiffs do not assert a right under either the Constitution or Texas law to hand-deliver their ballots before Election Day. Nor do Plaintiffs assert that if the Governor had simply issued an order allowing one delivery location per county, that

such an order would be unlawful. Instead, they fault the Governor for not expanding voting options *even more*. That argument is not cognizable, and in any event, the Governor's executive orders do not *become* unlawful merely because the Governor expanded voters' options to return marked mail-in ballots prior to Election Day then modified that expansion to ensure electoral integrity.

1. The October 1 Proclamation does not implicate—let alone burden—the right to vote.

The district court first found Plaintiffs were likely to prevail on their primary claim that the Governor's suspension of section 86.006(a-1) abridges their right to vote. On that score, the injunction fails for at least three reasons.

First, the October 1 Proclamation does not implicate the right to vote at all. The Constitution does not include a freestanding right to vote in whatever manner Plaintiffs deem most convenient. *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917, at *10 (5th Cir. Sept. 10, 2020) (*TDP II*). The law distinguishes "the right to vote" from the "claimed right to receive absentee ballots." *McDonald*, 394 U.S. at 807. The inability to vote by mail does not implicate the right to vote unless the State "preclude[s]" voting via other methods. *Id.* at 808. That holding dooms Plaintiffs' undue-burden claim. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring in the judgment) ("That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required.").

Second, even if the right to vote were implicated, the Governor's suspension of section 86.006(a-1) does not abridge that right; it simply permits additional options not otherwise authorized by Texas law. As this Court explained just last month, to "abridge" the right to vote, a state action must "create[] a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative" to existing state law. *TDP II*, 2020 WL 5422917, at *10. Here, the Governor has *expanded* voting options beyond what the Legislature has traditionally provided. Texas law ordinarily permits the in-person delivery of marked mail-in ballots only on Election Day. Tex. Elec. Code § 86.006(a-1). The October 1 Proclamation suspends that limitation provided that the county follows certain protocols. Ex. C. Plaintiffs might prefer even looser rules, but that does not establish any abridgement of the right to vote. *LaRose*, *supra* at 4 ("[A] limitation on drop boxes poses at most an inconvenience to a subset of voters (those who choose to vote absentee and physically drop-off their absentee ballot).").

Third, the October 1 Proclamation easily satisfies the *Anderson-Burdick* test. Plaintiffs' own evidence demonstrates that any burden is *de minimis*, and the restrictions on delivery of mail-in ballots advances weighty State interests. To apply the *Anderson-Burdick* test, a court must "first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). Then the Court "must identify and evaluate the precise interest put forward by the State as justifications for the burden imposed by its rule," taking into consideration

"the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* (quoting *Anderson*, 460 U.S. at 789). When a state election-law provision imposes only "reasonable, nondiscriminatory restrictions" upon the rights of voters, "the state's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson*, 460 U.S. at 788.

As discussed above, the Governor's executive orders have *expanded* Plaintiffs' early-voting options. *See supra* at 2-3. Furthermore, Plaintiffs have provided no proof that any voter will be unable to return their ballots by the deadline on account of the October 1 Proclamation. Indeed, Plaintiff Straty complains she will have to drive twenty minutes rather than five to turn in her ballot in person—while acknowledging that she retains the right to mail in her ballot or vote by personal appearance. Ex. E ¶ 16. This type of "inconvenience" will not support a constitutional claim. *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016).

The State's interests more than justify the supposed burden placed on voters. Vote-by-mail election fraud, has proven to be a frequent and enduring problem, *Crawford*, 553 U.S. at 196 n.12 (plurality op.), including in Texas, *Veasey v. Abbott*, 830 F.3d 216, 263 (5th Cir. 2016) (en banc). In the last Legislative Session, the Texas Legislature heard testimony from district attorneys and law enforcement about coordinated efforts to steal and harvest ballots. Ex. J.

Limiting the number of in-person delivery locations reduces the risk of these criminal acts succeeding by allowing personnel to focus their resources and attention on a single location, rather than having to spread those resources to scrutinize the delivery process at up to a dozen locations over the course of a 40-day period. For

example, poll watchers at delivery sites will help to alleviate unlawful pressure on voters by campaigns, *id.* at 18, which can lead to election contests, *cf. O'Caña v. Salinas*, No. 13-18-00563-cv, 2010 WL 1414021, at *1-2 (Tex. App.—Corpus Christi-Edinburg Mar. 29, 2019, pet. denied). And "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*, 553 U.S. at 196.

Finally, limiting the number of in-person delivery locations reduces the threat of disparate treatment for Texas voters. The historical practice has been not to allow in-person delivery of mail-in ballots, Ex. D ¶ 7, or to limit such deliveries to one location per county, *id.* ¶ 9. By continuing that limit, the October 1 Proclamation increases uniformity among early-voting clerks in interpreting and implementing section 86.006(a-1) and prevents disparate treatment among Texas voters. *Cf. id.* ¶¶ 9-10 (reporting that only four counties allow multiple delivery locations); Jacob Vaughn, *Abbott's Limits on Drop-off Locations for Mail-In Ballots Won't Affect Dallas County Directly*, Dallas Observer (Oct. 5, 2020), https://www.dallasobserver.com/news/trumps-diagnosis-flings-more-doubt-in-coronavirus-debate-11949951 (reporting that heavily populated Dallas County has one location). It is well-established that the State has an acute interest preserving uniformity and public confidence in the election. *See Purcell*, 549 U.S. at 4-5. When combined with the need

to prevent voter fraud, these interests more than justify the incidental burden required for voters to drive a few extra minutes to hand-deliver their ballots.[4]

2. The Secretary is likely to prevail on the "arbitrary disenfranchisement" claim.

The district court further held that Plaintiffs are likely to succeed on their equal-protection claim on the ground that the October 1 Proclamation arbitrarily disenfranchises voters. Again, the Secretary is likely to show the opposite on appeal.

As an initial matter, Plaintiffs do not assert that the October 1 Proclamation distinguishes based on any suspect classification. They cannot. The Proclamation does not regulate individual voters at all; it simply declares a general rule of law applicable to all 254 counties across the State.[5] Such a limitation is subject to rational-basis review unless it imposes a severe burden on the right to vote. *See, e.g.*, *Phillips v. Snyder*, 836 F.3d 707, 719 (6th Cir. 2016); *Decatur Liquors, Inc. v. District of Columbia*, 478 F.3d 360, 363 (D.C. Cir. 2007). As discussed above, the October 1 Proclamation easily meets the rational-basis test.

To avoid this conclusion, Plaintiffs have relied on two cases, neither of which demonstrates that the Proclamation is unconstitutional.

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[4] Hours before the district court issued its injunction, the Sixth Circuit stayed a similar injunction prohibiting Ohio officials from limiting the number of locations to hand-deliver ballots. *LaRose*, *supra.* As the Sixth Circuit explained, *Anderson-Burdick* precludes the district court's order in this case.

[5] For that reason, the district court's reliance (at 40-41) on cases where a State treated voters differently based on their counties of residence misstates the record.

First, Plaintiffs cannot state a claim under *Bush v. Gore*, 531 U.S. 98 (2000). From the day it issued, *Bush* has been limited to its facts. *LULAC v. Abbott*, 951 F.3d 311, 317 (5th Cir. 2020); *accord Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 235 (6th Cir. 2011) (expressing "concerns" about the arbitrary "review of provisional ballots by local boards of elections"). Those facts do not exist here: In *Bush*, the State was trying to intuit the subjective intent of the voter based on standards that "might vary not only from county to county but indeed within a single county." 531 U.S. at 106. Here, the Proclamation is trying to *eliminate* disparate treatment driven by the subjective preference of election officials by establishing a single, statewide rule that is easily administrable.

Second, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008), involved: inadequate voting machines that lead to twelve-hour wait times and caused 10,000 people to not vote, poll workers refusing to assist disabled voters, and ballot irregularities that caused "22% of the provisional ballots cast to be discounted." Here, Plaintiffs make only vague allegations that some voters *may* have longer wait-times. But no one posits that there would be constant twelve-hour wait-times every day prior to Election Day.

Taken separately or together, no authority casts doubt on the conclusion that the Proclamation is subject to and would survive rational-basis review because it supports the twin goals of ensuring uniformity and preventing election fraud. *Crawford*, 553 U.S. at 196 (plurality op.).

II. The Remaining *Nken* Factors Favor a Stay.

Because Plaintiffs are unlikely to demonstrate either that the district court had jurisdiction or a likelihood of success on the merits, the Court need not reach the remaining *Nken* factors. Nevertheless, they too support a stay pending appeal.

A. The Secretary will be irreparably harmed absent a stay.

Enjoining the Governor's Proclamation will have serious adverse effects on both the State and the public. Texas has a weighty interest in the equal, fair, and consistent enforcement of its laws. *Cf. Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). The "inability [for a State] to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018).[6] The State "indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Accordingly, it would inflict a significant injury on the State if the Court were to prevent the State from prescribing the conduct of its elections. *See Maryland*, 567 U.S. at 1303.

These interests are heightened here, as the challenged Proclamation also reflects the State's determination on how to respond to an ongoing health emergency. "[T]he Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States." *Andino*, 2020 WL 5887393, at *2

[6] Though the district court enjoined a Proclamation, not a statute, the same principle applies. Moreover, if the Court were to conclude that the Proclamation is improper, the appropriate remedy would be to enforce the statute and not permit voters to hand-deliver ballots before Election Day. *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2352-53 (2020) (plurality op.).

(Kavanaugh, J., concurring) (cleaned up). As a result, a State's "decision either to keep or to make changes to election rules to address COVID–19 ordinarily 'should not be subject to second guessing by an unelected federal judiciary, which lacks the background, competence, and expertise to assess public health and is not accountable to the people.'" *Id.* (citation omitted).

B. A stay will not harm Plaintiffs.

A stay pending appeal will not irreparably harm Plaintiffs because voters will retain more options to vote in the upcoming election than would ordinarily be permitted by Texas law. A preliminary injunction requires a showing of "irreparable harm" that is *likely*, not merely possible. *E.g.*, *Winter v. NRDC*, 555 U.S. 7, 22 (2008). And the threatened harm must be "imminent." *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975). Plaintiffs have not shown that. Indeed, the October 1 Proclamation does not even implicate their right to vote. *See supra* p. 12.

C. The public interest strongly favors a stay.

"Because the State is the appealing party, its interests and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). For the reasons discussed above in Part II.A, both the Secretary and the public interest are likely to be harmed by the injunction.

III. The Court Should Enter an Immediate Temporary Administrative Stay While It Considers this Motion.

For the reasons discussed above, the Secretary is entitled to a stay pending appeal. The Secretary further respectfully requests an immediate administrative stay while the Court considers this motion. Such administrative stays are both routine,

e.g., *TDP I*, 391 F.3d at 396, and necessary to avoid further disruption to the electoral process. *See* Ex. L (advising Harris County voters minutes after the injunction issued, that they may hand-deliver ballots to any of "12 county offices").

Conclusion

The Court should immediately enter a temporary administrative stay while it considers this motion, then stay the district court's injunction pending appeal.

Respectfully submitted.

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Certificate of Service

On October 10, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,189 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Exhibit List

A. Order, *Texas League of United Latin American Citizens v. Abbott*, No. 1:20-cv-01006-RP (W.D. Tex. Oct. 9, 2020)

B. Proclamation of July 27, 2020

C. Proclamation of October 1, 2020

D. Declaration of Brian Keith Ingram

E. Complaint for Declaratory and Injunctive Relief, *Straty v. Abbott*, No. 1:20-cv-01015-RP (W.D. Tex. Oct. 2, 2020)

F. First Amended Complaint for Declaratory and Injunctive Relief, *Texas League of United Latin American Citizens v. Abbott*, No. 1:20-cv-01006-RP (W.D. Tex. Oct. 5, 2020)

G. Plaintiffs' *Emergency* Motion for a Temporary Restraining Order and a Preliminary Injunction, *Texas League of United Latin American Citizens v. Abbott*, No. 1:20-cv-01006-RP (W.D. Tex. Oct. 5, 2020) (emphasis in original)

H. Plaintiffs' Verified Original Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, *The Anti-Defamation League of Austin v. Abbott*, No. D-1-GN-20-005550 (Travis Cty. Dist. Ct. Oct. 5, 2020)

I. Email from P. Segar to B. Dower and L. Cohan (Oct. 10, 2020) (setting hearing in *The Anti-Defamation League of Austin v. Abbott*, No. D-1-GN-20-005550 (Travis Cty. Dist. Ct. Oct. 5, 2020))

J. Defendants' Exhibit 10, *Texas League of United Latin American Citizens v. Abbott*, No. 1:20-cv-01006-RP (W.D. Tex. Oct. 9, 2020)

K. *A. Philip Randolph Inst. of Oh. v. LaRose*, No. 20-4063, slip op. (6th Cir. Oct. 9, 2020)

L. Harris County Clerk (@HarrisVotes), Twitter (Oct. 9, 2020)

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS, NATIONAL LEAGUE OF UNITED LATIN AMERICAN CITIZENS, LEAGUE OF WOMEN VOTERS OF TEXAS, RALPH EDELBACK, and BARBARA MASON, Plaintiffs, v. GREG ABBOTT, in his official capacity as Governor of Texas, RUTH HUGHS, in her official capacity as Texas Secretary of State, DANA DEBEAUVOIR, in her official capacity as Travis County Clerk, CHRIS HOLLINS, in his official capacity as Harris County Clerk, JOHN M. OLDHAM, in his official capacity as Fort Bend County Elections Administrator, and LISA RENEE WISE, in her official capacity as El Paso County Elections Administrator, Defendants.	§ §	1:20-CV-1006-RP (lead case)

LAURIE-JO STRATY, TEXAS ALLIANCE FOR RETIRED AMERICANS, and BIGTENT CREATIVE, Plaintiffs, v. GREGORY ABBOTT, in his official capacity as Governor of the State of Texas, and RUTH HUGHS, in her official capacity as Texas Secretary of State, Defendants.	§ § § § § § § § § § § § § § § § §	1:20-CV-1015-RP

ORDER

Before the Court are Plaintiffs Texas League of United Latin American Citizens, National League of United Latin American Citizens, League of Women Voters of Texas, Ralph Edelbach, and Barbara Mason's Motion for Temporary Restraining Order ("TRO") and Preliminary Injunction, (Mot. TRO, Dkt. 15),[1] and Governor Greg Abbott ("Governor Abbott") and Secretary Ruth Hugh's ("Secretary Hughs") Motion to Dismiss, (Mot. Dismiss, Dkt. 31). On October 6, 2020, this Court consolidated the TRO with the motion for temporary restraining order and preliminary injunction filed in a related case[2] for the limited purpose of simultaneously resolving the requests for preliminary injunctive relief in both cases.[3] (Case No. 1:20-cv-1015, Order, Dkt. 21). Having considered the briefing, the arguments made at the hearing, the evidence, and the relevant law, the Court will issue a preliminary injunction and grant in part and deny in part the Motion to Dismiss.

I. BACKGROUND

The pending motions for temporary restraining order and preliminary injunction arise from Governor Abbott's October 1, 2020 proclamation prohibiting Texas counties from providing absentee voters with more than one location where they can return completed absentee ballots in

[1] The Court incorporates Plaintiffs' contemporaneously filed Amended Motion for a Temporary Restraining Order and Preliminary Injunction, Dkt. 20.

[2] *Laurie-Jo Straty, et al. v. Gregory Abbott, et al.*, 1:20-CV-1015-RP (W.D. Tex. filed Oct. 2, 2020).

[3] In this Order, the Court will refer to the parties as follows:
(1) Plaintiffs Texas League of United Latin American Citizens, National League of United Latin American Citizens, League of Women Voters of Texas, Ralph Edelbach, Barbara Mason, (together, "LULAC Plaintiffs");
(2) Laurie-Jo Straty, Texas Alliance for Retired Americans, BigTent Creative (together, "Straty Plaintiffs");
(3) LULAC Plaintiffs and Straty Plaintiffs (together, "Plaintiffs"); and
(4) Greg Abbott, in his official capacity as Governor of the State of Texas ("Governor Abbott"), Ruth Hughs, in her official capacity as Texas Secretary of State ("Secretary Hughs") (together, the "State"), Dana DeBeauvoir ("DeBeauvoir"), in her official capacity as Travis County Clerk, Chris Hollins ("Hollins"), in his official capacity as Harris County Clerk, John M. Oldham ("Oldham"), in his official capacity as Fort Bend County Elections Administrator, and Lisa Renee Wise ("Wise"), in her official capacity as El Paso County Elections Administrator (together, the "County Clerks").
Although named as defendants, the County Clerks have filed documents and taken positions in the case that support Plaintiffs' arguments.

person (the "October 1 Order").[4] Governor Abbott's October 1 Order came on the heels of his July 27, 2020 proclamation (the "July 27 Order"), which allowed voters "to deliver a marked mail ballot in person . . . prior to and including on election day," at one or more locations.[5] Plaintiffs move for a preliminary injunction based on their claims that the October 1 Order places an undue burden on the right to vote under the First and Fourteenth Amendments and violates the Equal Protection Clause of the Fourteenth Amendment. The LULAC Plaintiffs also argue that the October 1 Order violates the Voting Rights Act. (Am. Compl, Dkt. 16, at 19).[6] The Straty Plaintiffs separately bring a cause of action under the Ku Klux Klan Act. (1-20-cv-1015, Compl., Dkt. 1, at 18).

A. Before the July 27, 2020 Proclamation

Before Governor Abbott issued his July 27 Order, the rules governing absentee ballots emanated from the Texas Election Code. Under Section 86.006(a-1), an absentee voter could "deliver a marked ballot in person to the early voting clerk's office only while the polls are open on election day" if they presented "an acceptable form of identification." Tex. Elec. Code § 86.006 (2017). Due to the Covid-19 pandemic, the Governor also declared a state of disaster for the State of Texas on March 13, 2020.[7]

B. The July 27, 2020 Proclamation

On July 27, 2020, Governor Abbott issued an executive order allowing (1) in-person early voting to begin on October 13 and (2) absentee ballots to be delivered "in person to the early voting

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[4] Proclamation by the Governor of the State of Texas, Oct. 1, 2020, *available at* https://gov.texas.gov/uploads/files/press/PROC_COVID-19_Nov_3_general_election_IMAGE_10-01-2020.pdf.

[5] Proclamation by the Governor of the State of Texas, July 27, 2020, *available at* https://gov.texas.gov/uploads/files/press/PROC_COVID-19_Nov_3_general_election_IMAGE_07-27-2020.pdf.

[6] All docket cites refer to the record in the lead case *LULAC, et al. v. Gregory Abbott, et al.*, 1:20-CV-1006-RP (W.D. Tex. filed Oct. 1, 2020), unless otherwise noted.

[7] Proclamation by the Governor of the State of Texas, Ma. 13, 2020, *available at* https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf.

clerk's office prior to" election day. (Am Compl., Dkt. 16, at 9; 1-20-cv-1015, July 27 Order, Dkt. 11-18). In issuing the July 27 Order to allow absentee voters expanded opportunities to return their ballots in person, Governor Abbott recognized the need to allow greater options to return absentee ballots in person to "ensure that elections proceed efficiently and safely." (*Id.*). Allowing greater options for in-person delivery of absentee ballots aligns with the U.S. Election Assistance Commission's recommendation that there be at least one ballot return center for every 15,000 to 2,000 registered voters, with added return centers in "communities with [historically] low vote by mail usage" such as Texas. (1-20-cv-1015, Compl., Dkt. 1, at 14–15).

The July 27 Order allowed voters to return their completed ballots on Election Day and during the early voting period beginning October 13, 2020 to the ballot return centers that are available "before, during, and after business hours in the weeks leading up to the election so that voters may quickly and efficiently submit their completed ballots as their schedules allow." (1-20-cv-1015, Compl., Dkt. 1, at 3). The July 27 Order did not place limits on the number of ballot return centers counties were permitted to operate, allowing elected county officials in each Texas county to determine whether to have additional ballot return centers during the early voting period and how many ballot return centers to open. (1-20-cv-1015, Mot. TRO, Dkt. 10-1, at 5; 1-20-cv-1015, July 27 Order, Dkt. 11-18; 1-20-cv-1015, Resp. Mandamus Brief, Dkt. 15-1, at 6, 38). If a county opened one or more ballot return centers, the county's ballot return centers and the employees who worked in those offices would be subject to the same election laws and rules. (Hollins Supp. Decl., Dkt. 51-1, at 1; Oldham Decl., Dkt. 21, at 8; DeBeauvoir Decl., Dkt. 18, at 7). Governor Abbott's July 27 Order did not loosen the statutory restrictions on how an absentee ballot is completed, transported, submitted, processed, secured, or stored. *See, e.g.*, Tex. Elec. Code § 86.011 (describing actions the voting clerk takes upon receipt of an absentee ballot).

After Governor Abbott issued his July 27 Order, State of Texas officials confirmed on several occasions that absentee ballots could be returned to any ballot return center in one's county. For example, on August 26, 2020, an attorney in the Elections Division of the Secretary of State's office stated that in-person delivery of an absentee ballot "may include satellite offices of the early voting clerk." (1-20-cv-1015, Email Dkt. 11-20, at 38). On September 30, 2020, Texas Attorney General Ken Paxton ("Attorney General Paxton") and Kyle Hawkins, the Solicitor General of Texas ("Solicitor General Hawkins") submitted that statement from the Elections Division attorney as an exhibit in support of their brief filed with the Supreme Court of Texas in another case involving the July 27 Order. (Resp. Mandamus Brief, Dkt. 11-21, at 38). In that brief, Attorney General Paxton and Solicitor General Hawkins explained to the Texas Supreme Court that nothing in the Election Code or the July 27 Order precluded county officials from having more than one ballot return center. (*Id.*). They also specifically confirmed that "the Secretary of State has advised local officials that the [Texas] Legislature has permitted ballots to be returned to any early-voting clerk office." (*Id.*).

In response to Governor Abbott's July 27 Order and with assurances from Secretary Hughs, Attorney General Abbott, and Solicitor General Hawkins, counties designed, publicized, and began operating ballot return centers to ensure the safety of absentee voters who are "older, sick, or have disabilities that prevent them from voting in person, and are thus at particularly high risk of COVID-19." (Am Compl., Dkt. 16, at 10). Several counties decided to offer multiple ballot return centers because "the size of some counties would make it difficult, if not impossible, for some voters to return their ballots to election administration headquarters in each county." (1-20-cv-1015, Compl., Dkt. 1, at 13). For example, on August 14, 2020, the Harris County Clerk announced his intention to open eleven ballot return centers to accept absentee ballots during early voting. (Mot.

TRO, Dkt. 15, at 2). On October 1, 2020, the Fort Bend County Clerk announced his plan to accept absentee ballots at five locations. (1-20-cv-1015, Houston Chron., Dkt. 11-24, at 4).

C. The October 1, 2020 Proclamation

On October 1, 2020, after voting had already begun, Governor Abbott changed the rules and—in contradiction to his July 27 Order and the assurances by other state officials including Secretary Hughs, Attorney General Paxton, and Solicitor General Hawkins—ordered county election officials to offer their absentee voters no more than one ballot return center per county. (Am. Compl., Dkt. 16, at 1; 1-20-cv-1015, Mot. TRO, Dkt. 15, at 3; Oct. Proc. Dkt. 11-23).[8] Governor Abbott cited a need to "add ballot security protocols for when a voter returns a marked mail ballot to the early voting clerk's office" as his reasoning for issuing the October 1 Order. (Mot. TRO, Dkt. 15, at 3; 1-20-cv-1015, Compl., Dkt. 1, at 13).

The October 1 Order only impacts absentee voters who, as defined by Texas law, either (1) will be away from their county on Election Day and during early voting; (2) are sick or have a disability; (3) are 65 years of age or older on Election Day; or (4) are confined in jail, but eligible to vote. Tex. Elec. Code §§ 82.001, 82.002, 82.003, 82.004. Texas is expected to witness an "unprecedented surge in mail voting" in the November election. (1-20-cv-1015, Mot. TRO, Dkt. 10-1, at 3).

Governor Abbott gave county officials less than 24 hours to close their ballot return centers. (Am. Compl., Dkt. 16, at 11; Mot. TRO, Dkt. 15, at 3). Because voting had already begun when Governor Abbott issued his October 1 Order, he had to specify that absentee ballots cast at previously available ballot return centers would remain valid and be counted. (Mot. TRO, Dkt. 15, at 3). As will be discussed more fully below, Governor Abbott's about-face not only impacted the

[8] Proclamation by the Governor of the State of Texas, Oct. 1, 2020, *available at* https://gov.texas.gov/uploads/files/press/PROC_COVID-19_Nov_3_general_election_IMAGE_10-01-2020.pdf.

County Clerks and their offices but also disrupted the plans of absentee voters who had begun making their voting plans in response to the July 27 Order that had been in effect for months. (*Id.* at 13; *see e.g.*, Mason Decl., Dkt. 15-11, at 2; 1-20-cv-1015, Rosas Decl., Dkt. 11-8 at 3). Many of these absentee voters planned to cast their ballots at a ballot return center to avoid unnecessary exposure to Covid-19 by voting in person, avoid driving long distances to return their ballots, and avoid the delays involved with mailing their ballots through the U.S. Postal Service ("USPS").

D. The Covid-19 Pandemic

On March 13, 2020, President Trump declared a national state of emergency in the face of the outbreak of Covid-19 in the United States. (Am. Compl., Dkt. 16, at 8). That same day, Governor Abbott declared a state of disaster in Texas. (*Id.*). In April 2020, Governor Abbott issued a stay-at-home order and postponed local elections scheduled for May until November to avoid further spread of the disease. (1-20-cv-1015, Compl., Dkt. 1, at 2). As of October 2020, Texas has also recorded over 750,000 Covid-19 cases and almost 16,000 deaths due to the virus. (Am Compl., Dkt. 16, at 8). Texas's infection rate tripled during the summer months and is expected to resurge this fall and winter. (*Id.* at 9).

Covid-19 has had disproportionate effects on certain communities. Texans over the age of 65, who are allowed by statute to vote absentee, are particularly vulnerable to the virus. (*Id.*). Texans over the age of 65 represent approximately 70% of coronavirus deaths, or 10,800 of the 16,000 total deaths in Texas, despite making up only 13% of the total Texas population. (*Id.*; 1-20-cv-1015, Compl., Dkt. 1, at 2). The Latino population in Texas also has suffered a disproportionate share of Covid-19 fatalities. While the Latino community constitutes 39.7% of the Texas population, they represent 56% of Covid-19 deaths. (Am Compl., Dkt. 16, at 8).

Because voting in person risks exposing voters to Covid-19, many more voters who qualify to vote absentee have chosen, or will choose, to cast an absentee ballot in the November election.

(1-20-cv-1015, Mot. TRO, Dkt. 10-1, at 3). However, widespread delays in the USPS have left voters "increasingly concerned" that their mailed ballots will not reach election officials in time to be counted. (1-20-cv-1015, Compl., Dkt. 1, at 11-12).

E. USPS Delays

The spread of coronavirus among USPS workers and an ongoing budgetary crisis has led to "substantial and high-profile delays" for mail delivered through USPS in Texas and around the country in recent months. (Am. Compl., Dkt. 16, at 15; 1-20-cv-1015, Compl., Dkt. 1, at 11). As of mid-August, 10% of all postal workers had tested positive for Covid-19, significantly reducing USPS staff. (1-20-cv-1015, Compl., Dkt. 1, at 11). In addition, operational changes have limited overtime hours available to employees who are able to work and decommissioned mail processing equipment. (*Id.* at 11). These problems have led to a "sharp decrease" in the USPS's delivery performance. (1-20-cv-1015, Mot. TRO, Dkt. 10-1, at 4). Because large numbers of Americans have chosen to vote by mail to reduce their exposure to Covid-19, the USPS will be handling a much higher volume of mail than usual in the run-up to the November election. (1-20-cv-1015, Compl., Dkt. 1, at 11.). Data collected by Harris County indicates that delivery of absentee ballots by mail will take "more than [a] few days and often more than a week." (Hollins Supp. Decl., Dkt. 51-1, at 2).

Specifically, the USPS has publicly warned state officials that election mail will be delayed in Texas. (1-20-cv-1015, Compl., Dkt. 1, at 2; USPS Letter, Dkt. 15-9, at 2). The USPS recommends voters to submit their request for an absentee ballot at least fifteen days before Election Day "and preferably long before that time" to ensure timely delivery of ballots. (USPS Letter, Dkt. 15-9, at 2). Under Texas law, however, voters can request absentee ballots up to eleven days before Election Day. (1-20-cv-1015, Compl., Dkt. 1, at 11; USPS Letter, Dkt. 15-9, at 3). Election officials will count all ballots received by Election Day, or those postmarked by 7:00 p.m. on Election Day that are delivered the next day. (1-20-cv-1015, Compl., Dkt. 1, at 10). On July 20, 2020, Thomas Marshall,

the General Counsel and Executive Vice President of USPS, notified Secretary Hughs that Texas's absentee ballot deadlines "are incongruous with the Postal Service's delivery standards," and "certain state-law requirements and deadlines appear to be incompatible with [USPS's] delivery standards and the recommended [15-day] timeframe noted above." (USPS Letter, Dkt. 15-9, at 3).

USPS also warned that "there is a significant risk that . . . a completed ballot postmarked on or near Election Day will not be delivered in time to meet the state's receipt deadline of November 4." (*Id.*). USPS requested that "election officials keep [USPS's] delivery standards and recommendations in mind when making decisions as to the appropriate means used to send a piece of Election Mail to voters, and when informing voters how to successfully participate in an election where they choose to use the mail." (*Id.*).

F. Impact of the October 1 Order

The Court finds that the October 1 Order has already impacted voters or will impact voters by (1) creating voter confusion; (2) causing absentee voters to travel further distances, (3) causing absentee voters to wait in longer lines, (4) causing absentee voters to risk exposure to the coronavirus when they hand deliver their absentee ballots on Election Day, and (5) causing absentee voters, if they choose not to return their ballots in person to avoid exposure to Covid-19, to face the risk that their ballots will not be counted if the USPS is unable to timely deliver their ballot after its been requested or unable to timely return their completed ballot. These burdens fall disproportionately on voters who are elderly, disabled, or live in larger counties. (Mot. TRO, Dkt. 15, at 4–6; 1-20-cv-1015, Mot. TRO, Dkt. 10-1, at 9; Lincoln Amicus Brief, Dkt. 53, at 8; Disability Rights Amicus Brief, Dkt. 52, at 6–7).

Voters are now unsure if they can safely return their absentee ballots and have concerns that their ballots may not be counted. (Hollins Decl., Dkt. 8-1, at 7; Oldham Decl., Dkt. 21, at 5 ("[T]he last-minute change to election procedures is causing voter confusion."); Mason Decl., Dkt. 15-11, at

2; Golub Decl., Dkt. 15-12, at 2 ("[T]he uncertainty this last-minute change to the elections process presents puts my ability to have my vote counted into jeopardy.")). The publication of news reports alerting the public to the effects of the July 27 Order further set expectations among voters and caused them to rely on the July 27 Order in making their voting plan. (DeBeauvoir Decl., Dkt. 18, at 3–6). The State contends that the October 1 Order serves to "clarify[] any confusion caused by the July 27 order," yet presents no evidence that anyone, let alone voters, were confused by the July 27 Order. (See Mot. Dismiss, Dkt. 31, at 3).

Because of the October 1 Order, voters who choose to return their absentee ballot in person are forced to consider "whether they need to risk their health and vote in person to ensure their vote is counted or find a way to hand deliver their ballot to one distant location." (Hollins Supp. Decl., Dkt. 51-1, at 2). Voters who choose the latter option will have to travel significantly farther to return their ballots. (Golub Decl., Dkt. 15-12, at 2 ("[T]his restriction has unduly burdened me because of the increased distance I will now have to travel to submit my completed mail-in ballot in person.")). This poses a greater challenge to those living in larger, more populous counties, such as Harris County, where the lone ballot return center "could be more than fifty miles away." (Hollins Decl., Dkt. 8-1, at 7; Berg Decl., Dkt. 15-18, at 3 ("[I]t can take up to an hour roundtrip to get to the [Harris County early voting clerk's office] and back from my home.")).

An hour-long trip is particularly burdensome for older or disabled voters, who may not have access to transportation or be able to spend long periods of time traveling. (Chimene Decl., Dkt. 15-17, at 3 ("[D]ifficulties [to members attempting to access early voting clerk's office] include accessing transportation and traveling long distances from their homes."); Golub Decl., Dkt. 15-12, at 3 ("["It is very possible that the time and effort this process will take may exceed my limitation on stamina, and afterwards, I will be far too exhausted to drive home.")).

Even if voters manage to make the longer trip to their county's lone ballot return center, they will likely face "massive lines to return ballots in person." (Hollins Decl., Dkt. 8-1, at 7; Oldham Decl., Dkt. 14, at 5 (anticipating "massive lines" as a result of the October 1 Order"); Chimene Decl., Dkt. 15-17, at 3 ("[L]imiting the number of drop-off locations to a single location in each county will result in crowding and long lines."); Mason Decl., Dkt. 15-11, at 2 (expressing concern about an "hours long effort to return my ballot in person"); Berg Decl., Dkt. 15-18, at 3 ("I am concerned that with only one drop-off location there will be crowding and congestion at the drop-off site.")). Disabled voters who choose to return their ballot to their single county location risk experiencing "significant fatigue and pain" due to travel distance and wait time. (Disability Rights Amicus Brief, Dkt. 36-1, at 5; 1-20-cv-1015; Straty Decl., Dkt. 11-6, at 1; Golub Decl., Dkt. 15-12, at 3).

Traveling longer distances and waiting in lines at the ballot return offices "may pose a unique challenge" to absentee voters who are elderly or disabled. (Chimene Decl., Dkt. 15-17, at 3). Because poll workers are exempt from the statewide mask mandate, the elderly or disabled face an increased risk of contracting Covid-19 if they are forced to return their ballots to a single, likely crowded ballot return center. (*Id.* ("Poll watchers [who are exempt from statewide requirements to wear masks] will create an addition risk of exposure for our elderly members and members with disabilities."); Mason Decl., Dkt. 15-11, at 2 (voting at the single county return ballot office may "increase my risk of exposure to COVID-19")).

The Court finds that the October 1 Order also directly burdens election officials. County officials have allocated resources and selected ballot return centers in reliance on the July 27 Order. (Oldham Decl., Dkt. 21, at 4; Travis County Amicus Brief, Dkt. 44-1, at 6). For example, in Fort Bend County, which encompasses portions of the Houston suburbs and vast rural areas, John Oldham ("Oldham"), the Fort Bend County Elections Administrator, advised the Court about his

office's "efforts to mitigate" the confusion and logistical complications created by the October 1 Order. (Oldham Advisory, Dkt. 46, at 3; Oldham Decl., Dkt. 21, at 6, at 7 (stating that election officials are administratively burdened by "having to change our voter education materials and our staff training"); Hollins Decl., Dkt. 8-1, at 8–9 (explaining that the October 1 Order "burdens the Clerk's Office administratively and was [] extremely disruptive.")). The October 1 Order also jeopardizes county efforts to accommodate disabled voters as required by the United States Department of Justice. (Hollins Supp. Decl., Dkt. 51-1, at 3 (stating that "last minute orders to change our management practices [make] it more difficult to comply with the DOJ settlement agreement" and adequately accommodate disabled voters)).

The October 1 Order also puts the health of election workers at risk, by increasing their likelihood of exposure to the coronavirus. (DeBeauvoir Decl., Dkt. 18, at 9 (expressing fear that October 1 Order "will make both election workers and voters less safe"); Oldham Advisory, Dkt. 1, at 3–4 (citing County Commissioner finding that multiple return ballot locations provide a "safe environment for all of our workers at the election polls")).

G. The State's Interests

The State argues that the October 1 Order, issued under Governor Abbott's powers pursuant to the Texas Disaster Act, serves to prevent voter confusion and fraud, and promotes purported uniformity of election laws. The state alleges that, despite its clear pronouncements that counties could decide whether to open additional ballot return centers during the early voting period under the Election Code and, (Resp. Mandamus Brief, Dkt. 15-2, at 6, 38), the July 27 Order caused confusion among counties and a lack of uniformity among the application of the Election Code among counties. (Resp. TRO, Dkt. 43, at 28–29). As discussed above, the County Clerks did not have any discretion on how an absentee ballot is completed, transported, submitted, processed, secured, or stored. The State has presented no evidence of confusion over the July 27 Order, though

the record reflects substantial confusion has been caused by the October 1 Order. (Hollins Decl., Dkt. 8-1, at 7; Oldham Decl., Dkt. 21, at 5; DeBeauvoir Decl. 18, Dkt. 18, at 3–6; Mason Decl., Dkt. 15-11, at 2; Golub Decl., Dkt. 15-12, at 2).

The record also reflects that the implementation of ballot return centers was uniform across counties. (Hollins Decl., Dkt. 8-1, at 9–12; Oldham Decl., Dkt. 21, at 7–8; DeBeauvoir Decl., Dkt. 18, at 10). At the hearing on Plaintiffs' preliminary injunction motions, counsel representing the County Clerks confirmed that all ballot return centers in their counties comply with all training and procedures required by state law to protect ballot integrity. (Hearing Trans., October 8, 2020, at 39:15–41:7). Rather, under the July 27 Order, the County Clerks exercised discretion only in deciding whether to have additional ballot return centers, which, as explained at the hearing, made sense given that one Texas county only has about 150 registered voters whereas Harris County has millions of registered voters making it difficult, if not impossible, for Harris County to safely collect absentee ballots from a single location during early voting. (Hearing Trans., October 8, 2020, at 82:23–83:6).

The State asserts, with no factual support, that limiting ballot return centers is necessary to "ensur[e] ballot security." (Resp. TRO, Dkt. 43, at 4). At the hearing, counsel for the County Clerks confirmed that the security protocols at return ballot centers were no different than those at the central ballot return centers, except to the extent the central centers served additional purposes. (Hearing Trans., October 8, 2020, at 39:15–41:7). Not only are the security procedures consistent between satellite and central ballot return locations, they are consistent across counties who chose to utilize satellite ballot return centers. The State did not rebut the County Clerks' evidence or attorney argument regarding their compliance with state-mandated election protocols that already ensure ballot integrity.

In fact, the State's proffered reason of ballot security is a pretext. On the one hand, the State argues that satellite ballot return centers cannot be used during the early voting period because of ballot security concerns. Yet, the State authorizes counties to use satellite ballot return centers on Election Day without regard to those ballot security concerns. It is perplexing to the Court that the State would simultaneously assert that satellite ballot return centers do not present a risk to election integrity on Election Day but somehow do present such a risk in the weeks leading up to November 3, 2020. The State's own approval of counties using satellite ballot return centers on Election Day belies their assertion that those same ballot return centers present ballot security concerns.

Moreover, the undisputed testimony from the County Clerks reflects that the existence of additional ballot return centers that are subject to existing, uniform protocols do not pose a threat to ballot security. (Oldham Decl., Dkt. 21, at 6 ("Reducing the drop-off locations from four to one will not enhance security of the ballots in any way"); Hollins Decl., Dkt. 8-1, at 8 (the October 1 Order "will not enhance voter security in any way."")). The procedures for ballots returned to a satellite ballot return center is as follows: (1) the voter signs a roster (just as they would when voting in-person), (2) the voter presents valid identification to comply with Section 63.0101 (just as they would when voting in-person), and (3) the voter signs the carrier envelope (just as they would when sending their ballot by mail). (Hollins Decl., Dkt. 8-1, at 6). As explained by Christopher Hollins, the Harris County Clerk: "Ballots are then placed in a 'mail ballot tub.' This is a locked ballot box designed by our long-time vote-by-mail director, which has a slit large enough for a ballot carrier envelope but small enough that fingers or tools cannot be forced inside the box to tamper with ballots. The box is sealed by tamper-proof seals. Working in pairs, staff delivers these sealed, tamper-proof boxes to the ballot return headquarters daily for processing. (*Id.*).

The County Clerks stated that "voters returning mail-in ballots in person is more secure than returning by mail" and "any concern about security of in-person drop-off of mail ballots is

unfounded." (Oldham Decl., Dkt. 21, at 8; Hollins Decl., Dkt. 8-1, at 11). In fact, the County Clerks explained that returning ballots through satellite return ballots center is "more secure than returning by mail" because (1) there is no risk of tampering or loss in the mail and (2) voters are required to present identification when returning their ballot. (Hollins Supp. Decl., Dkt. 51-1, at 1; Oldham Decl., Dkt. 21, at 8; DeBeauvoir Decl., Dkt. 18, at 7). Accordingly, the Court finds that the October 1 Order does not promote ballot security.

H. The Parties

1. The LULAC Plaintiffs

Plaintiff League of United Latin American Citizens ("LULAC") is a national membership organization dedicated to protecting the civil rights of Latinos, including voting rights. (Am Compl., Dkt. 16, at 3). Plaintiff Texas LULAC has over 20,000 members, including registered voters planning to vote absentee in the upcoming election. (*Id.*). Texas LULAC regularly engages in voter registration, voter education, and other endeavors aimed at increasing civic engagement amongst its members. (*Id.*). Texas LULAC asserts that the October 1 Order will force it to "divert resources away from its ongoing efforts to mobilize its members and their communities to vote and towards educating voters about the impact" of the October 1 Order. (*Id.* at 4).

Plaintiff League of Women Voters of Texas ("LWVTX") is a non-profit membership organization dedicated to nonpartisan, grassroots civic engagement to "encourage its members and all Texans to be informed and active participants in government," including by participating in elections. (*Id.*). LWVTX has approximately 3,000 members, many of whom plan to vote absentee and drop off their absentee ballot at a drop box. (*Id.*). Due to the Covid-19 pandemic and delays in mail delivery by the USPS, many LULAC, Texas LULAC, and LWVTX members plan to vote absentee and return their ballots to an in-person ballot return center to ensure that their votes are counted. (*Id.*).

Plaintiff Mexican American Legislative Caucus, Texas House of Representatives ("MALC") is a non-profit and non-partisan organization serving members of the Texas House of Representatives and their staff on matters of interest to the Mexican-American community. (*Id.* at 5). Plaintiff Texas Legislative Black Caucus ("TLBC") is a non-profit and non-partisan organization serving members of the Texas House of Representatives and their staff on matters of interest to the African-American community. (*Id.* at 5–6). MALC and TLBC each have at least one member who planned to return their absentee ballot to one of the satellite drop-off locations. (*Id.*). MALC and TLBC are in the process of devoting resources to voter education. (*Id.*).

Plaintiff Ralph Edelbach is an 82-year-old Texas voter who plans to vote by mail in the upcoming November election and had previously planned return his ballot to one of the eleven Harris County ballot return centers. (*Id.* at 6). As a result of the October 1 Order, Mr. Edelbach will have to travel to the lone ballot return location that is 36 miles from his home and 72 miles roundtrip. (*Id.*). Prior to the October 1 Order, the nearest ballot return center was less than half the distance—16 miles—from his home. (*Id.*).

Plaintiff Barbara Mason is a 71-year old Texas voter who planned to use one of Travis County's four ballot return centers to submit her absentee ballot for the November 3, 2020 election. (*Id.*). As a result of the October 1 order, Ms. Mason will have to drive 30 minutes each way to the nearest ballot return center. (*Id.* at 7). Ms. Mason is also concerned that she "may be forced to unnecessarily expose herself to COVID-19" to return her ballot to the lone ballot return location. (*Id.*). Other voters in similar circumstances have already returned their ballots at the previously authorized ballot return centers. (*Id.*).

2. The Straty Plaintiffs (1-20-cv-1015)

Laurie-Jo Straty is a 65-year-old resident of Dallas County. (1-20-cv-1015, Compl., Dkt. 1, at 6). Ms. Straty's multiple sclerosis, which renders her immunocompromised and thus at higher risk of

contracting the coronavirus, prevents her from voting in person. (*Id.*). As a caretaker for her 90-year-old parents, Ms. Straty fears that voting in person might risk exposing her parents and others at their assisted living center to the coronavirus. (*Id.*). Ms. Straty is also unable to stand in line because of an inflamed Achilles tendon that would cause her significant pain. (*Id.*). Prior to the October 1 Order, Ms. Straty planned to cast her ballot at a ballot return center 5 minutes from her home. (*Id.*). Because of the October 1 Order, Ms. Straty will now have to travel 20 minutes and risk having to stand in line due to "congestion at the single drop off location in the county." (*Id.*). Ms. Straty does not want to vote by mail given the widespread delays facing the USPS. (*Id.*).

Texas Alliance for Retired Americans ("TARA") is a non-profit organization with over 145,000 members, who are retirees from the public sector, private sector unions, community organizations, and individual activists. (*Id.* at 6–7). TARA's mission is to "ensure social and economic justice and the full civil rights that retirees have earned after a lifetime of work." (*Id.*). TARA asserts that the October 1 Order frustrates its mission because it "deprives individual members of the right to vote and have their votes counted." (*Id.* at 7). In addition, TARA believes the October 1 Order further frustrates TARA's mission because it will need to divert resources to "present voters with a feasible alternative to returning mail-in ballots" since there are no longer convenient locations for returning absentee ballots. (*Id.*).

