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
v.	§	TRAVIS COUNTY
GREG ABBOTT, in his official capacity as the Governor of Texas, *Defendant.*	§	353rd JUDICIAL DISTRICT

DEFENDANT'S PLEA TO THE JURISDICTION AND RESPONSE TO PLAINTIFF'S APPLICATION FOR TEMPORARY INJUNCTIVE RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

Relying on authority explicitly granted by the Texas Legislature, Governor Abbott has taken numerous actions to protect Texans during this pandemic, including adding safeguards to enable all eligible voters to cast a ballot in person when they go to the polls. Early in the COVID-19 pandemic, the Governor increased the number of days in the early voting period for the July run-off election. He similarly extended the early voting period for the November general election. And he suspended a provision of the Texas Election Code to expand the time period in which a person could deliver a marked mail ballot in person to the early voting clerk's office, which otherwise would have been limited to election day.

Plaintiffs' lawsuit challenges a sensible amendment to the latter expansion of voting opportunities—a suspension that was done in response to the ongoing COVID-19 disaster. In order to ensure ballot security, the Governor amended his prior suspension on October 1 to make clear that during the added time period for in-person delivery of marked mail ballots (1) 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, and (2) the early voting clerk's office must allow poll watchers to be present to observe any activity related to the in-person delivery of a marked mail ballot. To be clear, this suspension applies for the time period prior to election day; it leaves Section 86.006