BigTent Creative ("BigTent") is a non-profit, non-partisan voting registration and get-out-the vote technology organization. BigTent's efforts include registering new voters and publishing up-to-date information for voters whose primaries have been postponed, as happened in Texas in the spring. (*Id.*). Because of the October 1 Order, BigTent has had to divert resources away from its routine activities to "educating its employees and influencers, updating the Texas-specific pages on its website to account for the [October 1 Order], and funding influencer social media posts to inform Texas voters" about the impacts of the October 1 Order. (*Id.*). BigTent states that any

resources spent educating voters on how to comply with the October 1 Order "necessarily" takes away from its "get-out-the-vote efforts." (*Id.*).

II. LEGAL STANDARD

A. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) allows a party to assert lack of subject matter jurisdiction as a defense to suit. Fed. R. Civ. P. 12(b)(1). Federal district courts are courts of limited jurisdiction and may only exercise such jurisdiction as is expressly conferred by the Constitution and federal statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court properly dismisses a case for lack of subject matter jurisdiction when it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). "The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). "Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Id.* In ruling on a Rule 12(b)(1) motion, the court may consider any one of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court's resolution of disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

B. Motion for Preliminary Injunction

A preliminary injunction is an extraordinary remedy, and the decision to grant such relief is to be treated as the exception rather than the rule. *Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997). This remedy is granted only if a plaintiff demonstrates (1) likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the plaintiff's favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The party seeking injunctive relief carries the burden of

persuasion on all four requirements. *PCI Transp. Inc. v. W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005). However, even when a movant establishes each of the four requirements, "the decision whether to grant or deny a preliminary injunction remains within the Court's discretion[.]" *Sirius Comput. Sols. v. Sparks*, 138 F. Supp. 3d 821, 836 (W.D. Tex. 2015).

III. DISCUSSION

A. Plaintiffs' Standing

The State argues that Texas LULAC, LULAC, LWVTX, MALC, TLBC, TARA, and BigTent ("organizational Plaintiffs")[9] The State argues that the organizational Plaintiffs do not have standing to challenge the October 1 Order because they have failed to show an injury-in-fact and their purported injuries are speculative. (Resp. TRO, Dkt. 43, at 11–21). Under Article III of the Constitution, federal court jurisdiction is limited to cases and controversies. U.S. Const. art. III, 2, cl. 1; *Raines v. Byrd*, 521 U.S. 811, 818 (1997). A key element of the case-or-controversy requirement is that a plaintiff must establish standing to sue. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

To establish Article III standing, a plaintiff must demonstrate that she has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* at 560–61. "For a threatened future injury to satisfy the imminence requirement, there must be at least a 'substantial risk' that the injury will occur." *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)).

[9] Recognizing that the reader may not recall the full names of these organizations, the Court restates them here: Texas League of United Latin American Citizens ("Texas LULAC"), National League of United Latin American Citizens ("LULAC"), League of Women Voters of Texas ("LWVTX"), Mexican American Legislative Caucus, Texas House of Representatives ("MALC"), Texas Legislative Black Caucus ("TLBC"), Texas Alliance for Retired Americans ("TARA"), and BigTent Creative ("BigTent").

The purpose of these requirements is to ensure that plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186 (1962) (internal quotation marks removed). The standing requirements are heightened somewhat in the context of a motion for a preliminary injunction, in which case a plaintiff must make a "clear showing" that she has standing to maintain the preliminary injunction. *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017) (citing *Winter*, 555 U.S. at 22). However, "in the context of injunctive relief, one plaintiff's successful demonstration of standing 'is sufficient to satisfy Article III's case-or-controversy requirement.'" *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917, at *4 (5th Cir. Sept. 10, 2020) (quoting *Texas v. United States*, 945 F.3d 355, 377–78 (5th Cir. 2019). Further, "[t]he injury alleged as an Article III injury-in-fact need not be substantial; it need not measure more than an identifiable trifle. This is because the injury in fact requirement under Article III is qualitative, not quantitative, in nature." *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (quotations omitted).

Organizations can establish the first standing element, injury-in-fact, under two theories: "associational standing" or "organizational standing." *Id.* at 610; *Tenth St. Residential Ass'n v. City of Dallas, Texas*, 968 F.3d 492, 500 (5th Cir. 2020). Associational standing requires that the individual members of the group each have standing and that "the interest the association seeks to protect be germane to its purpose." *Tenth St. Residential Ass'n v. City of Dallas, Tex.*, 968 F.3d 492, 500 (5th Cir. 2020).

By contrast, "organizational standing" does not depend on the standing of the organization's members. The organization can establish standing in its own name if it "meets the same standing test that applies to individuals." *OCA-Greater Houston*, 867 F.3d at 610. The Supreme Court has recognized that when an organization's ability to pursue its mission is "perceptibly impaired"

because it has "diverted significant resources to counteract the defendant's conduct," it has suffered an injury under Article III. *N.A.A.C.P. v. City of Kyle, Tex.*, 626 F.3d 233, 238 (5th Cir. 2010) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)). An organization can demonstrate injury "by [alleging] that it had diverted significant resources to counteract the defendant's conduct; hence, the defendant's conduct significantly and 'perceptibly impaired' the organization's ability to provide its 'activities—with the consequent drain on the organization's resources.'" *Id.* "The fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury." *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181, 128 (2008).

The organizational Plaintiffs in this case have sufficiently demonstrated organizational standing. LULAC and Texas LULAC regularly engage in "voter registration, voter education, and other activities and programs designed to increase voter turnout among its members and their communities." (Am. Compl., Dkt. 16, at 3). As a result of the October 1 Order, Texas LULAC asserts it will have to divert resources away from ongoing voting efforts to educating its members and the community about the changes resulting from the October 1 Order. (*Id.* at 4). Similarly, LWVTX asserts that will be required to "divert resources away from LWVTX's existing get-out-the-vote efforts" as a result of educating its members and the public about the change. (Chimene Decl., Dkt. 15-7, at 6). The Mexican American Legislative Caucus, Texas House of Representatives ("MALC") and Texas Legislative Black Caucus ("TLBC") asserts that they, along with some of their members, were in the process of devoting resources to educate voters about mail-in voting, including drop off locations. (Am. Compl., Dkt. 16, at 5).

TARA and its individual members intend to engage in voter assistance and has been participating in "Dallas Votes, a coalition seeking, in part, to guarantee more drop-off locations." (Case No. 1:20-cv-1015, Compl., Dkt. 1, at 6–7). BigTent Creative is a get-out-the-vote technology

organization whose mission is to use technology for political engagement and voter turnout. (*Id.*). BigTent alleges it will be required to divert time and resources to educating its employees and updating its materials and funding social media education campaigns. (*Id.* at 8). Each organization has demonstrated that the sudden change resulting from the October 1 Ordinance requires them to adjust their voter education efforts for their members and the public.

The State contends that "spending resources to teach third parties about the law, on its own, is not an injury in-fact." (Resp. TRO, Dkt. 43, at 15 (citing *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995)). However, the Fifth Circuit has found organizational standing when an organization spends "additional time and effort [] explaining the Texas [voting] provisions at issue" because "addressing the challenged provisions frustrates and complicates its routine community outreach activities." *OCA-Greater Houston*, 867 F.3d at 610 (finding organizational standing where the organization had "calibrated its outreach efforts to spend extra time and money educating its members about these Texas [voting] provisions" and the "Texas statutes at issue 'perceptibly impaired' [the organization's] ability to 'get out the vote' among its members").

Alternatively, Plaintiff organization have sufficiently demonstrated associational standing. LULAC and Texas LULAC allege that "many eligible Texas LULAC members intend to vote absentee" as a result of the Covid-19 pandemic and reported USPS delays. (Am. Compl., Dkt. 16, at 3–4). Similarly, the LWVTX asserts that many of its members plan to vote absentee, including by using a ballot return box. (*Id.*). Plaintiffs attest that many LULAC and LWVTX members who are eligible to vote absentee will be unable to do so at the central ballot return center, leaving them with only two options: to vote by mail with "well reported delays in mail" or "risk deadly exposure to COVID-19" by voting in person. (*Id.* at 4–5). Additionally, MALC and TLBC assert that at least one of their members intended to submit their ballot at a ballot return center. (*Id.*). Similarly, TARA attests that TARA's mission is frustrated because the October 1 Order deprives its members of the

right to vote and makes it more difficult for them to effectively associate. (Case No. 1:20-cv-1015, Compl., Dkt. 1, at 6–7).

The State argues that for associational standing an organization must show its members "participate in and guide the organization's efforts." (Resp. TRO, Dkt. 43, at 15). However, this is not a requirement for traditional membership organizations. For instance, the State relies on *Ass'n for Retarded Citizens of Dallas v. Dallas Cty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241 (5th Cir. 1994), which found that the plaintiff organization bore "no relationship to traditional membership groups because most its 'clients'—handicapped and disabled people—are unable to participate in and guide the organization's efforts." *Id.* at 244. The State also cites *Tex. Indigenous Council v. Simpkins*, No. SA-11-CV-315-XR, 2014 WL 252024 (W.D. Tex. Jan. 22, 2014), where an organization that did "not have traditional members," because the plaintiff "testified that he alone makes all membership decisions and keeps the membership roster in his own head," there are heightened requirements for demonstrating membership. *Id.* at *3. In contrast, the organizational Plaintiffs in this case have testified that they have numerous participating members. (See e.g. Chimene Decl., Dkt. 15-17, 1-20-cv-1015, Bryant Decl., Dkt. 11-2).

Further, it is sufficient at this stage that the organizational Plaintiffs have alleged that some of their members have suffered an injury, even without naming specific members. *See Hancock Cnty. Bd. of Supervisors v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012) ("We are aware of no precedent holding that an association must set forth the name of a particular member in its complaint in order to survive a Rule 12(b)(1) motion to dismiss based on lack of associational standing."). Plaintiffs also need not assert that all of their members were injured, it is sufficient that some of them intended to vote using the ballot return boxes and were injured. *See Tex. All. for Retired Ams. v. Hughs*, No. 5:20-CV-128, 2020 WL 5747088, at *8 (S.D. Tex. Sept. 25, 2020) (finding standing where "TARA's

membership is composed of 145,000 Texans, a portion of whom are too young to qualify to vote by mail").

Here, however, each organization has alleged that some of its members have been injured by the October 1 Order. This injury is concrete because they have asserted that they intended to vote using a ballot return box which has since been removed. For instance, one 73-year-old LWVTX member who lives with multiple sclerosis explained that traveling to the only drop off location in Harris County will take as much as an hour each way, nearly double the distance it would have taken to access the ballot return box location she previously intended to use. (Golub Decl., Dkt. 15-12).

The State further argues that the organizational Plaintiffs lack standing to bring their suit under Section 1983 because they are enforcing the rights of third parties. (Resp. TRO, Dkt. 43, at 16–17). However, "[organizational] plaintiffs have standing to sue for voting rights violations using Section 1983 as a vehicle for *remedial*, not monetary, relief." *Texas All. for Retired Americans*, 2020 WL 5747088, at *9 (citing *Ass'n of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547, 551 (5th Cir. 2010) (association had standing to assert Section 1983 claims on behalf of members in seeking prospective declaratory and injunctive relief)). As the Court has found that the organizational Plaintiffs sufficiently demonstrate organizational and associational standing, standing on behalf of a third party is not an issue.

The individual Plaintiffs in these cases, Ralph Edelbach, Barbara Mason, and Laurie-Jo Straty, have also individually demonstrated standing. Each plaintiff contends that they suffered an injury-in-fact because they intended to vote using a ballot return center in their county, which has subsequently become more difficult since locations were reduced, requiring them to travel farther or risk USPS delays or risk their health by voting in person. (Mason Decl., Dkt. 15-11; Edelbach Decl., Dkt. 17; Case No. 1:20-cv-1015, Straty Decl., Dkt. 11-6). This is sufficient to demonstrate they have been injured and is more than an "identifiable trifle." *OCA-Greater Hous.*, 867 F.3d at 612 (finding an

injury in fact where voter plaintiffs were "forced to vote in person and risk contracting or spreading COVID-19"). The individual Plaintiffs range from 65 to 82 years old, and each cites concerns about exposure to the coronavirus. (*See, e.g.*, Mason Decl., Dkt. 15-11 ("I don't want to be outside of my house so long in order to deliver my ballot that I would need to use public restroom facilities, which I am not doing to protect myself from exposure to COVID-19.")).

The State argues that this harm from USPS delays is merely speculative and based on a "subjective fear." (Resp. TRO, Dkt. 43, at 21). Plaintiffs have provided sufficient evidence to legitimize their concerns about absentee ballots arriving too late to be counted. (*See* USPS Letter, Dkt. 15-9, at 2–3). The State asserts that 1.76% of mail-in ballots were rejected in Texas in 2018. (*Id.*). This rejection rate, not insignificant, may result in even more ballots being rejected in this election where substantially more voters are casting absentee ballots. (Hollins Decl., Dkt. 8-1, at 4–5 (explaining Harris County has received "more than 200,000 applications to vote by mail, more than double the total mail-in ballots received in prior elections")). Additionally, there "is no requirement that a plaintiff demonstrate that he or she is certain to have her ballot rejected." *Richardson v. Texas Sec'y of State*, No. SA-19-CV-00963-OLG, 2020 WL 5367216, at *8 (W.D. Tex. Sept. 8, 2020). Plaintiffs demonstrated harm by showing that they intended to vote using ballot centers that have since been removed, and this is further bolstered by their showing that alternative voting methods risk their ballot arriving late or exposure to the coronavirus.

Turning next to whether Plaintiffs' harms are traceable and redressable, the State contests that Governor Abbott and Secretary Hugh's actions did not cause Plaintiffs' injuries and they cannot enforce the October 1 Order.[10] (Resp. TRO, Dkt. 43, at 23). With regards to Governor Abbott, the Fifth Circuit has found that "[t]he power to promulgate law is not the power to enforce it." *In Re*

[10] The State does not contest that the alleged traceability and redressability requirements are met as to the County Clerks.

Abbott, 956 3d. 696, 709 (5th Cir. 2020). Following *Abbott*, as the Court is bound to do, the Court agrees that Plaintiffs' claims against Governor Abbott are barred because Plaintiffs cannot establish that Governor Abbott caused their enforcement-based injury or that enjoining certain activities by Abbott would redress their injury. Accordingly, Plaintiffs have not met their burden to establish Article III standing to litigate their claims against Abbott in federal court. However, the Court declines to extend *In Re Abbott* to Secretary Hughs, as discussed below with respect to the Eleventh Amendment. Because the Secretary of State is tasked with enforcing election laws in Texas, the traceability and redressability requirements for Article III standing are satisfied with respect to claims against Secretary Hughs. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017) ("[A] challenge to Texas voting law is, without question, fairly traceable to and redressable by the State itself and its Secretary of State").

Therefore, the Court finds that Plaintiffs have made a clear showing that *Lujan*'s requirements for standing are met at this stage in the litigation. Plaintiffs have plausibly alleged an injury in fact (undue burden on member voters and diversion of resources), which is fairly traceable to the conduct of the Defendants, except for Governor Abbott(those responsible for issuing and implementing the October 1 Order), and a favorable order from this Court (enjoining the implementation of the October 1 Order) would redress Plaintiffs' injuries. Nothing more is required.

B. Eleventh Amendment

The State argues that Plaintiffs' claims against Governor Abbott and Secretary Hughs are barred by sovereign immunity under the Eleventh Amendment. (Mot. Dismiss, Dkt. 31, at 4). The Eleventh Amendment typically deprives federal courts of jurisdiction over "suits against a state, a state agency, or a state official in his official capacity unless that state has waived its sovereign immunity or Congress has clearly abrogated it." *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014). However, under the *Ex parte Young* exception to sovereign immunity,

lawsuits may proceed in federal court when a plaintiff requests prospective relief against state officials in their official capacities for ongoing federal violations. 209 U.S. 123, 159–60 (1908). Thus, "[t]here are three basic elements of an *Ex parte Young* lawsuit. The suit must: (1) be brought against state officers who are acting in their official capacities; (2) seek prospective relief to redress ongoing conduct; and (3) allege a violation of federal, not state, law." *Williams ex rel. J.E. v. Reeves*, 954 F.3d 729, 736 (5th Cir. 2020).

"For the [*Ex parte Young*] exception to apply, the state official, 'by virtue of his office,' must have 'some connection with the enforcement of the [challenged] act, or else [the suit] is merely making him a party as a representative of the state, and thereby attempting to make the state a party.'" *City of Austin*, 943 F.3d at 997 (quoting *Young*, 209 U.S. at 157); *see also Abbott*, 956 F.3d at 708 ("*Ex parte Young* allows suits for injunctive or declaratory relief against state officials, provided they have sufficient 'connection' to enforcing an allegedly unconstitutional law."). Absent such a connection, "the suit is effectively against the state itself and thus barred by the Eleventh Amendment and sovereign immunity." *Abbott*, 956 F.3d at 709.

While "[t]he precise scope of the 'some connection' requirement is still unsettled," the Fifth Circuit has stated that "it is not enough that the official have a '*general* duty to see that the laws of the state are implemented.'" *Texas Democratic Party*, 961 F.3d at 400–01 (quoting *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014)). And "[i]f the official sued is not 'statutorily tasked with enforcing the challenged law,' then the requisite connection is absent and '[the] *Young* analysis ends.'" *Abbott*, 956 F.3d at 709 (quoting *City of Austin*, 943 F.3d at 998). Where, as here, "no state official or agency is named in the statute in question, [the court] consider[s] whether the state official actually has the authority to enforce the challenged law." *City of Austin*, 943 F.3d at 998.

The State argues that the *Ex parte Young* exception does not apply to Governor Abbott and Secretary Hughs because they do not have the power to enforce the October 1 Order, and thus lack

a sufficient "connection" to the order. (Mot. Dismiss, Dkt. 31, at 5). In *In Re Abbott*, the Fifth Circuit found that the *Ex Parte Young* exemption did not apply to a challenge to a pandemic-related executive order because "[t]he power to promulgate law is not the power to enforce it." Under current Fifth Circuit law, the Court agrees that Abbott cannot be sued in this case for injunctive relief under the *Ex parte Young* exception.

As previously noted, the Fifth Circuit reached this very issue in *Abbott* on a petition for a writ of mandamus directed to this very Court. After the District Court entered a second TRO against Abbott, exempting various categories of abortion from GA-09, Abbott filed a petition for a writ of mandamus, contending, among other things, that "the district court violated the Eleventh Amendment by purporting to enjoin [Abbott]." *Abbott*, 956 F.3d at 708. The Fifth Circuit agreed that the Eleventh Amendment required Abbott's dismissal and admonished the District Court for failing "to consider whether the Eleventh Amendment requires dismissal of the Governor or Attorney General because they lack any 'connection' to enforcing GA-09 under *Ex parte Young*." *Id.* at 709.

While the District Court concluded that Abbott had "some connection to GA-09 because of his statutory authority [under] Texas Government Code § 418.012," the Fifth Circuit read this provision narrowly, concluding that while § 418.012 empowers the Governor to "issue," "amend," or "rescind" executive orders, it does not empower him to "enforce" them. *Id.*; *see also* Tex. Gov't Code § 418.012. Because "[t]he power to promulgate law is not the power to enforce it," the Fifth Circuit held that Abbott "lack[ed] the required enforcement connection to GA-09" and thus could not be enjoined under the *Ex parte Young* exception to sovereign immunity. *Abbott*, 956 F.3d at 709. By this reasoning, Plaintiffs may not rely on the *Ex parte Young* exception to obtain injunctive relief against Abbott in this case either.

The Court reaches a different conclusion with respect to Secretary Hughs. The Court is unwilling to extend *In Re Abbott* to Secretary Hughs in the absence of such direction from the Fifth Circuit. Secretary Hughs serves as the Chief Election Office for Texas and is tasked with "*ensuring* the uniform application and interpretation of election laws throughout Texas." Tex. Elec. Code § 31.001(a); *OCA-Greater Houston*, 867 F.3d at 613 (Texas Secretary of State serves as the 'chief election officer of the state.'"). The State argues that Secretary Hughs lacks enforcement authority because she does not specifically implement the Election Code provision at issue and is "unlikely to make [] an effort" to enforce the October 1 Order. (Mot. Dismiss, Dkt. 31, at 6).

However, the Texas Election Code clearly tasks the Secretary with enforcing election laws in Texas by preparing directives for local and state authorities, and empowers her to order those who impede on voting rights to " correct the offending conduct" and "seek enforcement of [that] order" through the attorney general. Tex. Elec. Code §§ 31.003, 31,005. In addition, the Fifth Circuit has held that suits challenging Texas voting laws are properly brought against the Secretary of State. *OCA-Greater Houston v. Texas*, 867 F.3d at 613 ("[A] challenge to Texas voting law is, without question, fairly traceable to and redressable by the State itself and its Secretary of State"); *Lewis v. Hughs,* No. 5:20-CV-00577-OLG, 2020 WL 4344432, at *8 (W.D. Tex. July 28, 2020), *aff'd and remanded*, No. 20-50654, 2020 WL 5511881 (5th Cir. Sept. 4, 2020) (stating that the Secretary had "the requisite connection to the challenged [voting] restrictions for *Ex parte Young* to apply.").

The State also contends that enforcement of the October 1 Order stems from Governor Abbott's emergency powers under the Texas Disaster Act of 1975, and as such, enforcement "constitutes a criminal offense" that can only be enforced by local prosecutors. (Mot. Dismiss, Dkt. 31, at 6). Even if the Court accepts this assertion, Governor Abbott's September 17, 2020 Executive Order explicitly states that "failure to comply with any executive order issue during the COVID-19 disaster"…"may be subject to regulatory enforcement." Executive Order No. GA-30, Sept. 17,

2020; Tex. Elec. Code § 418.016. Given the regulatory powers entrusted to the Secretary of State under the Texas Election Code, the Court finds that Secretary Hughs bears a sufficient enforcement connection to the October 1 Order under either the Election Code or the Texas Disaster Act, or a combination of the two.

Secretary Hughs also has demonstrated her willingness to enforce Governor Abbott's recent executive orders. The State admits that Secretary Hughs recently advised county officials on how to comply with the July 27 Order, evincing her willingness to "make an effort" to ensure local election officials comply with the Governor Abbott's proclamations. (Mot. Dismiss, Dkt. 31, at 6; 1-20-cv-1015, Email, Dkt. 11-20, at 2). For all these reasons, the Court rejects the State's argument that *Ex parte Young* does not apply to Secretary Hughs.

C. Pullman Abstention

The State contends that the Court should exercise its discretion to abstain from ruling on the merits of Plaintiffs' claims until resolution of the pending state court case challenging Governor Abbott's authority to suspend the Texas Election Code. (Mot. Dismiss, Dkt. 43, at 32). The Supreme Court's landmark Pullman decision established that "a federal court may, and ordinarily should, refrain from deciding a case in which state action is challenged in federal court as contrary to the federal constitution if there are unsettled questions of state law that may be dispositive of the case and avoid the need for deciding the constitutional question." *United Home Rentals, Inc. v. Tex. Real Estate Com.*, 716 F.2d 324, 331 (5th Cir. 1983) (citation omitted).

Two elements must be met for *Pullman* abstention to apply: (1) the case must present an unsettled question of state law, and (2) the question of state law must be dispositive of the case or would materially alter the constitutional question presented. *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). The purpose of *Pullman* abstention is to "avoid unnecessary friction in federal-state functions, interference with important state functions, tentative decisions on questions of state law,

and premature constitutional adjudication." *Id.* However, *Pullman* abstention is not "an automatic rule applied whenever a federal court is faced with a doubtful issue of state law" but rather considered on "a case-by-case basis." *Baggett v. Bullitt*, 1964, 377 U.S. 360, at 376 (1964).

In assessing whether to exercise its discretion, the Court must "take into consideration the nature of the controversy and the particular right sought to be enforced." *Edwards v. Sammons*, 437 F.2d 1240, 1243 (5th Cir. 1971). In *Harman*, the Supreme Court upheld the district court's decision not to abstain from ruling on the constitutionality of a voting law pending decision of state law questions in the state courts given "the nature of the constitutional deprivation alleged and the probable consequences of abstaining." 380 U.S. at 537. The Supreme Court similarly declined to exercise its discretion to abstain in *Baggett* where abstention would "delay[] ultimate adjudication on the merits" in such a way as to "inhibit the exercise of First Amendment freedoms." 377 U.S. at 379–380.

Here, the Court is similarly concerned that given the alleged violations and irreparable harm that may result from a delay in resolution militates against exercising its discretion under the *Pullman* doctrine. Because there is "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live" the Court finds that the alleged violation of Plaintiffs' right to vote is of sufficient importance for the Court to issue its ruling. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

In addition, the parties in this case represented to the Court that the pending state court temporary restraining order will be heard next week. This Court cannot predict whether the state court will rule immediately or take days or weeks. The need for adjudication of Plaintiffs' claims is immediate; any delay risks irreparable violation of the a right that the Supreme Court has called "the essence of a democratic society." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Court concludes that abstention under this doctrine would not be appropriate here.

D. Motion for Preliminary Injunction

As a general matter, the Court is cognizant that under *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006), district courts should not ordinarily alter election rules on the eve of an election. *See also Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207, 206 L. Ed. 2d 452 (2020). In *Purcell*, the Supreme Court reversed a lower court's order enjoining the implementation of a proposition, passed by ballot initiative two years earlier, that required voters to present identification when they voted on election day. In reversing the lower court, the Court emphasized that the injunction was likely to cause judicially-created voter confusion in the face of an imminent election. *Purcell*, 549 U.S. at 2, 6. Relying in part on *Purcell*, in *Republican National Committee*, the Court similarly stayed a lower court's injunction that extended "the date by which ballots may be cast by voters." 140 S. Ct. 1205, 1207 (2020). Here, however, the concern that troubled the Supreme Court in *Purcell* and *Republican National Committee*—judicially-created confusion—is not present. *See Self Advocacy Sols. N.D. v. Jaeger*, No. 3:20-CV-00071, 2020 WL 2951012, at *11 (D.N.D. June 3, 2020) (finding the same).

Plaintiffs' requested injunction does not require the Court to overturn a voter-approved ballot initiative or change election deadlines. Nor does the Court's injunction lead to the problems identified by other courts that ruled on voting procedures shortly before an election. *See, e.g.*, *Veasey v. Perry*, 769 F.3d 890, 893–95 (5th Cir. 2014) (staying trial court's decision to grant injunction enjoining implementation of existing voter identification requirement when state introduced evidence that adopting new procedure nine days before voting begins would require it to "train 25,000 polling officials at 8,000 polling stations about the new requirements" imposed by the trial court); *Democratic Nat'l Comm. v. Bostelmann*, 451 F. Supp. 3d 952, 974 (W.D. Wis. 2020) (invoking *Purcell* in deciding not to "delay the date of an impending, state-wide election"); *Fair Maps Nevada v. Cegavske*, No. 320CV00271MMDWGC, 2020 WL 2798018, at *16 (D. Nev. May 29, 2020) ("[The

Purcell] principle is particularly pertinent where plaintiffs ask courts to 'impose large-scale changes to the election process.'").

Here, the Court has been asked, by Plaintiffs and Defendant County Clerks, to reduce or eliminate what would amount to *executive*-caused voter confusion on the eve of an election. Governor Abbott's unilateral decision to reverse his July 27 Order after officials already began sending out absentee ballots and just days before the start of early voting in Texas has caused voter confusion. (*See e.g.* Hollins Decl., Dkt. 8-1, at 7). Even without declaratory evidence, it is apparent that closing ballot return centers at the last minute would cause confusion, especially when those centers were deemed safe, authorized, and, in fact, advertised as a convenient option just months ago. As such, the Court's injunction supports the *Purcell* principle that courts should avoid issuing orders that cause voters to become confused and stay away from the polls. 549 U.S. 1, 4–5.

To the extent that this Court's injunction to reinstate the ballot return centers does potentially cause confusion, the Court is satisfied that it would be minimal and outweighed by the increase in voting access. Since Governor Abbott closed previously-sanctioned centers, there is confusion: (1) confusion resulting from a voter trying to cast a ballot at a center she thought was open—because it used to be—but which is now closed or (2) confusion resulting from a voter trying to cast a ballot at a center that she thought was recently closed but is now open again.[11] Between these two choices, the Court is of the opinion that the second scenario is the more favorable and just choice: it is the only choice that restores the status quo and likely reduces confusion on the eve of an election, and it results in a greater chance that a ballot can be cast at a ballot return center that was previously available to voters—after being vetted as safe and secure and publicly touted as a

[11] Because ballot return centers were ordered closed just one week ago, it is more likely that people would face scenario (1) since voters are less likely to have heard about such a recent change.

viable option to exercise voting rights. *See Ely v. Klahr*, 403 U.S. 108, 113 (1971) (affirming district court decision where "the court chose what it considered the lesser of two evils").

1. Likelihood of Success on Merits

Plaintiffs seek a preliminary injunction on their claims that the October 1 Order infringes on Plaintiffs' fundamental right to vote and their right to equal protection. To show a substantial likelihood of success on the merits of their claims, Plaintiffs must present a prima facie case that the burden imposed by the October 1 Order violates Plaintiffs' constitutional rights under the First and Fourteenth Amendments. *See Daniels Health Scis., L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 582 (5th Cir. 2013) ("To show a likelihood of success, the plaintiff must present a prima facie case, but need not prove that he is entitled to summary judgment."). Here, Plaintiffs have established a substantial likelihood of success on their claims under the First and Fourteenth Amendments.

a. Plaintiffs' Undue Burden Claims

Plaintiffs contend that the October 1 Order places an undue burden on their right to vote under the First and Fourteenth Amendments. The Court applies the *Anderson–Burdick* standard to Plaintiffs' claims, weighing 'the character and magnitude of the asserted injury' . . . against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983)). Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. *Id.* at 434.

Regulations imposing severe burdens on plaintiffs' rights are subject to strict scrutiny and must be narrowly tailored and advance a compelling state interest. *Burdick*, 504 U.S. at 434. When a state law imposes a "slight" burden on the right to vote, relevant and legitimate interests of sufficient weight may justify that burden. *Burdick*, 504 U.S. at 434; *Norman v. Reed*, 502 U.S. 279, 288–289

(1992) (requiring "corresponding interest sufficiently weighty to justify the limitation"). In challenges that fall between either end of these extremes, the Court applies the *Anderson-Burdick* standard. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788-89). There is no "litmus test" to separate valid from invalid voting regulations; courts must weigh the burden on voters against the state's asserted justifications and "make the 'hard judgment' that our adversary system demands." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190, (2008) (Stevens, J., announcing the judgment of the Court).

The Court first considers "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment." *Anderson*, 460 U.S. at 789. Here, while the burdens imposed on Plaintiffs'' right to vote are not severe, they are more than "slight." Because of the October 1 Order, absentee voters must choose between risking exposure to coronavirus to deliver their ballots in-person or disenfranchisement if the USPS is unable to deliver their ballots on time—which USPS has publicly stated it cannot guarantee under Texas's current vote-by-mail deadlines. (*See* USPS Letter, Dkt. 15-9).

Absentee voters in Texas are particularly vulnerable to the coronavirus because they are largely elderly or disabled, and thus face a greater risk of serious complications or death if they are exposed to the virus. (Am. Compl., Dkt. 16, at 8; 1-20-cv-1015, Compl., Dkt. 1, at 2). By limiting ballot return centers to one per county, older and disabled voters living in Texas's largest and most populous counties must travel further distances to more crowded ballot return centers where they would be at an increased risk of being infected by the coronavirus in order to exercise their right to vote and have it counted. (Mot. TRO, Dkt, at 15–16). Indeed, Governor Abbott's July 27 Order addressed those very concerns by allowing counties to accept absentee ballots delivered in person during the early voting period and on Election Day to multiple ballot return centers. (DeBeauvoir Decl., Dkt, 18, at 8 (the "multiple locations [authorized by the July 27 Order] ease the burden on

those most clearly entitled to and most likely to need this accommodation—the disabled and the elderly.").

If absentee voters choose not to deliver their ballot in person to avoid the risk of contracting coronavirus and becoming ill from, or potentially dying from, Covid-19, they must then risk disenfranchisement if the USPS is unable to deliver their ballots in time. Since Texas state voting deadlines are currently "incongruous" with USPS guidelines on how much time is needed to timely deliver ballots, absentee voters who request mail-in ballots within the Texas timeframe cannot be assured that their votes will be counted. (*See* USPS Letter, Dkt. 15-9, at 2–3). By forcing absentee voters to risk infection with a deadly disease to return their ballots in person or disenfranchisement if the USPS is unable to deliver their ballots in time, the October 1 Order imposes a burden on an already vulnerable voting population that is somewhere between "slight" and "severe."

As such, the Court must apply the *Anderson-Burdick* standard to weigh that burden against "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434, (quoting *Anderson*, 460 U.S. at 789). While the Court here has found the burden on Plaintiffs to be between severe and slight, it notes that irrespective of whether the burden is classified as "severe," "moderate," or even "slight," the burdensome law "must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Richardson v. Texas Sec'y of State*, No. SA-19-CV-00963-OLG, 2020 WL 5367216, at *35 (W.D. Tex. Sept. 8, 2020) (quoting *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (quoting *Crawford*, 553 U.S. at 191, 128).[12]

[12] The State cites to *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 89 (1969), for the proposition that rational basis is the appropriate standard when a state denies absentee ballots to some citizens and not others. (Resp. TRO, Dkt. 43, at 24). Plaintiffs contend *McDonald* is no longer good law. (Mot. TRO, Dkt. 15, at 10). The Court does not find *McDonald* instructive. There, incarcerated individuals challenged a state's denial of the right to vote absentee, and the Court found no evidence on record of a violation to the "claimed right to

In conducting this analysis, the Court "cannot speculate about possible justifications" for the challenged statute, but instead "'must identify and evaluate the precise interests put forward by the [State] as justifications for the burden imposed by its rule.'" *Reform Party of Allegheny Cty. v. Allegheny Cty. Dep't of Elections*, 174 F.3d 305, 315 (3d Cir. 1999) (quoting *Anderson*, 460 U.S. at 789). In addition, the Fifth Circuit has recently noted the importance of preventing last-minute changes to the election rules on the "on the eve of an election," or as here, during an election. *See Texas All. for Retired* Americans, 2020 WL 5816887, at *2; *Texas Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020).

The State advances only vague interests in promoting ballot security and uniformity, and alleviating voter confusion. (Resp. TRO, Dkt. 43, at 28–29). The state suggests that the October 1 Order serves to clarify the July 27 Order and promote uniformity because "not every county has interpreted Section 86.000(a-1) in the same way." (Resp. TRO, Dkt. 43, at 28–29). While certain counties have chosen to implement the July 27 suspension of Section 86.000(a-1) differently, there is simply no credible evidence on the record of confusion among counties or voters as to the effect or proper implementation of the July 27 Order. As set out above, the State and counties interpreted the July 27 Order to mean that counties could accept absentee ballots during the early voting period at one or multiple ballot return centers.

To reiterate, on August 26, 2020, an attorney in the Elections Division of the Secretary of State's office explicitly wrote that "[u]nder the Governor's July 27, 2020 proclamation, for this November election, hand-delivery process is not limited to election day and may occur at any point after the voter receives and marks their ballot by mail. Because this hand-delivery process can occur

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receive absentee ballots." *McDonald*, 394 U.S. at 807. Plaintiffs here do not suggest that they have a right to an absentee ballot but rather that they have been inhibited from exercising rights already granted by the State, which the October 1 Order removes in such a way that burdens their ability to vote and ensure that vote is counted. *See Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964).

at the early voting clerk's office, *this may include satellite offices of the early voting clerk*." (Brief, Dkt. 15-2, at 38, italics added). The State even submitted that statement from the Secretary of State's office as an exhibit to its brief to the Texas Supreme Court on September 30, 2020, (*id.* at 10), in support of its contention that "the Secretary of State has advised local officials that the Legislature has permitted ballots to be returned to any early-voting clerk office," (*id.* at 38). These statements belie any contention that there was confusion or lack of uniformity in the interpretation of Section 86.000(a-1). In fact, the October 1 Order is the true source of confusion and disparate treatment among voters.

Weighing the State's proffered ballot security concerns against the burdens imposed on absentee voters, the Court finds that Defendants have not presented any credible evidence that their interests outweigh these burdens. The State says the October 1 Order serves to "enhance voter security." (1-20-cv-1015, Oct. Proc., Dkt. 11-23, at 3). To be sure, "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters . . . . While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford,* 553 U.S. at 196. This does not mean, however, that the State can, by merely asserting an interest in promoting ballot security, establish that that interest outweighs a significant burden on voters.

At the hearing, the State did not provide any actual examples of voter fraud or refute Plaintiffs' recitation of the security measures implemented pursuant to law at ballot return centers. Rather, the State implied that its mere invocation of "ballot security" was sufficient to establish a "weighty state interest" in burdening its most vulnerable voters. As Plaintiffs point out, existing procedures already serve to prevent voter fraud, which the Court notes is uncommon in Texas in the context of hand-delivery of absentee ballots. (1-20-cv-1015, Compl., Dkt. 1, at 13; Hollins Decl., Dkt. 8-1, at 11; DeBeauvoir Decl., Dkt. 18, at 7; Lincoln Project Amici, Dkt. 34-1, at 10 (citing

Heritage Foundation Election Fraud Database demonstrating "how exceedingly infrequent fraudulent use of absentee ballot occurs" in Texas)).

In fact, Harris County used multiple ballot return centers for mail-in ballots in its July runoff election earlier this year, which resulted in "no security or other logistical issues." (1-20-cv-1015, Hollins Decl., Dkt. 11-22, at 3-4). The State likewise does not allege that Harris County encountered security issues at its ballot return centers during the July election. In the face of testimony that ballot integrity procedures are uniform among ballot return centers within and across counties, the State also fails to explain why procedures at ballot return centers would be different or insufficient compared to those implemented at the one location mandated by the October 1 Order. At the hearing, the State argued that multiple ballot return offices were only authorized on Election Day but failed to explain how ballot security at the satellite ballot return centers would be any different, much less inferior, before Election Day versus on Election Day. Allowing the State to rely on the pretextual talisman of promoting ballot security in imposing burdensome restrictions on vulnerable voters would render enforcement of voting rights through the Courts illusory.

Lastly, the Court notes that the State admits that Governor Abbott's authority to issue the July 27 Order and October 1 Order stems from his powers under the Texas Disaster Act, which grants the Governor the power to "suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster." Tex. Gov't Code § 418.016. While the Texas Legislature has given the Governor "emergency powers to temporarily change the law to protect public health and safety" in the face of the Covid-19 pandemic, it "has most definitely not given the Governor authority to act in a legislative capacity to revise and modify the operation of state law—even disaster declaration-based state law—on grounds divorced from public safety and health issues." (Travis Cty. Amicus Brief,

Dkt. 44-1, at 2–3). The State's justifications for the October 1 Order's limitation on ballot return centers bear no relationship to protecting public health and safety.

The State's justifications for the October 1 Order do not present a sufficiently relevant and legitimate interest in light of the burden it imposes on Plaintiffs. Plaintiffs have thus met their burden in showing that the October 1 Order likely violates their fundamental right to vote under the First and Fourteenth Amendments.

b. Plaintiffs' Equal Protection Claims

Plaintiffs argue that the October 1 Order violates the Equal Protection Clause of the Fourteenth Amendment because it imposes arbitrary and disparate burdens it places on voters based on where they live. While the State argued at the hearing that limiting ballot return centers to one per county, regardless of county size, serves uniformity, this ignores the disparate impact such a measure has upon voters. (Mot. TRO, Dkt. 15, at 24–25). The State mischaracterizes Plaintiffs' claims as accusing the State of not going "far enough in removing incidental barriers to voting," (Resp. TRO, Dkt. 31, at 29), to avoid the reality that because the State already granted absentee voters "the franchise" to vote at a satellite ballot return center, it may not now draw lines that "are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966). Having considered the evidence presented by both parties, the Court finds that Plaintiffs have satisfied their burden in showing they are likely to succeed in their claim that the October 1 Order treats absentee voters disparately based on their county of residence without proper justification.

It is well-settled law that the disparate treatment of voters based on county of residence violates the Equal Protection Clause of the Fourteenth Amendment. *Moore v. Ogilvie*, 394 U.S. 814, 818–19, (1969) (striking down law that applied "rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the

exercise of their political rights"); *Gray v. Sanders*, 372 U.S. 368, 379 (1963) (holding that voting system that weighted "the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties" violated Equal Protection Clause). Here, uncontested testimony from the organizational Plaintiffs and their members shows that absentee voters living in larger, more populous counties are necessarily treated differently than other similarly situated voters in smaller, less populated counties under the October 1 Order.

This disparate treatment is evident in the increased distance, increased wait time, and increased potential for exposure to the coronavirus experienced by absentee voters living in larger, more populous counties. (Mot. TRO, Dkt. 15, at 28; *see, e.g.*, 1-20-cv-1015, Bryant Decl., Dkt. 11-2, at 4 ("[D]istance to only designated early voting clerk's office in a county might be significant for many members who may not be able to find transportation."); Mason Decl., Dkt. 15-11, at 2; Golub Decl., Dkt. 15-12, at 3; Chimene Decl., Dkt. 15-17, at 3 (explaining that the October 1 Order has "guaranteed certain voters 'two, five, or 10 times' or more absentee voting resources than others")).

While the State contends that one month is sufficient time to cast a ballot by mail, this unjustifiably requires absentee voters who do not wish to risk experiencing fatigue or pain or contracting the coronavirus to vote earlier than those similarly situated but residing in smaller, less populous counties in order to ensure their vote is counted. *Reynolds*, 377 U.S. at 562 ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted.").

When, as here, "a state regulation is found to treat voters differently in a way that burdens the fundamental right to vote, the *Anderson–Burdick* standard applies." *See Hunter*, 635 F.3d at 238; *see also Clements v. Fashing*, 457 U.S. 957, 965 (1982). "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper*, 383 U.S.

at 670. Only where the State's interests outweigh the burden on the plaintiff's right to vote do voting restrictions not offend the Equal Protection Clause. *Obama for Am. v. Husted*, 697 F.3d 423, 433 (6th Cir. 2012).

The State's proffered interest in preventing voter fraud must thus be "sufficiently weighty" to justify the elimination of ballot return centers. *Burdick*, 504 U.S. at 434; *Norman*, 502 U.S. at 288–89. If the State had enacted a generally applicable, nondiscriminatory voting regulation that limited voting locations for all Texas voters, its "important regulatory interests" would likely be sufficient to justify the restriction. *See Burdick*, 504 U.S. at 434. The Equal Protection Clause permits states to enact neutrally applicable laws, even if the impact of those laws falls disproportionately on a subset of the population. *See, e.g., Crawford*, 553 U.S. at 207 (Scalia, J., concurring) (citing *Washington v. Davis*, 426 U.S. 229, 248 (1976)). However, the October 1 Order is self-evidently not neutrally applicable; it restricts the rights of some voters, those who qualify to vote absentee in larger, more populous counties and not others. Nor is the State's justification sufficiently "important" to excuse the discriminatory burden it has placed on some Texans, including the most vulnerable.

With no evidence that ballot return centers have jeopardized election integrity in the past, no evidence that they may threaten election integrity in the November Election, the State's admission that multiple ballot return centers can be open on Election Day, and faced with assertions by the County Clerks that their ballot return centers operate in the same manner as central ballot return centers, the State has not shown that its regulatory interest in smooth election administration is "important," much less "sufficiently weighty" to justify the burden it has placed on absentee voters in Texas. As such, Plaintiffs have met their burden of showing a substantial likelihood that they will succeed in showing that the October 1 Order violates the Equal Protection Clause of the Fourteenth Amendment.

2. Irreparable Harm

To satisfy this prong of the preliminary injunction test, Plaintiffs must show that in the absence of an injunction they are "likely to suffer irreparable harm," that is, harm for which there is no adequate remedy at law. *Daniels Health Scis., L.L.C.*, 710 F.3d at 585. The party seeking a preliminary injunction must prove that irreparable harm is likely, not merely possible. *Winter*, 555 U.S. at 20. Here, Plaintiffs allege they will experience irreparable harm in the absence of an injunction because the fundamental right to vote is threatened by the October 1 Order.

Plaintiffs have already established a likelihood of success on their constitutional challenges to the October 1 Order. The right to vote and have one's vote counted is undeniably a fundamental constitutional right, *Reynolds*, 377 U.S. at 554, whose violation cannot be adequately remedied at law or after the violation has occurred. *See, e.g.*, *Obama for Am.*, 697 F.3d at 436; *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986); *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 663 (W.D. Tex. 2014), *aff'd sub nom. De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015). Even the violation of fundamental constitutional rights for minimal periods of time "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The State contends that Plaintiffs' only injury is "one due to personal preference and geographical distance," and this does not rise to the level of irreparable harm. (Resp. TRO, Dkt, 43, at 30). Not so. State Defendants ignore that Plaintiffs have not alleged that the October 1 Order makes voting inconvenient, but rather that it disproportionately impacts the elderly and disabled, who are less likely to be able to travel long distances, stand in line, or risk exposure to the coronavirus. (*See, e.g.* 1-20-cv-1015, Bryant Decl., Dkt. 11-2, at 4 ("distance to only designated early voting clerk's office in a county might be significant for many members who may not be able to find transportation."); Mason Decl., Dkt. 15-11, at 2; Golub Decl., Dkt. 15-12, at 3; Chimene Decl., Dkt.

15-17, at 3). Even accepting the State's assertion that absentee voters can still mail in their ballots or return them at the designated ballot return office in their County, (Resp. TRO, Dkt. 43, at 28–29), the existence of alternative means of exercising one's fundamental rights "does not eliminate or render harmless the potential continuing constitutional violation of a fundamental right." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). That is especially true when each alternative under the current scheme is also likely to unconstitutionally burdens Texans' right to vote. We have already determined that the fundamental right to vote is likely "either threatened or in fact being impaired," on the eve of an election, and this conclusion mandates a finding of irreparable injury. *Id.* (citing *Elrod*, 427 U.S. at 373).

3. Balance of Equities

Next the Court must determine whether Plaintiffs' threatened injuries outweigh any damage that the injunction may cause to the State. *See Winter*, 555 U.S. at 20; *Valley*, 118 F.3d at 1050. Plaintiffs argue that the equities greatly favor an injunction, as there is no harm from issuing a preliminary injunction that prevents the enforcement of a likely unconstitutional state law. *See Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002).

The State counters that the balance of equities weighs against an injunction because it considers the alleged violations to Plaintiffs' constitutional rights to be "one[s] due to personal preference and geographical distance." (Resp. TRO, Dkt. 43, at 30). The Court disagrees. The harm to the State in returning to its previously planned voting procedures is minimal compared to the potential for loss of constitutional rights to Plaintiffs. An individual's constitutional rights are not submitted to state vote and may not depend on the outcome of state legislation or a state constitution, much less an executive proclamation issued on the eve of a national election. *See Barnette*, 319 U.S. at 638. Accordingly, the Court finds that the balance of equities favors an injunction.

4. Public Interest

Injunctions preventing the violation of constitutional rights are "always in the public interest." *See Ingebretsen on behalf of Ingebretsen v. Jackson Public Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (holding that where a enactment is unconstitutional, "the public interest [is] not disserved by an injunction preventing its implementation"); *see also, e.g.*, *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Charles H. Wesley Educ. Fdn., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005) ("[The . . . cautious protection of the Plaintiffs' franchise-related rights is without question in the public interest.").

Courts generally consider the *Purcell* principle in the context of determining whether an injunction that changes a state election law serves the public interest. *See, e.g.*, *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018); *League of Women Voters of United States v. Newby*, 838 F.3d 1, 13 (D.C. Cir. 2016); *Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006). Here, for the reasons discussed above, the *Purcell* principle does not apply. While the Court has considered the public interest in preventing confusion, it maintains that allowing the challenged provisions of the October 1 Order to remain in place causes greater confusion and impedes on the public's "strong interest in exercising the fundamental political right to vote." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). That interest is best served by upholding enfranchisement and ensuring that qualified absentee voters, who comprise some of the most vulnerable citizens in Texas, can exercise their right to vote and have that vote counted.

Here, the public interest is not served by Texas's continued enforcement of a proclamation Plaintiffs have shown likely violates their fundamental right to vote. This factor therefore weighs in favor of a preliminary injunction.

IV. CONCLUSION

For the reasons given above, **IT IS ORDERED** that Governor Abbott's Motion to Dismiss, (Dkt. 43), is **GRANTED IN PART and DENIED IN PART**. Plaintiffs' claims against Governor Abbott are **DISMISSED**.

IT IS FURTHER ORDERED that Governor Abbott's Motion to Dismiss, (1-20-cv-1015, Dkt. 27), is **GRANTED**.

IT IS FURTHER ORDERED that Secretary Hughs's Motion to Dismiss, (1-20-cv-1015, Dkt. 28), is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' motions for a preliminary injunction, (Dkt. 15; Case No. 1:20-cv-1015, Dkt. 10-1), are **GRANTED**. Secretary Hughs, in her official capacity as Texas Secretary of State, Dana DeBeauvoir, in her official capacity as Travis County Clerk, Chris Hollins, in his official capacity as Harris County Clerk, John Oldham, in his official capacity as Fort Bend County Elections Administrator, and their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order, are preliminarily **ENJOINED** from implementing or enforcing the following paragraph on page 3 of the October 1 Order:

> "(1) the voter delivers the marked mail ballot at a single early voting clerk's office location that is publicly designated by the early voting clerk for the return of marked mail ballots under Section 86.006(a-1) and this suspension;"

(1-20-cv-1015, Oct. 1 Proc., Dkt. 11-23).

SIGNED on October 9, 2020.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

Exhibit B

GOVERNOR GREG ABBOTT

July 27, 2020

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
2:00pm O'CLOCK
JUL 27 2020
Secretary of State

The Honorable Ruth R. Hughs
Secretary of State
State Capitol Room 1E.8
Austin, Texas 78701

Dear Secretary Hughs:

Pursuant to his powers as Governor of the State of Texas, Greg Abbott has issued the following:

A proclamation suspending certain statutes concerning elections on November 3, 2020.

The original of this proclamation is attached to this letter of transmittal.

Respectfully submitted,

Gregory S. Davidson
Executive Clerk to the Governor

GSD/gsd

Attachment

PROCLAMATION

BY THE

Governor of the State of Texas

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, I, Greg Abbott, Governor of Texas, issued a disaster proclamation on March 13, 2020, certifying under Section 418.014 of the Texas Government Code that the novel coronavirus (COVID-19) poses an imminent threat of disaster for all counties in the State of Texas; and

WHEREAS, in each subsequent month effective through today, I have renewed the disaster declaration for all Texas counties; and

WHEREAS, the Commissioner of the Texas Department of State Health Services, Dr. John Hellerstedt, has determined that COVID-19 continues to represent a public health disaster within the meaning of Chapter 81 of the Texas Health and Safety Code; and

WHEREAS, pursuant to legislative authorization under Chapter 418 of the Texas Government Code, I have issued executive orders, proclamations, and suspensions of Texas laws in response to the COVID-19 disaster, aimed at using the least restrictive means available to protect the health and safety of Texans and ensure an effective response to this disaster; and

WHEREAS, Section 41.001(a) of the Texas Election Code provides that a general or special election in this state shall be held on a uniform election date, and the next uniform election date is occurring on November 3, 2020; and

WHEREAS, I issued a proclamation on March 18, 2020, suspending Sections 41.0052(a) and (b) of the Texas Election Code and Section 49.103 of the Texas Water Code to the extent necessary to allow political subdivisions that would otherwise have held elections on May 2, 2020, to move their general and special elections for 2020 only to the November 3, 2020 uniform election date; and

WHEREAS, Texas law provides that eligible voters have a right to cast a vote in person; and

WHEREAS, as counties across Texas prepare for the upcoming elections on November 3, 2020, and establish procedures for eligible voters to exercise their right to vote in person, it is necessary that election officials implement health protocols to conduct elections safely and to protect election workers and voters; and

WHEREAS, in order to ensure that elections proceed efficiently and safely when Texans go to the polls to cast a vote in person during early voting or on election day for the November 3, 2020 elections, it is necessary to increase the number of days in which polling locations will be open during the early voting period, such that election officials can implement appropriate social distancing and safe hygiene practices; and

WHEREAS, Section 85.001(a) of the Texas Election Code provides that the period for early voting by personal appearance begins 17 days before election day; and

WHEREAS, Section 86.006(a-1) of the Texas Election Code provides that a voter may deliver a marked mail ballot in person to the early voting clerk's office while the polls are open on election day; and

WHEREAS, in consultation with the Texas Secretary of State, it has become apparent that for the November 3, 2020 elections, strict compliance with the statutory requirements in Sections 85.001(a) and 86.006(a-1) of the Texas Election Code would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster, and that providing additional time for early voting will provide Texans greater safety while voting in person; and

WHEREAS, pursuant to Section 418.016 of the Texas Government Code, the legislature has expressly authorized the Governor to suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster;

NOW, THEREFORE, I, GREG ABBOTT, Governor of Texas, under the authority vested in me by the Constitution and laws of the State of Texas, do hereby suspend Section 85.001(a) of the Texas Election Code to the extent necessary to require that, for any election ordered or authorized to occur on November 3, 2020, early voting by personal appearance shall begin on Tuesday, October 13, 2020, and shall continue through the fourth day before election day. I further suspend Section 86.006(a-1) of the Texas Election Code, for any election ordered or authorized to occur on November 3, 2020, to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early voting clerk's office prior to and including on election day.

The Secretary of State shall take notice of this proclamation and shall transmit a copy of this order immediately to every County Judge of this state and all appropriate writs will be issued and all proper proceedings will be followed to the end that said elections may be held and their results proclaimed in accordance with law.

IN TESTIMONY WHEREOF, I have hereto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 27th day of July, 2020.

GREG ABBOTT
Governor of Texas

FILED IN THE OFFICE OF THE SECRETARY OF STATE
2:30 PM O'CLOCK
JUL 27 2020

ATTESTED BY:

RUTH R. HUGHS
Secretary of State

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
2:00 pm O'CLOCK

JUL 27 2020

Exhibit C

GOVERNOR GREG ABBOTT

October 1, 2020

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
11:00AM O'CLOCK
OCT 01 2020
Secretary of State

The Honorable Ruth R. Hughs
Secretary of State
State Capitol Room 1E.8
Austin, Texas 78701

Dear Secretary Hughs:

Pursuant to his powers as Governor of the State of Texas, Greg Abbott has issued the following:

A proclamation suspending certain statutes concerning the November 3, 2020 elections.

The original of this proclamation is attached to this letter of transmittal.

Respectfully submitted,

Gregory S. Davidson
Executive Clerk to the Governor

GSD/gsd

Attachment

PROCLAMATION

BY THE

Governor of the State of Texas

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, I, Greg Abbott, Governor of Texas, issued a disaster proclamation on March 13, 2020, certifying under Section 418.014 of the Texas Government Code that the novel coronavirus (COVID-19) poses an imminent threat of disaster for all counties in the State of Texas; and

WHEREAS, in each subsequent month effective through today, I have renewed the disaster declaration for all Texas counties; and

WHEREAS, the Commissioner of the Texas Department of State Health Services, Dr. John Hellerstedt, has determined that COVID-19 continues to represent a public health disaster within the meaning of Chapter 81 of the Texas Health and Safety Code; and

WHEREAS, pursuant to legislative authorization under Chapter 418 of the Texas Government Code, I have issued executive orders, proclamations, and suspensions of Texas laws in response to the COVID-19 disaster, aimed at using the least restrictive means available to protect the health and safety of Texans and ensure an effective response to this disaster; and

WHEREAS, on July 27, 2020, I issued a proclamation suspending certain provisions of the Texas Election Code to provide additional time for early voting and to provide additional time in which a voter can deliver a marked mail ballot in person to the early voting clerk's office, such that this may be done prior to and including on election day; and

WHEREAS, the suspension of the limitation on the in-person delivery of marked mail ballots, as made in the July 27, 2020 proclamation, merely increased the amount of time for an eligible voter to return a marked mail ballot in person to the early voting clerk's office and did not suspend or otherwise affect the other applicable requirements that a voter must comply with when returning a marked mail ballot, including presenting an acceptable form of identification described by Section 63.0101 of the Election Code; and

WHEREAS, an amendment to the suspension of the limitation on the in-person delivery of marked mail ballots, as made in the July 27, 2020 proclamation, is appropriate to add ballot security protocols for when a voter returns a marked mail ballot to the early voting clerk's office; and

WHEREAS, Section 41.001(a) of the Texas Election Code provides that a general or special election in this state shall be held on a uniform election date, and the next uniform election date is occurring on November 3, 2020; and

WHEREAS, I issued a proclamation on March 18, 2020, suspending Sections 41.0052(a) and (b) of the Texas Election Code and Section 49.103 of the Texas Water Code to the extent necessary to allow political subdivisions that would otherwise have held elections on May 2, 2020, to move their general and special elections for 2020 only to the November 3, 2020 uniform election date; and

WHEREAS, Texas law provides that eligible voters have a right to cast a vote in person; and

WHEREAS, as counties across Texas prepare for the upcoming elections on November 3, 2020, and establish procedures for eligible voters to exercise their right to vote in person, it is necessary that election officials implement health protocols to conduct elections safely and to protect election workers and voters; and

WHEREAS, in order to ensure that elections proceed efficiently and safely when Texans go to the polls to cast a vote in person during early voting or on election day for the November 3, 2020 elections, it is necessary to increase the number of days in which polling locations will be open during the early voting period, such that election officials can implement appropriate social distancing and safe hygiene practices; and

WHEREAS, Section 85.001(a) of the Texas Election Code provides that the period for early voting by personal appearance begins 17 days before election day; and

WHEREAS, Section 86.006(a-1) of the Texas Election Code provides that a voter may deliver a marked mail ballot in person to the early voting clerk's office while the polls are open on election day; and

WHEREAS, in consultation with the Texas Secretary of State, it has become apparent that for the November 3, 2020 elections, strict compliance with the statutory requirements in Sections 85.001(a) and 86.006(a-1) of the Texas Election Code would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster, and that providing additional time for early voting will provide Texans greater safety while voting in person; and

WHEREAS, in the Texas Disaster Act of 1975, the legislature charged the governor with the responsibility "for meeting ... the dangers to the state and people presented by disasters" under Section 418.011 of the Texas Government Code, and expressly granted the governor broad authority to fulfill that responsibility; and

WHEREAS, under Section 418.012, the "governor may issue executive orders hav[ing] the force and effect of law;" and

WHEREAS, pursuant to Section 418.016 of the Texas Government Code, the legislature has expressly authorized the governor to suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster; and

WHEREAS, under Section 418.018(c), the "governor may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area;"

NOW, THEREFORE, I, GREG ABBOTT, Governor of Texas, under the authority vested in me by the Constitution and laws of the State of Texas, do hereby suspend Section 85.001(a) of the Texas Election Code to the extent necessary to require that, for any election ordered or authorized to occur on November 3, 2020, early voting

by personal appearance shall begin on Tuesday, October 13, 2020, and shall continue through the fourth day before election day.

I further suspend Section 86.006(a-1) of the Texas Election Code, for any election ordered or authorized to occur on November 3, 2020, to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early voting clerk's office prior to and including on election day; provided, however, that beginning on October 2, 2020, this suspension applies only when:

(1) the voter delivers the marked mail ballot at a single early voting clerk's office location that is publicly designated by the early voting clerk for the return of marked mail ballots under Section 86.006(a-1) and this suspension; and

(2) the early voting clerk allows poll watchers the opportunity to observe any activity conducted at the early voting clerk's office location related to the in-person delivery of a marked mail ballot pursuant to Section 86.006(a-1) and this suspension, including the presentation of an acceptable form of identification described by Section 63.0101 of the Election Code by the voter.

Any poll watchers operating under this suspension must comply with the requirements of Chapter 33 of the Election Code as if they were serving at an early voting polling place, as applicable to observing the in-person delivery of a marked mail ballot pursuant to Section 86.006(a-1) and this suspension.

Any marked mail ballot delivered in person to the early voting clerk's office prior to October 2, 2020, shall remain subject to the July 27, 2020 proclamation.

The Secretary of State shall take notice of this proclamation and shall transmit a copy of this order immediately to every County Judge of this state and all appropriate writs will be issued and all proper proceedings will be followed to the end that said elections may be held and their results proclaimed in accordance with law.

IN TESTIMONY WHEREOF, I have hereto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 1st day of October, 2020.

GREG ABBOTT
Governor of Texas

FILED IN THE OFFICE OF THE SECRETARY OF STATE
11:00 AM O'CLOCK
OCT 0 1 2020

ATTESTED BY:

RUTH R. HUGHS
Secretary of State

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
11:00AM O'CLOCK

OCT 0 1 2020

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LAURIE-JO STRATY; TEXAS ALLIANCE FOR RETIRED AMERICANS; and BIGTENT CREATIVE,

Plaintiffs,

v.

GREGORY ABBOTT, in his official capacity as Governor of the State of Texas; and RUTH HUGHS, in her official capacity as Texas Secretary of State,

Defendants.

CIVIL ACTION NO. 1:20-cv-01015-RP

DECLARATION OF BRIAN KEITH INGRAM

I, Brian Keith Ingram pursuant to 28 U.S.C. § 1746, testify that:

1. I currently serve as the Director of Elections for the Office of the Texas Secretary of State and have served in this capacity since 2012. The Texas Secretary of State is the chief election officer for Texas, and I am the director of the division that implements this responsibility for the Secretary. As the State's chief election officer, the Secretary, through the Elections Division, prepares and distributes guidance to appropriate state and local authorities in the administration of elections in Texas.

2. On July 27, 2020, Governor Abbott issued a proclamation that expanded voting opportunities beyond those provided for by the Texas Election Code. Among other things, the July 27, 2020 proclamation suspended Section 85.001(a) and Section 86.006(a-1) of the Texas Election Code to allow additional time for early voting in person and extended the time period for in-person delivery of marked mail ballots.

3. As a result of the suspension of Section 85.001(a), the period for early voting by personal appearance during the November election is slated to begin on October 13, 2020. Pursuant to Texas Election Code § 85.001, without the suspension, early voting would have begun on October 19, 2020.

4. As a result of the suspension of Section 86.006(a-1), voters were permitted to deliver their marked mail ballot in person to the early voting clerk's office both prior to and including on election day. Under Texas Election Code 86.006(a-1), without the suspension, voters would have only been permitted to deliver their marked mail in ballots in person to the early voting clerk's office on election day.

5. As a result of the Governor's July 27, 2020 proclamation, the opportunities for in-person early voting increased by six days; moreover, because counties began sending mail ballots on or before September 19, 2020, the proclamation increased the opportunities for voters to hand-deliver their marked mail ballots from only one day—election day—to over forty days.

6. Texas Election Code § 86.006 was amended in 2015 by HB 1927 (84R), sponsored by Representative Greg Bonnen, to include subsection (a-1).

7. Prior to 2015, the Texas Election Code provided voters two methods by which to return their ballots: mail and common or contract carrier. As a result of HB 1927, the changes to Section 86.006 gave voters a limited option of in-person delivery, only at the early voting clerk's office, and only while the polls are open on election day.

8. During the July 14, 2020 primary runoff, Harris County became the first county in Texas, to my knowledge, to ever offer multiple locations for in-person delivery of mail ballots pursuant to Section 86.006(a-1) of the Election Code. It is my understanding that those multiple delivery locations were only offered by Harris County on election day.

9. Following the issuance of the Governor's July 27, 2020 proclamation suspending Section 86.006(a-1) and allowing the delivery of marked mail ballots in person to the early voting clerk's office prior to election day, several early voting clerks—including the Harris County Clerk—announced plans to have multiple mail ballot delivery locations in their counties for the November election. Sometime in late August or September it was reported that Travis County also intended to organize multiple sites for the in-person delivery of mail ballots. Fort Bend County followed suit and publicized its policy change in either late September or on October 1. My understanding is that some counties intended to utilize "annex" locations or parking garages for delivery sites.

10. Out of 254 counties, I am only aware of four counties that intended to utilize more than one location for in-person delivery of mail ballots: Harris, Travis, Fort Bend, and Galveston. By statute, and even under the July 27 proclamation, some of these locations would not have been authorized sites to deliver a marked ballot in person because they did not constitute an "early voting clerk's office." For example, in Fort Bend County, the early voting clerk is the county's elections administrator, who maintains only one office. My understanding is that Fort Bend County intended to use other county annex offices—in addition to the elections administrator's office—to accept in-person delivery of mail ballots under Section 86.006(a-1).

11. On October 1, 2020, Governor Abbott issued a second proclamation that amended his prior suspension. The October 1 proclamation made clear that during the added time period for in-person delivery of marked mail ballots, a voter who is delivering a marked mail ballot in person prior to election day must do so at a single early voting clerk's office location. It is my understanding that this suspension applies to the time period prior to election day and leaves Section 86.006(a-1) of the Election Code unchanged on election day.

12. A separate provision of the October 1, 2020 proclamation also provided that early voting clerks must allow poll watchers "the opportunity to observe any activity conducted at the early

voting clerk's office location related to the in-person delivery of a marked mail ballot pursuant to Section 86.006(a-1)."

13. Under Chapter 33 of the Texas Election Code, poll watchers were—prior to the October 1 proclamation—authorized to observe certain activity at "precinct polling place[s]," "early voting polling place[s]," "a meeting place for an early voting ballot board," or a "central counting station." Chapter 33 did not authorize poll watchers at any offices that did not constitute the above locations.

14. The effect of the July 27 Proclamation and October 1 Proclamation's suspension of Section 86.006(a-1) of the Texas Election Code was to add more days on which eligible voters may hand-deliver their marked mail ballots. Without these proclamations, pursuant to statute a voter would only be able to deliver his or her marked mail ballot to the early voting clerk's office while the polls are open on election day.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 8, 2020.

Brian Keith Ingram
Director of Elections

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LAURIE-JO STRATY, TEXAS ALLIANCE FOR RETIRED AMERICANS and BIGTENT CREATIVE,

Plaintiffs,

vs.

GREGORY ABBOTT, in his official capacity as Governor of the State of Texas; and RUTH HUGHS, in her official capacity as Texas Secretary of State,

Defendants.

Civil Action No. 1:20-cv-1015

Related to:
Texas League of United Latin American Citizens v. Abbott, No. 1:20-cv-1006

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Laurie-Jo Straty, Texas Alliance for Retired Americans, and BigTent Creative (together, "Plaintiffs") file this Complaint for Declaratory and Injunctive Relief against Defendant Gregory Abbott, in his official capacity as Governor of the State of Texas, and Ruth Hughs, in her official capacity Texas Secretary of State (together, "Defendants"). This Complaint challenges the constitutionality of Governor Abbott's October 1, 2020 proclamation that prohibits Texas counties from providing voters with more than one location to return their marked mail-in ballots. In support of their claims and request for relief, Plaintiffs allege as follows:

NATURE OF THE CASE

1. In their latest ploy to suppress the vote, which they have thinly veiled as an attempt to "enhance[e] ballot security," Defendants have ordered that there can only be one location in each county where voters can return their marked mail-in ballots directly to the county election administration. This means that thousands of Texans who *must* vote by mail to avoid the risk of

COVID-19 infection will be prevented from dropping off their mail-in ballots at secure county drop-off locations. For many voters who will vote by mail, the nearest drop-off location will now be dozens or even hundreds of miles away, forcing those voters to travel long distances to deliver their ballots to their county's election administration or to put their ballots in the care of the overburdened, unreliable United States Postal Service ("USPS")—which has explicitly informed Defendants that election mail will be delayed in Texas. This latest effort to take away Texas voters' access to voting during the pandemic imposes a significant, unjustifiable burden and must be immediately enjoined.

2. The first case of COVID-19 in Texas was confirmed on March 4, and Governor Abbott declared a state of disaster nine days later. By the beginning of April, every Texan was under a stay-at-home order and Governor Abbott postponed the scheduled May local elections until November to avoid community spread of infection. However, the governor quickly succumbed to mounting political and economic pressure to open the state back up, which resulted in the dramatic rise in rates of infection over the summer months. As of October 1, less than seven months after the state's first case of COVID-19, Texas has seen 752,501 confirmed cases and 15,823 people have died. Texans age 65 and older constitute approximately 70% of those fatalities, despite that age group making up less than 13% of the state's overall population. While tragic, this figure is not surprising: before the novel coronavirus even touched U.S. soil, epidemiologists warned that individuals above the age of 65 and individuals with certain underlying heath conditions are particularly vulnerable to COVID-19's most severe complications.

3. The Texans whose age puts them at the highest risk of severe complications from the virus are, fortunately, eligible to cast their ballots by mail. Still, the right to vote extends beyond just the right to *cast a ballot*. Rather, the right to vote includes "the right to mark a piece of paper

and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot *counted*." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (citation and quotation omitted) (emphasis added). Particularly in light of the pandemic and its myriad challenges, the law Plaintiffs challenge here—which derives from Governor Abbott's October 1 "proclamation enhancing ballot security" ("October Proclamation")—will unduly burden and, in some cases, entirely prevent the most vulnerable Texans from having their votes counted in November.

4. On July 27, 2020—after skyrocketing rates of COVID-19 infection in Texas and calls for expanded voting by mail to protect Texas voters from the risk of infection inherent with in-person voting—Governor Abbott issued a proclamation extending early voting in Texas to October 13 and suspending the Texas Election Code provision that permitted voters to return their mail-in ballots in person only on election day ("July Proclamation"). The July Proclamation permits eligible voters to return their marked ballots to a county drop-off location on election day *or* during the early voting. With the July Proclamation, Texas joined many other states in offering voters the opportunity to return their mail-in ballots at secure, tamper-proof ballot drop-off sites that are available before, during, and after business hours in the weeks leading up to the election so that voters may quickly and efficiently submit their completed ballots as their schedules allow.

5. The July Proclamation made clear that expanded early voting in person and a bigger window for voters to hand-deliver mail-in ballots was the state's answer (however unsatisfactory) to its citizens' concerns about participating in the November election. Counties therefore began preparing for a longer in-person early voting period and, at the same time, considered establishing additional mail-in ballot drop-off locations to ensure that voters casting their ballots by mail have ready access to drop-off locations.

6. The availability of drop-off locations has become absolutely critical in the pandemic. While other means of voting may allow voters to cast their ballots outside of regular business hours, or in a manner that minimizes in-person interactions, or at a location that guarantees their ballot is submitted in time to be counted, drop-off locations provide the only means of voting that guarantee voters *all* of these things, ensuring that even those voters who are vulnerable to the worst complications of COVID-19 and rightfully concerned about the mounting delays in mail service by the USPS have safe and available means of returning their ballots to elections officials in time to be counted. In this vein, the nonpartisan U.S. Election Assistance Commission ("EAC") currently recommends at least one drop-off location for every 15,000 to 20,000 registered voters.

7. Governor Abbott has ignored this EAC guidance, as well as his constituents' grave concerns and what is plainly required to protect vulnerable Texans' ability to vote in this election. Yesterday—a mere *twelve days* before voting in Texas begins—he issued the October Proclamation, mandating that voters may only return their mail-in ballots to a single designated location in their county of residence ("Ballot Return Restriction"). In issuing this restriction, Governor Abbott threw a wrench in the counties' plans to decrease the burden on voters casting their ballots by mail by providing those voters with a convenient, reliable way to timely return their marked mail-in ballots.

8. Not only is the Ballot Return Restriction suppressive, it is also perplexing. It represents a drastic about-face to the position taken by the Texas government only *one day earlier*: On September 30, 2020, Texas Attorney General Ken Paxton represented to the Texas Supreme Court that the July Proclamation permitted multiple ballot drop-off locations in each county. As such, "the Secretary of State has advised local officials that the Legislature has permitted ballots

to be returned to any early-voting clerk office." *In re Hotze, et al.*, No. 20-0751, Brief in Supp. of Mandamus Petition at 5 (Tex. Sept. 30, 2020).

9. The Ballot Return Restriction is sudden, surprising, and surreptitious. It was mandated just days before the start of early voting in a general election that is expected to see the largest voter turnout in years, with an unprecedented number of voters casting their ballots by mail to avoid the risk of COVID-19 infection and serious complications or even death. Meanwhile, the USPS is overburdened and subject to increasing delays. Thus, many vulnerable voters whose only safe option is voting by mail will have to either (a) hope that USPS delivers their mail-in ballot to the county election office by the deadline or (b) travel great distances and wait in long lines to return their mail-in ballot at the single approved location in their county of residence. The former option poses a significant risk of disenfranchisement based on the unreliability of the postal service, and the latter is simply infeasible for elderly and disabled Texans with no or limited access to reliable transportation or those who have mobility issues. The latter option also exposes voters to the same risks that they were attempting to avoid in voting by mail.

10. In the following ways, the Ballot Return Restriction directly threatens the right to vote for countless lawful Texas voters. Plaintiffs therefore seek emergency relief from this Court to enjoin the unlawful Ballot Return Restriction.

JURISDICTION AND VENUE

11. Plaintiffs bring this action under 42 U.S.C. §§ 1983 and 1988 to redress the deprivation, under color of state law, of rights secured by the United States Constitution.

12. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the Constitution and laws of the United States.

13. This Court has personal jurisdiction over the Defendants, who are sued in their official capacities only.

14. Venue is proper in the U.S. District Court in the Western District of Texas pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events that gave rise to Plaintiffs' claims occurred there.

15. This Court has the authority to enter a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

PARTIES

16. LAURIE-JO STRATY is a 65-year-old citizen and resident of and registered voter in Dallas County. Ms. Straty is unable to vote in person because she is particularly vulnerable to the coronavirus due to her multiple sclerosis, which leaves her immunocompromised. She is also unable to stand in line to wait to vote in person because she has an inflamed Achilles tendon. Ms. Straty helps care for her 90-year-old parents, who live in a senior living home. She fears that if she were to vote in person, she would risk exposing them, and other residents of the care facility, to the coronavirus. Because Ms. Straty is aware of reports of widespread issues with USPS, she does not trust that her ballot will arrive on time and be properly counted if she mails it in. Prior to the Ballot Return Restriction, Ms. Straty planned to drop off her ballot in person at a location near her home, a trip that would have taken approximately 5 minutes each way. Because of the Ballot Return Restriction, however, that location is no longer available. Instead, Ms. Straty must drop off her ballot at a location that will require her to travel 20 minutes each way. Ms. Straty is concerned about long lines to drop off her ballot due to congestion at the single drop off location in the county.

17. The TEXAS ALLIANCE FOR RETIRED AMERICANS ("TARA") is incorporated in Texas as a 501(c)(4) nonprofit, social welfare organization under the Internal Revenue Code. The Alliance has over 145,000 members, composed of retirees from public and

private sector unions, community organizations, and individual activists. It is a chartered state affiliate of the Alliance for Retired Americans. TARA's mission is to ensure social and economic justice and the full civil rights that retirees have earned after a lifetime of work. The Ballot Return Restriction frustrates TARA's mission because it deprives individual members of the right to vote and to have their votes counted, threatens the electoral prospects of progressive candidates whose supporters will face greater obstacles casting a vote and having their votes counted, and makes it more difficult for TARA and its members to associate to effectively further their shared political purposes. TARA and its individual members intend to engage in voter assistance programs. And, for the past several months, TARA has participated in Dallas Votes, a coalition seeking, in part, to guarantee more drop-off locations so its Dallas members are able to guarantee the county's receipt of their marked mail-in ballots without shouldering the burden of traveling long distances and waiting in long lines. TARA would like to educate voters and conduct awareness campaigns about returning mail-in ballots to convenient locations as a superior alternative to returning ballots via USPS because, in increasing the likelihood that these voters' ballots will count, TARA fulfills its organizational mission. TARA is unable to present voters with a feasible alternative to returning mail-in ballots via USPS because the Ballot Return Restriction prevents county election administrators from offering voters convenient locations for personally delivering their mail-in ballots.

18. BIGTENT CREATIVE ("BigTent") is incorporated in California as an LLC. Plaintiff BigTent is a non-profit, non-partisan voting registration and get-out-the-vote (GOTV) technology organization. BigTent's mission is to use technology to simplify political engagement, increase voter turnout, and strengthen American democracy. It carries out this mission by channeling funds from donors to young people of color to organize within their own communities

using social media platforms. BigTent has registered more than 8,000 new voters throughout the United States for the upcoming November election. In Texas, BigTent has helped over 3,000 voters register to vote. Since the onslaught of COVID-19, BigTent has added additional information to its website; for example, during the primary elections, BigTent offered up-to-date, state-by-state information for voters whose primaries have been postponed, including Texas. The Ballot Return Restriction frustrates BigTent's mission because it presents Texans with significant obstacles in registering to vote, casting their votes, and having those votes counted, thus thwarting political engagement. Because of the burdens on returning absentee ballots created by Defendants, BigTent will be required to divert time and resources to educating its employees and influencers, updating the Texas-specific pages on its website to account for the Ballot Return Restriction, and funding influencer social media posts to inform Texas voters about these obstacles and how they can successfully overcome them. These efforts will reduce the time and resources BigTent is able to spend funding influencers to engage in voter registration efforts within Texas and organizing efforts in swing states. Any resources spent ensuring voters in Texas can successfully return their ballots necessarily takes away from the get-out-the-vote efforts which are crucially needed in other states.

19. Defendant Gregory Abbott is the Governor of Texas and is named as a Defendant in his official capacity. Governor Abbott issued the proclamation imposing the Ballot Return Restriction, and in doing so acted under color of state law at all times relevant to this action.

20. Defendant Ruth Hughs is the Secretary of State of Texas and is named as a Defendant in her official capacity. Secretary Hughs is the state's chief elections officer and, as such, is responsible for the administration and implementation of election laws in Texas, including

the Ballot Return Restriction at issue in this complaint. *See* Tex. Elec. Code § 31.001(a). The Secretary acted under color of state law at all times relevant to this action.

FACTUAL ALLEGATIONS

I. COVID-19's Impact on Early Voting

21. Virtually all aspects of life in our country today are affected by the unprecedented COVID-19 pandemic. In Texas alone, more than 752,501 people have been infected with confirmed cases of the virus; more than 1.8 million people have lost their jobs; and more than 15,823 people have lost their lives. Almost 70% of fatalities in the state have been of Texans age 65 or older, who, along with people that have certain underlying health conditions such as asthma, diabetes, and cancer, are at increased risk of suffering severe complications from COVID-19.

22. Though epidemiologists initially expected the rate of infection to decline during the summer months, Governor Abbott declined to extend early stay-at-home orders and, from mid-May to July, the State's positively rate tripled, from 6.99% to 20.8%. Thousands of new COVID-19 cases continue to be reported daily, and the rate of infection is expected to resurge this fall and winter.

23. Even without a statewide stay-at-home order in November, the continuing threat posed by the pandemic requires that self-isolation and social distancing remain the norm in order to protect the millions of Texans most vulnerable to the virus's worst complications.

24. The threat of infection, and the need to socially distance to prevent community spread of infection, has greatly affected this year's elections in Texas. This is particularly true for vulnerable voters—individuals age 65 and older and individuals with certain underlying health conditions. Casting a ballot at a polling location is not a viable option for these vulnerable voters; their only way to safely vote is by mail, returning their marked ballots either through USPS or at a ballot drop-off location.

II. The Need for Ballot Drop-Off Locations

25. Under the Texas Election Code, a voter's returned mail-in ballot must be postmarked by 7:00 p.m. on election day and received by the voter's county election administration by 5:00 p.m. the day after the election.

26. USPS advises that First-Class mail typically takes between two to five days to arrive at its destination even under normal circumstances. USPS has also recommended (in a pre-COVID-19 world) that jurisdictions ask their citizens to mail their ballots at least a week before ballots are due because of increased mail demands around the time of an election.

27. Now, in light of COVID-19, there has been a substantial increase in postal delays, and USPS has recently advised elections officials around the country that election mail will take seven to ten days to arrive at its intended destination.

28. The general counsel of USPS sent Defendant Hughs a letter "strongly recommend[ing]" a timeframe to ensure that ballots arrive to voters and are returned to the counties on time, but the timeframe is unworkable in Texas.

29. For example, USPS recommends that the Secretary have all voters submit their applications to vote by mail *at least fifteen days before* the election, though the deadline for submitting an application to vote by mail is eleven days before the election under the Texas Election Code.

30. USPS also recommends that the Secretary allow one week for the ballot to arrive to voters and one week for the voter's marked ballot to arrive back to the county.

31. But, as discussed above, the deadline to apply to vote by mail is October 23. Assuming the county immediately processes the many applications it will receive from voters on October 23—which is already after the deadline by which USPS "strongly recommends" that vote-by-mail applications should be received by the county—those voters may very well not receive

their ballots from the county until October 30. Assuming next that the voters receiving their ballots on October 30, mark those ballots, and put them back in the mail the same day, based on USPS's instructions and warning county elections administrators likely will not receive those marked ballots back until November 6, two days after the Texas Election Code's receipt deadline. This exact scenario has been illustrated again and again in past elections: the majority of late ballots in every election arrive within a few days of the ballot receipt deadline.

32. Increased delays at USPS are also attributable to the ongoing budgetary crisis, due to COVID-19, and operational changes that have limited overtime hours for employees and decommissioned mail processing equipment.

33. Currently, USPS is operating with significantly reduced staff as more and more employees fall victim to the virus: as of mid-August, nearly 10% of all postal workers—or approximately 63,000 of the agency's employees across the country—have tested positive for COVID-19.

34. Underfunded and understaffed, the USPS will be tasked with processing a much higher volume of mail than it is accustomed to processing for the November election.

35. The upshot of all this is that as USPS attempts to deliver an unprecedented number of vote-by-mail ballots across the country—both from county elections officials to voters, and then back again—the system will be under heightened pressure, causing increased delays and, ultimately, an increase in the number of ballots that are not received by the county election administrators before the ballot receipt deadline. Those ballots will be left uncounted, and the voters who cast them will be disenfranchised.

36. The enormous problems with USPS service since COVID-19 is no secret. Texans have already experienced delayed mail delivery across the state. As such, voters are increasingly

concerned that their mail-in ballots will not be received by the county election office in time to be counted. Texas mail-in voters understand that, due to delays, they may receive their ballots with insufficient time to mark and mail those ballots back by the deadline. Thus, to ensure that their ballots will be counted, many voters intend to personally return their mail-in ballots.

37. County ballot drop-off locations permit eligible vote-by-mail voters to drop off their ballots at a designated site rather than mail in their ballots via USPS. Drop-off locations are increasingly a staple of effective election administration. This year, drop-off locations are available in at least 34 states and Washington, D.C. These drop-off locations, when available, are heavily utilized. For example, in Colorado's 2016 general election, which was conducted by mail, nearly three-quarters of all ballots were returned to a drop-off location.

38. In Texas, county elections officials have been relying on and planning on continuing to rely upon expanded drop-off locations to decrease traffic and to guarantee that drop-off locations are closer, and thus more accessible, to mail-in voters.

39. For example, Harris County has already been operating 11 ballot drop-off locations to be open during early voting and on election day; Travis County has already been operating four such locations; and Dallas County was considering operating additional ballot drop-off locations before the issuance of the Ballot Return Restriction.

III. The Ballot Return Restriction

40. On July 27, 2020, Governor Abbott issued a proclamation permitting early voting to begin on Tuesday, October 13, and permitting voters to deliver their marked mail in ballots in person to an early voting clerk's office any time between October 13 up to and including election day, November 3, 2020. Counties therefore began preparing for a longer in-person early voting period and, at the same time, considered establishing additional mail-in ballot drop-off locations to ensure that voters casting their ballots by mail have ready access to drop-off locations.

41. Election administrators planned for multiple return locations because the size of some counties would make it difficult, if not impossible, for some voters to return their ballots to election administration headquarters in each county.

42. Despite county elections administrators' efforts, just yesterday Governor Abbott suddenly changed course and announced the Ballot Return Restriction, which is purportedly intended to "enhance[e] ballot security."

43. Neither Governor Abbott nor the Secretary have explained *how* the restriction enhances ballot security, and indeed the Restriction does not.

44. Whether voters can return their mail-in ballots at one county drop-off location or choose from one hundred locations, an election official is legally required to verify the voter's picture ID and the information on the ballot carrier envelope. Accordingly, there is already in place a procedure to protect against improper voting, which is, any event, exceedingly rare.

IV. The Ballot Return Restriction's Impact

45. By land mass, Texas is the largest state in the contiguous United States. By population, Texas is the second largest state in the Union, and is home to approximately 29 million residents.

46. Harris County alone covers over 1,703 square miles, making it larger geographically than the state of Rhode Island. The distance to drive across Harris County is equivalent to driving all the way through Massachusetts; clear across all of Puerto Rico; or nearly all the way across Taiwan. A boat ride the distance of Houston is equivalent to a boat ride from Cleveland, Ohio, to the Canadian side of Lake Erie.

47. According to the U.S. Census Bureau's population estimates, as of July 2019, Harris County alone is home to over 4.7 million people. If it were a state, it would be the 25th most populous state–larger than Kentucky, Oregon, Iowa, or Nevada (among 20 others). In fact, Harris

County has more people living in it than the states of Rhode Island, both Dakotas, Alaska, Vermont, and Wyoming combined.

48. Harris County's size is a fraction of Texas's largest county, Brewster, which covers over 6,000 square miles. Spread out amongst those 6,000 square miles is a population in which those aged 65 and older make up 25%, almost double the percentage of people aged 65 and older across the state's population.

49. And even at a quarter the size of Harris County, Travis County's population of 1.3 million residents is larger than the populations of Montana, Rhode Island, Delaware, South Dakota, North Dakota, Alaska, Washington, D.C., Vermont, and Wyoming. It is approximately 1,023 square miles.

50. The nonpartisan EAC, which issued a series of documents providing guidance for state elections officials on how to administer and secure election infrastructure in light of the COVID-19 pandemic, recommends at least one drop-off location per 15,000 to 20,000 voters.

51. Assuming that only 10% of Texas voters cast their ballots by mail in November—which vastly underestimates the expected rate in light of the pandemic, as evidenced by the increased rates of voting by mail in the July primary runoff—Harris County, with over 2 million registered voters, should have at least 10 ballot drop-off locations, and Travis County, with over 800,000 registered voters, should have at least 4 drop-off locations.

52. The EAC further suggests that election administrators "[c]onsider adding more drop-off locations to areas where there may be communities with historically low vote by mail usage," and stresses that drop-off locations should be allocated using demographic data and analysis, recognizing the differences in rural and urban populations, and recommends using U.S. Census Bureau tools "to help visualize where residents of your jurisdiction work or live to help

you see where drop-off locations might be particularly useful." That guidance applies to all of Texas, in which only about 6% of voters have cast their ballots by mail in any given election.

53. The Ballot Return Restriction does not take any of these recommendations into account. To the contrary, it blatantly disregards differences in population, geography, and demography that exist in Texas' 254 diverse counties, as well as the sheer number of voters in each county who will be voting by mail in November at unprecedented rates.

54. The Ballot Return Restriction's arbitrary burden on timely returning mail-in ballots places a significant burden on Texans' ability to safely vote in November. Voters will be forced to decide between mailing their ballots and risking loss or delay, voting in person and risking COVID-19 infection, or finding transportation to travel tens, hundreds, or even thousands of miles from their homes to wait in line with other voters to drop of their mail-in ballots. Despite their best efforts to navigate the perilous waters of the Texas vote-by-mail process, many voters will be disenfranchised.

55. This does not have to be the case. Permitting counties to operate more than one ballot drop-off location will reduce Texas voters' burden in returning their ballots and will make it safer for those voters to personally deliver their ballots while ensuring that those ballots are returned before the receipt deadline. On the other hand, Defendants have *no* interest in limiting the number of drop-off locations in every county.

FIRST CLAIM FOR RELIEF
U.S. Const. amends. 1, XIV
Undue Burden on the Right to Vote

56. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs below as though fully set forth herein.

57. Under the *Anderson-Burdick* balancing test, a court considering a challenge to a state election law must carefully balance the character and magnitude of injury to the First and

Fourteenth Amendment rights that the plaintiff seeks to vindicate against "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

58. The Ballot Return Restriction severely burdens the right to vote. At best, the Restriction requires Texans—millions of whom are vulnerable to severe complications from COVID-19—to travel long distances to avoid the health and safety hazards posed by voting in person and the risk that USPS will not deliver their ballots on time. At worst, they disenfranchise voters who cannot risk exposure to COVID-19 by voting in person but who also cannot travel the long distance to the single ballot drop-off location in their county. This is a particular concern for those Texans who receive their mail-in ballots shortly before election day because such voters may be rightfully concerned that their ballots will not be received in time to be counted.

59. Defendants can offer no justification that outweighs the significance of the burden here: the disenfranchisement of millions of Texans.

60. Defendants' stated reason for the Ballot Return Restriction—ballot security—is patently pretextual. In the October Proclamation, Governor Abbott pointed to no reason why having multiple drop-off locations, rather than one, will pose any threat whatsoever to the security of the ballots submitted at each location. In fact, the protocols in place at each drop-off locations are the same: an election official is legally required to verify the voter's picture ID and the information on the ballot carrier envelope.

61. Moreover, other state interests, including maintaining the health and safety of the electorate, which was Defendants' stated interest in issuing the July Proclamation, militate in favor

of *more* ballot drop-off locations in geographically large and highly populated counties. This interest cannot be advanced by Defendants' decision to open only *one* ballot drop-off location per county, no matter the county's size or population. Larger counties require additional ballot drop-off sites to enable voters to vote efficiently while maintaining recommended social distancing.

62. In short, the Ballot Return Restriction is not supported by *any* state interest, let alone one that is sufficiently compelling to justify the significant burdens on the right to vote. The Ballot Return Restriction therefore violates the First and Fourteenth Amendments.

SECOND CLAIM FOR RELIEF
U.S. Const. amend. XIV
Violation of Equal Protection

63. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs below as though fully set forth herein.

64. The Equal Protection Clause protects "the equal weight accorded to each vote and the equal dignity owed to each voter." *Bush v. Gore*, 531 U.S. 98, 104 (2000). Yet the Ballot Return Restriction, as applied, treats Texans differently depending on where they live: those that live in counties with bigger populations and counties with bigger land masses will be burdened more than those that live in counties with smaller populations and counties covering smaller geographic areas. As discussed above, there is no compelling, let alone rational, interest in treating these similarly situated voters differently.

65. The Ballot Return Restriction severely burdens voters by limiting ballot drop-off locations to one per county. The Ballot Return Restriction will require millions of voters to travel long distances to reach their ballot drop-off locations. While some voters will have the option to drop off their ballots close to home, others will have to travel substantially farther.

66. As discussed above, Defendants can advance no legitimate, let alone compelling, state interest to justify these severe burdens.

FOURTH CLAIM FOR RELIEF
Ku Klux Klan Act, 42 U.S.C. § 1985(3)

67. Plaintiffs reallege and incorporate by reference all prior paragraphs of this Complaint and the paragraphs below as though fully set forth herein.

68. 42 U.S.C. § 1985(3) prohibits conspiracies that have the purpose of "depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws" (the "Equal Protection Provision") or conspiracies "to prevent by force, intimidation, or threat," any lawful voter from supporting or advocating for any candidate in a presidential or congressional election (the "Support and Advocacy Provision").

69. The Ballot Return Restriction was designed to disenfranchise voters that Defendants, Republican politicians, believe are not likely to support Republican candidates. The Ballot Return Restriction has a disproportionate impact on older and more diverse voters, many of which typically vote for Democratic candidates. The barriers to voting placed by the Ballot Return Restriction will prevent many of these individuals from lawfully casting their ballots.

70. Defendants conspired with individuals in the Republican Party, including members of the Texas Republican Party and the Republican National Committee, to issue the Ballot Return Restriction in order to prevent lawful voting. They did so in order to deprive the impacted voters of the equal protection of the laws and deprive them of their rights.

71. The Ballot Return Restriction thus falls within the scope of Section 1985(3)'s Equal Protection provision, which provides a cause of action against anyone who "conspire[s] … for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws." 42 U.S.C. § 1985(3).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that the October Proclamation's Ballot Return Restriction is unconstitutional, and that county election administrators may establish, at their discretion, multiple locations where voters may return their marked mail-in ballots to secured ballot drop-off locations;

B. Preliminarily and permanently enjoin Defendants, and their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them, from taking any action to inhibit election administrators from offering drop-off locations as described;

C. Award statutory damages pursuant to 42 U.S.C. § 1985(3); and

D. Grant such other or further relief as the Court deems just and proper.

Dated: October 2, 2020

Respectfully submitted,

/s/ Skyler Howton

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**Pro hac vice applications forthcoming*

Exhibit F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS, LEAGUE OF UNITED LATIN AMERICAN CITIZENS, LEAGUE OF WOMEN VOTERS OF TEXAS, RALPH EDELBACH, BARBARA MASON, MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES, AND TEXAS LEGISLATIVE BLACK CAUCUS; Plaintiffs, v. GREG ABBOTT, in his official capacity as Governor of Texas, RUTH HUGHS, in her official capacity as Texas Secretary of State, DANA DEBEAUVOIR, in her official capacity as Travis County Clerk, CHRIS HOLLINS, in his official capacity as Harris County Clerk; JOHN W. OLDHAM, in his official capacity as Fort Bend County Elections Administrator Defendants.	Civil Action Case No. 1:20-cv-01006-RP

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. On June 29, 2020, Defendant Governor Greg Abbott argued in federal court that "precipitous changes to the [election] rules can cause 'confusion' and even undermine public confidence in the outcome of the election itself."

2. Three months later, with voting underway in Texas, Governor Abbott made exactly the type of "precipitous change" that he had cautioned against. On October 1, 2020, Governor Abbott issued an order forcing county election officials to offer their absentee voters no more than one physical drop-off location at which to return their ballot. In the State's largest counties,

including Harris and Travis counties, the October 1 order meant that the number of drop off location would respectively be reduced from 11 and 4 locations.

3. For Texas' absentee voters—including those who had already requested or received their absentee ballot with the expectation that they would be able to use one of many drop-off locations offered by their county—the effect of the October 1 order is to unreasonably burden their ability to vote. They will have to travel further distances, face longer waits, and risk exposure to COVID-19, in order to use the single ballot return location in their county. And, if they are unwilling or unable to face these new burdens, they will have to rely on a hobbled postal mail system—that has expressed a lack of confidence in its own ability to timely deliver the mail—and hope that their ballot will be delivered in time to be counted. Inevitably, for some absentee voters, their hope will be misplaced, and their ballot will not be counted.

4. In the midst of an election that is already underway, forcing such new burdens on voters who relied on a different set of election rules to make their voting plan, is unreasonable, unfair, and unconstitutional. And, as Governor Abbott recently argued, it engenders voter confusion and undermines the public's confidence in the election itself.

5. This Court must therefore immediately enjoin Governor Abbott's October 1 order, and restore the status quo to Texas's already-occurring election.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.

7. This Court has personal jurisdiction over Defendants, who are elected or appointed officials for the State of Texas or Texas Counties, and are residents of the State of Texas.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

9. This Court has authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

PARTIES

10. Plaintiff League of United Latin American Citizens ("LULAC") is the oldest and largest national Latino civil rights organization in the United States. LULAC is a non-profit membership organization with a presence in most of the fifty states, including Texas. It was founded with the mission of protecting the civil rights of Latinos, including voting rights. LULAC participates in civic engagement activity, such as voter registration, voter education, and voter turnout efforts, throughout the United States.

11. LULAC has been recognized and accepted as an organizational plaintiff protecting Latino rights in federal courts across the country, including the United States Supreme Court and the U.S. District Court for the Western District of Texas.

12. Plaintiff Texas LULAC is the Texas chapter of the League of United Latin American Citizens. Plaintiff Texas LULAC was founded in Texas in 1929. Texas LULAC has over 20,000 members across the state of Texas. Texas LULAC's members include registered voters who are eligible to and plan to vote absentee in the current general election.

13. Texas LULAC regularly engages in voter registration, voter education, and other activities and programs designed to increase voter turnout among its members and their communities. These efforts are key to LULAC's mission of increasing civic participation of its members. Texas LULAC commits time, personnel, and resources to these efforts throughout Texas.

14. In light of the coronavirus pandemic, many eligible Texas LULAC members intend to vote absentee rather than vote in person and risk exposure to COVID-19. And because of

widespread reports of mail delays in mail processed by the United States Postal Service, many Texas LULAC members have planned to drop off their ballots at one of the drop-off locations provided by, or planned to be provided by, Texas elections officials, to ensure their ballots are timely received an counted.

15. In light of the Governor's precipitous announcement that counties may only operate a single absentee ballot drop-off location, Texas LULAC will be forced to divert resources away from its ongoing efforts to mobilize its members and their communities to vote and towards educating voters about the impact of the Governor's order eliminating ballot drop-off locations and prohibiting counties from providing more than one location where voters can drop off their absentee ballots.

16. The League of Women Voters of Texas (LWVTX) is a nonprofit membership organization focused on nonpartisan, grassroots civic engagement. LWVTX's mission is to empower voters and defend democracy. LWVTX encourages its members and all Texans to be informed and active participants in government, including by registering and voting in local, statewide, and national elections. LWVTX has approximately 3,000 members in Texas, many of whom are eligible to vote absentee and plan to do so in the upcoming election, including by returning their absentee ballots to a drop box.

17. In light of the Governor's order limiting the number of absentee ballot drop-off locations to one per county, many Texas LULAC and LWVTX members will lack reasonable access to a drop-location and thus will be unable to timely cast their absentee ballots, absent federal court intervention. In-person voting is simply not an option for many absentee-eligible Texas LULAC and LWVTX members. Elderly, sick, and disabled members—the only categories of persons eligible to vote absentee by dropping off their ballot in person—simply cannot risk deadly

exposure to COVID-19. As such, absentee ballots are the only option for many eligible Texas LULAC and LWVTX members to exercise the franchise without jeopardizing their own health or the health of their families. Furthermore, given the well-reported delays in mail processed by the United States Postal Service, many Texas LULAC and LWVTX members will be denied the right to vote unless they travel long distances and wait in crowded lines (something they cannot do without risking their health) to drop off their ballots.

18. Plaintiff, Mexican American Legislative Caucus, Texas House of Representatives (hereinafter MALC), is the nation's oldest and largest Latino legislative caucus. MALC is a non-profit and non-partisan organization established to serve the members of the Texas House of Representatives and their staffs in matters of interest to the Mexican American community of Texas, in order to form a strong and cohesive voice on those matters in the legislative process, including voting rules. Many of its members are elected from and represent constituencies in majority Latino districts and many of its members are Latino. Moreover, some of the members reside in large population counties most affected by the Governor's order.

19. MALC and some of its members have expended or were in the process of devoting resources to educate voters about the procedures for using mail-in ballots, the eligibility rules of mail-in voting, and the availability of multiple locations for drop off of mail-in ballots within a County, where appropriate. Furthermore, at least one member intended to drop off their voted mail ballot at a mail ballot drop-off location that is not the early voting clerk office.

20. Texas Legislative Black Caucus (hereinafter TLBC) is a non-profit and non-partisan organization established to serve the members of the Texas House of Representatives and their staffs in matters of interest to the African-American community of Texas, in order to form a strong and cohesive voice on those matters in the legislative process, including voting rules. Many

of its members are elected from and represent constituencies in majority African American majority districts and many of its members are African American. Moreover, some of the members reside in large population counties most affected by the Governor's order.

21. TLBC and some of its members have expended or were in the process of devoting resources to educate voters about the procedures for using mail-in ballots, the eligibility rules of mail-in voting and the availability of multiple locations for drop off of mail-in ballots within a County, where appropriate. Furthermore, at least one member intends to drop off their voted mail ballot at a mail ballot drop-off location that is not the early voting clerk office.

22. Ralph Edelbach is an 82-year old Texas voter who lives in Cypress, Texas. Mr. Edelbach plans to vote by mail in this November's election. Because of his concerns around whether the Postal Service will be able to timely and safely transmit his absentee ballot for counting, Mr. Edelbach planned to drop his ballot off at one of the eleven Harris County ballot return locations. Prior to Governor Abbott's October 1 order, the nearest drop-off location to Mr. Edelbach's home was about 16 miles away. That location has been forced to close by the Governor's order, and now, the nearest drop-off location to Mr. Edelbach will be about 36 miles away. As a result, if he wants to drop his ballot off in person—which is his preference—Mr. Edelbach will have to drive nearly an hour-and-a-half roundtrip in order to do so. Other voters in Harris County in similar circumstances have already dropped off their ballots at previously authorized return locations.

23. Barbara Mason is a 71-year-old Texas voter who lives in Austin, Texas. She is an annual absentee voter and plans to vote by mail in this November's election. Before Governor Abbott's October 1 order, Ms. Mason planned to use one of the four Travis County drop-off locations to return her absentee ballot because she is concerned that she will not have enough time

to receive, consider, vote, and timely return her ballot by mail. Indeed, Ms. Mason is especially worried that given its recent mail delivery problems, the Postal Service will not be able to timely and safely deliver her absentee ballot for counting. However, since the number of drop off locations in Travis County has been reduced to one, Ms. Mason is concerned about the logistical challenges that using the single location will pose. For example, Ms. Mason will need to drive approximately 30 minutes each way to drop off her ballot, as well as the time that she will need to spend waiting to reach the front of the drop-off line. Ms. Mason is also concerned that by having to spend additional time trying to return her ballot at the single drop off location, she may be forced to unnecessarily expose herself to COVID-19. Other voters in Travis County in similar circumstances have already dropped off their ballots at previously authorized return locations.

24. Defendant Greg Abbott is the Governor of Texas and, pursuant to Article IV, Section I of the Texas Constitution, is the chief executive officer of the State of Texas. He is sued in his official capacity.

25. Defendant Ruth Hughs is the Texas Secretary of State, and pursuant to Tex. Election Code § 31.001, is the chief election officer of the state. She is sued in her official capacity.

26. Defendant Dana DeBeauvoir is the Travis County Clerk and Election Administrator. She is sued in her official capacity.

27. Defendant Chris Hollins is the Harris County Clerk and Elections Administrator. He is sued in his official capacity.

28. Defendant John W. Oldham is the Fort Bend County Elections Administrator. He is sued in his official capacity.

FACTUAL ALLEGATIONS

29. As this Court is well aware, America is living through an unprecedented pandemic. On March 13, 2020, outbreak of the pandemic disease caused President Trump to declare a national state of emergency, and Governor Abbott to declare a state of disaster in Texas. Both declarations remain in place to this day, and there is no discernible end to the public health crisis caused by COVID-19 in sight. And Texas has been among the hardest hit states in the country. Texas has had over 750,000 coronavirus cases and nearly 16,000 fatalities. Over 2,500 of those fatalities were in Harris County alone. The coronavirus crisis is not abating. One September 30, Texas reported a recent high of 5,335 new cases. On October 1, Texas reported 3,234 new cases and 115 deaths.

30. The dangers presented by COVID-19 affect everyone but do not fall evenly on all populations. While the Latino community only represents 39.7% of the Texas population overall, they represent over 56% of fatalities in Texas.

31. And the risk of coronavirus is well-known to be of particular concern for older voters, for whom it is too often deadly. Approximately 10,800 of the nearly 16,000 fatalities in Texas are among those 65 and older, a demographic that is categorically eligible to vote absentee and is expected to do so in record numbers this year in light of the serious risks in-person voting poses for older voters.

32. The State of Texas strictly limits who is eligible to vote absentee to the following categories: individuals who (1) will be away from their county on Election Day and during early voting; (2) are sick or have a disability; (3) are 65 years of age or older on Election Day; or (4) are confined in jail, but eligible to vote. Tex. Code §§ 82.001; 82.002; 82.003; 82.004. The Texas Supreme Court has held that lack of immunity to COVID-19 is not a "disability" under the Texas election code but "a voter can take into consideration aspects of his health and his health history

that are physical conditions in deciding whether, under the [COVID-19] circumstances, to apply to vote by mail because of disability."

33. All restrictions on absentee voting impact only those eligible to vote absentee. And restrictions on in-person drop-off locations for absentee ballots affect *exclusively* older, or sick voters, and voters with disabilities that prevent them from voting in person. These individuals already face barriers to voting that are seriously exacerbated by the COVID-19 crisis.

34. In ordinary times, Texas only allows an absentee ballot to be delivered by one of three means: (1) mail; (2) common or contract carrier; or (3) in person at an early voting clerk's office *"only while the polls are open on election day."* Tex. Elec. Code 86.0006(a), (a-1).

35. On July 27, 2020, Governor Abbott issued an executive order recognizing that having such limited drop-off options for absentee voters was not viable or desirable given the dramatic rise in absentee voting expected for the November 3, 2020 election. In order to "ensure that elections proceed efficiently and safely when Texans go to the polls" this election cycle, Governor Abbott extended in-person early voting to begin on October 13, 2020 instead of October 19, 2020.

36. In the same order, Governor Abbott suspended the restriction in Texas Election Code 86.006 that only allows in-person delivery of absentee ballots on Election Day: "I further suspend Section 86.006(a-1) of the Texas Election Code, for any election ordered or authorized to occur on November 3, 2020, to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early voting clerk's office prior to and including on election day."

37. In so doing, the Governor specifically found that "Sections 85.00 1(a) and 86.006(a-1) of the Texas Election Code [the in-person delivery restriction] would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster[.]"

38. Since July 27, 2020, election officials and voters have made their election administration and voting plans accordingly.

39. In recent days, absentee voting has begun in earnest. Local election officials began sending out absentee ballots to voters in September.

40. In accordance with the Governor's order and to ensure safe and accessible voting for all Texans, counties had begun to roll out multiple absentee voting drop-off locations, particularly in counties that are both geographically large and populous. County election officials were designing plans to ensure that absentee voters will have reasonable access to those locations and that drop-off locations will not be overcrowded, which would pose a serious risk for absentee voters. By definition, absentee voters dropping off their ballots in-person are older, sick, or have disabilities that prevent them from voting in person, and thus at particularly high risk of COVID-19. Importantly, the public has been planning to use these locations. Now, hundreds, if not thousands of voters, have already utilized them. In some counties, lines have already formed during working hours to drop off voted ballots.

41. Harris County was among the earliest counties to act. By August, it had established that its 11 drop-off locations open on Election Day for the July elections would be operational for absentee ballot drop-offs "beginning whenever [voters] receive their ballots and continuing through Election Day, November 3, at 7:00 PM." Over 4 million Texans reside in Harris County, which spans about 1,777 square miles. Harris County is a majority-minority county. Over 40% of residents identify as Latino and almost 20% of residents identify as Black.

42. Earlier today, October 1, Travis County followed suit announcing the open of four drop-off locations. Over 1.2 million Texans reside in Travis County, which spans about 1,023

square miles. Travis County is also very diverse, with a population that is approximately one-third Latino and over 8 percent Black.

43. And just minutes before the Governor issued his executive order, Fort Bend had announced its plan to open several absentee ballot drop-off locations. Over 500,000 Texans live in Fort Bend, which spans about 885 square miles. Fort Bend is a majority-minority community. Together, the Latino, Asian, and Black communities of Fort Bend make up over 60 percent of the population.

44. Upon information and belief, there have been no security issues with these drop-off locations, all of which have been staffed with authorized election officials capable of checking voters' identification, as required by Texas Election Code 86.006(a-1).

45. Upon information and belief, absent Governor Abbott's order, other diverse, populous, and physically expansive counties would establish more than one drop-off location to ensure equal and safe access to drop-off locations.

46. However, on October 1, 2020, Governor Abbott issued an executive order precipitously requiring the closure of any absentee ballot drop-off locations in excess of *one location per county* as of October 2, 2020 and prohibiting the establishment of any absentee ballot drop-off locations in excess of one per county. The order also requires the early voting clerk to allow poll watchers to observe, in accordance with all applicable laws and regulations, the absentee voting by drop-off process, including the presentation of identification.

47. Upon information and belief, election officials were given *no notice* that they would be required to change their election operations in under 24 hours.

48. Indeed, election officials had no reason to question their election plans. Just yesterday, Texas Attorney General Ken Paxton submitted a brief to the Texas Supreme Court on behalf of Defendant Hughs stating:

> Finally, the Court asks whether, "in light of the Governor's July 27, 2020 proclamation, . . . allowing a voter to deliver a marked mail ballot in person to any of [the] eleven annexes in Harris County violates Texas Election Code section 86.00[6](a-1)." The Government Code generally provides that the singular includes the plural. *See* Tex. Gov't Code § 311.012(b). Nothing in section 86.006(a-1) overcomes that presumption or otherwise indicates that "office," as used in section 86.006(a-1), does not include its plural, "offices." Accordingly, the Secretary of State has advised local officials that the Legislature has permitted ballots to be returned to any early-voting clerk office. *See* Attachment B (email dated Aug. 26, 2020).

49. Thus, Governor Abbott's October 1 executive order does not merely suspend section 86.006(a-1) but concurrently *adds* a one-location-per-county rule that the Texas Attorney General admits is incongruous with the statutory text.

50. Governor Abbott's October 1 order did *not* determine any change in circumstances surrounding the COVID-19 pandemic and the need to increase voting options in response. Indeed, Governor Abbott reiterated his finding that "strict compliance with the statutory requirements in Sections 85.001(a) and 86.006(a-l) of the Texas Election Code would prevent, hinder, or delay necessary action in coping with the COVID- 19 disaster[.]"

51. Governor Abbott's order provides no justification for the sudden imposition of this harsh restriction except an *ipse dixit* statement that it is "appropriate to add ballot security protocols for when a voter returns a marked mail ballot to the early voting clerk's office[.]" But the Governor identified no security benefit to restricting the number of properly staffed ballot drop-off locations in a county and indeed there is none.

52. This order comes while absentee voting, including at drop-off locations, is already in progress and voters like Plaintiffs Edelbach and Mason, as well as many Texas LULAC and LWVTX members, have already made their voting plans.

53. The impact of this eleventh-hour decisions is momentous, targets Texas' most vulnerable voters—older voters, and voters with disabilities—and results in wild variations in access to absentee voting drop-off locations depending on the county a voter resides in. It also results in predictable disproportionate impacts on minority communities that already hit hardest by the COVID-19 crisis.

54. Officials in Harris and Travis counties have made clear the negative impact this will have on their voters. In a statement, Harris County Clerk Chris Hollins stated:

> The Governor's previous proclamation gave voters more options to vote safely during the global pandemic and alleviated concerns over mail delivery to ensure that every vote is counted. I applauded that proclamation. Going back on his word at this point harms voters and will result in widespread confusion and voter suppression. Many mail ballots have already been dropped off by voters across Harris County, and multiple drop-off locations have been advertised for weeks.
>
> Our office is more than willing to accommodate poll watchers at mail ballot drop-off locations. But to force hundreds of thousands of seniors and voters with disabilities to use a single drop-off location in a county that stretches over nearly 2,000 square miles is prejudicial and dangerous.

Travis County Clerk Dana DeBeauvoir has rung similar alarm bells about the impact on her county.

55. The ten largest counties by total land area in the State of Texas are all predominantly minority counties. The largest, Brewster County, is 45.2% Latino, the second largest, Pecos County, is 69% Latino, the third largest, Hudspeth County, is 76.9% Latino, the fourth largest, Presidio County is 82% Latino, the fifth largest, Culberson County is 72.9% Latino, the sixth largest, Webb County is 95.4% Latino, the seventh largest, Val Verde County is 82.3% Latino, the eight largest, Crockett County, is 66% Latino, the ninth largest, Reeves County, is

74.6% Latino, and the tenth largest, Terrell County, is 51.4% Latino. The percentage of Latino residents in each of these counties is notably larger than the percentage statewide, which is only 39.7%.

56. Similarly, seven out of the ten most populous counties in the state have a higher percentage of either Latino or Black residents than the state average.

57. Harris County, the state's most populous county, is 43.7% Latino and 20% Black. It is also home to 25% of Black residents and 18% of the state's Latino population. Governor Abbott's recent order reduced the number of absentee ballot drop-off locations in Harris County from 11 to 1.

58. Travis County is the fifth most populous county in the state, and is 33.6% Latino and 8.9% Black. Prior to Governor Abbott's order, Travis County voters could drop off their absentee ballots at 4 different locations. That number has now been reduced to 1.

59. Texas's other heavily populated counties are also likely to be disproportionately impacted by the drastic limit on drop-box locations. Given the demographics of theses counties, this impact is likely to fall disproportionately on Black and Latino voters. For example, the second most populous county, Dallas County, is 40.3% Latino and 23.6% Black. The third most populous county, Tarrant County, is 29.5% Latino and 17.9% Black. The fourth most populous county, Bexar County, is 60.7% Latino and 8.6% Black. The eighth most populous county, Hidalgo is 92.5% Latino. The ninth most populous county, El Paso County, is 82.9% Latino and 4% Black. Finally, the tenth most populous county, Fort Bend County, is 24.9% Hispanic or Latino and 21.3% Black.

60. The importance of drop-off locations for absentee ballots for voters in these counties, and across Texas, cannot be overstated. This is particularly so given the current pandemic

conditions that make it especially dangerous for elderly voters and voters with disabilities that prevent them from voting in person—the only voters affected by the October 1 order—and U.S. Postal Service recommendations that cannot guarantee timely delivery of absentee ballots on the timeline provided by Texas statute.

61. Under Texas law, voters can request absentee ballots until 11 days before Election Day. Those absentee ballots must be *received* by Election Day under Texas law, although mailed ballots that are postmarked by 7:00 p.m. on Election Day will be accepted if received by elections officials by 5:00 p.m. the next day.

62. But the U.S. Postal Service (USPS) recommends that that voters request mail-in ballots no later than 15 days before Election Day. Thus, there is a four-day gap between Texas law and USPS guidelines wherein U.S.P.S. will not promise timely delivery of absentee ballots. As a result, Texas voters will receive their absentee ballots after it is too late for them to safely return them by mail and be confident they will be counted.

63. Moreover, USPS has experienced substantial and high-profile delays in service in recent months, sparking several lawsuits concerning USPS's readiness to deliver voters' ballots in a timely fashion. These delays—which have occurred in Texas as well as across the country—have understandably shaken some voters'—including Plaintiffs Edelbach's and Mason's—confidence in leaving their vote in the hands of USPS. These voters seek to drop off their absentee ballots in-person at one of the locations established by their counties. But, under Governor Abbott's order, many of these locations will be unjustifiably shuttered leaving voters with wildly different access to absentee voting drop-off locations depending on the county they reside in.

64. The Fifth Circuit has recently cautioned against changes to election processes this late in the election calendar, including a decision just yesterday. This change is an affront to recent Fifth Circuit precedents involving the state's election rules.

CAUSES OF ACTION

Count 1
Violation of Plaintiffs' Fundamental Right to Vote
First and Fourteenth Amendments
42 U.S.C. § 1983

65. Plaintiffs reallege the facts set forth in paragraphs 1-61 above.

66. "There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440–41 (2014). The Supreme Court has recognized that "voting is of the most fundamental significance under our constitutional structure" and the right to an effective vote is protected by the Equal Protection Clause of the Fourteenth Amendment. See *Burdick v. Takushi*, 504 U.S. 428, 433-44 (1992). Indeed, the right to vote is the "fundamental political right . . . preservative of all rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

67. When analyzing the constitutionality of a restriction on voting, the Court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

68. When a burden on the right to vote is severe or discriminatory, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

69. Texas LULAC and LWVTX members, as well as individual Plaintiffs, in Texas have a fundamental right to vote under the First and Fourteenth Amendments to the Constitution of the United States. Where the operation of an election law is alleged to cause a deprivation of such a fundamental right, the court "must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment that the plaintiff seeks to vindicate against eh precise interest put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

70. Texas's limit on absentee ballot drop-boxes ensures that many disabled and elderly voters—who cannot safely vote in person—will have to travel long distances and suffer crowded drop-off locations in order to drop off their absentee ballots. And for those who receive their absentee ballots close to Election Day, they will not be able to return those ballots by mail with any confidence they will be counted.

71. Governor Abbott has provided no meaningful justification for the one-per-county limit on drop-off locations. The limit advances no security goals, despite Governor's unexplained invocation of security in the October 1 order.

72. The limitation on absentee ballot drop-off locations unconstitutionally burdens the fundamental right to vote of Texas voters who have a right to vote by absentee, including individual Plaintiffs and Texas LULAC and LWVTX members, in violation of the First and Fourteenth Amendments to the Constitution.

Count 2
Arbitrary Disenfranchisement in Violation of the Fourteenth Amendment to the United States Constitution
42 U.S.C. § 1983

73. Plaintiffs' repeat and reallege paragraphs 1-61 above.

74. "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v Gore*, 531 U.S. 98, 104-05; *see also id.* at 106 (finding that voting procedures that "vary not only from county to county but indeed within a single county" are not "sufficient [to] guarantee[] equal treatment"); *see, e.g.*, *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.").

75. Defendants' insistence that every county in Texas provide only a single absentee ballot drop box—regardless of geographical size or population—*requires* that counties provide voters with disparate access to the franchise. Texas's 254 counties vary dramatically in both physical size and population. The use of county lines as the delineation for the number of voting resources that may be provided is therefore arbitrary. As a result of the October 1 order, eligible absentee voters like Plaintiffs Edelbach and Mason, as well as Texas LULAC and LWVTX members, will face disparate burdens on their right to vote based entirely on which county the voter lives in, or on *where* they live in a particular county in relationship to the single absentee ballot drop box allowed under Defendants' order.

76. Defendants' elimination of absentee ballot drop-off locations and limit of such drop-off locations to one per county cannot withstand even rational basis review.

77. Defendant's elimination of absentee ballot drop-off locations limit of such drop-off locations to one per county *requires* arbitrary treatment of voters, creates disparate burdens on voters across and within counties, and allows arbitrary disenfranchisement all in violation of the Equal Protection Clause of the Fourteenth Amendment.

Count 3
Race and Language Minority Discrimination,
Section 2 of the Voting Rights Act
52 U.S.C. § 10301

78. Plaintiffs reallege the facts set forth above in paragraphs 1-61.

79. Texas's Latino voters are particularly susceptible to contracting and dying from COVID-19. Latino voters' increased susceptibility to the dangers of COVID-19 is directly tied to social and historical conditions stemming from discrimination.

80. Texas's limit of one-per-county for absentee ballot drop-off locations will have a disproportionate impact on absentee-eligible Texas LULAC members and other Latino voters living in densely populated counties like Harris and Travis, and in large but geographically dispersed counties like Webb, who wish to cast an absentee ballot without subjecting themselves to the risk of contracting COVID-19 or the risk that their mailed ballot will arrive too late to be counted.

81. Texas's arbitrary one-per-county limit on ballot drop-off locations violates Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, because it results in the denial of the right to vote on account of race and language minority status, insofar as, under the totality of the circumstances, LULAC Plaintiffs and minority voters are denied an equal opportunity to participate effectively in the political process.

82. Texas's limits on absentee drop-off locations violate Section 2 because they deny and abridge the right to vote on account of race and language minority status.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

a. Issue a declaratory judgment that Governor Abbott's October 1 order limiting absentee voting drop-off locations to one per county violates the First and Fourteenth Amendments and the Voting Rights Act;

b. Grant preliminary and permanent injunctive relief restraining Defendants Abbott and Hughs from enforcing, and the Defendant County Election Officials from implementing, Governor Abbott's October 1 order limiting absentee voting drop-off locations to one per county;

c. Award Plaintiffs their costs, expenses, and reasonable attorneys' fees incurred in the prosecution of this action, as authorized by the Voting Rights Act and the Civil Rights Attorneys Fees Awards Act, 52 U.S.C. § 10310(e) and 42 U.S.C. § 1988.

d. Grant such other equitable and further relief as the Court deems just and proper, and as may be necessary to afford Plaintiffs the fully relief to which they are entitled under the United States Constitution and the Voting Rights Act.

Dated: October 5, 2020

Respectfully submitted,

/s Chad Dunn

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CERTIFICATE OF SERVICE

I certify that on October 5, 2020, the foregoing was served on all parties of record registered for CM/ECF notifications, and is also being provided by e-mail to the following counsel for Defendants.

Defendants Abbott and Hughes: Patrick Sweeten (patrick.sweeten@oag.texas.gov)

Defendant Debeauvoir: Sherine Thomas (sherine.thomas@traviscountytx.gov)

Defendant Hollins: Susan Hays (hayslaw@me.com)

Defendant Oldham: Justin Pfeiffer (justin.pfeiffer@fortbendcountytx.gov)

/s/ Chad W. Dunn
Chad W. Dunn

Exhibit G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, Plaintiffs, v. GREG ABBOTT, in his official capacity as Governor of Texas, *et al.*, Defendants.	Civil Action No. 1:20-cv-1006-RP

PLAINTIFFS' *EMERGENCY* MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

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INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs respectfully move the Court for a temporary restraining order and preliminary injunction on Counts 1 and 2 of their Complaint to enjoin Defendants from enforcing the portion of Governor Abbott's October 1, 2020 Executive Order (the "Governor's Order") limiting Texas county election officials to providing voters with just *one* absentee ballot drop-off site per county. Because of the urgency of this matter, Plaintiffs request that the Court enter a temporary restraining order to remain in effect pending a hearing and resolution of Plaintiffs' motion for a preliminary injunction, in order to return to the status quo *ex ante*—prior to issuance of the October 1 Order—pending the Court's consideration of this case.[1]

The Governor's Order forced counties election administrators to close—with less than a day of notice—any additional drop-off sites, even though they were already in use and had been advertised to voters, based solely on unexplained "security" concerns that have no basis in fact. That action violates Plaintiffs' First and Fourteenth Amendment rights by posing an undue—and arbitrarily unequal—burden on their right to vote that is not justified by any state interest.

FACTUAL BACKGROUND

I. The Governor's July 27 Order Expanding Early Voting Days and Permitting Absentee Ballot Drop-Off Prior to Election Day

On July 27, 2020, Governor Greg Abbott issued an Executive Order—using his emergency powers—extending the number of early in-person voting days by one-week in order to allow election officials to "implement appropriate social distancing and safe hygiene practices," and as

[1] As evidenced in the Certificate of Service, Plaintiffs' counsel have provided notice to Defendants' counsel of this Motion, and have provided declarations demonstrating the immediate and irreparable harm that will result to movant if a temporary restraining order is not expeditiously entered pending resolution of Plaintiffs' motion for a preliminary injunction. *See* Fed. R. Civ. P. 65(b)(1)(A) & (B).

relevant here, providing that Texas absentee voters could "deliver a marked mail ballot in person to the early voting clerk's office prior to and including on election day." Ex. 1 (July 27 Order). In issuing the Order, Governor Abbott stated that "it is necessary that election officials implement health protocols to conduct elections safely and to protect election workers and voters," and that "strict compliance with the statutory requirements . . . of the Texas Election Code would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster." *Id.*

In light of Governor Abbott's July 27th order, multiple Texas Counties either opened or planned to open mail-in ballot drop-off locations at early voting clerk's offices throughout their respective counties. The Harris County Clerk, for example, opened 11 locations for voters across the county to drop off their mail-in ballots, *see* ECF No. 8 ("Hollins Decl.") ¶ 14, the Travis County Clerk opened 4 locations, Ex. 15 (Travis County Social Media) and the Fort Bend County Clerk announced that his office would soon be opening multiple locations, Ex. 16 (Fort Bend Statement). Defendant Hughs took no issue with county clerks opening multiple absentee ballot return locations, and instead, explicitly advised county clerks that it was permissible. Indeed, on September 30, 2020, the State of Texas told the Texas Supreme Court that, "the Secretary of State has advised local officials that the Legislature has permitted ballots to be returned to any early-voting clerk office." Ex. 2 (SOS Brief) at 5. Similarly, no other Defendant in this litigation raised *any* ballot integrity concerns about county clerks opening multiple absentee ballot return locations, despite knowing of counties' intention to do so since shortly after the July 27 order was issued,[2]

[2] *See*, Shelley Childers, *Harris Co. Clerk Responds to Mail-In-Ballot Warning from USPS*, ABC13 (August 14, 2020) (noting that Harris County would have 11 annex offices open to accept voters' absentee ballot in advance of November 3), https://abc13.com/2020-election-mail-in-ballot-usps-mailing-fraud/6371514/.

and despite knowing that for the July 14, 2020 primary election, at least some county clerks had also made multiple ballot return locations available (albeit only on Election Day itself).[3]

II. October 1 Order

On October 1—one day after the Secretary advised the Supreme Court of Texas that voters could lawfully return their absentee ballots to any early-voting clerk office in the county, and just a few minutes after the Fort Bend County Clerk announced additional drop-off sites—Governor Abbott issued an Executive Order limiting each county to "a single early voting clerk's office location that is publicly designated by the early voting clerk." Ex. 3 (Oct. 1 Order). Governor Abbott justified this change as being, "appropriate to add ballot security protocols for when a voter returns a marked mail ballot to the early voting clerk's office." *Id.* But no added "security protocols" are actually included in the Governor's Order.

The Governor's Order gave Harris and Travis counties less than 24 hours-notice to close their satellite ballot drop-off locations. The order did not explain how limiting the number of ballot drop-off locations meshed with its stated goal of "using the least restrictive means to protect the health and safety of Texans." Ex. 3 (Oct. 1 Order). And, because it was issued *after* voting was *already underway* across the state, the order also had to clarify that any absentee ballot delivered to a satellite drop off location prior to October 2, 2020 would "remain subject to the July 27, 2020 proclamation," *i.e.*, countable. *Id.*

[3] *See, e.g., Voters Can Drop Off Their Voting by Mail Ballots at These 11 Locations Across Harris County on Election Day*, KPRC2 (July 14, 2020) (identifying the 11 absentee ballot return locations open in Harris County on July 14, 2020), https://www.click2houston.com/news/local/2020/07/14/voters-can-drop-off-their-vote-by-mail-ballots-at-these-11-locations-across-harris-county-on-election-day/.

III. The Burden on Voters

This Order will impose burdens on eligible absentee voters, including individual Plaintiffs and Organizational Plaintiffs members. *See, e.g.*, Ex. 10 (Edelbach Dec.); Ex. 11 (Mason Dec.); Ex. 17 (Chimene Dec.); Ex. 12 (Golub Dec.); and Ex. 18 (Berg Dec.); *see also* Ex. 19 (Smith Report) ¶¶ 19-25, 28-32; Ex. 20 (Barreto Report) ¶¶ 30-44. Furthermore, the burdens faced by voters will vary significantly, based solely on what county they live in and where in the county they live. *See, e.g.*, Ex. 19 (Smith Report) ¶¶ 43-48.; Ex. 20 (Barreto Report) ¶¶ 30-44.

Harris County has 4,713,325 people—more people than 26 states, Puerto Rico, and the District of Columbia—spread over 1,800 square miles. Travis County has 1,273,954 people—more people than 8 states and the District of Columbia—spread over nearly 1,000 square miles. Fort Bend County has 811,688 people—more than 4 states and the District of Columbia—spread over 850 square miles. The average commute time for workers is 32.9 minutes in Fort Bend County, 29.2 minutes in Harris County, and 25.4 minutes in Travis County. Ex. 4 (Commute Time Data).

According to Houston County Clerk Christopher Hollins, traveling from Harris County's northwest corner to the current location of the main election office is more than a 100-mile round trip. ECF No. 8-1 (Hollins Dec.) ¶ 4. Harris County is in the fifth largest metropolitan statistical area (MSA) in the United States.[4] As a result, Harris County often has "extreme traffic congestion," such that a trip to and from Harris County's sole location for mail-in ballot drop-off "can easily take at least half a day by car and all day by public transportation (if any public transportation is available in the voter's home area)." ECF No. 8-1 (Hollins Dec.) ¶ 4.

[4] U.S. Census Bureau, *New Census Bureau Estimates Show Counties in South and West Lead Nation in Population Growth*, https://www.census.gov/newsroom/press-releases/2019/estimates-county-metro.html#table6 (last visited Oct. 5, 2020).

Harris County is the third most populous county in the country, behind only Los Angeles County, California and Cook County, Illinois. Cook County currently has 53 drop-boxes for mail ballots.[5] Los Angeles County has over 400 drop boxes.[6] In Maricopa County, Arizona, the fourth most populous county in the country, voters can return their mail ballots at any one of the 175 Vote Centers located across the county, or at any of 17 absentee ballot drop boxes.[7] Even Miami-Dade County, Florida, the seventh most-populous county in the nation, with nearly 2 million fewer people than Harris County, allows voters to return their absentee ballots at any one of its 33 early voting locations across the county,[8] as well as at the Elections Department's physical address, and the Election Department's branch office.[9]

The inadequacy of one drop-off site per county in counties such as Harris County is further belied by the Election Assistance Commission's guidance that there should be a drop off location for every 15,000 to 20,000 registered voters and recommends using different formulas for rural and urban areas to address travel burdens as well.[10] Even adjusting Harris County's over 2 million

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[5] Cook County, Ill. Clerk, Mail Ballot Drop Box Locations, https://www.cookcountyclerk.com/service/mail-ballot-drop-box-locations (last visited Oct. 4, 2020).

[6] Los Angeles County Registrar-Record/County Clerk, Vote by Mil Drop-Off, https://www.lavote.net/home/voting-elections/voting-options/vote-by-mail/vbm-ballot-drop-off (last visited Oct. 4, 2020).

[7] Maricopa County Elections Dep't, Where do I vote?, https://recorder.maricopa.gov/pollingplace/ (last visited Oct. 4, 2020).

[8] Miami-Dade County Supervisor of Elections, Early Voting Schedule and Official Ballot Drop Box Information for the 11/03/2020 General Election, https://www.miamidade.gov/elections/library/2020-general-early-voting-schedule.pdf (last visited Oct 4, 2020).

[9] Miami-Date County Supervisor of Elections, Vote-By-Mail Ballot Return Policy, https://www.miamidade.gov/elections/library/instructions/vote-by-mail-ballot-return-policy-en.pdf (last visited Oct. 4, 2020).

[10] Election Assistance Comm'n, Cybersecurity & Infrastructure Agency (CISA) Elections Infrastructure Government Coordinating Council & Sector Coordinating Council's Joint COVID

registered voters to those over 65 and thus eligible to vote absentee, the Governor's Order mandates that Harris County flout this standard by a mile.

According to Google Maps, a drive from Pflugerville, TX in the Northeast corner of Travis County to Lucky Lake Ranch, in the Southwest corner of Travis County takes 49 minutes one-way assuming there is zero traffic congestion and that the driver pays a toll. Ex. 5 (Google Maps Display). A drive from Lucky Lake Ranch to Travis County's only mail ballot drop-off site takes at least 35 minutes one way by car, assuming there is no traffic. Ex. 6 (Google Maps Display). Regardless, reducing Travis County's sites from four to one will quadruple the demand, and wait times, at the remaining drop-off site.

In Fort Bend County, a drive from Woodcreek Reserve, a neighborhood in Katy, Texas, to Guy, Texas, typically takes 50 minutes one-way, assuming there is no traffic. Ex. 7 (Google Maps Display). A drive from Fresno, TX to Fort Bend's only mail ballot drop-off site in Rosenberg, TX takes, at the very least, 35 minutes one-way, again assuming there is no traffic—an unlikely occurrence between 8 a.m. and 5 p.m. Monday through Friday, the only times the Fort Bend County Elections Administration office is open. Ex. 8 (Google Maps Display).

IV. USPS Delays

On July 30, 2020, the United States Postal Service ("USPS") put Defendant Hughs, each of the State's 254 county clerks, and voters generally, on notice that Texas's absentee ballot application and absentee ballot deadlines risk disenfranchising voters. *See* Ex. 9 (USPS Letter).

> Under our reading of your state's election laws . . . certain state-law requirements and deadlines appear to be the incompatible with the Postal Service's delivery standards and the recommended timeframe noted above.

Working Group, Ballot Drop Box Paper, https://www.eac.gov/sites/default/files/electionofficials/vbm/Ballot_Drop_Box.pdf.

> There is a significant risk that . . . ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted.
>
> The Postal Service asks that election officials keep the Postal Service's delivery standards and recommendations in mind when making decisions as to the appropriate means used to send a piece of Election Mail to voters, and when informing voters how to successfully participate in an election where they choose to vote by mail.

Id.

The deadline to request an absentee ballot in Texas is October 23. But, as the USPS has itself stressed, a voter that requests an absentee ballot on the deadline, cannot use USPS to deliver that ballot with any confidence it will be counted. Moreover, undecided voters who wish to weigh all the facts of the election cycle before deciding how to cast their ballot cannot use USPS to deliver their ballots with any confidence that it will be counted.

USPS's letter to the State is on the minds of voters. *See, e.g.*, Ex. 20 (Barreto Report) ¶ 27. Plaintiffs Edelbach and Mason both stated that they are aware of USPS's significant delays in delivering mail and are not confident that if they mail their ballots, they will be delivered in time for them to be counted. Ex. 10 (Edelbach Dec.) ¶ 4; Ex. 11 (Mason Dec.) ¶ 2. Similarly, Joyce Golub, an active member of Plaintiff League of Women Voters of Texas, stated that over the past few months, she has "personally experienced delayed mail delivery" at her home, as well as "mail that simply never arrived." Ex. 12 (Golub Dec.) ¶ 8. Golub expressed that her vote is "much too precious" to risk mailing her ballot through USPS and having it either arrive late or not arrive at all. As a result, she has decided that she "will not mail my ballot under any circumstances." *Id.*

V. No Security Interest in Restricting Number of Ballot Drop-off Sites

The Governor has provided *no explanation* of the alleged security interest in restricting the number of ballot drop-off sites.[11] Indeed, the record shows the opposite. Harris County—which actually was operating multiple absentee ballot return locations before the Governor's order—demonstrates this. Harris County "arranged to apply the same ballot collection and security protocols at each drop-off location, whether at election administration headquarters or elsewhere." Clerk Hollins testified that "[a]ll ballot drop-off locations are equally secure" and that his office "trained enough staff regarding election protocols at each location so that two such trained employees are present at all times while the location is accepting ballots." Ex. 8-1 (Hollins Dec.) ¶ 16. Specifically, Harris County elections officials were trained to "ensure that (1) the voter signs a roster (just as they would when voting in-person), (2) the voter presents valid identification to comply with Section 63.0101 (just as they would when voting in-person), and (3) the voter signs the carrier envelope (just as they would when sending their ballot by mail)." *Id.* Hollins described the mail-in ballot drop-off process as "more secure than the voter using the mail system" because

[11] Perhaps to attempt to make up for this deficiency, Texas House Speaker Dennis Bonnen recently claimed that Governor Abbott's October 1 order was made after state leaders received "reports from the field" of people trying to submit multiple mail-in ballots. KXAN, *Lawsuit filed against Gov. Greg Abbott for limiting ballot drop off locations* (Oct. 2, 2020), https://www.kxan.com/news/us-politics/election/lawsuit-filed-against-gov-greg-abbott-for-limiting-ballot-drop-off-locations/ (last visited Oct. 4, 2020). Specifically, Speaker Bonnen claimed that there was a case in Bexar County, where someone attempted to drop off "as many as 40" mail-in ballots. This allegation, however, adds nothing to any security rationale for the Governor's Order. First, Bexar County was not immediately impacted by Governor Abbott's October 1 order because at the time the order went into effect, it was operating only one drop off location. *Id.* Second, the Bexar County Clerk never confirmed this "report," nor did Speaker Bonnen indicate any such ballots were accepted, given that returned ballots require presentation of the voter's ID. *Id.* Third, given the protocols in place at every drop-off location, such a scheme would be identified regardless of *which* drop-off location was used. It would make no sense for a person seeking to fraudulently submit multiple mail-in ballots to use a drop-off location rather than the U.S. mail.

"the ballots are kept in sealed, secured boxes from the moment they leave the voter's hand. *Id.* ¶ 17.

VI. Sudden Burdens on Election Officials

Harris County Clerk Hollins has also testified to the significant administrative burden of reducing the number of mail-in ballot drop-off locations from 12 to 1. He "conducted detailed modeling and analysis to determine the likely turnout, methods of voting that voters may choose," and determined "the best allocation of resources to meet voter demand without creating long lines or other circumstances where social distancing would not be possible." *Id.* ¶ 14. Explaining that the ballot drop-off locations had been set since mid-July, Hollins indicates that the Governor's Order is "causing voter confusion." *Id.* ¶ 20. He also warned that the forced reduction "will increase congestion as the volume of ballot returns increases over the next few weeks." *Id.* Finally, Hollins expressed that the Governor's Order "burdens the Clerk's Office administratively," by forcing the county to "change [its] voter education materials, [its] website, and [its] staff training. *Id.* ¶ 25.

ARGUMENT

To succeed on a motion for a temporary restraining order or for a preliminary injunction, Plaintiffs must show "(1) a substantial likelihood of success on the merits, (2) a substantial threat that plaintiffs will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury outweighs any damage that the injunction might cause the defendant, and (4) that the injunction will not disserve the public interest." *Planned Parenthood v. Sanchez,* 403 F.3d 324, 329 (5th Cir. 2005). Plaintiffs make that showing here.

I. Plaintiffs Are Likely to Succeed on the Merits of their First and Fourteenth Amendment Claim of Discriminatory, Undue Burdens on the Right to Vote.

Plaintiff are likely to succeed on the merits of Count 1 of their Complaint, which alleges that the Governor's Order restricting the number of absentee ballot drop-off sites imposes a discriminatory and undue burden on their right to vote in violation of the First and Fourteenth Amendments. When analyzing the constitutionality of a restriction on voting, the Court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).[12]

[12] Defendants Abbott and Hughs have previously suggested that under Supreme Court precedent, there is no right to vote by mail. For several reasons, this argument has no purchase here. First, this is not a case about whether or which voters have a right to cast their ballot by mail—it is undisputed that the individual Plaintiffs and the Organizational Plaintiffs' affected members unequivocally have such a right under Texas law. *See* Tex. Elec. Code § 82.003. As such, Texas has a constitutional obligation to ensure this right is not abridged in a manner that is either arbitrary or discriminatory. *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."). The Governor's October 1 Order fails that test.

Second, Defendants Abbott and Hughs have relied on *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-09 (1969) for their proposition that vote by mail practices get little to no constitutional scrutiny. In *McDonald*, the Supreme Court rejected a claim by pretrial detainees that the state had denied them equal treatment under the law by denying them access to absentee ballots. *Id.* at 811. The Court applied rational basis review because it found that the right being denied was "not the right to vote . . . but a claimed right to vote absentee," *id.* at 807, and denied the plaintiffs' claim because they had not offered any proof that they had been "absolutely prohibited" from exercising the franchise, *id.* at 809. But *McDonald* is no longer good law. *See Goosby v. Osser*, 409 U.S. 512, 521 (1973) (declining to follow *McDonald* and permitting a claim to proceed based on evidence that alternative means of voting were unavailable); *O'Brien v. Skinner*, 414 U.S. 524, 529, 531 (1974) (again declining to follow *McDonald* and holding that *McDonald* "rested on failure of proof" rather than absence of a right to equal protection); *Am. Party of Tex. v. White*, 415 U.S. 767 (1974) (abandoning *McDonald*'s reasoning and finding that minor party voters had a right to vote absentee in their primary where that right had been extended to major party voters, notwithstanding that minor party voters had the alternative option to vote in-person); *see also Tex.*

When a burden on the right to vote is severe *or* discriminatory, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)) (emphasis added). When a state imposes "reasonable, nondiscriminatory" election regulations, its "important regulatory interests are generally sufficient to justify the restrictions." *Tex. Independent Party v. Kirk*, 84 F.3d 178, 182 (5th Cir. 1996). Slight or moderate burdens that fall between the two extremes are subject to a flexible standard that requires the court to make "the 'hard-judgments' common in ordinary litigation," *Voting for Am. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013). "[I]rrespective of whether the burden is classified as 'severe,' 'moderate,' or even 'slight,' 'it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.'" *Richardson v. Tex. Sec'y of State*, No. SA-19-cv-00963-OLG, -- F. Supp. 3d --, 2020 WL 5367216, at *35 (W.D. Tex. Sept. 8, 2020) (quoting *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009)).

Because the Governor's one-site-per-county rule is discriminatory against voters in Texas's most populous and geographically large counties—counties that on both scores have disproportionately large minority populations—the restriction should be subjected to strict scrutiny. *See Burdick*, 504 U.S. at 434. But even under intermediate or rational basis scrutiny, the evidence shows the State lacks any weighty interests sufficient to justify the burden.

Democratic Party v. Abbott, 2020 WL 5422917 at *17 (5th Cir. Sep. 10, 2020) (noting the prior motions panel's failure to wrestle with *Am. Party* in relying on *McDonald*). *American Party* abrogated *McDonald* entirely and Defendants cannot rely on it here.

A. The Governor's Order Imposes a Significant and Discriminatory Burden on Voters

1. The Governor's Order Imposes Significant and Unnecessary Burdens on Voters

Under Texas law, so long as a voter returns their absentee ballot to their local county clerk by no later than (1) before polls close on election day, or (b) not later than 5 pm on the day after the election if the ballot was postmarked before election day, their vote may be counted. *See* Texas Elec. Code § 86.007. Typically, the ballot must be returned either by mail, contract carrier, or in-person if delivered to the early voting clerk's office while polls are open on election day. *Id.* at § 86.006. But Governor Abbott's July 27 Order changed the typical requirements of the Texas Election Code by providing voters with the option to return their absentee ballot in person to their county clerk early, rather than waiting until election day to do so. The Governor implemented this change because "strict compliance with the statutory requirements . . . of the Texas Election Code would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster." Ex. 1 (July 27 Order).

The Governor was right. On July 30, 2020, just three days after his July 27 Order, the USPS sent a letter to Secretary Hughs warning that based on USPS's delivery performance, it would be virtually impossible for some absentee voters to timely return their absentee ballot for counting by mail. *See* Ex. 9 (USPS Letter) at 2 (noting the incompatibility between Texas law, under which a voter may request an absentee ballot up to 11 days before the election and may not be sent the ballot until 7 days later, and USPS delivery standards which require the voter to mail their ballot at least 7 days prior to the counting deadline in order to arrive on time). Combining this reality with the expected upsurge in mail voting, *see, e.g.*, ECF No. 8-1 (Hollins Dec.) ¶ 11, and the need to reduce congesting at polling locations on Election Day given the COVID-19 crisis, additional

days on which to return mail ballots by hand are critical to ensuring that absentee voters' ballots are actually counted. *See generally* Ex. 1 (July 27 Order).

But permitting absentee voters to return their ballot early only alleviated one part of their burden. That is because, in a state as large and geographically diverse as Texas, voters in certain counties might still not be able to return their absentee ballot if only permitted to do so to one location. *See* ECF No. 8-1 (Hollins Dec.) ¶ 14 (describing the rigorous study undertaken by Harris County to determine the most efficient way to facilitate voting in November). For some voters, the significant distance between their home and the single absentee ballot return location could act as a significant deterrent to using the in-person delivery option. *See infra* Part I.A.2 (describing the distance voters in Harris County would need to travel in order to return their absentee ballot); *see also, e.g.*, Ex. 10 (Edelbach Dec.) ¶ 7 (noting that it would take him about an hour-and-a-half roundtrip to travel from his home to the NRG Arena). Worse, the congestion and unreasonable wait times that are likely to result from allowing only a single in-person ballot return location at a time when mail voting is skyrocketing can serve as a strong deterrent. *See* ECF No. 8-1 (Hollins Decl.) ¶ 20 ("If we are forced to reduce to one location, I anticipate that toward the end of the early voting and especially on Election Day, we will see massive lines to return ballots in person."); *see also, e.g.*, Ex. 11 (Mason Dec.) ¶ 3–4 (noting that the combination of a long drive to the ballot return location, combined with long wait times once there, raises serious concerns about the risk of exposure to COVID-19 as a result of, for example, having to use public restroom facilities while away from home for such an extended period of time). This is particularly true since the *only people* able to use these locations are precisely those voters at high risk for COVID-19—those

voters over 65 and/or with disabilities—and who will be taking as many precautions as possible to avoid crowded places.

Recognizing the significance of these burdens, some counties, including the populous Harris, Travis, and Fort Bend counties made, implemented, and advertised to voters a plan to make available multiple ballot return locations. *See supra* Factual Background. Such a plan was consistent with the Governor's order. *See* Ex. 2 (SOS Brief) at 5 (noting that "the Secretary of State has advised local officials that the Legislature has permitted ballots to be returned to any early-voting clerk office"). And it was also based on the considered judgment of county clerks who are actually responsible for running Texas's elections. *See, e.g.*, ECF No. 8-1 (Hollins Dec.) ¶¶ 14-17.

The Governor's Order restores the burdens that the county clerks' actions were intended to alleviate. Thus, for voters who, for whatever reason, receive or become ready to return their absentee ballot later in the election cycle but still before the statutory deadline,[13] the only way to

[13] It is no defense for Defendants to argue that absentee voters could simply choose to vote sooner, or place their ballot in the postal mail sooner, to ensure that it arrives on time. First, as noted above not all voters will have that option. Under Texas law, voters have a statutory right to request a mail ballot until October 23, 2020. *See* Tex. Elec. Code § 86.0015(b-1). And county clerks are only required to mail the voter a ballot within seven days of processing the application. *Id.* § 86.004. Thus, as the USPS noted in its July 30 letter, some voters—who act consistently with the State's statutory deadlines—simply may not receive their ballot in enough time to timely return it by mail. Second, voters have a First Amendment right to actually consider their vote, and to wait until they feel they have enough information to make a considered choice before returning their ballot. *See, e.g.*, Berg Decl. ¶ 3 (noting the length of the Harris County ballot and his desire to take the necessary time to review his choices and make an informed decision). While that may not require much time for some voters, others may need more time, particularly considering that new information about a candidate is often revealed in the days and weeks before Election Day. For such voters, it cannot be the case that simply because they elected to vote safely by absentee ballot, they also unwittingly submitted to an earlier Election Day and waived their ability to consider all the information (including, for example, the ongoing planned Presidential debates) before casting their ballot.

return their ballot and ensure it is actually counted will be either (1) to hope that USPS will be able to timely deliver their ballot notwithstanding its own insistence that it will not be so able, or (2) to endure a long drive to, a long wait time at, or both a long drive and a long wait time at the single ballot return location in their county. *See supra*. For many voters, either choice—which the Governor's order makes impossible to avoid—imposes a serious burden on their right to vote.

2. The Governor's Order Imposes Discriminatory Burdens on Voters.

The burdens of the Governor's Order do not fall evenly on all voters. Instead, the Order mandates disparate burdens based on where voters live and has predictable disparate impacts on minority communities.

First, the Governor's Order discriminates against people living in Texas's most populous counties by disregarding the extreme variation in demand for access to the drop-off sites among counties.[14] As of January 2020, Harris County had 2.37 million registered voters and 1,012 precincts.[15] Travis had nearly 815,000 registered voters and 247 precincts. *Id.* Fort Bend had over 450,000 registered voters and 159 precincts. *Id.* Other Texas counties have magnitudes fewer registered voters. For example, Loving County has 116 registered voters and 4 precincts,

[14] Plaintiffs are mindful that regardless the Governor's order, not all counties intended to open more than one absentee ballot return location. But whether such counties *must* open additional ballot return locations is not a question this Court need grapple with here for two reasons. First, Plaintiffs are not arguing that the Constitution requires any individual county to provide multiple ballot return locations, but simply that where counties have already determined that multiple locations are needed to adequately serve voters, the Governor cannot arbitrarily veto that determination without reasonable justification. Second, the Governor's order entirely forecloses the option to offer multiple ballot return locations, which at least some counties have made clear are necessary to alleviate the serious burdens their voters would otherwise face on their right to vote. There is a serious difference between allowing county election officials to assess the needs of their voters and provide a menu of options to serve those needs—leading to different menus even in different counties of similar size—and imposing a one-size-fits-all policy on counties that bear no reasonable resemblance to one another.

[15] *See* Tex. Sec'y of State, January 2020 Voter Registration Figures, https://www.sos.state.tx.us/elections/historical/jan2020.shtml (last visited Oct. 2, 2020).

Armstrong County has 1,441 registered voters and 9 precincts, Coke County had 2,337 registered voters and 4 precincts, and Upton County had 2,131 registered voters and 6 precincts. *Id.* Texas has 254 counties, most with substantially fewer voters and precincts than the handful of Texas's most populous counties. *Id.* By limiting voters to a single drop-off site regardless of the county's population, the Governor's Order imposes a discriminatory burden on the populous counties' voters. This includes substantially increasing congestion and wait-time for submitting ballots, requiring voters in populous counties to endure significant traffic delays to reach the single drop-off site, and requiring longer public transportation commutes to the single site—with the attendant increased COVID exposure for those seeking to return absentee ballots (by law, limited to those over 65 and with disabilities).

For example, Mr. Hollins has testified that Harris County contains 14% of all the registered voters in Texas, has a population of 4.7 million people, and currently has 2.4 million registered voters. *Id.* ¶ 4. Harris County is also the fourteenth largest county in Texas based on geography, "stretching [ ] nearly 1,800 square miles." *Id.* The reduction from 12 ballot drop-off sites to a single site substantially increases the burden on voters seeking to return their ballots. "Traveling from the County's northwest corner to the current location of the main election office is more than a 100-mile round trip," Mr. Hollins explains. *Id.* Traffic exacerbates that burden. "As an urban county, Harris County often has extreme traffic congestion – even during the pandemic – and traveling across the county to a central location and back can easily take *at least half a day* by car and *all day* by public transportation (if any public transportation is available in the voter's home area)." *Id.* (emphasis added). The problems with the postal service exacerbate the burden the Governor's Order has imposed. "Particularly because of the widely-publicized problems with the U.S. Postal Service, some voters may have trouble receiving their ballot until close to Election

Day, and will thus have to return their ballot in person in order to ensure it is returned on time." *Id.* ¶ 20. Mr. Hollins has explained that "[i]f we are forced to reduce to one location, I anticipate that toward the end of the early voting and especially on Election Day, we will see *massive* lines to return ballots in person." *Id.* (emphasis added). Massive lines are precisely the danger that the Governor's July 27 Order and Clerk Hollins' careful planning were designed to prevent. Massive lines—of people over 65 and/or with disabilities—during this epidemic are a recipe for disaster in light of the ongoing pandemic.

Thus, the Governor's Order will impose an impossible burden for some. As Mr. Hollins testified, "voters without reliable transportation will be unable to get to NRG Arena from their homes (which could be more than fifty miles away) in time to have their vote counted." *Id.*; *see id.* ¶ 23 ("The size of the County, and the location of our Houston headquarters, would make it difficult, if not impossible, for some voters to return their ballots to only that single drop-off location. This will undoubtedly force some voters to decide if they will risk their health by voting in person or if they instead will not vote at all. No Texas voters should have to make that decision."); *id.* ¶ 24 ("In my experience, rural voters, and voters without access to transportation have the hardest time traveling significant distances to vote or drop off their ballots."); *see also* Ex. 11 (Mason Dec.) ¶ 3 (expressing concern about long lines and hour-long drive to reach single drop-off site in Travis County); Ex. 10 (Edelbach Dec.) ¶ 6 (testifying that NRG Arena in central Houston is a 36 mile drive from his house).

Second, the Governor's Order discriminates against those living in Texas's geographically largest counties, by preventing the county election officials from spreading the location of drop-off sites throughout the county in a way to reduce travel time. Texas's largest counties by land area are generally located in the southwestern area of the state. For example, Pecos has 4,763 square

miles, Presidio has 3,855 square miles, Val Verde has 3,134 square miles, and Harris is nearly 1,800 square miles.[16] By contrast, Camp County has 196 square miles, Walker County has 784 square miles, Sabine has 491 square miles, and Delta has 256 square miles. *Id*. As Mr. Hollins explained, a Harris County driver could require half a day to return a ballot to its single location, while a person taking public transportation may require an entire day. ECF No. 8-1 (Hollins Dec.) ¶ 4.

Third, the Governor's Order has a racially discriminatory impact because Texas's most populous counties, and its geographically largest counties, are both disproportionately Black and Latino, while its least populous, and geographically smallest, counties are disproportionately white. Harris is both the most populous Texas county and one of the state's geographically largest, but only 29.54% of its residents are white. Ex. 13 (Tex. Demographic Center Data). Only 33.62% of Fort Bend County's residents are white. By contrast, Texas's geographically smallest and/or least populous counties are disproportionately white. For example, 90.71% of Armstrong County residents are white, 83.72% of Sabine County residents are white, 80.18% of Delta County residents are white, 78.21% of Coke County residents are white, and 75.53% of Loving County residents are white. *Id.*

Even within the most populous counties, there are racial disparities that yield disparate burdens of the Governor's Order by race. For example, in Harris County, white workers make up only 29.54% of the population but only 18.6% of those who rely on public transportation, while Black workers make up 35.7% of those who rely upon public transportation, but only about 20% of the County's population. Ex. 14 (Harris County Public Transportation Data). Minority voters

[16] U.S. Census Bureau, QuickFacts Texas, https://www.census.gov/quickfacts/fact/table/TX/LND110210#LND110210 (last visited Oct. 2, 2020).

within Harris County are thus the most likely to be discriminatorily burdened by the need to potentially spend an entire day, ECF 8-1 (Hollins Dec.) ¶ 4, commuting to the single Harris County ballot drop-off site.

B. The Governor's Order Also Worsens Election Officials' Administrative Burdens and Complicates their Effort to Provide a Safe and Secure Ballot Return Process.

Making matters even worse, the Governor's Order is particularly burdensome because it comes days after absentee voting in Texas *had already begun*, and after counties had already opened, or announced plans to open, multiple satellite ballot drop-off sites. Such late-breaking changes to the rules should not be countenanced, particularly from the State of Texas, which has repeatedly argued before federal courts in the past weeks and months that it is too late to change the rules to accommodate voters' needs. The Governor's Order contributes to voter confusion and imposes unnecessary administrative burdens on the local election officials who must comply with it in the middle of running an election during an unprecedent national crisis. This is something the State has decried in federal court. Ex. 21 (SOS Reply Brief, *Hughs v. Tex. Democratic Party, et al.*, No. 20-50683) at 12 (noting the need to provide "certainty" to voters and that voters should be entitled to "rely on announced polling locations and trust that early voting polling places will remain open throughout the early voting period"). The State cannot have it both ways: arguing before federal courts that rules alleviating burdens on voters cannot be implemented because it is too late while issuing gubernatorial edicts with less than 24-hours' notice upending local election officials' carefully calibrated plans. The Governor is not an election official; at this point in the election cycle, this Court should give all due deference to the needs of local election officials to proceed as they had planned.

As Chris Hollins, Harris County Clerk has testified, "[t]his last minute change to election procedures is causing voter confusion." ECF No. 8-1 (Hollins Dec.) ¶ 20; *see also id.* ¶ 25 (noting that county election officials, who have many other election-related tasks to accomplish for the already underway election, are being forced to field calls from voters and other interested constituencies about the impact of the Governor's order). This is so, Mr. Hollins explains, because Harris County's "multiple ballot drop-off locations ha[d] been advertised to voters via social media, media interviews, and other methods." *Id.* ¶ 21. The County's *Harris Votes* website announced the locations, *id.* Ex. F at 2, which were set since mid-July, *id.* ¶ 14. The shifting rules also create the potential for unfounded challenges to voters; for that reason Mr. Hollins explains that "it is ***very important*** that the legality of methods of returning mail-in ballots be very clear." *Id.* ¶ 6 (emphasis in original). Moreover, in light of the Governor's Order hastily issued on one day's notice, clerks "are having to change our voter education materials, our website, and our staff training." *Id.* ¶ 25. Thus, the Governor's order thus harms the orderly administration of the election.

In recent months, it is *exactly* these types of "precipitous changes to the [election] rules" that the state has successfully argued to the Fifth Circuit "can cause 'confusion' and even undermine public confidence in the outcome of the election itself." *See, e.g.*, State's Opening Br., *Texas Democratic Party v. Abbott*, Case No. 20-50704 (5th Cir. Jun. 29, 2020) (arguing that "precipitous changes to the [election] rules (citing *Purcell v. Gonzales*, 549 U.S. 1 (2006)). Indeed, as the State argued just 2 days before the Governor's Order was issued, "[t]he 2020 election is already underway." *See* Emergency Motion for Stay, *Texas Alliance for Retired Americans v. Hughs*, Case No. 20-40643 (5th Cir. September 28, 2020). Whether or not the State was right in making these arguments, at the very least, it cannot have it both ways: arguing in one court that it

is too late to make changes to the election, and then arguing in this court that it is not. *Cf. Tex. Alliance for Retired Americans v. Hughs*, No. 20-40643, 2020 WL 5816887, at *1 (noting that importance of not "alter[ing] the election rules on the eve of an election"). And the Fifth Circuit's *repeated* recent orders indicating that it is too late to change the election rules should weigh heavily in this Court's analysis of the appropriateness of the Governor's action here. *See id.*; *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. June 4, 2020) (enjoining election changes one month and ten days before the election); *see also RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020) (noting voter confusion caused by last minute changes to election rules); *Purcell*, 549 U.S. at 4 (same). After all, the Governor is not an election official. So it is not at all clear why the Governor's interference with election machinery at this late stage of the game should be treated differently than a court order.

C. The Governor's Order Is Not Justified By Its Purported Interest In Advancing Election Security.

Governor Abbott justifies his Order by asserting a need "to add ballot security protocols" at absentee ballot return locations. Ex. 3 (Oct. 1 Order) at 1. But the Order does not require county officials to actually "add" any additional security measures, and instead only forces them to reduce the number of ballot return locations to one per county. *Id*. Put differently, the actual ballot security protocols required before and after the Governor's order are identical, with the only difference being that now they will only be applied in one location rather than multiple. Such a reduction in voters services does not serve to enhance election security, and may even degrade it instead.

In Harris County, for example—which, before the Governor's order, had set up the most ballot drop off locations of any county in the State—the election security protocols at each of the 12 sites, including the one that now remains in light of the Governor's order, were "the same" and "equally secure." ECF No. 8-1 (Hollins Dec.) ¶ 16. The security measures included having two

trained staff present at the drop off location at all times that it would be open, and having those staff ensure that each voter signed the roster, provided valid identification, and signed the ballot carrier envelope. *Id.* They also included using a "mail ballot tub" to receive the voted absentee ballots, which is a locked ballot box—sealed by tamper-proof seals— that has "a slit large enough for a ballot carrier envelope but small enough that fingers or tools cannot be forced inside the box to tamper with ballots." *Id.* ¶ 17. And they required the mail ballot tub to be returned to the election administration's headquarters each day for processing by a pair of employees. *Id.*

Because the ballot security measures at the single remaining drop off location in Harris County are (and remain) no different than those that were being taken at the 11 other now-closed locations, *id.* ¶ 16, the Order requiring that only one drop off location be used cannot be justified as necessary to "add ballot security protocols."

The Governor's Order actually reduces ballot security. By ordering a reduction down to one ballot return location per county, it is nearly certain that fewer absentee voters will drop their ballots off in person. *See* ECF No, 8-1 (Hollins Dec.) ¶¶ 22, 32. This matters because the use of drop off sites by voters returning mail-in ballots in person "is more secure than returning by mail because (1) there is no danger of tampering or loss of the ballot in transit and (2) voters who return ballots in person must sign a roster and present voter ID." *Id.* ¶ 32; *see also id.* ¶ 22 ("Reducing the drop-off locations from twelve to one will not enhance security of the ballots in any way, as it will force more voters to use USPS rather than see their ballot securely delivered straight to a sealed, secure ballot box."). Thus, to the extent Defendants have a genuine interest in actually *enhancing* election security, they should promote counties setting up multiple convenient drop-off locations and encourage voters to use them. Unfortunately, the Governor's Order takes the opposite approach.

While "[a] State indisputably has a compelling interest in preserving the integrity of its election process," the assertion of such an interest does not require the Court to rubber stamp the State's actions where they do not actually serve such a purported interest. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989). Rather, the state must "show[] that its regulation . . . is necessary to the integrity of the electoral process." *Id.* Defendants cannot carry their burden. To the contrary, the overwhelming weight of the testimony—provided by local election officials that are actually responsible for running the State's elections—is that the Governor's Order will not enhance ballot security, and perversely, will instead have the overall effect of harming it.

The Court should therefore not countenance the State's unsupported and plainly contrived justification of the Governor's Order as necessary to the election's integrity. Rather, it should find that election integrity in fact requires the Governor's order to be enjoined, and the election conditions returned to their status quo *ante*.

* * *

Ultimately, weighing the substantial burden that the Governor's order imposes on voters and election officials *while an election is ongoing* against the cursory justification Governor Abbott has provided for it, it is evident that the Governor may not arbitrarily force counties to restrict voters' ability to return their absentee ballot to a single return location. The status quo *ante* should be restored.

II. Plaintiffs Are Likely to Succeed on their Equal Protection Claim.

Plaintiffs are likely to succeed on their Equal Protection claim because the Governor's Order is not "consistent with [the State's] obligation to avoid arbitrary and disparate treatment of the members of its electorate." *Bush v. Gore*, 531 U.S. 98, 105 (2000). It is well-established that

"once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 665 (1966). And it is likewise well-established that "[t]he right to vote is protected in more than the initial allocation of the franchise [and] Equal protection applies as well to the manner of its exercise." *Bush*, 531 U.S. at 105; *see also Jones v. United States Postal Serv*., 2020 WL 5627002, at *19 (S.D.N.Y. Sept. 21, 2020) ("[E]ven the nuts and bolts of election administration must comport with equal protection."). Indeed, every "citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *see also Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions."); *Bush*, 531 U.S. at 104 (stressing "the equal dignity owed to each voter"). Thus, a State violates the Equal Protection Clause when it fails to meet "the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right." *Id.* at 105.

The Governor's Order not only permits, but *demands*, unequal and arbitrary treatment of Texas voters. By limiting absentee voting drop-off locations to one per county, the Governor has tied the delivery of critical election resources to an arbitrary benchmark. County lines do not—in any way—provide a reasonable measure for the allocation of election resources. Texas has 254 counties ranging in population from 4.7 million people in Harris County to 134 people in Loving County; and ranging in geographic size from Brewster County, over 6,000 square miles and larger than the state of Connecticut, to Rockwall County, under 150 square miles. The election resources needed in Harris or Loving Counties are plainly—and by any reasonable metric—radically different. And yet, the Governor's order *mandates* their equivalence. And the corresponding

burden on voters in populous and geographically large counties is both palpable, *see supra* Part I.A, and impermissible, *see Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Our Constitution leaves no room for classification of people in a way that unnecessarily abridges [the right to vote.]"); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476–78 (6th Cir. 2008) (finding allegations sufficient to establish "burdens on the exercise of that right *depending on where they live* in violation of the Equal Protection Clause"). It is beyond cavil that requiring Harris County and Loving County to have the same number of in-person voting locations would violate the Equal Protection Clause. The same Equal Protection principles apply here.

The Supreme Court has long recognized the arbitrariness of using county lines in allocating electoral representation; and the same principle applies here. In *Gray v. Sanders*, the Supreme Court struck down a county-based electoral procedure for counting votes in the nominating process for statewide offices. 372 U.S. 368 (1963); *see also Bush*, 531 U.S. at 107 (citing *Gray* for the rule against arbitrary and disparate treatment of voters). In so doing, the Court recognized that the equal treatment of *counties* necessarily means the arbitrary and disparate treatment of *voters*. *Id.* at 379 ("Georgia gives every qualified voter one vote in a statewide election; but in counting those votes she employs the county unit system which in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties."). The Court again recognized this principle in *Moore v. Ogilvie*, striking down a signature gathering requirement that used a county unit metric: "This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights." 394 U.S. 814, 818-19 (1969); *see also Bush*, 531 U.S. at 107 (citing *Moore*).

Our elections are governed by the choices of voters, "not trees or acres" or "farms or cities or economic interests." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). In other words, the Supreme Court has long done away with the vestiges of using counties as the appropriate benchmark for providing equality to voters. *See Gray*, 372 U.S. at 380 ("There is no indication in the Constitution that homesite . . . affords a permissible basis for distinguishing between qualified voters within the State."). The Governor's Order is even more troublesome than cases like *Bush*—where a State has merely failed to *prevent* arbitrary and disparate treatment—because the Governor has mandated such arbitrary and disparate treatment with full knowledge of the disconnect between county lines and any reasonable metric of the needs of voters or election administration. He has, in essence, guaranteed certain voters "two, five, or 10 times" or more absentee voting resources than others. *Reynolds*, 377 U.S. at 562. Like in *Moore*, the Governor's Order "discriminates against the residents of the populous counties of the State" and "therefore, lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment." 394 U.S. at 819.

This is not to say that the Equal Protection Clause mandates precise equality in electoral resources across localities. However, statewide electoral rules—like the Governor's Order—cannot create the opportunity for, or in this case *require*, disparate treatment of voters. As the Court in *Bush v. Gore* explained, "[t]he question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." To be sure, they can. Here, "we are presented with a situation where a state [official] with the power to assure uniformity" has not only failed to provide adequate safeguards to voters, as was the case in *Bush*, but has *required* the disparate treatment at issue. 531 U.S. at 109. When a statewide rule is promulgated like the Governor's order, "there must be at least some assurance that the rudimentary

requirements of equal treatment and fundamental fairness are satisfied." *Id.* The Governor's Order fails that basic test.

III. Plaintiffs Will Be Irreparably Harmed if the Governor's Order Is Not Enjoined.

Because the Order violates Plaintiffs' fundamental constitutional rights, they will suffer irreparable harm absent this Court's intervention. *See, e.g.*, *Deerfield Med. Center v. City of Deerfield Beach*, 661 F. 2d 328, 338 (5th Cir. Unit B Nov. 1981) (finding that violations of fundamental rights are always irreparable) (citing *Elrod v. Burns*, 347 U.S. 373 (1976)); *see also DeLeon v. Perry*, 975 F. Supp. 2d 632, 663 (W.D. Tex. 2014), *aff'd sub nom. DeLeon v. Abbott*, 791 F.3d 619 (5th Cir. 2015) ("Federal courts at all levels have recognized that violation of constitutional rights constitutes irreparable harm as a matter of law.") The right to vote, and to have one's vote counted, is a fundamental constitutional right. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to have their votes counted.") (internal citations omitted). As discussed above, the October 1 Order violates that constitutional right by placing an unconstitutional burden on voters, including individual Plaintiffs and Organizational Plaintiffs' members, *see, e.g.* Ex. 17 (Chimene Dec.), increasing the risk that their valid, timely cast ballots will not be counted. Furthermore, it denies voters the equal protection of the law in violation of the Fourteenth Amendment, by arbitrarily making it more difficult for certain voters to cast a ballot based solely on where they live within a county, and on which county they live in. This harm is irreparable. *See Deerfield*, 661 F.2d at 338 (holding that where a fundamental right is "either threatened or in fact being impaired . . . mandates a finding of irreparable injury.") And, even to the extent that the harm to plaintiffs is mitigated in some way because they have the option of voting in person or mailing their ballot—it is not, *see supra*—it is still irreparable. *See id.* (finding that the existence of

alternative means of exercising one's rights "does not eliminate or render harmless the potential continuing constitutional violation of a fundamental right."). Moreover, that alternative may likely be illusory. As Harris County Clerk Hollins testified, the mail delays may cause voters to receive their ballots with insufficient time to return them by mail, forcing voters to attempt to reach the single drop off site or risk their health voting in person. ECF No. 8-1 (Hollins Dec.) ¶ 20.

Finally, the harm is irreparable because the Order's infringement on Plaintiffs' constitutional rights "cannot be undone through monetary relief." *Deerfield*, 661 F.3d at 338; *see also Jones v. Governor of Fla.*, 950 F.3d 795, 828 (11th Cir. 2020) *overruled on other grounds*, -- F.3d --, 2020 WL 5493770 (11th. Cir. 2020) (*en banc*) ("Casting a vote has no monetary value. It is nothing other than the opportunity to participate in the collective decisionmaking of a democratic society and to add one's own perspective to that of his or her fellow citizens. Each vote provides a unique opportunity to do that. No compensation a court can offer could undo that loss.").

IV. The Balance of the Equities Weighs in Favor of Plaintiffs.

The Governor's Order violates Plaintiffs' constitutional rights, thus enjoining it will serve the public interest. *See Ingebretsen on behalf of Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (holding that where a enactment is unconstitutional, "the public interest [is] not disserved by an injunction preventing its implementation."); *see also, e.g., G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Charles H. Wesley Educ. Fdn., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005) ("[The . . . cautious protection of the Plaintiffs' franchise-related rights is without question in the public interest."). Furthermore, although the Governor's Order purports to serve an interest in maintaining the integrity of the election and combatting voter fraud, the evidence presented herein rebuts any assertion that the

Order actually serves such a purpose. *See supra* Part I.B. As such, Plaintiffs' have demonstrated that the injury to their constitutional rights outweighs any interest the State may assert, and that the grant of an injunction will not disserve the public interest. *See Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). Because the balance of the equities favors Plaintiffs, the Court should grant the injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a temporary restraining order or preliminary injunction should be granted.

Dated: October 5, 2020

Respectfully submitted,

/s Chad Dunn

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CERTIFICATE OF SERVICE

I certify that on October 5, 2020, the foregoing was served on all parties of record registered for CM/ECF notifications, and is also being provided by e-mail to the following counsel for Defendants.

Defendants Abbott and Hughes: Patrick Sweeten (patrick.sweeten@oag.texas.gov)

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/s/ Chad W. Dunn
Chad W. Dunn

Exhibit H

CAUSE NO. D-1-GN-20-005550

THE ANTI-DEFAMATION LEAGUE AUSTIN, SOUTHWEST, AND TEXOMA REGIONS; COMMON CAUSE TEXAS; and ROBERT KNETSCH; *Plaintiffs*,	§	IN THE DISTRICT COURT
	§	TRAVIS COUNTY TEXAS
v.	§	353RD JUDICIAL DISTRICT
GREG ABBOTT, in his official capacity as the Governor of Texas, *Defendant*.	§	

PLAINTIFFS' VERIFIED ORIGINAL PETITION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION, AND PERMANENT INJUNCTION

Plaintiffs, the Anti-Defamation League Austin, Southwest, and Texoma Regions ("ADL"); Common Cause Texas; and Robert Knetsch (collectively, "Plaintiffs"),[1] by and through their counsel of record, file this Verified Original Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction against Defendant Greg Abbott, in his official capacity as Governor of Texas.[2]

1. For several months, Texas voters and election officials have prepared to cast and receive ballots based on rules laid out in the Texas Election Code and Governor Abbott's July 27 Proclamation regarding early and absentee voting. Now, at the eleventh hour, Governor Abbott issued a new Proclamation that, if allowed to stand, dramatically changes the applicable rules,

[1] "Plaintiffs" include the supporters, constituents, and/or members of ADL and Common Cause Texas.

[2] Notice of this Petition and Application was provided to the Texas Attorney General in advance of filing pursuant to Local Rule 10.4.

namely where ballots-by-mail can be dropped off. This bait-and-switch exceeds the Governor's authority and violates the Texas Constitution – in addition to being inconsistent with principles of efficient election administration and fundamental fairness to all Texas voters.

2. Defendant Governor Greg Abbott's October 1, 2020 Proclamation ("the Proclamation") impermissibly intrudes on local election officials' authority to manage elections and imposes an unconstitutional burden on voters' right to vote. The Proclamation bars local election officials from providing more than one drop-off site for mail-in ballots during the early voting period, regardless of the size or population density of the county. *See* **Ex. A**, **Proclamation (Oct. 1, 2020).**

3. It is consistent, however, with a broader effort by the State to make it more difficult for elderly, sick, and disabled Texans to cast ballots by mail. Earlier this year, the State asked the Texas Supreme Court to narrow the circumstances in which sick and disabled voters would be eligible to vote by mail. Several weeks ago, Texas sued the Harris County Clerk for sending ballot applications to voters under the age of 65 in his jurisdiction. The Secretary of State still does not allow Texans to apply for ballot-by-mail online, forcing voters to download the application, print it out, and mail it in. And now the Governor has issued an order decimating a well-ordered system for returning marked ballots in person. Governor Abbott's distaste for an accessible ballot-by-mail system puts him at odds with the Texas Constitution, Texas statutes, and county election authorities. This court should enjoin his Proclamation.

4. At a time when COVID-19 is ravaging the country and the U.S. Postal Service ("USPS") acknowledges the "significant risk" that ballots will not be delivered in time to be counted, ballot drop-off locations provide eligible Texas voters with a means of voting that reduces contacts with others but still ensures the voter's ballot will be received and counted.

5. The Election Code designates local election officials as the officials with the authority to manage and conduct the early voting process, not Defendant. Tex. Elec. Code §§ 32.071, 83.001(c), 83.002. Indeed, ***just one day prior to the issuance of the Proclamation,*** Defendant conceded in a judicial admission to the Supreme Court of the State of Texas that the Texas Election Code allows local election officials to designate more than one early voting ballot drop-off site in each county. ***See* Ex. B at 5, Texas SG Submission dated Sept. 30, 2020**.

6. Given the COVID crisis and the recent upheaval at the USPS, many counties had already proceeded with multiple drop-off locations in the primary runoff election based on this authority, and intended to do so in the upcoming general election. For example, Harris County operated 11 drop-off sites receiving ballots-by-mail in advance of the July 2020 primary runoff, and was already operating 12 drop-off sites receiving ballots-by-mail for the November 2020 general election at the time Defendant issued the Proclamation.[3] Travis County had also opened four locations to receive ballots on October 1.[4] Fort Bend County had announced plans to open five drop-off locations.[5] And after Defendant's Proclamation was released, Dallas County announced that they had had plans to open multiple drop-off locations as well.[6]

7. Plaintiffs and their supporters, constituents, and/or members include Texas residents who are eligible to vote by mail, either because they are over 65 or because they have a

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3 https://www.texastribune.org/2020/10/02/texas-greg-abbott-ballot-drop-lawsuit/

4 *Id.*

5 https://www.fbherald.com/news/county-announces-more-ballot-drop-off-locations-but-abbott-later-bans-them/article_32bb3fc3-fd7c-5888-b059-2ab1bfd18b89.html

6 Dallas County Judge On Changes To Mail Ballot Drop-Off Locations In Texas: 'This Has President Trump Written All Over It', CBSDFW.com (Oct. 1, 2020), available at: https://cbsloc.al/3l0ZpMu.

physical condition that puts them at greater risk for contracting COVID-19. In light of the continuing pandemic, many of these voters planned to vote by mail.

8. Because of recent, unprecedented delays in mail delivery by USPS, Plaintiffs prefer to return their ballots to a local drop-off location to ensure that their vote is counted rather than risk that a mailed-in ballot will not reach the clerk prior to the deadline to be counted. Until Defendant issued the Proclamation, many of these voters could choose the early voting drop-off location most convenient to them – whether because it is closest to their place of residence, easily accessible by public transportation, or some other factor.

9. By limiting each county to just one early voting drop-off location, Defendant's Proclamation substantially and unconstitutionally burdens Plaintiffs' right to vote. The Proclamation forces voters eligible to vote by mail to choose between risking their health by voting in-person so that they have more assurance that their ballots will count, or protecting their health by attempting to vote by mail and risking the real possibility that their ballots will not count because of USPS delays. Defendant's action further burdens Plaintiffs who would be precluded from returning their ballots to the early voting drop-off location because they would have to travel a significant distance and spend a substantial amount of time getting to their county's only location. Finally, the Proclamation burdens Plaintiffs who would be precluded altogether from early voting because they do not have access to a car and live too far from the early voting drop-off location; they do not have access to public transportation; or they have access to public transportation but that mode of transportation is not a practical and/or a safe means during a pandemic.

10. The Proclamation unlawfully favors voters in counties smaller in population over those counties larger in population, in violation of equal protection of the law. While the

Proclamation substantially burdens all Texans, that burden is greater for those who live in more populated counties because only one early voting drop-off location is available for hundreds of thousands of registered voters in the county eligible to vote by mail. And because the Texas Election Code requires a voter returning a marked ballot in person to present identification, voters who reside in more populous counties will encounter long lines and wait times at the single drop-off location. The Proclamation thereby eliminates one of the primary advantages of returning a ballot in person during the early voting period during the ongoing pandemic. For these reasons, Defendant's Proclamation substantially and unconstitutionally burdens and threatens the right of Plaintiffs to vote.

11. Plaintiffs seek immediate injunctive and declaratory relief before the November 3, 2020 general election and ask this Court to enjoin enforcement of the Proclamation to the extent that it prohibits local election officials from operating multiple early voting drop-off locations in their counties.

DISCOVERY CONTROL PLAN

12. Discovery is intended to be conducted under Level 3 of Rule 190.4 of the Texas Rules of Civil Procedure.

JURISDICTION / VENUE

13. The Court has jurisdiction over this matter of election law under Texas Election Code § 273.081 and other laws. Plaintiffs do not seek damages and therefore make no statement under Texas Rule of Civil Procedure 47. Plaintiffs seek injunctive relief which, in this context, is within the jurisdiction of this Court.

14. Venue is proper in Travis County under sections 15.002(a)(1) of the Texas Civil Practices and Remedies Code.

PARTIES

15. **Plaintiffs Anti-Defamation League Austin, Southwest, and Texoma Region** are the regional offices of the Anti-Defamation League in Texas. ADL's mission, consistent with national Anti-Defamation League's overall mandate, is to protect the civil rights of all persons, eliminate vestiges of discrimination, racism, and antisemitism within communities in Texas, and to fight hatred in all its forms.

16. Accordingly, a critical part of ADL's mission includes voter mobilization and education activities. Among other things, ADL is encouraging college-age students to be pollworkers and poll monitors, providing approximately 700 schools with information about the voting process, holding webinars on the voting process, and engaging in outreach to and education of its constituents about Texas's vote-by-mail process and ensuring voters have a plan about how to cast their ballots. If the Governor's Proclamation is permitted to stand, it will distract from ADL's voter mobilization and education activities and force ADL to move resources from those planned activities to assist and educate voters in casting ballots at the single drop-off location in their county.

17. ADL has approximately 23,000 constituents or supporters who are Texas residents, a substantial number of whom are registered to vote in Texas and eligible to vote by mail, either because of their age or because of a physical condition that puts them at greater risk for contracting COVID-19. ADL also has approximately 250 regional board members throughout Texas, a substantial number of whom are registered to vote in Texas and eligible to vote by mail, either because of their age or because of a physical condition that puts them at greater risk for contracting COVID-19.

18. **Plaintiff Common Cause Texas** is a chapter of Common Cause, a non-partisan citizen lobby organized as a not-for-profit corporation under the laws of the District of

Columbia, and devoted to electoral reform, ethics in government and to the protection and preservation of the rights of all citizens to vote in national, state and local elections, including the education of voters about voting rights and procedures.

19. Since its founding, Common Cause Texas has been dedicated to the promotion and protection of the democratic process, including the right of all citizens to vote in fair, open, and honest elections. Common Cause Texas conducts significant non-partisan voter-protection, advocacy, education, and outreach activities to ensure that voters are registered and have their ballots counted as cast. At this point in the election cycle, Common Cause Texas's three full-time staff and five paid fellows are primarily focused on the organization's election protection program, including recruiting and training poll monitors and assisting voters. In addition, Common Cause Texas is engaging in a digital advertising campaign to educate voters. If Defendant's Proclamation is permitted to stand, it will thwart Common Cause Texas's voter advocacy, education, and outreach activities and force Common Cause Texas to move resources from those planned activities to assist voters in casting ballots at the single drop-off location in their county.

20. Common Cause Texas is one of the nation's leading grassroots, democracy-focused organizations and has over 1.2 million members nationwide and chapters in 30 states. Common Cause Texas has approximately 36,000 members and supporters across the state of Texas, a substantial number of whom are registered to vote in Texas and eligible to vote by mail, either because of their age or because of a physical condition that puts them at greater risk for contracting COVID-19.

21. **Plaintiff Robert Knetsch** is a registered voter who resides in Harris County. He is 70 years old. His age renders him particularly vulnerable if he contracts COVID-19.

22. **Defendant Greg Abbott** is the Governor of Texas and, pursuant to Article IV, Section I of the Texas Constitution, is the chief executive officer of the State of Texas. He is sued in his official capacity.

FACTUAL ALLEGATIONS

Voting By Mail in Texas & County Clerks' Authority to Establish Drop-Off Locations

23. Under Texas law, a voter is eligible to vote by mail if he or she meets any of the following requirements: (1) the voter is 65 or older; (2) the voter has a sickness or physical condition that prevents the voter from appearing at the polls; (3) the voter will be outside his or her county of residence for all of the Early Voting period and on Election Day; or (4) the voter is in jail, but otherwise eligible to vote. Tex. Elec. Code § 82.001-004.

24. Earlier this year, the Texas Supreme Court ruled that "a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of disability." *In re State*, 602 S.W.3d 549, 560 (Tex. 2020). Thus, while a lack of immunity to COVID-19 "is not itself a 'physical condition' that renders a voter eligible to vote by mail," a voter with a physical condition that puts himself or herself at greater risk of contracting COVID-19 may vote by mail. *Id*.

25. The Texas Election Code provides that eligible voters may deliver their marked ballots "in person to the early voting clerk's office . . . on election day." Tex. Elec. Code § 86.006(a-1).

26. The Texas Election Code designates local election officials, as the officials "in charge of and responsible for the management of the election." *Id*. § 32.071. That authority extends to early voting. *Id*. §§ 83.001(c), 83.002.

27. As Defendant Abbott previously conceded, the Texas Election Code allows the local election official to set up more than one "early voting clerk's office." On September 30,

2020, the Attorney General advised the Texas Supreme Court in an official filing responding to a a question from the Supreme Court as follows: "The Court asks whether, 'in light of the Governor's July 27, 2020 proclamation, . . . allowing a voter to deliver a marked mail ballot in person to any of [the] eleven annexes in Harris County violates Texas Election Code section 86.00[6](a-1).' The Government Code generally provides that the singular includes the plural. See Tex. Gov't Code § 311.012(b). Nothing in section 86.006(a-1) overcomes that presumption or otherwise indicates that 'office,' as used in section 86.006(a-1), does not include its plural, 'offices.' ***Accordingly, the Secretary of State has advised local officials that the Legislature has permitted ballots to be returned to any early-voting clerk's office.***" **Ex. B at 5,** Texas SG Submission dated Sept. 30, 2020 (emphasis added).

Harris County Operated Multiple Drop-Off Sites For July Primary Runoff

28. The authority of local election officials to establish multiple ballot drop-off locations is confirmed by the fact that the Harris County Clerk did, in fact, provide multiple drop-off locations in the July primary runoff.

29. In advance of the July primary runoff, Harris County operated 11 locations at which voters could drop off their mail-in ballots.

30. The state did not make any objection to Harris County's provision of these additional drop-off sites.

Defendant's July 27, 2020 Proclamation

31. Shortly after the July primary runoff election, on July 27, 2020, Defendant Abbott issued an executive order extending the early voting period in light of the COVID-19 pandemic. Specifically, to "ensure that elections proceed efficiently and safely when Texans go to the polls"

this election cycle, Defendant Abbott extended in-person early voting to begin on October 13, 2020 instead of October 19, 2020.[7]

32. In the same order, Defendant Abbott suspended the restriction in Texas Election Code 86.006 that only allows in-person delivery of ballots on Election Day: "I further suspend Section 86.006(a-1) of the Texas Election Code, for any election ordered or authorized to occur on November 3, 2020, to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early voting clerk's office prior to and including on election day."[8]

33. In so doing, Defendant Abbott specifically found that "Sections 85.001(a) and 86.006(a-1) of the Texas Election Code [the in-person delivery restriction] would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster[.]"[9]

County Clerks' Establishment of Multiple Drop-Off Locations for the Return of Ballots

34. In accordance with Defendant Abbott's order and to ensure safe and accessible voting for all Texans, counties began preparations to run multiple early voting drop-off locations, particularly in counties that are both geographically large and populous. County election officials were designing plans to ensure that voters will have reasonable access to those locations and that drop-off locations will not be overcrowded, which would pose a serious health risk for voters. By definition, voters dropping off their ballots-by-mail are older, sick, or have disabilities that prevent them from voting in person, and thus at particularly high risk of COVID-19.

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7 July 27, 2020 Proclamation, https://gov.texas.gov/uploads/files/press/PROC_COVID-19_Nov_3_general_election_IMAGE_07-27-2020.pdf

8 *Id.*

9 *Id.*

35. Harris County covers a large area of approximately 1700 square miles.[10] As of January 2020, approximately 2.3 million people were registered to vote in Harris County.[11]

36. In August 2020, the Harris County Clerk announced that there would be multiple locations in operation for ballot drop-offs "beginning whenever [voters] receive their ballots and continuing through Election Day, November 3, at 7:00 PM."[12] Eleven of these locations were the same drop-off sites that Harris County successfully administered during the July 2020 primary runoff elections, with no objection by the State, with an additional ballot drop-off location at the NRG Arena in Houston.[13]

37. Travis County covers an area of approximately 1,000 square miles[14] and has more than 813,000 registered voters.[15] Prior to the Proclamation, Travis County had opened four locations to receive ballots on October 1.[16]

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10 U.S. Census Bureau, QuickFacts – Harris County, Texas, https://www.census.gov/quickfacts/fact/table/harriscountytexas/PST045219

11 https://www.sos.state.tx.us/elections/historical/jan2020.shtml

12 Statement: Harris County Clerk Chris Hollins on Expected USPS Delivery Delays in November (Aug. 14, 2020), available at: https://bit.ly/2GqFAPD. ("Voters concerned with mail delays will be able to drop off their marked ballot in-person at any of the County's eleven offices and annexes").

13 Despart, Zach, Gov. Abbott Forces Harris County To Close 11 Mail Ballot Drop-Off Sites, Leaving Just One, Houston Chronicle (Oct. 1, 2020), available at: https://bit.ly/2St1PqZ

14 U.S. Census Bureau, QuickFacts – Travis County, Texas, https://www.census.gov/quickfacts/fact/table/traviscountytexas/PST045219

15 https://www.sos.state.tx.us/elections/historical/jan2020.shtml

16 Despart, Zach, Gov. Abbott Forces Harris County To Close 11 Mail Ballot Drop-Off Sites, Leaving Just One, Houston Chronicle (Oct. 1, 2020), available at: https://bit.ly/2St1PqZ

38. Just minutes before Defendant issued his executive order, Fort Bend County Judge KP George announced plans to open five ballot drop-off locations across the county.[17] Fort Bend covers an area of approximately 861 square miles.[18] Approximately 445,757 people are registered to vote in Fort Bend, and of those, 86,055 are over the age of 65.[19]

39. And after Defendant's Proclamation was released, Dallas County Judge Clay Davis stated that Dallas County had planned to announce multiple ballot drop-off locations.[20] Dallas County covers approximately 871 square miles.[21] Approximately 1,271,254 people are registered to vote in Dallas, and of those, 250,858 are over the age of 65.[22]

Projected Increased Use of Voting By Mail

40. Due to the ongoing COVID-19 pandemic, elections officials in Texas are projecting a marked increase in the use of voting by mail compared to prior elections.

41. The Harris County Clerk's Office, for instance, has reportedly received approximately 208,000 ballot-by-mail requests for the November 3, 2020 General Election as of

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17 Modrich, Stefan. Smart Financial Centre to be Used as Polling Place, Fort Bend Star (Oct. 1, 2020), available at: https://bit.ly/33q1onG

18 U.S. Census Bureau, QuickFacts – Fort Bend County, Texas, https://www.census.gov/quickfacts/fact/table/fortbendcountytexas/PST045219

19 Figures include inactive voters and are pulled from L2 Political's VoterMapping Tool, a proprietary database.

20 Dallas County Judge On Changes To Mail Ballot Drop-Off Locations In Texas: 'This Has President Trump Written All Over It', CBSDFW.com (Oct. 1, 2020), available at: https://cbsloc.al/3l0ZpMu.

21 U.S. Census Bureau, QuickFacts – Dallas County, Texas, https://www.census.gov/quickfacts/fact/table/dallascountytexas/PST045219

22 Figures include inactive voters and are pulled from L2 Political's VoterMapping Tool, a proprietary database.

August 23, 2020—an increase from the approximately 111,000 requests received in 2018 and 115,000 requests received in 2016.[23]

42. In Travis County—where just 27,000 absentee ballots were cast in the 2016 presidential election—71,000 voters had requested mail-in ballots as of October 2, 2020.[24] Elections officials expect up to 200,000 mail-in ballots to be cast.[25]

43. And as of September 3, McLennan County had seen a 162% increase in mail-in ballot requests since the 2016 presidential election.[26]

44. The increase in ballot-by-mail requests is also being seen in Texas's less populous counties.

45. Taylor County, for example, has already received a record-breaking number of vote-by-mail applications, processing almost 4,900 applications by September 25 and continuing to process 50-70 requests per day.[27] In 2016, by contrast, the county received only 3,579 requests, and just 2,977 requests in 2012.[28]

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23 Despart, Zach, *Harris County Launches Mail Ballot Tracking System to Ensure Residents Their Vote Has Counted*, Houston Chronicle (Sept. 30, 2020), available at: https://bit.ly/3nh7qAU.

24 Lindell, Chuck, and Nicole Cobler. *Abbott Orders Counties to Close Multiple Ballot Drop-Off Sites*, Austin American-Statesman (Oct. 2, 2020), available at: https://bit.ly/3jiHyt.

25 Devenyns, Jessi. *Travis County Plans for Drive-Thru Voting Drop-Off for Mail-In Ballots*, Austin Monitor (Aug. 26, 2020), available at: https://bit.ly/3nfLDrl.

26 Eisenberger, Paige. Central Texas Counties are Seeing a Surge in Mail-In Ballot Requests. KXXV.com (Sept. 3, 2020), available at: https://bit.ly/2Sm7fnA.

27 Bethel, Brian, Taylor County Elections Office Seeing Record Mail Ballot Requests, Abilene Reporter-News (Sept. 25, 2020), available at: https://bit.ly/30uAfxN.

28 *Id.*

46. The virus that causes COVID-19 is highly contagious and spreads through a variety of ways, including the respiratory droplets that an infected person produces when they cough, sneeze, or talk; or through contact between individuals. The virus enters the body through the nose, mouth, or eyes, and then attaches to a protein, which then enters the cell and replicates. Each infected cell can release millions of copies of the virus before the cell breaks down and dies. An infected person who coughs and sneezes can leave respiratory droplets on surfaces where it can remain in an infectious state for several hours to days without a human host.

47. The risks of severe illness, complications, and death due to COVID-19 increase with age. In addition to age, several other underlying health factors increase the risks associated with COVID-19. People who have underlying health conditions (such as heart disease, diabetes, and lung disease) have weakened immune systems, have cancer, and who are pregnant are considered populations at an increased risk for severe illness from COVID-19.[29]

48. For these reasons, the Centers for Disease Control and Prevention ("CDC") urges Americans to adhere to social distancing measures (for example, staying home as often as possible, maintaining at least six feet of physical distance from other people when outside the home, and wearing face masks) to minimize person-to-person contact and reduce the spread of COVID-19. The CDC emphasizes that these measures are crucial for reducing an individual's risk of becoming infected with the disease and for preventing the transmission of the disease throughout the population. Moreover, it is especially critical for elderly individuals and

[29] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html

members of other high-risk populations to continue to adhere to these social distancing measures for the sake of their own health.

49. In June, Texas election officials issued guidance to the County Clerks directing them to permit in-person voters to vote at polling places without a face covering. The guidance, in pertinent part, states that "[t]here is no authority under Texas law to require voters to wear face coverings when presenting to vote," and that "voters cannot be required to wear a face mask." Texas Election Advisory 2020-19 (June 18, 2020).

Delays in USPS Mail Delivery

50. At the same time as elections officials are projecting—and seeing—a massive increase in the number of voters choosing to vote by mail, the COVID-19 pandemic and internal policy changes within the USPS have led to delays in mail delivery that risks ballot-by-mail applications and completed ballots not being delivered to boards of elections on time.

51. Due to projected delays, the USPS recommends that voters submitting their absentee ballot applications by mail should do so at least 15 days before Election Day.[30] Texas law allows voters to request applications to vote by mail as late as 11 days before Election Day—four days after the recommended USPS cutoff. Tex. Elec. Code Ann. § 84.007.

52. During Texas's 2020 primary election, the general counsel for USPS wrote to Texas Secretary of State Ruth Hughs that, "[u]nder our reading of Texas' election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards," and "[a]s a result, to the extent that the mail is used to transmit ballots to and from voters, there is a ***significant risk*** that, at least in certain circumstances, ballots may be

[30] See Lee, Michelle Ye Hee, and Jacob Bogage, *Postal Service Backlog Sparks Worries That Ballot Delivery Could Be Delayed In November*, Washington Post (July 30, 2020), available at: https://wapo.st/34lVOlu.

requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted."[31]

53. It was reported that during Texas's 2020 primary election, 2,482 absentee ballots were rejected because they arrived too late to be counted.[32] More than 2,000 of these rejected ballots were in Harris County.[33]

54. Compounding this is the fact that mail sorting machines have been decommissioned and removed from USPS facilities across Texas. In August, the President of the National Association of Letter Carriers Branch 181 in Austin reported that four sorting machines and one Automated Flat Sorting Machine were taken out of service in Branch 181 territory, which covers Austin, Burnet, Fredericksburg, Bastrop, Lockhart, Georgetown and Round Rock.[34] The same month, representatives of the American Postal Workers Union Local 195 in San Antonio reported that four of the 32 large sorting machines had been removed from the city's Perrin Beitel Road distribution center.[35] In Houston, postal workers reported that about 15 sorting machines were removed from the Aldine Bender postal sorting center. And while

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31 Letter from Thomas J. Marshall, General Counsel, USPS, to Ruth Hughs, Texas Secretary of State (July 30, 2020), available at: https://cbsloc.al/3laiYlC (emphasis added).

32 Ura, Alexa. In Texas, USPS Woes and State Deadlines Could Leave Voters Without Enough Time to Return Mail-In Ballots, Texas Tribune (Aug. 20, 2020), available at: https://bit.ly/30tZTmB.

33 *Id.*

34 Marut, Mike. *While Postmaster General Testifies, Austin Union Leader Confirms Sorting Machines Removed From Local USPS Locations,* KVUE.com (Aug. 24, 2020), available at: https://bit.ly/2SqKGhA.

35 Flahive, Paul. *Four Mail Sorting Machines Removed From San Antonio Postal Distribution Center,* Texas Public Radio (Aug. 17, 2020), available at: https://bit.ly/3lpsMIH.

these sorting machines require two people to operate, because staffing has been reduced, only one employee remained to work the remaining machines at the processing plant.[36]

The October 1 Proclamation

55. Despite his awareness of the significant risks posed to voters by COVID-19 an and the current delays in USPS delivery times, Defendant Abbott issued the Proclamation on October 1, 2020, which purported to limit election officials' authority by prohibiting them from operating more than one early voting drop-off location in each county. Ex. A.

56. The Proclamation provided:

> I further suspend Section 86.006(a-1) of the Texas Election Code, for any election ordered or authorized to occur on November 3, 2020, to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early voting clerk's office prior to and including on election day; provided, however, that beginning on October 2, 2020, this suspension applies only when:
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> (1) the voter delivers the marked mail ballot at a single early voting clerk's office location that is publicly designated by the early voting clerk for the return of marked mail ballots under Section 86.006(a-1) and this suspension; and
>
> (2) the early voting clerk allows poll watchers the opportunity to observe any activity conducted at the early voting clerk's office location related to the in-person delivery of a marked mail ballot pursuant to Section $6.006(a-1) and this suspension, including the presentation of an acceptable form of identification described by Section 63.0101 of the Election Code by the voter.

57. According to Defendant Abbott, this measure was necessary to "add ballot security protocols." Defendant claims to have authority to issue the Proclamation to "control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area" under Texas Government Code § 418.018(c).

[36] Dellinger, Hannah, and Currie Engel. *'Not Acceptable': Lawmakers Not Satisfied As Changes At U.S. Postal Service Halted*, Houston Chronicle (Aug. 18, 2020), available at: https://bit.ly/36wE8q0

58. The Proclamation, however, impermissibly interferes with each county clerk's statutory authority to conduct and manage early voting, including through the operation of more than one "early voting clerk's office" to accept ballots from voters. Tex. Elec. Code §§ 32.071, 83.001(c), 83.002; Tex. Gov't Code § 311.012(b).

59. The Proclamation is thus contrary to each early voting clerk's authority under the Texas Election Code, as established by the Legislature. Indeed, the Secretary of State advised local officials that the Election Code permitted the operation of more than one early voting clerk's office to accept ballots, *see* **Ex. B at Attachment B, Email dated Aug. 26, 2020**, and the Texas Solicitor General made the same representation to the Texas Supreme Court on September 30, 2020, *see* **Ex. B at 5, Texas SG Submission dated Sept. 30, 2020**.

60. The Proclamation is an illegal *ultra vires* act that would compound, rather than alleviate, the COVID-19 disaster and interfere with the statutory authority of local election officials. The Proclamation exceeds gubernatorial authority, even in an emergency setting. Defendant is not the election official with authority to manage and conduct the early voting process. Moreover, Defendant's authority to control "ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area" is authority granted to alleviate a disaster. It is not a boundless grant of power that allows Defendant to conduct activity that would exacerbate the crisis, as the Proclamation does.

Harms to Plaintiffs

61. Defendant's Proclamation, which scrambles the rules applicable to early voting at the last minute before the election, harms Plaintiffs and the voters they represent.

62. ADL's supporters and constituents include registered Texas voters who are eligible to vote by mail. But because of USPS delays, a significant number of those voters no

longer feel comfortable sending their ballot back by mail and wish to drop off their ballot at an early voting drop-off location.

63. ADL will also be injured in its own right, because Defendant's Proclamation will cause ADL to expend additional resources to inform voters of the newly changed rules and assist them in making alternative plans to vote or return their mail-in ballots.

64. Common Cause Texas's members include registered Texas voters who are eligible to vote by mail. But because of USPS delays, a significant number of those voters no longer feel comfortable sending their ballot back by mail and wish to drop off their ballot at an early voting drop-off location.

65. Common Cause Texas will also be injured in its own right, because Defendant's Proclamation will cause Common Cause Texas to expend additional resources to inform voters of the newly changed rules and assist them in making alternative plans to vote or return their mail-in ballots.

66. Mr. Knetsch is a registered voter in Harris County who is eligible to vote by mail. Because of his age, he is particularly vulnerable to COVID-19 and so elected to vote by mail. He had planned to return his mail-in ballot to an early voting drop-off location approximately 3.1 miles from his residence to ensure his ballot would be received in time to be counted. But because the Proclamation now limits Harris County to just one early voting drop-off location, Mr. Knetsch now plans to risk voting in-person at his local polling place, despite the risk to his health, because he is worried about even longer lines and crowd congestion at the single drop-off site that now must serve the entire county. The single drop-off site, NRG Arena, is 12.7 miles from his home.

67. The Proclamation significantly burdens Plaintiffs in urban counties. For example, Harris County – where 20% of the population is Black and 43.7% is Latino – has more than 2.3 million registered voters. By contrast, Rains County – where more than 84% of the population is White[37] – has less than 8,000 registered voters.[38] And Somervell County – where more than 77% of the population is White[39] – has less than 6,500 registered voters.[40] Yet under the Proclamation these counties would have the exact same number of ballot return locations as Harris County: one.

68. The Proclamation particularly burdens Plaintiffs who reside in large urban counties such as Harris County, the largest county by population in the state, because travel distances are longer in the county due to its large spatial area and relatively high levels of road congestion. More than a third of all voters eligible to vote by mail in Harris County would expect to have a substantial travel burden to access a ballot drop-off location if only one location per county is allowed.

69. The Proclamation also burdens Plaintiffs who do not have access to a vehicle in their household. This is because public transit and walk times are much longer on average than drive times. While approximately 5% of Texas citizens under the age of 65 without a disability do not have access to a vehicle, the share is substantially higher for citizens aged 65 or more (at

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37 U.S. Census Bureau, QuickFacts – Rains County, Texas, https://www.census.gov/quickfacts/fact/table/rainscountytexas/PST045219

38 Texas Sec'y of State Jan. 2020 Voter Registration Figures, https://www.sos.state.tx.us/elections/historical/jan2020.shtml

39 U.S. Census Bureau, QuickFacts – Somervell County, Texas, https://www.census.gov/quickfacts/fact/table/lovingcountytexas/PST045219

40 Texas Sec'y of State Jan. 2020 Voter Registration Figures, https://www.sos.state.tx.us/elections/historical/jan2020.shtml

about 9 percent) and particularly for those with a reported disability aged 18 to 64 (at about 14 percent). This means a travel burden is particularly likely for people with disabilities under the age of 65, and for people over the age of 65, i.e., voters eligible to vote by mail and utilize the drop-off locations.

70. The Proclamation also burdens Plaintiffs who reside in less urban parts of the State, who will face lengthy travel times and wait times to return their ballots to the single drop-off location in their county, if they are able to travel there at all due to lack of access to a vehicle or public transportation.

71. Moreover, for voters with a disability that places them at greater risk of contracting COVID-19 and qualifies them to vote by mail, the long lines caused by the wait to show identification with the return of ballots as required by Texas Election Law creates additional unreasonable health risks that defeat the primary benefit of voting by mail and delivering the marked ballot in person.

72. Finally, for voters eligible to vote by mail, estimated queue lengths for ballot drop off on Election Day show that queues will become intolerably long for the largest counties, and effectively drive away voters who cannot afford the cost of wait time to cast their ballot.

COUNT ONE
(Ultra Vires)

73. The preceding and subsequent allegations are incorporated into Count One, as though fully set forth herein.

74. A state officer may not act without legal authority. *See, e.g., City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

75. The Texas Election Code grants authority to the early voting clerk to manage and conduct early voting, including the operation and designation of early voting drop-off locations.

76. By limiting early voting drop-off locations to one site per county, Defendant has acted without authority and has impermissibly interfered with the authority of the early voting clerks across the state of Texas.

77. Defendant's Proclamation also purports to rely on emergency powers that do not save this *ultra vires* act.

78. Section 418.018(c) of the Texas Government Code provides that "the governor may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area."

79. Defendant invoked this provision to bar counties from offering more than one ballot drop-off location. Counties offering multiple drop-off locations have thus had to reduce their drop-off sites and can only operate one location.

80. However, because social distancing and crowd reduction is of critical importance during the COVID-19 pandemic, Defendant's action makes the remaining ballot drop-off location more dangerous for voters.

81. Voters returning their ballots to a drop-off location must present identification. By being forced into one ballot drop-off location per county, voters therefore will not be able to avoid the long lines and crowd congestion that will necessarily result from Defendant's action.

82. Defendant's purported modification of state law therefore exceeded his legal authority, even under emergency powers, and is *ultra vires*. The Proclamation impermissibly prejudices the right to vote of Plaintiffs.

COUNT TWO

(The Proclamation violates Article 1, Section 3 of the Texas Constitution)

83. The preceding and subsequent allegations are incorporated into Count Two, as though fully set forth herein.

84. The Texas Constitution provides for the equal protection of all laws. Article I, Section 3 of the Texas Constitution provides: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." Tex. Const. art. I, § 3. An individual's right to vote falls within the ambit of Article I, Section 3 and is coextensive with the U.S. Constitution's Fourteenth Amendment equal protection clause. Texas courts apply federal standards to determine a violation of Article I, Section 3. *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 846 (Tex. 1990).

85. When resolving a challenge to a provision of Texas election laws under the state constitution, the Texas Supreme Court has adopted the balancing test set forth by the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). *State v. Hodges*, 92 S.W.3d 489, 496 (Tex. 2002) ("The parties agree that the proper test for determining the constitutionality of section 162.015(a)(2) is the balancing test articulated in *Anderson*").

86. Under *Anderson*, a court must evaluate "'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate'" and "'the precise interests put forward by the State as justifications for the burden imposed by its rule,'" while considering "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* (quoting the *Anderson* standard as described in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

87. A state's important regulatory interests are generally sufficient to justify "reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788. But when a burden on the right to vote is severe or discriminatory, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*,

502 U.S. 279, 289 (1992)). This approach also applies to equal protection challenges under the Texas Constitution.

88. Plaintiff's constituents in Texas have a fundamental right to vote under the Texas Constitution. Where the operation of an election law is alleged to cause a deprivation of such a fundamental right, the court "must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment that the plaintiff seeks to vindicate against eh precise interest put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

89. Texas's limit on early voting drop-off locations ensures that many disabled and elderly voters – who cannot safely vote in person because of the pandemic – will have to travel long distances and suffer crowded drop-off locations in order to drop off their ballots. And for those who receive their ballots close to Election Day, they will not be able to return those ballots by mail with any confidence they will be counted.

90. Defendant has provided no meaningful justification for the one-per-county limit on drop-off locations. The limit advances no security goals, despite Defendant's unexplained invocation of security in the October 1 order. And though the Proclamation invokes Defendant's power to control the ingress and egress into disaster areas, far from controlling and reducing crowding, the Proclamation actually will result in more crowded conditions in a pandemic where social distancing is critical. The Governor cannot invoke his emergency powers to violate voters' equal protection rights under the Texas Constitution.

91. The limitation on early voting drop-off locations unconstitutionally burdens the fundamental right to vote of Texas voters.

COUNT THREE
(Arbitrary Disenfranchisement in Violation of Article 1, Section 3 of the Texas Constitution)

92. The preceding and subsequent allegations are incorporated into Count Two, as though fully set forth herein.

93. "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104-05; *see also id.* at 106 (finding that voting procedures that "vary not only from county to county but indeed within a single county" are not "sufficient [to] guarantee[] equal treatment"); *see, e.g., Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."); *see Andrade v. NAACP of Austin*, 345 S.W.3d 1, 12 (Tex. 2011) (citing *Bush v. Gore*).

94. Defendant's insistence that every county in Texas provide only a single ballot-by-mail drop-off location—regardless of geographical size or population—requires that counties provide voters with disparate access to the franchise. Texas's 254 counties vary dramatically in both physical size and population. The use of county lines as the delineation for the number of voting resources that may be provided is therefore arbitrary. As a result of the October 1 Proclamation, eligible voters, including constituents of Common Cause Texas and ADL, will face disparate burdens on their right to vote based entirely on which county the voter lives in, or on where they live in a particular county in relationship to the single ballot-by-mail drop-off

location allowed under Defendant's Proclamation. The Governor cannot invoke his emergency powers to violate voters' equal protection rights under the Texas Constitution.

95. The Proclamation's elimination of additional ballot drop-off locations and limit of such drop-off locations to one per county cannot withstand even rational basis review.

APPLICATION FOR EMERGENCY TEMPORARY RESTRAINING ORDER

96. A temporary restraining order's purpose is to maintain the status quo pending trial. "The status quo is the last actual, peaceable, non-contested status that preceded the controversy." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004).

97. Plaintiffs are entitled to a temporary restraining order because absent one, the status quo will be destroyed. The Proclamation itself has garnered significant media attention, and unless the Court acts, Plaintiffs and their members, supporters, and constituents who are eligible to vote by mail may decline to timely apply for an application to do so because they will not trust that their ballot will be returned in time to be counted by the USPS and cannot travel to the distant single location within their county to return their ballot in person. These voters will either risk their personal safety to vote in person despite being particularly vulnerable to serious and potentially lethal complications from COVID-19 due to age or disability, or will choose not to vote at all for fear that in person voting creates too great a risk.

APPLICATION FOR TEMPORARY INJUNCTION

98. Plaintiffs are also entitled to temporary injunctive relief for these same reasons. Section 273.081 of the Texas Election Code provides that "[a] person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring."

99. A temporary injunction's purpose is to preserve the status quo of the litigation's subject matter pending a trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

100. Plaintiff must prove three elements to obtain a temporary injunction: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable imminent and irreparable injury. *Id*.

101. Plaintiffs state a valid cause of action against Defendant and have a probable right to the relief sought. For the reasons detailed above, there is a substantial likelihood that Plaintiffs will prevail after a trial on the merits because the Proclamation is an unconstitutional ultra vires act exceeding Defendant's authority and an unconstitutional infringement of equal protection and voting rights as protected by Article I, Section 3 of the Texas Constitution.

102. An injury is irreparable if the injured party cannot be adequately compensated in damages, or if damages cannot be measured by any certain pecuniary standard. *Butnaru*, 84 S.W.3d at 204.

103. If the Proclamation is not enjoined, the resulting burden on voting and loss of opportunity to vote cannot be redressed by damages.

APPLICATION FOR PERMANENT INJUNCTION

104. After a trial on the merits, Plaintiffs asks the Court to enter a permanent injunction granting the relief requested herein.

PRAYER FOR RELIEF

105. Therefore, Plaintiffs respectfully request that this Court:

106. Declare that Texas law, including Texas Election Code § 86.006(a-1), does not limit the number or locations of early voting drop-off sites that the statutory Early Voting Clerks may provide to the voters of their respective counties;

107. Declare the Proclamation an unconstitutional infringement of equal protection and voting rights as protected by Article 1, Section 3 of the Texas Constitution; and

108. Enter a temporary restraining order and temporary injunction, as well as a permanent injunction, enjoining the enforcement of Defendant's Proclamation forcing the statutory Early Voting Clerks to operate only one drop-off location for vote-by-mail ballots.

Dated: October 5, 2020

Respectfully submitted,

/s/ Lindsey B. Cohan

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Attorneys for Plaintiffs

DECLARATION OF CHERYL DRAZIN

I, CHERYL DRAZIN, declare that:

1. My name is Cheryl Drazin and I am the Vice President of the Central Division of the Anti-Defamation League.

2. I am over the age of eighteen and am competent to make this declaration on behalf of the Anti-Defamation League's Austin, Southwest, and Texoma Regions.

3. I have reviewed the Original Petition pertaining to Texas Governor Greg Abbott's October 1, 2020 proclamation limiting local election officials to operating a single drop-off site for ballots cast early in the 2020 presidential election. The facts stated in the Original Petition, Application for Temporary and Permanent Injunctions and for Declaratory Judgment are true and correct to the best of my personal knowledge.

I declare this under penalty of perjury that the foregoing is true and correct.

Signed this the 5th Day of October, 2020.

Cheryl Drazin

CHERYL DRAZIN

DECLARATION OF ANTHONY GUTIERREZ

I, ANTHONY GUTIERREZ, declare that:

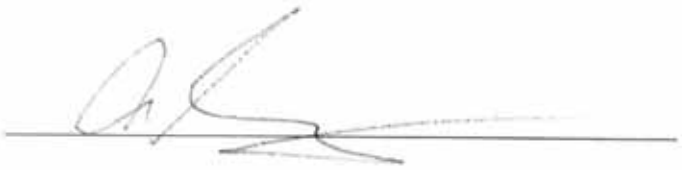
1. My name is Anthony Gutierrez and I am the Executive Director of Common Cause Texas.

2. I am over the age of eighteen and am competent to make this declaration on behalf of Common Cause Texas.

3. I have reviewed the Original Petition pertaining to Texas Governor Greg Abbott's October 1, 2020 proclamation limiting local election officials to operating a single drop-off site for ballots cast early in the 2020 presidential election. The facts stated in the Original Petition, Application for Temporary and Permanent Injunctions and for Declaratory Judgment are true and correct to the best of my personal knowledge.

I declare this under penalty of perjury that the foregoing is true and correct.

Signed this the 5th Day of October, 2020.



ANTHONY GUTIERREZ

CAUSE NO. _____

THE ANTI-DEFAMATION LEAGUE AUSTIN, SOUTHWEST, AND TEXOMA REGIONS; COMMON CAUSE TEXAS; and ROBERT KNETSCH, *Plaintiffs*,	§	IN THE DISTRICT COURT
	§	TRAVIS COUNTY TEXAS
v.	§	___ JUDICIAL DISTRICT
GREG ABBOTT, in his official capacity as the Governor of Texas, *Defendant*	§	

DECLARATION OF ROBERT KNETSCH

I, Robert Knetsch, declare that:

1. My name is Robert Knetsch. I am over the age of eighteen and am competent to make this declaration.

2. I have reviewed the Original Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction in this case pertaining to Texas Governor Greg Abbott's October 1, 2020 proclamation limiting county election officials to operating a single drop-off site for absentee ballots cast in the 2020 presidential election. The facts stated in the Original Petition, Application for Temporary and Permanent Injunctions and for Declaratory Judgment are true and correct to the best of my personal knowledge.

3. I am seventy years old and I reside in Houston, Texas.

4. I am registered to vote in Harris County, and I am eligible to vote by mail because I am over the age of 65.

5. Because of my age, I am also particularly vulnerable to COVID-19. I therefore planned to vote by mail in the upcoming Presidential election.

6. Due to reports of widespread issues with the U.S. Postal Service, I planned to return my ballot to an early voting drop-off location so that it would be received in time to be counted for the election.

7. I recently learned of Governor Abbott's October 1, 2020 Proclamation which will limit Harris County to one drop-off location for the whole county.

8. Before the Governor issued the Proclamation, I was aware that Harris County was operating multiple ballot drop-off locations. I identified a drop-off site located approximately 3.1 miles from my home. I was not that concerned about long lines to drop off my ballot or encountering crowd congestion at the drop-off site, because I knew that there were a number of ballot drop-off locations in Harris County.

9. Now, because of the Proclamation, there will only be one drop-off location for all of Harris County. The single drop-off location will be at NRG Arena, which is approximately 12.7 miles from my home. I am worried about long lines and crowd congestion at the drop-off site because it has to serve voters from all of Harris County.

10. I have therefore decided to vote in person at a polling location, even though I am concerned about contracting COVID-19.

I declare this under penalty of perjury that the foregoing is true and correct.
Signed this the 5th Day of October, 2020.

Robert Knetsch

Exhibit A

Governor Abbott Issues Proclamation Enhancing Ballot Security

October 1, 2020 | Austin, Texas | Proclamation

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, I, Greg Abbott, Governor of Texas, issued a disaster proclamation on March 13, 2020, certifying under Section 418.014 of the Texas Government Code that the novel coronavirus (COVID-19) poses an imminent threat of disaster for all counties in the State of Texas; and

WHEREAS, in each subsequent month effective through today, I have renewed the disaster declaration for all Texas counties; and

WHEREAS, the Commissioner of the Texas Department of State Health Services, Dr. John Hellerstedt has determined that COVID-19 continues to represent a public health disaster within the meaning of Chapter 81 of the Texas Health and Safety Code; and

WHEREAS, pursuant to legislative authorization under Chapter 418 of the Texas Government Code, I have issued executive orders, proclamations, and suspensions of Texas laws in response to the COVID-19 disaster, aimed at using the least restrictive means available to protect the health and safety of Texans and ensure an effective response to this disaster; and

WHEREAS, on July 27, 2020, I issued a proclamation suspending certain provisions of the Texas Election Code to provide additional time for early voting and to provide additional time in which a voter can deliver a marked mail ballot in person to the early voting clerk's office, such that this may be done prior to and including on election day; and

WHEREAS, the suspension of the limitation on the in-person delivery of marked mail ballots, as made in the July 27, 2020 proclamation, merely increased the amount of time for an eligible voter to return a marked mail ballot in person to the early voting clerk's office and did not suspend or otherwise affect the other applicable requirements that a voter must comply with when returning a marked mail ballot, including presenting an acceptable form of identification described by Section 63.0101 of the Election Code; and

WHEREAS, an amendment to the suspension of the limitation on the in-person delivery of marked mail ballots, as made in the July 27, 2020 proclamation, is appropriate to add ballot security protocols for when a voter returns a marked mail ballot to the early voting clerk's office; and

WHEREAS, Section 41.001(a) of the Texas Election Code provides that a general or special election in this state shall be held on a uniform election date, and the next uniform election date is occurring on November 3, 2020; and

WHEREAS, I issued a proclamation on March 18, 2020, suspending Sections 41.0052(a) and (b) of the Texas Election Code and Section 49.103 of the Texas Water Code to the extent necessary to allow political subdivisions that would otherwise have held elections on May 2, 2020, to move their general and special elections for 2020 only to the November 3, 2020 uniform election date; and

WHEREAS, Texas law provides that eligible voters have a right to cast a vote in person; and

WHEREAS, as counties across Texas prepare for the upcoming elections on November 3, 2020, and establish procedures for eligible voters to exercise their right to vote in person, it is necessary that election officials implement health protocols to conduct elections safely and to protect election workers and voters; and

WHEREAS, in order to ensure that elections proceed efficiently and safely when Texans go to the polls to cast a vote in person during early voting or on election day for the November 3, 2020 elections, it is necessary to increase the number of days in which polling locations will be open during the early voting period, such that election officials can implement appropriate social distancing and safe hygiene practices; and

WHEREAS, Section 85.001(a) of the Texas Election Code provides that the period for early voting by personal appearance begins 17 days before election day; and

WHEREAS, Section 86.006(a-1) of the Texas Election Code provides that a voter may deliver a marked mail ballot in person to the early voting clerk's office while the polls are open on election day; and

WHEREAS, in consultation with the Texas Secretary of State, it has become apparent that for the November 3, 2020 elections, strict compliance with the statutory requirements in Sections 85.001(a) and 86.006(a-1) of the Texas Election Code would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster, and that providing additional time for early voting will provide Texans greater safety while voting in person; and

WHEREAS, in the Texas Disaster Act of 1975, the legislature charged the governor with the responsibility "for meeting … the dangers to the state and people presented by disasters" under Section 418.011 of the Texas Government Code, and expressly granted the governor broad authority to fulfill that responsibility; and

WHEREAS, under Section 418.012, the "governor may issue executive orders hav[ing] the force and effect of law;" and

WHEREAS, pursuant to Section 418.016 of the Texas Government Code, the legislature has expressly authorized the governor to suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster; and

WHEREAS, under Section 418.018(c), the "governor may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area;"

NOW, THEREFORE, I, GREG ABBOTT, Governor of Texas, under the authority vested in me by the Constitution and laws of the State of Texas, do hereby suspend Section 85.001(a) of the Texas Election Code to the extent necessary to require that, for any election ordered or authorized to occur on November 3, 2020, early voting by personal appearance shall begin on Tuesday, October 13, 2020, and shall continue through the fourth day before election day.

I further suspend Section 86.006(a-1) of the Texas Election Code, for any election ordered or authorized to occur on November 3, 2020, to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early voting clerk's office prior to and including on election day; provided, however, that beginning on October 2, 2020, this suspension applies only when:

(1) the voter delivers the marked mail ballot at a single early voting clerk's office location that is publicly designated by the early voting clerk for the return of marked mail ballots under Section 86.006(a-1) and this suspension; and

(2) the early voting clerk allows poll watchers the opportunity to observe any activity conducted at the early voting clerk's office location related to the in-person delivery of a marked mail ballot pursuant to Section 86.006(a-1) and this suspension, including the presentation of an acceptable form of identification described by Section 63.0101 of the Election Code by the voter.

Any poll watchers operating under this suspension must comply with the requirements of Chapter 33 of the Election Code as if they were serving at an early voting polling place, as applicable to observing the in-person delivery of a marked mail ballot pursuant to Section 86.006(a-1) and this suspension.

Any marked mail ballot delivered in person to the early voting clerk's office prior to October 2, 2020, shall remain subject to the July 27, 2020 proclamation.

The Secretary of State shall take notice of this proclamation and shall transmit a copy of this order immediately to every County Judge of this state and all appropriate writs will be issued and all proper proceedings will be followed to the

end that said elections may be held and their results proclaimed in accordance with law.

IN TESTIMONY WHEREOF, I have hereto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 1st day of October, 2020.

View the proclamation

Office of the Texas Governor
P.O. Box 12428
Austin Texas 78711
(512) 463-2000

/

Exhibit B

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

KYLE D. HAWKINS
Solicitor General

(512) 936-1700
Kyle.Hawkins@oag.texas.gov

September 30, 2020

Via Electronic Filing

Blake Hawthorne, Clerk
Supreme Court of Texas

Re: No. 20-0751, *In re Hotze, et al.*

Dear Mr. Hawthorne:

On September 28, 2020, the Court invited the Solicitor General to file a brief expressing the views of the State on these questions presented in this mandamus petition.[1]

The view of the State is that the mandamus petition should be denied or dismissed for lack of jurisdiction. Each of Relators' claims fails on the merits. *See infra* I. But the Court should not reach the merits because Relators lack standing and, independently, are not entitled to mandamus relief. *See infra* II. Viewing those matters through the mandamus standard, Relators have not shown an entitlement to the relief they seek.

I. Respondent's alleged actions are lawful.

In the State's view, each of the three questions the Court presented to the State should be answered in the negative.

A. The Court first asks whether, "in light of the Governor's July 27, 2020 proclamation, . . . allowing early voting to begin on October 13, 2020, violates Texas Election Code section 85.001(a)." The Governor's Proclamation "suspend[ed] Section 85.001(a) of the Texas Election Code to the extent necessary to require that . . . early voting by personal appearance shall begin on Tuesday, October 13, 2020." The Governor has authority to suspend this statute, and his Proclamation to that

[1] No fee has been paid or will be paid for the preparation of this brief.

effect has "the force and effect of law" under the Texas Disaster Act of 1975. Tex. Gov't Code § 418.012.

The Legislature expressly granted the Governor the authority to suspend "*any regulatory statute* prescribing the *procedures* for conduct of state business" when necessary to respond to a declared disaster. Tex. Gov't Code § 418.016(a) (emphases added); *see also* Att'y Gen. Op. KP-191 (2018) (concluding that Section 418.016(a) authorized a suspension of the Texas Election Code that yielded deadlines different than those provided by statute). Section 85.001(a) is a statute regulating the procedures for conducting an election, insofar as it specifies a beginning point for early voting. The Governor's Proclamation extends the time for early voting by suspending that beginning point effective October 13, 2020.

Relators are wrong to argue that the suspension power in section 418.016(a) is unconstitutional on its face and as employed in the Proclamation. *See* Pet. 20–24. As explained in Relators' parallel mandamus action against the Secretary of State, section 418.016(a)—and the Disaster Act as a whole—represents a proper delegation because the Governor's power is cabined by reasonable standards from the Legislature. *See* Attachment A at 14–15 (Resp. to Pet. for Writ of Mandamus, *In re Hotze*, No. 20-0739 (filed Sept. 28, 2020)).

Specifically, legislative power can be delegated where "because of the nature of the subject of legislation [the Legislature] cannot practically and efficiently exercise such powers." *Hous. Auth. of City of Dallas v. Higginbotham*, 143 S.W.2d 79, 87 (Tex. 1940). "[A]s long as the Legislature establishes reasonable standards to guide the agency in exercising those powers," it may delegate legislative powers to another branch. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000). Moreover, the Legislature can delegate "the power to grant exceptions . . . of a fact-finding and administrative nature." *Williams v. State*, 176 S.W.2d 177, 185 (Tex. Crim. App. 1943) (holding that the Pink Bollworm Act did not violate Texas Constitution article I, section 28 by empowering the Governor and the Agriculture Commissioner to designate zones where growing cotton would not violate state law).

Under these principles, section 418.016(a) is a proper delegation during a state of disaster that requires quick and decisive action. In empowering the Governor to suspend regulatory statutes that would impede disaster-recovery efforts, the Legislature has not given him unlimited authority to suspend laws. Instead, the Legislature has restricted the suspension power to statutes whose "strict interpretation" would, according to the Governor's factual determination about the

effects of a rapidly unfolding disaster, "prevent, hinder, or delay necessary action in coping with a disaster." Tex. Gov't Code § 418.016(a). Further, the suspension power is temporally restricted by the 30-day expiration date for declared states of disaster, absent renewal, together with the Legislature's ability to "terminate a state of disaster at any time." *Id.* § 418.014(c). And the Disaster Act explicitly sets forth the purposes it serves. *Id.* §§ 418.002, 418.003, 418.004(1). These provisions help ensure that gubernatorial suspension power is not used in a manner inconsistent with legislative design. Operating within the confines of this delegated authority, the Proclamation properly suspends the statutory limit on the days for early voting in order to protect voters and poll workers during the COVID-19 disaster.

This conclusion is bolstered by the Legislature's awareness of past exercises of section 418.016(a). Indeed, use of this suspension power is nothing new, as Governors have exercised this delegated authority many times in responding to disasters. For example, during the 2017 Hurricane Harvey disaster, the Governor suspended numerous provisions of Texas law in order to alleviate hindrances to response efforts.[2] The suspension power has also been used to suspend provisions of the Texas Election Code in order to promptly call a special election.[3] Yet the Legislature did not repeal or amend the challenged provisions to further limit the Governor's authority to respond to the next crisis. A ruling in Relators' favor would contravene this clear authority from the Legislature and, importantly, undermine the State's ability to respond effectively to any existing or future disaster.

Relators here challenge the Legislature's grant of suspension authority to the Governor, but the Legislature has similarly delegated suspension power to this Court. *See* Tex. Gov't Code § 22.0035(b). The Court has repeatedly exercised that

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[2] *See, e.g.*, Proclamation (Oct. 16, 2017), *https://gov.texas.gov/news/post/governor-abbott-extends-suspension-of-rules-relating-to-vehicle-registratio*; Proclamation (Sept. 7, 2017), *https://gov.texas.gov/news/post/governor-abbott-extends-suspension-of-hotel-occupancy-tax-after-hurricane-h*; Proclamation (Aug. 29, 2017), *https://gov.texas.gov/news/post/governor-abbott-issues-a-proclamation-for-port-aransas-independent-school-d*; Proclamation (Aug. 25, 2017), *https://gov.texas.gov/news/post/governor-abbott-suspends-hotel-occupancy-tax*; Proclamation (Aug. 23, 2017), *https://gov.texas.gov/news/post/Disaster-Proclamation-Issued-For-30-Texas-Counties-in-Anticipation-Of-Tropical-Depression-Harvey-Making-Landfall*.

[3] *See* Proclamation (Apr. 24, 2018), *https://gov.texas.gov/news/post/governor-greg-abbott-orders-emergency-special-election-for-the-27th-congressional-district-of-texas*.

authority in addressing the pandemic's severe impact on court operations.[4] There is nothing novel—or unconstitutional—about this or section 418.016(a)'s grant of suspension power.

In any event, regardless of whether Relators' suspension arguments have merit, the Court should deny relief because the Proclamation can be upheld based on any power properly delegated to the Governor. The Proclamation generally invokes the Disaster Act, which expressly grants the Governor the authority to "control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area." Tex. Gov't Code § 418.018(c). Even if the suspension power did not exist, the Proclamation could be upheld based on the independent power to limit the occupancy of early voting sites while allowing all voters the chance to cast their votes. Mandamus and other relief should be denied simply because there are valid, alternative grounds to support the Proclamation.

B. The Court next asks whether, "in light of the Governor's July 27, 2020, proclamation, . . . allowing a voter to deliver a marked mail ballot in person to the early voting clerk's office beginning on September 28, 2020, violates Texas Election Code section 86.00[6](a-1)."

The answer to that question is no, mostly for the reasons discussed above. Exercising the Governor's constitutionally delegated authority in section 418.016(a), as well as the authority to control the occupancy of premises under section 418.018(c), the Proclamation "suspend[ed] Section 86.006(a-1) of the Texas Election Code . . . to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early voting clerk's office prior to and including on election day." The Proclamation thus allows voters to personally return their completed mail ballots at any time up to and including election day. The Governor did so by

[4] *See, e.g.*, Misc. Dkt. Nos. 20-9042, 20-9044, 20-9059, 20-9071, 20-9080, 20-9095, 20-9112 (proclaiming that "all courts in Texas may . . . [m]odify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order"); Misc. Dkt. No. 20-9068 (proclaiming that "[a]ny Texas statute requiring or permitting citation by publication on the website or requiring the Office of Court Administration to generate a return of citation is suspended until July 1, 2020," thereby suspending the explicit deadline in S.B.891, § 9.04, 86th Leg., R.S. (2019)); Misc. Dkt. No. 20-9045 (proclaiming that "[i]n any action for eviction to recover possession of residential property under Chapter 24 of the Texas Property Code . . . [n]o trial, hearing, or other proceeding may be conducted, and all deadlines are tolled").

suspending the requirement that a voter can return the marked mail ballot only on election day.

Importantly, the Proclamation does not change section 86.006's protections for ballot integrity. Only the voter may return his marked ballot in person—no third-party may do so. Tex. Elec. Code § 86.006(a)(3). And when delivering his ballot, the voter "must present an acceptable form of identification described by [Texas Election Code] section 63.0101." *Id.* § 86.006(a-1).

C. Finally, the Court asks whether, "in light of the Governor's July 27, 2020 proclamation, . . . allowing a voter to deliver a marked mail ballot in person to any of [the] eleven annexes in Harris County violates Texas Election Code section 86.00[6](a-1)." The Government Code generally provides that the singular includes the plural. *See* Tex. Gov't Code § 311.012(b). Nothing in section 86.006(a-1) overcomes that presumption or otherwise indicates that "office," as used in section 86.006(a-1), does not include its plural, "offices." Accordingly, the Secretary of State has advised local officials that the Legislature has permitted ballots to be returned to any early-voting clerk office. *See* Attachment B (email dated Aug. 26, 2020).[5]

II. The Court should not reach these questions, however, because Relators lack standing and because mandamus relief is not available.

The Court should not reach any of these issues, however, because Relators do not have standing and because Relators, having slumbered on their rights, are not entitled to mandamus relief.

A. Relators lack standing, so the Court does not have jurisdiction. As explained in response to Relators' parallel petition, Relators do not have constitutional standing because they lack a concrete, justiciable interest in the issues raised. *See* Attachment A at 11–13. Because Relators "seek to correct an alleged violation of the separation of powers, [the Court's] standing inquiry must be especially rigorous."

[5] To the extent county early-voting clerks maintain several early-voting offices capable of receiving completed ballots, the State has a compelling interest in ensuring the integrity of the protections in place at such offices. This brief does not opine on the circumstances under which a "watcher" may be "appointed" under Chapter 33 of the Election Code in the context of annexes. Nevertheless, the State notes that counsel for Harris County recently agreed in oral argument before this Court that "poll watchers have been there [at annexes] for a couple of days," and "I don't understand why they couldn't be in a public office building." Oral Argument at 44:05–44:48, *State v. Hollins*, No. 20-0729 (Sept. 30, 2020).

In re Abbott, 601 S.W.3d 802, 809 (Tex. 2020) (per curiam) (internal quotation marks omitted). Their general interest in compliance with the law is the type of generalized grievance that is not cognizable in Texas courts. This petition, like No. 20-0739, should be dismissed for want of jurisdiction.

B. Alternatively, the Court should deny the petition because Relators have waited too long to seek relief. Mandamus is "controlled largely by equitable principles," one of which is that "equity aids the diligent and not those who slumber on their rights." *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 676 (Tex. 2009) (per curiam) (quoting, *inter alia*, *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993)). The Governor extended early voting for the July 14 elections on May 11, 2020. The Governor first announced plans to extend early voting for the general election later in May. The Governor then issued this Proclamation on July 27, 2020—over two months ago. Yet Relators waited until September 28 to ask this Court to "alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). They offer no excuse or explanation for this lengthy delay. And they offer no reason, much less a compelling one, for failing to first seek relief in the court of appeals. *See* Tex. R. App. P. 52.3(e).

To the extent the issues raised here have any merit—which they do not—those questions, and the consequences they have for the State of Texas, deserve careful study and consideration by the parties, the State, and the Court. Such weighty issues deserve more than a hurried disposition necessitated by Relators' dilatory litigation conduct. Because Relators cannot justify their lengthy delay, mandamus relief should be denied. *See Chambers-Liberty Counties Navigation Dist. v. State*, 575 S.W.3d 339, 356 (Tex. 2019); *Rivercenter*, 858 S.W.3d at 367–68.

The Court should dismiss the petition for lack of jurisdiction or deny relief.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On September 30, 2020, this document was served electronically on Jared R. Woodfill, lead counsel for Relators, at woodfillservice@gmail.com; and on Susan Hays, lead counsel for Real Party in Interest Chris Hollins, via hayslaw@me.com.

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CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this document contains 2,147 words, excluding the portions of the document exempted by Rule 9.4(i)(1).

/s/ Kyle D. Hawkins
KYLE D. HAWKINS

ATTACHMENT A:
RESP. TO PET. FOR WRIT OF MANDAMUS, *IN RE HOTZE*, NO. 20-0739 (FILED SEPT. 28, 2020)

No. 20-0739

In the Supreme Court of Texas

IN RE STEVEN HOTZE, M.D., HON. ALLEN WEST, REPUBLICAN PARTY OF TEXAS, HON. SID MILLER, HON. MARK HENRY, HON. CHARLES PERRY, HON. PAT FALLON, HON. BILL ZEDLER, HON. CECIL BELL, JR., HON. STEVE TOTH, HON. DAN FLYNN, HON. MATT RINALDI, HON. RICK GREEN, HON. MOLLY WHITE, HARRIS COUNTY REPUBLICAN PARTY/HON. KEITH NIELSON, HON. BRYAN SLATON, HON. ROBIN ARMSTRONG, M.D., JIM GRAHAM, HON. CATHIE ADAMS, HON. JOANN FLEMING, JULIE MCCARTY, SHARON HEMPHILL, AND AL HARTMAN,

Relators.

On Petition for Writ of Mandamus to the Secretary of State

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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Constitutional Provisions and Statutes:

Other Authorities:

Record References

Respondent's appendix is cited as "App.[x]." As Relators did not submit a mandamus record, "MR" refers to the record submitted herewith, which includes materials relevant to this response.

Statement of the Case

Nature of the Case: This is an original proceeding filed by Relators Steven Hotze and others seeking a writ of mandamus directing the Texas Secretary of State to take unspecified actions. Relators argue the Secretary has violated the Texas Constitution and the Election Code because on July 27, 2020, the Governor issued a proclamation that suspends two provisions of the Election Code using his emergency powers under the Disaster Act. The proclamation extends the time for early voting in the upcoming general election and allows voters to return early-vote-by-mail ballots in person any time after they receive their ballots. Relators further contend thatthe Disaster Act is unconstitutional and that the Governor has acted improperly by failing to call a special session of the Legislature.

Statement of Jurisdiction

The Court lacks jurisdiction to issue the requested writ. Generally speaking, Texas Government Code section 22.002 and Texas Election Code section 273.061 allow the Court to issue writs of mandamus. The Court lacks statutory or constitutional jurisdiction, however, to issue a writ of mandamus to the Governor. Tex. Const. art. V, § 3(a); Tex. Gov't Code § 22.002(a). And it lacks jurisdiction to issue a writ to the Secretary because the Secretary has no power to rescind or enforce the Governor's Proclamation, so any such writ would not redress Relators' alleged injury.

Issues Presented

1. Whether the Secretary of State has any ministerial duties under Election Code sections 85.001(a) or 86.006(a-1), which are implemented by local early-voting clerks.

2. Whether Relators have constitutional standing to sue the Secretary.

3. Whether this petition properly presents Relators' constitutional challenges to the Disaster Act, and if so, whether the Disaster Act delegates legislative power governed by reasonable standards.

To the Honorable Supreme Court of Texas:

Relators direct their petition at the Secretary of State, even though they do not allege that she has undertaken or threatened to undertake any unlawful action. Neither the Governor's July 27 proclamation ("the Proclamation") nor the Election Code imposes any ministerial duty on the Secretary. And the provisions of the Election Code concerning early voting are administered by county election officials, not the Secretary of State. Although the Election Code designates the Secretary as Texas's "chief election officer," this Court has long held that does not give her generalized enforcement power over every provision of the Election Code. Moreover, the Proclamation independently binds each county's early-voting clerk, so any mandamus issued against the Secretary would not remedy Relators' grievances. Indeed, granting the relief Relators seek would have no impact at all—which makes this petition nothing more than a request for an advisory opinion.

Relators' merits arguments are similarly misguided. They raise multiple constitutional challenges to the Disaster Act, but none is properly before this Court because the Disaster Act delegates no power to the Secretary. And in any event, the Governor's discretion and authority under the Disaster Act are cabined by reasonable standards, so it is a lawful delegation of legislative power, and the July 27 Proclamation is a proper exercise of that delegated power.

Relators waited two months to file this mandamus petition, yet they ask this Court to "alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). They are not entitled to relief.

Statement of Facts

I. In the Disaster Act, the Legislature Delegated Emergency Powers to the Governor to Enable Quick and Decisive Action.

The Disaster Act empowers the Governor to exercise emergency powers in the event of a disaster in one or more Texas counties. Tex. Gov't Code ch. 418. The Act both defines and limits when the Governor may declare a disaster. It pronounces the Governor's responsibilities to include "meeting" "dangers to the state and people presented by disasters" and "disruptions to the state and people caused by energy emergencies." Tex. Gov't Code § 418.011. When a state of disaster is declared, the Act allows the Governor to issue executive orders and proclamations with the "force and effect of law." *Id.* § 418.012.

A state of disaster may be declared if the Governor "finds a disaster has occurred or that the occurrence or threat of disaster is imminent." Tex. Gov't Code § 418.014(a). It explicitly provides that an "epidemic" can constitute a disaster, *id.* § 418.004(1), and that the Governor decides when "the threat or danger has passed" or "the disaster has been dealt with to the extent that emergency conditions no longer exist," *id.* § 418.014(b)(1). Nevertheless, the Act requires that the Governor reexamine his decision every 30 days and announces that the Legislature may terminate it at any time. *Id.* § 418.014(c).

Under the Disaster Act, a declaration of disaster permits the Governor to suspend the provisions of any regulatory statute[s]" prescribing the procedure for conduct of state business and the orders and rules of state agencies if they would "in any way prevent, hinder, or delay necessary action in coping with [the] disaster."

Tex. Gov't Code § 418.016. He "may use all available resources of state government and of political subdivisions that are reasonably necessary." *Id.* § 418.017.

II. During the Pandemic, the Governor Has Acted to Ensure the Safety and Integrity of Texas Elections.

The coronavirus pandemic reached American shores in early 2020 and Texas in March. The Governor first declared a statewide disaster on March 13, 2020. *See* App.3 (Proclamation of March 13, 2020). In the ensuing six months, the declaration of disaster has been renewed multiple times—most recently on September 7, 2020. *See* App.7 (Proclamation of Sept. 7, 2020). As the Fifth Circuit explained early in the pandemic:

> [W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some real or substantial relation to the public health crisis and are not beyond all question, a plain, palpable invasion of rights secured by the fundamental law. Courts may ask whether the state's emergency measures lack basic exceptions for extreme cases, and whether the measures are pretextual—that is, arbitrary or oppressive. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.

In re Abbott, 954 F.3d 772, 784–85 (5th Cir. 2020) (citations and internal quotation marks omitted).

Using the emergency powers granted by the Disaster Act, the Governor has taken numerous actions to protect Texans, including when they go to the polls. The Governor authorized postponement of elections scheduled for May until July 14. *See, e.g.*, App.4 (Proclamation of March 20, 2020). He expanded the early-voting period

for all July 14 elections so "election officials can implement appropriate social distancing and safe hygiene practices." App.5 (Proclamation of May 11, 2020).

Four months ago, in May, the Governor announced plans to similarly extend the early voting period for the November general election. *See* Patrick Svitek, *Texas will extend early voting period this fall, Gov. Greg Abbott says*, Tex. Tribune (May 28, 2020), https://www.texastribune.org/2020/05/28/texas-2020-early-voting-greg-abbott-coronavirus/. On July 27, he did so.

In his Proclamation, which is the subject of this petition, the Governor found that "in order to ensure that elections proceed efficiently and safely . . . it is necessary to increase the number of days in which polling locations will be open during the early voting period, such that election officials can implement appropriate social distancing and safe hygiene practices." App.6 (Proclamation of July 27, 2020).

To accomplish that aim, the Proclamation suspends two provisions of the Election Code. First, it suspends "[s]ection 85.001(a) of the Texas Election Code to the extent necessary to require that, for any election . . . on November 3, 2020, early voting by personal appearance shall begin on Tuesday, October 13, 2020, and shall continue through the fourth day before election day." *Id.* Second, it suspends "[s]ection 86.006(a-1) . . . to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early voting clerk's office prior to and including on election day." *Id.*

Like the May 11 proclamation, the Proclamation ordered the Secretary to "take notice of this proclamation" and to "transmit a copy of this order immediately to every County Judge of this state." App.6; *see also* App.5. And, like the May 11

proclamation, the Proclamation provides in the passive voice that "all appropriate writs *will be issued* and all proper proceedings *will be followed* . . . in accordance with law." App.6 (emphases added); App. 5.

III. The Secretary Performed the Only Act Required of Her Months Ago.

The Secretary complied with the only provision of the Proclamation addressing her. Specifically, on the afternoon of July 27, 2020, the Secretary sent a copy of the Proclamation to local election officials. *See* MR.01–02. Relators do not allege the Secretary has taken any additional action since that day.

Summary of the Argument

The Secretary of State does not enforce the Proclamation or Election Code sections 85.001(a) and 86.006(a-1), and those who do—local early-voting clerks—are independently bound by the Proclamation. As such, there is no ministerial duty this Court could order the Secretary to perform that would remedy Relators' supposed injury. For that reason alone, Relators' petition fails.

Moreover, Relators lack constitutional standing to sue because they have not identified any justiciable interest that could be vindicated here. A mandamus petitioner must identify and support an injury-in-fact, causation, and redressability. Relators' general interest in ensuring the law is followed does not create standing. Because Relators state no more than generalized grievances common to the public at large, the petition for writ of mandamus should be dismissed for want of jurisdiction.

Finally, Relators' sundry challenges to the Disaster Act's constitutionality are not the subject of a live controversy in this petition. The Act does not delegate any

power to the Secretary, so any order against her would not provide relief; and the Governor is not a party, so any opinion about the constitutionality of his delegated powers would be advisory. In any event, Relators' constitutional challenges would fail because the Disaster Act is an appropriate delegation of legislative authority subject to reasonable standards, and the Proclamation is a proper exercise of that authority.

ARGUMENT

I. Relators Have Not Identified Any Ministerial Duty Imposed on the Secretary.

To seek mandamus under Election Code section 273.061, Relators must identify a ministerial "duty imposed by law in connection with the holding of an election." *See* Pet. 3. Relators do not identify any ministerial duty they want "to compel the performance of." Tex. Elec. Code § 273.061.

A. Relators argue that the Secretary has "statutory duties to administer early voting in person consistent with Texas Election Code §86.001" and "statutory duties under Texas Election Code § 86.006(a-1)." Pet. 1. Neither of those sections imposes any duty, much less a ministerial one, on the Secretary. Section 86.001 is not about the Secretary or in-person voting. It requires "[t]he early voting clerk" to "review each application for a ballot to be voted by mail." Tex. Elec. Code § 86.001(a). That section cannot support a writ of mandamus against the Secretary.

Nor does any other provision. For example, although Relators did not cite section 85.001, it provides that "[t]he period for early voting by personal appearance begins on the 17th day before election day and continues through the fourth day

before election day." *Id.* § 85.001(a). That does not impose a ministerial duty on the Secretary either. It sets a general rule telling local officials when to open and operate early voting polling places.

Local officials, not the Secretary, administer early voting. The Election Code provides that "one or more early voting polling places . . . may be established" by "the commissioners court" or "the governing body of the political subdivision." Tex. Elec. Code § 85.062(a). Local officials then open and operate early-voting polling places "[a]t the official time." *Id.* § 61.002. Thus, even if section 85.001 imposes a ministerial duty on those who open and operate early-voting polling places, it would not impose such a duty on the Secretary.

Section 86.006(a-1) also does not impose a ministerial duty on the Secretary. It provides that "[t]he voter may deliver a marked ballot in person to the early voting clerk's office only while the polls are open on election day." Tex. Elec. Code § 86.006(a-1). On its face, that provision gives an option to those who vote by mail. One might argue it imposes an implicit duty on voters not to return marked ballots to their local early-voting clerks at a different time, but that has nothing to do with the Secretary.

Section 86.006(h) makes clear that local officials, not the Secretary, enforce any limitations imposed by section 86.006(a-1). "If the early voting clerk determines that the ballot was returned in violation of this section, *the clerk* shall make a notation on the carrier envelope and treat it as a ballot not timely returned in accordance with [s]ection 86.011(c)." *Id.* § 86.006(h) (emphasis added). Then, depending on timing, "the early voting clerk" may have to "deliver to the voter a written notice." *Id.* In

any event, the local officials responsible for counting votes do not count improperly returned ballots. *See id.* That process has nothing to do with the Secretary.

B. Elsewhere, Relators point to two duties that the Governor's Proclamation allegedly imposes on the Secretary. But these proclamation-based duties also do not require ministerial acts that could be compelled.

First, Relators say that the Secretary "has been ordered to take notice of Governor Abbott's July 27, 2020 proclamation and transmit a copy of Governor Abbott's order to every County Judge of this state." Pet. 4. That cannot support mandamus for three reasons. First, Relators do not seek to compel the exercise of that duty. Ordering the Secretary to transmit the Governor's proclamation would not advance Relators' goal of preventing the Governor's proclamation from going into effect. Second, the Secretary has already carried out this duty, so a writ of mandamus would accomplish nothing. Third, the Proclamation has "the force and effect of law," Tex. Gov't Code § 418.012, but by definition a section 273.061 mandamus action "is limited to a duty imposed by a constitution, statute, city charter, or city ordinance." *In re Republican Party of Tex.*, 605 S.W.3d 47, 48 (Tex. 2020) (citing Tex. Elec. Code § 1.005(10)).

Second, Relators claim the Secretary "is further ordered to 'issue all appropriate writs . . . and all proper proceedings will be followed to the end that said elections may be held and their results proclaimed in accordance with law.'" Pet. 4. Relators' reliance on this proclamation-based duty is misplaced for the same reasons explained above. In particular, this portion of the Proclamation does not impose a duty on the Secretary at all. Instead of focusing on the Secretary, the Proclamation uses the

passive voice: "all appropriate writs will be issued and all proper proceedings will be followed to the end that said elections may be held and their results proclaimed in accordance with law." App.6; *see also* App.5. But the Secretary does not issue writs of election. *See* Tex. Elec. Code §§ 3.003, 3.004, 4.007.*

C. Finally, Relators point to the Secretary's title, "chief election officer," Pet. 4, 9, 23–24, but this Court has explained that the title "chief election officer" is not "a delegation of authority to care for any breakdown in the election process." *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972) (Reavley, J.). Texas law, then as now, charged the Secretary with "'obtain[ing] and maintain[ing] uniformity in the application, operation and interpretation of the election laws.'" *Id.* at 371 (quoting former Tex. Elec. Code art. 1.03); *accord* Tex. Elec. Code § 31.003. "Acting as the 'chief election officer' of the state," the Secretary had "determined that uniformity [could not] be obtained . . . without the expenditure of state funds." *Bullock*, 480 S.W.2d at 369. This Court rejected the idea that the Secretary had an implied power to do whatever was necessary to achieve uniformity. *See id.* at 372. In situations like this, where no one is "impeded[ing] the free exercise of a citizen's voting rights," Tex. Elec. Code § 31.005, the Secretary does not even have authority to "order" local officials to change their practices. The Secretary's title does not give her power to

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* The Secretary of State's website contains forms used for writs of election, but she does not issue the writs herself. *See* Writ of Election, https://www.sos.state.tx.us/elections/forms/pol-sub/4-12f.pdf; Writ of Election for the General Election, https://www.sos.state.tx.us/elections/forms/pol-sub/4-13f.pdf; Writ of Election for Early Voting Ballot Board Judge, https://www.sos.state.tx.us/elections/forms/pol-sub/4-14f.pdf.

coerce local officials into ignoring the Governor's proclamation, much less impose a ministerial duty to do so. *See In re Stalder*, 540 S.W.3d 215, 218 n.9 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding) (noting that a party provided "no legal authority to suggest that, having received the Secretary of State's assistance and advice in response to an inquiry, the party chair lacked the authority to then form and act upon her own ultimate legal judgment" (citation omitted)).

Relators cite *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017), but that case is both irrelevant and wrongly decided. It addressed whether the Secretary was a proper defendant under federal principles of Article III standing. *See id.* at 613–14. That has nothing to do with whether the Election Code imposes a ministerial duty on the Secretary in this case. Moreover, *OCA*'s cursory analysis did not even cite—let alone substantively discuss—this Court's precedent interpreting the Secretary's powers. *See id.* In any event, *OCA* is neither binding on this Court, *see Pidgeon v. Turner*, 538 S.W.3d 73, 83 & n.17 (Tex. 2017); Bryan A. Garner *et al.*, *The Law of Judicial Precedent* 655 (2016); nor persuasive, *see Bullock*, 480 S.W.2d at 372. A federal court's *Erie* guess about the meaning of the Texas Election Code cannot control this Court's authoritative interpretation.

But even if the Secretary had a ministerial duty to obtain uniformity in this situation, uniformity already has been achieved. To the best of the Secretary's knowledge, all local officials are properly implementing the Election Code in light of the Proclamation, and Relators never argue otherwise. This shows that uniformity is not what Relators seek. Because uniformity can be achieved by either all counties following the Governor's proclamation (as the State wants) or no counties following

the Governor's proclamation (as Relators want), a writ of mandamus compelling the Secretary to achieve uniformity would not redress Relators' supposed injuries.

II. Relators Lack Constitutional Standing.

The Court need not decide whether Relators have identified a ministerial duty, however, because they have not alleged, let alone established, standing to pursue the writ. "[S]tanding is a constitutional prerequisite to maintaining a suit" in Texas courts. *Tex. Ass'n. of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). It requires "a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Heckman v. Williamson County*, 369 S.W.3d 137, 154 (Tex. 2012). To meet those requirements, the party invoking the court's jurisdiction must show (1) an "injury in fact" that is both "concrete and particularized" and "actual or imminent"; (2) that the injury is "fairly traceable" to the defendant's challenged actions; and (3) that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 154–55 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). And where the suit "seek[s] to correct an alleged violation of the separation of powers, [the Court's] standing inquiry must be 'especially rigorous.'" *In re Abbott*, 601 S.W.3d 802, 809 (Tex. 2020) (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)).

A. An "undifferentiated public interest in executive officers' compliance with the law" does not confer standing. *Lujan*, 504 U.S. at 577; *see also Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001) ("Our decisions have always required a plaintiff to allege some injury distinct from that sustained by the public at large."). The Petition suggests nothing more than that.

Relators are individual voters, political organizations, candidates for office and officeholders, and the Galveston County Judge. Pet. ii–vi. None of them alleges an injury that could support standing. The individual voters do not claim the Proclamation burdens their right to vote; the organizations do not claim it will harm their preferred candidates' electoral prospects (or even identify any such candidates); the current legislators do not claim any personal interest in Election Code sections 85.001(a) and 86.001(a-1); and the hopeful candidates do not claim the Proclamation will affect their races, much less cause them to lose.

None of these potential injuries would suffice to confer standing, even if they were alleged and proved. "No Texas court has ever recognized that a plaintiff's status as a voter, without more, confers standing to challenge the lawfulness of governmental acts." *Brown*, 53 S.W.3d at 302. Even when a "preferred candidate . . . has less chance of being elected," the "harm" is not "a restriction on voters' rights and by itself is not a legally cognizable injury sufficient for standing." *Becker v. FEC*, 230 F.3d 381, 390 (1st Cir. 2000); *see also Berg v. Obama*, 586 F.3d 234, 240 (3d Cir. 2009); *Gottlieb v. FEC*, 143 F.3d 618, 622 (D.C. Cir. 1998). The same is true for an organization. *See Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 5289377, at *7 (11th Cir. Sept. 3, 2020). And Relators do not so much as suggest "that a particular candidate's prospects in a future election will be harmed." *Id.* at *9. Finally, this Court has rejected the theory that individual officeholders—including legislators—have standing based on voting for or against legislation. *See Brown*, 53 S.W.3d at 304–06.

Galveston County Judge Henry also fails to state a cognizable injury. The Petition states he is being "unlawfully forc[ed] . . . to implement Abbott's unlawful order." Pet. 9. An elected official's belief that a law he is charged with implementing or enforcing is unconstitutional does not support standing to sue because it does not cause a personal injury. *See Finch v. Miss. State Med. Ass'n, Inc.*, 585 F.2d 765, 774 (5th Cir. 1978), *modified*, 594 F.2d 163 (5th Cir. 1979) ("[M]atters of public importance" must be resolved "through the adversary system of justice in particular cases involving parties who are genuinely, personally affected." *In re Abbott*, 601 S.W.3d at 809. Judge Henry is not such a party.

But even if this were an injury-in-fact, it cannot support standing to sue *the Secretary* because it is not traceable to any ministerial duty the secretary has performed or failed to perform. Indeed, a writ against the Secretary would not bind county officials, who are not parties to this litigation. *Cf.* 44 Tex. Jur. 3d, *Injunctions* § 232 (observing that non-parties are not bound by an injunction). That means "the effect of the court's judgment on the [Secretary]" would not provide relief. *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (emphasis omitted). Relators cannot show that ordering the Secretary to refrain from enforcing the Proclamation will "significantly increase the likelihood" that local election officials will ignore it. *Id.* At its core, then, Relators' petition seeks an advisory opinion.

B. The petition fails for another reason still: Relators fail to meet their burden of offering evidence to support their standing. To establish standing in this original proceeding, Relators must submit evidence. *See Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984); *e.g.*, *In re Roman*, 554 S.W.3d 73, 76 (Tex. App.—El Paso 2018, no pet.);

Comm'rs Ct. of Cherokee County v. Cooksey, 718 S.W.2d 26, 28 (Tex. App.—Tyler 1986, writ ref'd n.r.e.); *see also Lujan*, 504 U.S. at 561–62 ("[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."). That evidence must show a "particular personal interest which separates [relator] from the general public." *Hunt*, 664 S.W.2d at 324. Relators did not do so or explain why such evidence is not required; the petition may be dismissed on that basis.

III. Relators' Constitutional Challenges Are Not Properly Before the Court—and They Would Fail if They Were.

A. Rather than identifying anything this Court can order the Secretary to do, Relators argue at length that the Disaster Act is unconstitutional, Pet. 13–20, and air their desire for a special session of the Legislature, Pet. 20–23. But as discussed above, the Secretary lacks any power under the Disaster Act. *See supra* Part I. And she has nothing to do with calling a special session. So Relators seek an advisory opinion, which this Court may not issue. This petition is consequently not a viable vehicle for assessing the constitutional questions raised in Relators' petition.

B. Even if properly presented, Relators' constitutional challenges would fail. The Disaster Act is presumed constitutional, *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996), and Relators would bear a heavy burden in their facial attacks on its validity, *id.* at 623. Relators could not carry that burden for multiple reasons.

First, Relators' argument runs headlong into longstanding precedent approving such limited and cabined delegation of legislative power. "Although the Constitution vests legislative power in the Legislature, courts have recognized that in a complex society like ours, delegation of legislative power is both necessary and proper in certain circumstances." *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000). Thus, the Legislature may delegate legislative powers to another branch "as long as the Legislature establishes reasonable standards to guide the agency in exercising those powers." *Id.*; *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen,* 952 S.W.2d 454, 466 (Tex. 1997), *as supplemented on denial of reh'g* (Oct. 9, 1997); *accord Mistretta v. United States*, 488 U.S. 361, 372 (1989).

Second, Relators' proposed distinction separating the delegation of the power to suspend laws from the delegation of other powers finds no support. Relators presume the Legislature's authority to suspend laws, Tex. Const. art. I, § 28, can never be delegated. But they do not say why that power is different from other legislative powers, which can be delegated when guided by reasonable standards. The Legislature properly exercised its delegation power when it enacted the Disaster Act because it contains adequate standards to guide its exercise. It sets parameters for what constitutes a disaster, provides a standard for how the Governor is to declare one, places limits on his emergency powers, and specifies when the disaster ends. *See supra* at 2–3. And the Legislature reserved for itself the authority to call an end to a state of disaster even if the Governor does not. Tex. Gov't Code § 418.014(c). All this confirms that the Disaster Act is an appropriate delegation of legislative power. For its part, the Proclamation is a proper exercise of delegated authority to

"suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business." *Id.* § 418.016(a).

C. Finally, Relators gesture at, without raising, a due-course challenge, arguing that the Proclamation "deprives Plaintiffs of their constitutional rights without due course of law." Pet. 16–17. Relators do not, however, identify any liberty or property interest, much less submit evidence and argument showing how the unidentified interest has been harmed. Their due-course claim is thus deficient on its face.

* * *

For these reasons (among others), the Court should not award Relators relief. In explaining its decision, the Court should also dispel any confusion regarding the Secretary's role by clarifying that she does not have a general duty to ensure that the Governor and local officials comply with the Election Code.

Prayer

The Court should dismiss or deny the petition for writ of mandamus.

Respectfully submitted.

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Ryan L. Bangert
Deputy First Assistant
Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

/s/ Kyle D. Hawkins
Kyle D. Hawkins
Solicitor General
State Bar No. 24094710
Kyle.Hawkins@oag.texas.gov

Lanora C. Pettit
Natalie D. Thompson
Assistant Solicitors General

William T. Thompson
Special Counsel

Beau Carter
Assistant Attorney General

Counsel for Respondent

Certificate of Service

On September 28, 2020, this document was served electronically on Jared R. Woodfill, lead counsel for Relators, via woodfillservice@gmail.com.

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Certificate of Compliance

Microsoft Word reports that this document contains 4,334 words, excluding the portions of the document exempted by Rule 9.4(i)(1).

/s/ Kyle D. Hawkins
Kyle D. Hawkins

ATTACHMENT B:
EMAIL DATED AUGUST 26, 2020

From:	Charles Pinney
To:	Donna Stanart
Subject:	Re: Questions regarding mail in ballots (EI Response)
Date:	Wednesday, August 26, 2020 9:30:48 AM

Hello,

I'll answer your two questions in order:

1. Election Code 86.011(d) is not necessarily a "cure" process, but it does provide a procedure under which the early voting clerk can take certain steps to allow a voter to address certain deficiencies on the carrier envelope after that carrier envelope has been received by the early voting clerk.

   The early voting clerk has a number of different options available under this section, including delivering the carrier envelope back to the voter either in-person or by mail, or notifying the voter by telephone so the voter can correct the defect on the carrier envelope or cancelling that ballot by mail in-person at the early voting clerk's office. Whichever procedure is used, the corrected carrier envelope must be received before the deadline for receiving the ballot by mail. This procedure can only be performed by the early voting clerk and must occur before the ballot is sent to the ballot board. Once the ballot is sent to the ballot board, these procedures are no longer available.

   The early voting clerk is not required to implement these procedures and has the option of determining which of those procedures they wish to implement. However, whichever procedure they implement must be applied consistently to all voters in the same situation.

2. Election Code 86.006(a-1) provides that the voter may hand-deliver a marked ballot by mail to the early voting clerk's office while the polls are open on election day, but they must present voter ID at the time that they do so. Under the Governor's July 27, 2020 proclamation, for this November election that hand-delivery process is not limited to election day and may occur at any point after the voter receives and marks their ballot by mail.

   Because this hand-delivery process can occur at the early voting clerk's office, this may include satellite offices of the early voting clerk. Typically, this will only happen if the early voting clerk is the county clerk because county clerks will occasionally have satellite offices elsewhere in the county, but it is rare for an elections administrator to have a satellite office. A county clerk's satellite office in a county where the elections administrator is the early voting clerk for that election would not be a valid location for hand-delivery of mail ballots because the elections administrator is the early voting clerk in that situation and the county clerk's satellite office is not the "early voting clerk's office" in that situation. Ultimately, the availability of hand-delivery of mail ballots at a county clerk's satellite office depends on the identity of the early voting clerk for that specific election.

Please let us know if you have any other questions about this issue or anything else relating to the election. You can reach us at Elections@sos.texas.gov or 1-800-252-8683, or you can visit our

website at sos.state.tx.us/elections/index.shtml.

Thanks,

Chuck Pinney
Attorney -- Elections Division
Office of the Texas Secretary of State
1019 Brazos Street | Rudder Building, 2nd Floor | Austin, Texas 78701
1.800.252.VOTE (8683)
elections@sos.texas.gov | www.sos.texas.gov/elections

From: Donna Stanart <donnastanart1@gmail.com>
Sent: Tuesday, August 25, 2020 10:26 AM
To: Charles Pinney <CPinney@sos.texas.gov>
Subject: Questions regarding mail in ballots

Chuck,

Thanks so much for taking my call.

I had two questions we touched on today.

1. In regards to mail in ballots being "cured" during voting, is it the responsibility of the County Clerk or the Ballot Board to call that voter to fix their ballot before it's counted? Also, you had mentioned inconsistency in that regard. Can you touch on that again?

2. When dropping off mail in ballots, in a county with a county clerk, we know that if there are annexes it is acceptable for voters to drop off their ballots up to election day at any of these annexes. If a county clerk type county were to transition into an election administration before the election, they would not be able to use the county clerk annexes and only be able to drop off at their main office. Is this correct?

Thank you!

--
Donna Stanart
(713) 703 - 9840 - Cell
donnastanart1@gmail.com

Automated Certificate of eService

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Status as of 9/30/2020 4:07 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Wolfgang PHirczy de Mino, PhD		wphdmphd@gmail.com	9/30/2020 4:00:38 PM	SENT
Jared Woodfill		woodfillservice@gmail.com	9/30/2020 4:00:38 PM	SENT
Vince Ryan		vince.ryan@cao.hctx.net	9/30/2020 4:00:38 PM	SENT
Kyle Hawkins		kyle.hawkins@oag.texas.gov	9/30/2020 4:00:38 PM	SENT
Lanora Pettit		lanora.pettit@oag.texas.gov	9/30/2020 4:00:38 PM	SENT
Natalie Thompson		natalie.thompson@oag.texas.gov	9/30/2020 4:00:38 PM	SENT
Beau Carter		Beau.Carter@oag.texas.gov	9/30/2020 4:00:38 PM	SENT
Maria Williamson		maria.williamson@oag.texas.gov	9/30/2020 4:00:38 PM	SENT

Associated Case Party: Chris Hollins

Name	BarNumber	Email	TimestampSubmitted	Status
Susan Hays		hayslawfirm.com	9/30/2020 4:00:38 PM	SENT

CAUSE NO. _____

THE ANTI-DEFAMATION LEAGUE AUSTIN, SOUTHWEST, AND TEXOMA REGIONS; COMMON CAUSE TEXAS; and ROBERT KNETSCH, *Plaintiff,*	§	IN THE DISTRICT COURT TRAVIS COUNTY TEXAS
v.	§	___ JUDICIAL DISTRICT
GREG ABBOTT, in his official capacity as the Governor of Texas, *Defendant*	§	

TEMPORARY RESTRAINING ORDER &
ORDER SETTING HEARING FOR TEMPORARY INJUNCTION,

1. After considering Plaintiffs' application for temporary restraining order, the pleadings, the affidavits, and arguments of counsel, the Court finds there is evidence that harm is imminent to Plaintiffs, and if the Court does not issue the temporary restraining order, Plaintiffs will be irreparably injured by the ultra vires and unconstitutional provisions of Defendant's October 1, 2020 Proclamation (the "Proclamation").

2. Therefore, by this Order, the Court does the following:

   a. Restrains Defendant from enforcing the Proclamation.

   b. Orders the Clerk to issue notice to Defendant that the hearing on Plaintiffs' application for temporary injunction is set for _____, 2020, at _____. The purpose of the hearing will be to determine whether this temporary restraining order should be made a temporary injunction pending a full trial on the merits.

   c. Sets bond at $0.

This Order expires on _____, 2020.

SIGNED on _____, 2020, at _____.

_____

Exhibit I

Pettit, Lanora

From: Sweeten, Patrick
Sent: Saturday, October 10, 2020 9:03 AM
To: Pettit, Lanora;
Subject: FW: ADL v. Abbott - Request for TRO Hearing

From: Pamela Seger <Pam.Seger@traviscountytx.gov>
Sent: Wednesday, October 7, 2020 3:13 PM
To: Dower, Benjamin <Benjamin.Dower@oag.texas.gov>; Cohan, Lindsey <Lindsey.Cohan@dechert.com>
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>; Rachelle Primeaux <Rachelle.Primeaux@traviscountytx.gov>; Snapp, Erik <Erik.Snapp@dechert.com>; Megan Johnson <Megan.Johnson@traviscountytx.gov>
Subject: RE: ADL v. Abbott - Request for TRO Hearing

Dear Counsel,

Please see the link below for the Zoom hearing, which is scheduled for Tuesday, October 13, 2020 at 9:00 a.m. The Court requests copies of pleadings relating to this hearing be emailed to me and our staff attorney, Megan Johnson, who is copied on this email (other than Plaintiffs' Original Petition which has already been received).

Topic: D-1-GN-20-005550; ADL, et al v. Greg Abbott
Time: Oct 13, 2020 09:00 AM Central Time (US and Canada)

[redacted]

[redacted]

Dial by your location
+1 346 248 7799 US (Houston)
+1 669 900 6833 US (San Jose)
+1 253 215 8782 US (Tacoma)
+1 929 205 6099 US (New York)
+1 301 715 8592 US (Germantown)
+1 312 626 6799 US (Chicago)
[redacted]
Find your local number: https://txcourts.zoom.us/u/aq1WvOJAV

Join by Skype for Business
[redacted]

If you have any questions, please let us know.

Regards,

Pam Seger
Judicial Executive Assistant
353rd District Court
The Honorable Tim Sulak
1000 Guadalupe, Room 501
Austin, Texas 78701
P: (512) 854-9179
F: (512) 854-3203
pam.seger@traviscountytx.gov

From: Dower, Benjamin <Benjamin.Dower@oag.texas.gov>
Sent: Wednesday, October 7, 2020 12:23 PM
To: Cohan, Lindsey <Lindsey.Cohan@dechert.com>; Pamela Seger <Pam.Seger@traviscountytx.gov>
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>; Rachelle Primeaux <Rachelle.Primeaux@traviscountytx.gov>; Snapp, Erik <Erik.Snapp@dechert.com>
Subject: RE: ADL v. Abbott - Request for TRO Hearing

Dear Ms. Seger,

Defendant also has no objection to proceeding before Judge Sulak. I know that you are waiting to hear back from the Court Administrator's office for confirmation, but Defendant would prefer the Tuesday setting given the choice.

Benjamin L. Dower
Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
512.475.4674 (direct)
512.320.0667 (facsimile)
benjamin.dower@oag.texas.gov

From: Cohan, Lindsey <Lindsey.Cohan@dechert.com>
Sent: Wednesday, October 7, 2020 12:15 PM
To: Pamela Seger <Pam.Seger@traviscountytx.gov>; Dower, Benjamin <Benjamin.Dower@oag.texas.gov>
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>; Rachelle Primeaux <Rachelle.Primeaux@traviscountytx.gov>; Snapp, Erik <Erik.Snapp@dechert.com>
Subject: RE: ADL v. Abbott - Request for TRO Hearing

Ms. Seger,

Thank you for your email and the Court's willingness to work with the parties to schedule the hearing. We have spoken with the State, and based on their current thinking and ours, our best estimate at this time for the hearing is approximately 5 hours. We will confer with the State over the coming days to try and come to agreement on certain issues that could shorten this time, and will advise the Court as soon as possible if our estimate changes.

We have no objection to proceeding before Judge Sulak.

Thank you.

Lindsey Cohan
Counsel

Dechert LLP
+1 512 394 3027 Direct
+1 202 607 9260 Mobile

lindsey.cohan@dechert.com
dechert.com

From: Pamela Seger [mailto:Pam.Seger@traviscountytx.gov]
Sent: Wednesday, October 07, 2020 10:33 AM
To: Cohan, Lindsey <Lindsey.Cohan@dechert.com>; Dower, Benjamin <Benjamin.Dower@oag.texas.gov>
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>; Rachelle Primeaux <Rachelle.Primeaux@traviscountytx.gov>; Snapp, Erik <Erik.Snapp@dechert.com>
Subject: RE: ADL v. Abbott - Request for TRO Hearing

Dear Counsel,

This case has been assigned to Judge Tim Sulak for consideration of all pending matters. In the interest of transparency and full disclosure, you and the parties are informed that
Judge Sulak and his wife have made financial contributions to Common Cause in the past, which may constitute "member" or "supporter" status, but they have not been in any positions of leadership or "active" participants in any other sense. Should you have concerns or objections to his consideration of this case, you may wish to contact the Local Administrative Judge, Lora Livingston.

Judge Sulak is available and willing to hear the TI and Plea to the Jurisdiction on Friday morning at 9:00 a.m. I believe he is also available Tuesday, October 13th at 9:00 a.m. or 2:00 p.m., but am waiting to hear back from

the Court Administrator's office for confirmation. I will need to know your estimate of total time for the hearing.

Regards,

Pam Seger
Judicial Executive Assistant
353rd District Court
The Honorable Tim Sulak
1000 Guadalupe, Room 501
Austin, Texas 78701
P: (512) 854-9179
F: (512) 854-3203
pam.seger@traviscountytx.gov

From: Cohan, Lindsey <Lindsey.Cohan@dechert.com>
Sent: Tuesday, October 6, 2020 9:21 PM
To: Pamela Seger <Pam.Seger@traviscountytx.gov>; Dower, Benjamin <Benjamin.Dower@oag.texas.gov>
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>; Rachelle Primeaux <Rachelle.Primeaux@traviscountytx.gov>; Snapp, Erik <Erik.Snapp@dechert.com>
Subject: RE: ADL v. Abbott - Request for TRO Hearing

Pam,

The parties had a chance to confer following the State's submission this evening. In order to avoid arguing these issues before the Court twice in quick succession (first a TRO, and then a TI) and mindful of the Court's limited resources, the parties have agreed that they would be willing to forego tomorrow's TRO hearing if Judge Sulak has availability to conduct the TI hearing on Friday of this week or Tuesday of next. We would request that the hearing address both Plaintiffs' request for a TI and the State's plea to the jurisdiction. Could you please advise if Judge Sulak is amenable to this proposal and has availability?

We very much appreciate all of your assistance. Counsel can make themselves available to speak with either you or Judge Sulak to the extent any further clarification is needed.

Thank you.

Lindsey Cohan
Counsel

Dechert LLP
+1 512 394 3027 Direct
+1 202 607 9260 Mobile

lindsey.cohan@dechert.com
dechert.com

From: Pamela Seger [mailto:Pam.Seger@traviscountytx.gov]
Sent: Tuesday, October 06, 2020 2:56 PM
To: Cohan, Lindsey <Lindsey.Cohan@dechert.com>; Dower, Benjamin <Benjamin.Dower@oag.texas.gov>

Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>; Rachelle Primeaux <Rachelle.Primeaux@traviscountytx.gov>
Subject: RE: ADL v. Abbott - Request for TRO Hearing

Dear Counsel,

Please see the attached Rules and Procedures, along with the link below for the scheduled Zoom hearing on Wednesday, October 7, 2020, at 3:00 p.m. I am also attaching a Contact Information sheet that only needs to be completed if you need our Court Reporter, Rachelle Primeaux, to provide you a Box link for the hearing.

Topic: D-1-GN-20-005550; ADL, et al v. Greg Abbott
Time: Oct 7, 2020 03:00 PM Central Time (US and Canada)

Join Zoom Meeting
[redacted]

Meeting ID: [redacted]
One tap mobile
[redacted]

Dial by your location
+1 346 248 7799 US (Houston)
+1 669 900 6833 US (San Jose)
+1 253 215 8782 US (Tacoma)
+1 929 205 6099 US (New York)
+1 301 715 8592 US (Germantown)
+1 312 626 6799 US (Chicago)
Meeting ID: [redacted]
Find your local number: https://txcourts.zoom.us/u/aq1WvOJAV

Join by Skype for Business
[redacted]

If you have any questions, please let me know.

Regards,

Pam Seger
Judicial Executive Assistant
353rd District Court
The Honorable Tim Sulak
1000 Guadalupe, Room 501
Austin, Texas 78701
P: (512) 854-9179
F: (512) 854-3203

pam.seger@traviscountytx.gov

From: Cohan, Lindsey <Lindsey.Cohan@dechert.com>
Sent: Tuesday, October 6, 2020 12:59 PM
To: Dower, Benjamin <Benjamin.Dower@oag.texas.gov>; Pamela Seger <Pam.Seger@traviscountytx.gov>
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>
Subject: [CAUTION EXTERNAL] RE: ADL v. Abbott - Request for TRO Hearing

Ms. Seger,

Tomorrow at 3PM also works for Plaintiffs. Thank you.

Lindsey Cohan
Counsel

Dechert LLP
+1 512 394 3027 Direct
+1 202 607 9260 Mobile

lindsey.cohan@dechert.com
dechert.com

From: Dower, Benjamin [mailto:Benjamin.Dower@oag.texas.gov]
Sent: Tuesday, October 06, 2020 12:58 PM
To: Pamela Seger <Pam.Seger@traviscountytx.gov>; Cohan, Lindsey <Lindsey.Cohan@dechert.com>
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>
Subject: RE: ADL v. Abbott - Request for TRO Hearing

Dear Ms. Seger:

I will confirm that tomorrow Wednesday, October 7th at 3:00 P.M. works for the defendant. Thank you.

Benjamin L. Dower
Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
512.475.4674 (direct)
512.320.0667 (facsimile)
benjamin.dower@oag.texas.gov

From: Pamela Seger <Pam.Seger@traviscountytx.gov>
Sent: Tuesday, October 6, 2020 12:52 PM
To: Dower, Benjamin <Benjamin.Dower@oag.texas.gov>; Cohan, Lindsey <Lindsey.Cohan@dechert.com>
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>
Subject: RE: ADL v. Abbott - Request for TRO Hearing

Dear Counsel,

If everyone is available tomorrow afternoon, we will schedule the TRO Hearing for Wednesday, October 7th at 3:00 p.m. Please advise if this works for everyone and I will send out a Zoom link today.

Regards,

Pam Seger
Judicial Executive Assistant
353rd District Court
The Honorable Tim Sulak
1000 Guadalupe, Room 501
Austin, Texas 78701
P: (512) 854-9179
F: (512) 854-3203
pam.seger@traviscountytx.gov

From: Dower, Benjamin <Benjamin.Dower@oag.texas.gov>
Sent: Tuesday, October 6, 2020 9:40 AM
To: Pamela Seger <Pam.Seger@traviscountytx.gov>; Cohan, Lindsey <Lindsey.Cohan@dechert.com>
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>
Subject: [CAUTION EXTERNAL] RE: ADL v. Abbott - Request for TRO Hearing

Dear Ms. Seger:

This is lead counsel for the defendant. Unfortunately, I am not available today. I have a full-day mediation that starts in 20 minutes. Tomorrow could work for me. We are currently working on a written response to the application, and would prefer mid-afternoon tomorrow if possible so we can file it with enough time for the Honorable Court to review it before the hearing. I think written briefing from both sides will aid the Court and potentially speed up the hearing. With that in mind, as far as time estimates, I imagine we could get it done with 30 minutes per side for the TRO hearing?

Ms. Cohan, what do you think?

Benjamin L. Dower
Assistant Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
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512.475.4674 (direct)
512.320.0667 (facsimile)
benjamin.dower@oag.texas.gov

From: Pamela Seger
Sent: Tuesday, October 6, 2020 9:29 AM
To: Cohan, Lindsey
Cc: Myrna Pérez; Steiner, Neil; EXT Max Feldman; Sweeten, Patrick; Dower, Benjamin; Abrams, Michael; Laurent, David; Disher, Todd
Subject: RE: ADL v. Abbott - Request for TRO Hearing

Dear Counsel,

How much time do you anticipate needing for the hearing? There is a chance that we could have a hearing later in the afternoon today. Otherwise, it will have to be sometime mid-morning or mid-afternoon tomorrow.

Regards,

Pam Seger
Judicial Executive Assistant
353rd District Court
The Honorable Tim Sulak
1000 Guadalupe, Room 501
Austin, Texas 78701
P: (512) 854-9179
F: (512) 854-3203
pam.seger@traviscountytx.gov

From: Cohan, Lindsey <Lindsey.Cohan@dechert.com>
Sent: Tuesday, October 6, 2020 8:39 AM
To: Pamela Seger <Pam.Seger@traviscountytx.gov>
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Dower, Benjamin <Benjamin.Dower@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>
Subject: RE: ADL v. Abbott - Request for TRO Hearing

Ms. Seger,

Thank you for your quick response. Here is the petition and its attachments.

Lindsey Cohan
Counsel

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From: Pamela Seger [mailto:Pam.Seger@traviscountytx.gov]
Sent: Tuesday, October 06, 2020 8:30 AM
To: Cohan, Lindsey <Lindsey.Cohan@dechert.com>
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Dower, Benjamin <Benjamin.Dower@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>
Subject: RE: ADL v. Abbott - Request for TRO Hearing

Ms. Cohan,

Please email me all of the documents that were provided to the 201st District Court so that I can forward them to Judge Sulak for his review.

We have hearings all day today, but will discuss possible times to hear this matter tomorrow.

Regards,

Pam Seger
Judicial Executive Assistant
353rd District Court
The Honorable Tim Sulak
1000 Guadalupe, Room 501
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From: Cohan, Lindsey <Lindsey.Cohan@dechert.com>
Sent: Monday, October 5, 2020 9:55 PM
To: Pamela Seger <Pam.Seger@traviscountytx.gov>
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Dower, Benjamin

<Benjamin.Dower@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>
Subject: [CAUTION EXTERNAL] RE: ADL v. Abbott - Request for TRO Hearing

Good Evening Ms. Seger,

I am writing to follow-up on Ms. Merrell's email advising that we should contact you regarding Plaintiffs' hearing request. As of late this afternoon, the matter has been assigned cause number D-1-GN-20-00550. Please let me know what information you and Judge Sulak need in order to move forward with a setting. I appreciate your time and attention, and am happy to speak at your convenience if that is easiest. I have copied counsel for the State on this email so that they are advised of these scheduling discussions as well.

Best,
Lindsey

Lindsey Cohan
Counsel

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From: Huette Merrell [mailto:Huette.Merrell@traviscountytx.gov]
Sent: Monday, October 05, 2020 8:37 PM
To: Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; Cohan, Lindsey <Lindsey.Cohan@dechert.com>; Vicky Mescher <Vicky.Mescher@traviscountytx.gov>; Dower, Benjamin <Benjamin.Dower@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>; Pamela Seger <Pam.Seger@traviscountytx.gov>
Subject: RE: ADL v. Abbott - Request for TRO Hearing
Importance: High

Good Evening Counsel,
The Travis County Local Administrative Judge informed me that you all will need to contact Judge Sulak's office for a hearing on your request. Please contact Pam Seger, Judicial Executive Assistant for Judge Sulak, she is copied on this email for your reference. Thank you for your attention to the matter.

201st Judicial District Court of Travis County

Heman Marion Sweatt Travis County Courthouse
1000 Guadalupe St., Room 327
Austin, Texas 78701

P.O. Box 1748
Austin, Texas 78767

From: Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>
Sent: Monday, October 5, 2020 4:43 PM
To: Cohan, Lindsey <Lindsey.Cohan@dechert.com>; Huette Merrell <Huette.Merrell@traviscountytx.gov>; Vicky Mescher <Vicky.Mescher@traviscountytx.gov>; Dower, Benjamin <Benjamin.Dower@oag.texas.gov>; Abrams, Michael <Michael.Abrams@oag.texas.gov>; Laurent, David <David.Laurent@oag.texas.gov>; Disher, Todd <Todd.Disher@oag.texas.gov>
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>
Subject: [CAUTION EXTERNAL] RE: ADL v. Abbott - Request for TRO Hearing

Ms. Cohan,

Ben Dower, copied here, is representing the state on this matter.

Thank you,

Patrick

From: Cohan, Lindsey <Lindsey.Cohan@dechert.com>
Sent: Monday, October 5, 2020 4:30 PM
To: huette.merrell@traviscountytx.gov; vicky.mescher@traviscountytx.gov
Cc: Myrna Pérez <perezm@brennan.law.nyu.edu>; Steiner, Neil <neil.steiner@dechert.com>; Sweeten, Patrick <Patrick.Sweeten@oag.texas.gov>; EXT Max Feldman <feldmanm@brennan.law.nyu.edu>
Subject: ADL v. Abbott - Request for TRO Hearing

Good Afternoon,

Per your request, I am emailing a copy of Plaintiffs' Verified Petition and Application for a TRO, TI, and PI (along with attachments and proposed order). The envelope number pending with the Clerk's office is 46882957. I have copied Patrick Sweeten, who I understand is representing the State in a similar matter in order to provide the AG's office with notice of this submission.

Please contact me at your convenience with any questions or concerns.

Thank you.

Lindsey Cohan
Counsel

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This e-mail is from Dechert LLP, a law firm, and may contain information that is confidential or privileged. If you are not the intended recipient, do not read, copy or distribute the e-mail or any attachments. Instead, please notify the sender and delete the e-mail and any attachments. Thank you.

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This e-mail is from Dechert LLP, a law firm, and may contain information that is confidential or privileged. If you are not the intended recipient, do not read, copy or distribute the e-mail or any attachments. Instead, please notify the sender and delete the e-mail and any attachments. Thank you.

Exhibit J

Exhibit 10

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TRANSCRIPTION OF

TEXAS SENATE COMMITTEE ON STATE AFFAIRS

SENATE BILL 9

MARCH 18, 2019

****

TRANSCRIBED BY: GRACE FAY

TRANSCRIPTION DATE: October 2, 2020

easier on the -- on the county to have a finite period of -- start voting on one day and you end on Election Day with voting available all the way through. And so that will be a amendment also.

MS. HUFFMAN: All right. We're gonna call up your invited witnesses, Senator Hughes. Is that good? Omar Escobar, Anthony Shaffer, and Dylan Lynch.

MR. ESCOBAR: Good morning.

MS. HUFFMAN: Mr. Escobar?

MR. ESCOBAR: Yes.

MS. HUFFMAN: You may proceed, sir. Thank you.

MR. ESCOBAR: Thank you. Good morning. My name is Omar Escobar. I'm the district attorney for the 229th Judicial District. Those counties include Starr County, Jim Hogg Counties, and Duval counties.

I'm gonna just talk about some of our experience as far as with the election code violations and sort of what our experience with election fraud in the most recent elections and then I'll field any questions you might have. We began our efforts sometime in January of 2018 to begin to enforce the laws that were passed in 2017 regarding election fraud. And some of the -- some of the things that we began to see was that, for example, we have 30,000 registered voters in Starr County. And out of 30,000 registered voters, we might see -- well, in the 2018 Democratic primary, we

would have seen approximately 14,000 people vote. But for that election, we had 2000 applications for ballot by mail. 2000 applications for ballot by mail.

When we began our enforcement efforts as far as that the changes to mail-in voting laws, what we saw was sort of a decrease in the number of people that actually voted by application -- by mail. So what happened in the actual election was that only approximately 800 -- somewhere about 800 of the persons who applied for ballot by mail actually voted by mail. The rest began to cancel their ballots. And the reason for -- the reason they did that is because many people had been told by political workers that they could vote from the convenience of their own home if they just signed a form that they didn't understand. For many voters, they believed that the political workers were actually official election workers. So they were being shoved a application in their face and told, "Do you want to vote in the convenience of your own home?" And, well, who's going to say "no" to that? So you had people signing off on forms. What they didn't know was that the applications had "disabled" marked for them. And many of these people were not 65 years of age or older. They didn't know any better.

And so the practice had been that these political workers who are being paid to harvest the votes would tell them, "Hey, by the way, these particular -- the

mail-in is gonna come in at a particular time. As soon as you get that mail-in, you call me and I'm gonna take care of it for you." By the way, this is all borne out through our investigation. And one of our investigators is here also that will be available to testify. And so this had been the practice. As soon as people found out that we were sort of investigating these matters, people started canceling their applications for ballot by mail and started instead going to vote in person. So that decreased the people -- the mail-in voting significantly, at least in the -- in the March 2018 Democratic primary.

What we did see was that most of these people -- I'm going to say, 9 out of 10 voters that claimed the disability on a mail-in -- application for ballot by mail were not disabled under Texas law. There is no way. Some of them -- you had a firefighter, you even had a jailer, some work for the school district -- they were all claiming disability, and they didn't know any better. Some of these are professionals, because of the practices that were -- that were common at that particular time. Also on the mail-in side, you had elderly people, many of whom receive food bank distributions, sort of approached by workers and being told, you know, "Hey, here's a application for ballot by mail. You need to sign this thing. And as soon as you get the ballot, we're gonna come in and we're gonna -- we're

gonna prepare it for you." So the practice as we have seen it was that they'd go in and, of course, as soon as that ballot came in, they'd swoop in and help them sort of "vote the right way."

And so that was really the practice -- that has been the practice for years. But like I said, it began to decrease the moment we began to investigate some of this. And what I will tell you is that some -- what has led to some of this -- these practices is that the reason they were -- the political workers were so confident in allowing sort of -- just putting "disabled" when they were not disabled, is because the Secretary of State has sort of given this opinion over the years that elections administrators could not ask whether somebody was disabled or not. So the law was on the books, in other words, you have to qualify to get an application -- or ballot by mail, but there was really no enforcement of it. So it's akin to saying that possession of cocaine is illegal in Texas, but telling law enforcement officers, "You can't ask what the white powdery substance in the pocket is." That's the -- exactly what's going on with the -- with the election code provision. So people were not allowed to -- the elections administrators were not allowed to ask -- inquire anything about disability. It's when we started asking ourselves that people started noticing -- that election workers started sort of coming back to that.

So that was really our experience there and part of the other experience that we saw was that we drafted policies that were basically property use policies in Starr County that kind of designated the parking areas around the courthouse as "parking areas," because before what would happen is that these parking areas would be commandeered by people who were sort of campaign workers, and they'd have tents and all kinds of things, and so it would effectively cut off most of the parking. And as soon as a voter would get down, you know, they'd be sort of congregated around, harassed to vote in a particular way. And so our experience, at least, is that most workers -- I mean, most voters just want to be left alone. They want to get down, go vote in peace, and leave in peace. And that wasn't happening. So that was also our experience there.

One of the things that I will note is that in the November election for 2018, we had -- we started noticing a different practice of now it -- our enforcement efforts decreased mail-in voting, even though -- I will tell you that even though it decreased mail-in voting, it didn't seem to have any impact in overall numbers. There was still 14,000 people who voted, probably more than non-presidential primary elections, so it didn't affect -- in my mind, it didn't affect voter turnout at all. In fact, it seemed to increase it in one way or another. But it didn't affect it.

So as we go to November 2018, some of the local races as far as the school district races and some of the general election, at least in one polling location what we saw was -- I'll preface it by saying there was much less mail-in than had been in previous years. So now we have a whole bunch of people that are cognizant that if they're not disabled, they can't vote. So that really, you know, kind of weeded out a lot of the false applications. And there's a lot of election fraud there.

But what we started noticing in the first day of early vote was at one polling location all of a sudden you had people that -- campaign workers and even candidates approaching the voters and asking them -- evidently asking them if they needed assistance. Now -- so you can imagine a situation where a person is going to vote, wants to get off his car and go vote, being approached and asked, "Hey, do you need assistance?" "Well, maybe, maybe not." "No, no. You need assistance." You know, "You need assistance." "Well," and so, "Okay, well, yeah, let me get -- " So we saw approximately one out of every five voters all of a sudden needed assistance. They couldn't read, write, or otherwise understand a ballot. I found that -- we found that completely suspicious immediately. So it's my opinion, I think, that the strategy then changed from mail-in -- from concentrating on mail-in voting to then concentrating on

"assisted voting."

So what happens with assisted voting? Same thing that happens with disabled -- disability. I'll reach into the sort of curbside voting also -- is that when somebody asked for assistance, most elections administrators are told you cannot ask. So once again, the exception is swallowing the rule. And so -- or this practice is now making it largely unenforceable. So political workers know this, and so they can go to a particular voter, say, "You need to vote?" You know, "You need -- you need to -- you need assistance." So somebody's gonna go in and say, "I -- this person needs assistance," and they can't ask. So it was hard to believe that a lot of these people that could otherwise read and write were getting assistance.

And so it seems to me like the fraud seemed to now shift over into assisted voting, which -- that has been the Starr County experience. I won't talk for Hidalgo County, but certainly Starr County that has been our experience. So we've seen a reduction in mail-in, but now we have an expansion in the practice of assisted voting. So definitely I think the provisions in SB9 are something that will help address these situations as far as election integrity is concerned.

I will just briefly comment on something that I think bears mention, that nowhere in any bill that I've seen

or any bills that I've seen are there enforcement provisions. When we think about election fraud, we think of it as after it happens. So we've got before fraud happens, which is what -- why we have election laws and provisions. And then we have what happens after election fraud, you know, occurs. So we're usually coming in -- along with the AG's office, or coming in after it happens and sometimes a year or years after the election fraud happens, to investigate, you know, interview witnesses, and come in and sort of prosecute. But we've already had several election cycles that have already gone past by the time there's action taken.

So my concern is that I think some of our conversation with the AG's office is that there is no enforcement provision that I can see in the election code that would give an -- and let's say, the county attorney, district attorney, or the AG's office enforcement provisions that would say, "Okay, Elections Administrator, you know what the laws are, but you're not enforcing them." And so the question would be, is there a way that, you know -- where we can have some kind of emergency enforcement authority from the local officials before fraud happens? By that I mean, either an injunction, mandamus, TROs, anything that might -- and maybe, you know, some sort of punishment for somebody who knowingly engages or knowingly fails to

enforce the election code. And that would apply basically to presiding judges and elections administrators.

But right now, there -- it is unclear who enforces election code violations and who can -- who can sort of mandate that election code officials or election officials enforce the laws. So I would recommend that at some time in the -- some point in the future, there'll be some provision in the laws that would give enforcement authority to the AG's office and the county attorney, the district attorney, or even the private -- even a private remedy that would allow somebody to go into district court and say, "Election official, you need to enforce this provision." Or even if you know and you can show that -- let's say a politicara, that is a political worker, is is knowingly engaging in election fraud to go in and get a TRA, a temporary restraining order, against this person if they can show it in court and have an order restraining them from engaging in election code violations under some sort of order that a court can adopt. But right now, it's just unclear, you know, who can -- who can sort of in -- we did have one situation of an election official who refused to comply with part of the code. And it was like, "Well, there's no enforcement. There's no remedy."

So in either case, I think that a lot of the provisions that we have in SB9 are -- address a lot of the

concerns that we have, and I think they go a long way towards -- towards addressing election fraud. Thank you.

MR. CREIGHTON: Thank you, very much. Members? Senator Hughes.

MR. HUGHES: Thank you, Mr. Chairman. Mr. Escobar, thanks for your testimony. The -- what you offered during the hearing of the select committee some months ago was really something. Much of what you shared, we had heard -- maybe stories from back home, you know, nothing that we could -- nothing that anyone would swear to, just rumors, "This happens. That happens." And the investigation you conducted, at great risk, we realize, did a lot to shine a light not just for your county, but for the whole state. And so thank you again for that and for being here today and helping us -- helping us do something about it.

Let me ask you just a little bit --

MR. ESCOBAR: Sure. Sure.

MR. HUGHES: -- to make sure we get the picture of what's happening about these folks who are offering -- "offering," I'm putting that in quotes -- assistance to folks, either with curbside voting or meeting folks at the polling place. So when these folks -- when these folks are there to assist a voter, under current law, under the practice, these political workers actually go in and see how the person voted. Is that correct?

MR. ESCOBAR: That's right. So the assistant, by the way -- so we're talking about -- there is assisting in mail-in, and then there's assistant in in-person voting.

MR. HUGHES: Yes.

MR. ESCOBAR: So I will just get this in here. So on the assisted voting on the applications for ballot by mail, I just want to reference this quickly. Our investigation has showed that we had one person, just one person, assist 230 voters in an application for ballot by mail. Just one. You had another one that assisted 100 people. Another one that assisted 70 people. Another one that assisted 50 people.

Now, this is just the -- this is the application for ballot by mail. On this other side, on the in-person voting, you have people who are gonna assist, and of course, the assistant is watching this voter vote and sometimes marking the ballot for them. What's interesting about that is that under current law, as I understand it, poll watchers cannot watch when somebody is being assisted privately to vote a ballot. But if the elections worker, somebody who's working under elections administration, if they assist the voter, the poll watchers can watch that ballot being prepared and being voted, okay? To make sure that they are not being told how to vote or forced. But when it's somebody asking for an assistant, their own personal somebody -- I'm

gonna call it a "personal assistant" -- that cannot be viewed.

And so it creates a situation where -- see, assisted voting, just like mail-in voting, has become commercialized. It's a business. So a lot of this, what you're gonna find on this side, on in-person voting, is that they know that poll watchers can't watch this. So it's just -- now you're just left with the voter and the assistant that they choose, which a lot of times is an election worker and -- not like an official election worker, but a politicara, or a political worker of some kind, campaign worker. It's just them two in the car, and you're praying -- you're hoping that this person, this assistant, is not telling them how to vote. You're sort of the honor system. And so that's the situation that currently exists.

So I can I can find no reason for why poll watchers should not be allowed to see that. I can understand the privacy concerns, but in the end, I think the -- sort of the election integrity concerns are something that we're gonna have to balance out and address. And right now it's sort of swinging the other way that allows an exception that is -- I think is swallowing the rule also.

MR. HUGHES: That makes sense. And that's why I'm -- to your point you just made, in Senate Bill 9, the -- what we propose is if a voter's being assisted by a family

member, then they wouldn't -- be wouldn't be observed.

MR. ESCOBAR: Right.

MR. HUGHES: But otherwise, the watchers ought to be able to observe that process, again, to make sure the voter is being protected. Right?

MR. ESCOBAR: Right. I think -- I think you can have a situation where, you know, a family member, which is -- in the ordinary cases, somebody who's gonna vote that needs help is probably gonna take a family member and -- to go -- to help them out. When you've got somebody who's being paid, or even though they might say that they are "volunteers," so to speak, there's an incentive there for them to vote the "right way." And I think that's where it makes sense to have poll watchers seeing this. And you've got a family member who's taking their family member in to vote, I -- we can see that they need some kind of privacy. But when you've got somebody, a non-family member doing this, I mean, obviously there's a risk that they're being told -- they're getting paid to bring these people in. They're being told or suggested, you know, who to vote and nobody's watching it.

So I think, you know, I think these provisions address that, and I think it does satisfy certain concerns as to family members, sort of a family member exception that is defined here. I think that it strikes the right balance.

I think it's -- it strikes a good balance. We're trying to sort of stamp out voter fraud.

MR. HUGHES: Thank you very much. Thank you, Mr. Chairman.

MR. CREIGHTON: Thank you. Members, any other questions? Okay. Thank you very much.

MR. ESCOBAR: Okay. Than you.

MR. CREIGHTON: Lieutenant Colonel, correct?

LT. COL. SHAFFER: Yes.

MR. CREIGHTON: Go ahead.

LT. COL. SHAFFER: Good afternoon, Chairwoman Huffman, esteemed members of the committee. Thank you for the opportunity today to testify. My name is Lieutenant Colonel Anthony Shaffer. I'm here testifying for SB9 on the behalf of London Center for Policy Research. I support SB9 efforts to end Texas use of insecure and vulnerable voting systems. I want to thank Senator Hughes in particular, for his excellent leadership on this important issue.

I have 38 years of experience in national security and cyber operations to include having worked with the FBI, CIA, and NSA. I created the first undercover cyber -- offensive cyber unit in the Department of Defense back in the late 1990s. I continue to advise the Pentagon, the Army War College, U.S. members -- U.S. Congressmembers and committees, members of President Trump's Cabinet on cyber

We don't have to worry about just Russians. We need to worry about people in our own counties. It's worth millions and billions of dollars. How much is a city or a county or a state election worth in dollars? Think about all the contracts and all the contractors have a huge stake in the outcomes of these. Surely, there are bad actors who are -- who would love to have somebody in place or even next door operating through the power cord to change the elections. Thank you.

MS. HUFFMAN: All right. Thank you. Next we have Robert Caples.

MR. CAPLES: Good afternoon. My name is Robert Caples. I'm the commander for the Starr County Special Crimes Unit. The district attorney covered most of the things that we've experienced since January of 2018. But my team and I are the ones that were actually on the ground investigating a lot of these cases.

A lot of the things that we found were that -- and this goes back to the assistance issue -- we found that people were being told misinformation, they were being manipulated by campaign workers. Every single person that I spoke to had no idea that their mail-in -- their mail-in ballot application had been marked with the disability. One of them was a rodeo cowboy, and he had zero disabilities. Another one was a firefighter, a jailer, a nurse, providers.

And we also found that they were being told to let the campaign workers know to come back when the mail-in ballots were in, the actual ballots. And they were coming back and picking them up, and they were taking off with them. And when I asked these people, "Do you know what they did with them?" They said, "Well, they were supposed to go put it in the mail, I guess." Which is another violation of the law, because they have not actually marked anywhere that they had done so.

So all we've seen in our investigations are manipulations, misinformation, and I know people have said that it's up to the voters at the end of the day, but I think that, you know, that's a really bad idea, because the people that are doing the manipulation are the campaign workers.

MS. HUFFMAN: Senator Hughes?

MR. HUGHES: Commander, thanks for your testimony. Thank you for doing this. We know that in law enforcement from your standpoint, also with prosecutors, have so many crimes to be concerned about, violent crimes, property crimes. Often election law violations, as important as they are, there's just not the resources, there's not the decision to commit the resources. So thank you for doing it. And what you've done has really opened the eyes of a lot of us to what's going on in all of our communities.

Let me ask you this. These election workers, and we're talking about -- by that I mean campaign workers, right? Paid campaign workers who come to these folks' homes, especially the elderly. Did you ever find cases where the -- where the voters who are being visited by these political workers -- where voters thought these folks were official election workers from the county or from the government, had some official role?

MR. CAPLES: We had some cases where they believed that they were official workers, but even the ones that didn't, because they were working with the elections, they expect these folks to be knowledgeable about the laws. So if they were coming to their house and say, "Hey, how would you like to vote by mail? That way you don't have to take the time off work or do anything else. You don't even have to drive over there." The answer is always, "Yeah. What do I need to do?" "Just sign the form and I'll take care of the rest." So in every single case that I saw, none of the voters actually filled out the mail-in applications. The only thing they were required to do is to sign their name to it.

And, you know, I ended up with a -- there's a stack about that big on my desk. And I could randomly pick any application out of there, which is how how we worked it -- and we did that to avoid the implication that there's,

you know, targeting, you know, a particular side or whatever. So we randomly selected applications, and every single one of them was illegitimate that I've encountered. 100%.

MR. HUGHES: Man. Thank you for -- thank you for the investigation and thank you for testifying. Thank you, Madam Chair.

MS. HUFFMAN: Thank you. Okay. Dr. Laura Pressley?

DR. PRESSLEY: Yes. Hello, Senator Huffman. Thank you for this meeting and bringing this bill forward to the committee. And thank you, Senator Hughes and Senator Hall and other senators on this and moving this forward. I'm the founder of True Texas Elections, I have a PhD in chemistry and physics and spent 17 years in the semiconductor industry, where I was a manager and an engineer and have four patents on computer technology. I'm also a member of the Grassroots America Coalition that supports Senate Bill 9.

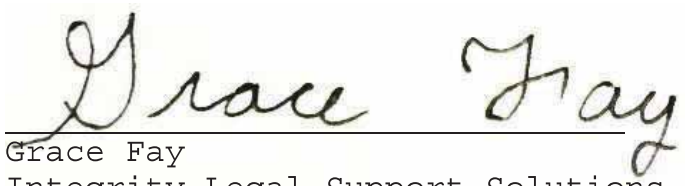
This senate bill -- and, you know, Mr. Tom Glass said it very well -- this senate bill really addresses all of the issues in our Texas Supreme Court case that was -- that was pending for about four years across the state. And I've given about 275 presentations around the state of Texas on these issues. And I really support, you know, the

CERTIFICATION PAGE FOR TAPE RECORDING

I, Grace Fay, certify that the foregoing is a correct transcription from the tape recording of the proceedings in the above-entitled matter.

Please take note that I was not personally present for said recording and, therefore, due to the quality of the audiotape provided, inaudibles may have created inaccuracies in the transcription of said recording.

I further certify that I am neither counsel for, related to, not employed by any of the parties to the action in which this hearing was taken, and further that I am not financially or otherwise interested in the outcome of the action.



Grace Fay
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Austin, Texas 78652
512.320.8690

STATE OF TEXAS)

COUNTY OF TRAVIS)

NOTARY PAGE

Before me, Brian Christopher, on this day personally appeared Grace Fay, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this 2nd day of October, 2020.

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS
COMMISSION EXPIRES:_____

Exhibit K

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0580n.06

No. 20-4063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 09, 2020
DEBORAH S. HUNT, Clerk

A. PHILIP RANDOLPH INSTITUTE OF OHIO, et al., Plaintiffs-Appellees, v. FRANK LAROSE, Defendant-Appellant.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

ORDER

BEFORE: GRIFFIN, WHITE, and THAPAR, Circuit Judges.

GRIFFIN, Circuit Judge.

The Supreme Court has repeatedly emphasized that lower federal courts should ordinarily not alter election rules on the eve of an election. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). Here, the district court went a step further and altered election rules *during* an election. The district court enjoined Ohio Secretary of State Frank LaRose from enforcing his directive that absentee ballot drop boxes be placed only at the offices of the county boards of elections. Secretary LaRose appealed to this Court, and now moves for an administrative stay and a stay of the district court's injunction pending appeal. Plaintiffs have responded. For the reasons set forth below, we grant the motion for a stay pending appeal and dismiss the motion for an administrative stay as moot.

I.

Plaintiffs, a collection of non-partisan civil rights organizations and individual voters, filed this challenge on August 26, 2020, to Directive 2020-16, which concerns the placement of drop boxes for the collection of absentee voters' ballots. They claimed that the Directive, which was promulgated by Ohio Secretary of State Frank LaRose, represented an unconstitutional infringement on Ohioans' right to vote. Shortly after filing their complaint, plaintiffs moved for a preliminary injunction asking the court to enjoin Directive 2020-16 "to the extent that it would limit county boards of elections to a single ballot drop box at the board office." In response, the district court enjoined Secretary LaRose from "enforcing that portion of Directive 2020-16 that prohibits a county board of elections from installing a secure drop box at a location other than the board of elections office," and from "prohibiting a board from deploying its staff for off-site ballot delivery." Secretary LaRose filed an interlocutory appeal of the district court's order the same day, and the intervenor-defendants have also filed an interlocutory appeal. Secretary LaRose has filed an emergency motion in our court seeking an administrative stay and a stay pending appeal.

II.

This Court considers four factors when considering whether a stay pending appeal is appropriate: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). When evaluating these factors for an alleged constitutional violation, "the likelihood of success on the merits often will be the determinative factor." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *see also Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012) ("In First Amendment cases,

however, the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. This is so because . . . the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the state action." (internal quotation marks and alteration omitted).

The merits of Plaintiffs' claims are analyzed under the "*Anderson Burdick*" framework. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court articulated a "flexible standard," *Burdick*, 504 U.S. at 434, for evaluating "[c]onstitutional challenges to specific provisions of a State's election laws." *Anderson*, 460 U.S. at 789. The first step of the *Anderson-Burdick* framework requires us to "determine the burden the State's regulation imposes on the plaintiffs' First Amendment rights." *Hawkins v. DeWine*, 968 F.3d 603, 606 (6th Cir. 2020) (citation omitted). "[W]hen those rights are subjected to 'severe' restrictions," the regulation is subject to strict scrutiny and "must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). But when those rights are subjected only to "reasonable, nondiscriminatory restrictions," the regulation is subject to rational-basis review and "the State's important regulatory interests are generally sufficient to justify" the restriction. *Id*. (quoting *Anderson*, 460 U.S. at 788). "For cases between these extremes, we weigh the burden imposed by the State's regulation against 'the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Thompson v. DeWine*, 959 F.3d 804, 808 (6th Cir. 2020) (internal quotations marks omitted) (quoting *Burdick*, 504 U.S. at 434).

Here, Directive 2020-16 prohibits county boards of elections from "installing a drop box at any other location other than the board of elections." Notably, Ohio voters are not required to

use a ballot drop box to vote. And we have acknowledged that "Ohio is generous when it comes to absentee voting," even though "there is no constitutional right to an absentee ballot." *Mays v. LaRose*, 951 F.3d 775, 779, 792 (6th Cir. 2020). Voters may (1) vote in person on election day, (2) vote in-person for more than four weeks before election day, (3) mail in an absentee ballot; or (4) drop off an absentee ballot at a drop box. Thus, a limitation on drop boxes poses at most an inconvenience to a subset of voters (those who choose to vote absentee *and* physically drop-off their absentee ballot). It surely does not impose a "severe restriction[] on the right to vote" and therefore does not trigger strict scrutiny. *Id*. at 784. Moreover, the State cannot be faulted for these voters' choice to not take advantage of the other avenues available to them to cast their ballot. *Id*. at 786 ("Plaintiffs' choice to not participate in the opportunities Ohio provides to vote . . . was, at least in part, the cause of [plaintiffs'] inability to vote.")

In all, we conclude that Ohio's restrictions are reasonable and non-discriminatory and thus subject to rational basis review. *See Mays v. LaRose*, 951 F3d 775, 791-92 (6th Cir. 2020). But even if we subject them to mid-level scrutiny, they easily pass constitutional muster for the following reasons.

First, Directive 2020-16 promotes uniformity, which in turn promotes the fair administration of elections. Courts have consistently recognized a state's interest in the "orderly administration of elections." *Mays*, 951 F.3d at 787. Second, Directive 2020-16 promotes the state's efficiency interests in administering elections. "[T]he list of responsibilities of the board of elections is long and the staff and volunteers who prepare for and administer elections undoubtedly have much to accomplish during the final few days before the election." *Id*. (quoting *Obama for Am. v. Husted*, 697 F.3d at 432–33. This efficiency interest is particularly important where, as here, voting is already in progress. Third, limiting drop boxes to one location per county

promotes the accuracy of the election. According to LaRose, voters who return a ballot to the wrong drop box run the risk of having their ballot rejected. (citing Ohio Rev. Code § 3509.05(A)). Fourth, the Directive 2020-16 promotes the security of the election. As noted by LaRose, Ohio has never before used off-site drop boxes. Implementing off-site drop boxes now would thus require on-the-fly implementation of new, untested security measures.

All of LaRose's reasons for implementing and enforcing Directive 2020-16 concern important state interests. And these state interests, taken together, justify the burden that it places on this one method of voting in Ohio. Accordingly, we conclude that LaRose has made a strong showing that he is likely to succeed on appeal.

Moreover, the other three factors all support granting the motion for a stay pending appeal. First, not granting the stay could irreparably harm Ohio's election process. The resources (time, money, etc.) available for preparing for an election are finite and rivalrous. Without a stay, at least some instrumentalities of the state might spend resources setting up off-site drop boxes, which they may then be required to remove if LaRose prevails on appeal. Those are resources that state could have spent on other election "tasks necessary to preserving the integrity of the election process, maintaining a stable political system, preventing voter fraud, and protecting public confidence." *Mays*, 951 F.3d at 787.

Second, the stay is unlikely to harm anyone. As discussed above, Ohio offers many ways to vote. Given all of those options—including on-site drop boxes, casting a vote by mail, and voting in-person weeks before election day—the absence of off-site drop boxes does not impose a material harm.

Third, granting the stay is in the public interest. Immediate implementation of the district court's injunction would facilitate a grave risk of voter confusion. *See Purcell v. Gonzalez*,

549 U.S. 1, 4–5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.") The public interest would be best served by consistent rules regarding how to vote during the pendency of this lawsuit.

III.

Federal courts are not "overseers and micromanagers" of "the minutiae of state election processes." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016). The district court in this case altered election rules during an election and in disregard for Ohio's important state interests. Because we conclude that a stay pending appeal is appropriate, we grant Secretary LaRose's motion for a stay pending appeal, dismiss the motion for an administrative stay as moot, and stay the district court's preliminary injunction.

HELENE N. WHITE, Circuit Judge, dissenting.

I would not stay the district court's order. It is true that the federal courts should ordinarily "not alter election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). This is because "[w]here a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (Breyer, J., concurring).

Here, the legislature crafted a statute that neither "prescribes nor prohibits ballot drop boxes at locations other than the board of elections," *Ohio Democratic Party v. LaRose*, 2020-Ohio-4778 (Ohio Ct. App. 2020), and places primary responsibility for administering elections in bipartisan county boards of elections. These boards have the duty to oversee the administration of elections, including the duty to "[f]ix and provide the places for registration and for holding primaries and elections." Ohio Rev. Code Ann. § 3501.11. To be sure, the Secretary has the statutory authority to issue directives, but the Secretary's statutory authority is not at issue. Plaintiffs challenge the constitutionality of the directive, an issue squarely within the authority of the federal courts to determine.

Although federal courts are instructed, in ordinary cases, to refrain from altering election rules close in time to an election, this is not an ordinary case. Here, unlike the cases in which such rules were announced, *see Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam); *Andino v. Middleton*, No. 20A55, 2020 U.S. Lexis 4832, *2–3 (U.S. Oct. 5, 2020) (Kavanaugh, J., concurring in grant of stay); *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616–17 (Roberts, C.J., concurring in the grant of stay), Plaintiffs are not challenging the application of a statute drafted and debated by

a legislature, or an election rule determined by referendum. Nor are they challenging the application of a rule that has long applied to elections in Ohio. Instead, Plaintiffs ask the federal courts to determine the constitutionality of an eleventh-hour directive issued unilaterally by a single elected official to disrupt the established plans of bipartisan county boards of elections endeavoring to perform their duty to administer a fair and orderly election in their jurisdictions. The Secretary of State claims that he is seeking a stay in order to "preserve the status quo." But it was the Secretary's last-minute directive that disrupted the status quo by banning county boards of elections from exercising their discretion regarding the location and number of ballot drop boxes needed to facilitate orderly administration of the November election. The district court's order merely returns the administration of Ohio's elections to the status quo, enacted by the legislature, that existed prior to the Secretary's last-minute (and very recent) order, until the constitutionality of the Secretary's order can be adjudicated on the merits.

The Secretary initially took the position that the R.C. 3509.05(A) forbids election boards from having multiple, off-site ballot locations within a single county. *Ohio Democratic Party*, 2020-Ohio-4778 at *1. The Ohio courts determined that the Secretary's interpretation was incorrect and that such additional locations were neither prohibit nor mandated. Prior to the state-court decision, the Secretary stated that he would allow off-site drop boxes if a court determined they are permissible under the statute. The Secretary then changed his mind. The county elections boards are bipartisan, with of two Democrats and two Republicans. Although the Secretary has overall control of the election, and may promulgate directives, the individual county boards are granted the authority to control the local aspects of elections. *See* Ohio Rev. Code §§ 3501.04, 3501.05, and 3501.11. This makes sense; county populations, geographic dimensions, and

infrastructure vary considerably throughout the state. Cuyahoga County has 850,000 voters: Noble County has under 10,000. R. 91, PID 2921.

Plaintiffs presented considerable evidence that voters in the largest counties will suffer significant burdens as a result of the Secretary's directive limiting the ability of the county boards to implement bipartisan plans tailored to best administer efficient, safe, and secure voting in their counties. *Id.* at 2920–22. The Secretary's asserted interests in uniformity, secure and orderly elections, avoidance of voter confusion and public confidence in the integrity of the electoral process, Appellant Motion at 17–20, are not served by the Secretary's directive.

The Secretary's asserted interest in uniformity ignores that each county has its own bipartisan election commission with knowledge of the county's needs. Uniformity in the number of ballot drop-off locations across counties with 850,00 voters and counties with less than 10,000 voters promotes unequal, rather than uniform, voting opportunities.

The Secretary has not shown that the proposed locations at the libraries staffed by elections officials will undermine the security and orderly of the election. R. 91, PID 2922–24. Nor has the Secretary shown that the plan will lead to voter confusion. *Id.* Any confusion is a result of the Secretary's changing positions. Finally, public confidence in the integrity of the electoral process is served by allowing Ohio citizens to have the best chance of having their votes safely cast and their ballots counted, subject to strict supervision by local bipartisan election commissions.

In sum, I would not find that the district court, after conducting evidentiary hearings with multiple witnesses, and analyzing significant briefing, abused its discretion in enjoining what it determined to likely be an unconstitutional directive issued by a single elected official, impacting the voting rights of thousands of citizens. Although last minute injunctions issued during an election are usually disfavored, the justifications for such a rule are not present in this case. The

status quo, created by the legislature, will be preserved by the district court's injunction. Moreover, to hold that the constitutionality of a last-minute order by a single state official impacting the voting rights of thousands of citizens may not be adjudicated until after their right to vote has been disrupted applies Supreme Court precedent to an inappropriate context.

For the foregoing reasons, I dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Exhibit L

Thread

Chris Hollins Retweeted

Harris County Clerk
@HarrisVotes

Statement from Harris County Clerk @CGHollins: Tonight's injunction reinstating Harris County voters' ability to hand-deliver their ballots at 12 county offices is a victory for voting rights. (1/3)

> **Texas Tribune** @TexasTribune · 12h
> Breaking: Texas counties can have multiple absentee ballot drop-off locations, a federal judge ruled Friday.
>
> The ruling blocks an order from Texas Gov. Greg Abbott that had limited counties to just one drop-off location each. bit.ly/3nC54KU

10:52 PM · Oct 9, 2020 · Twitter for iPhone

99 Retweets **10** Quote Tweets **251** Likes

Harris County Clerk @HarrisVotes · 11h
Replying to @HarrisVotes
The Governor's suppressive tactics should not be tolerated, and tonight's ruling shows that the law is on the side of Texas voters. (2/3)

2 18 83

Harris County Clerk @HarrisVotes · 11h
Seniors and voters with disabilities across Harris County need these drop-off locations to deliver their mail ballots safely and conveniently during the global pandemic. We shouldn't be playing politics with voters' lives. (3/3)

3 10 75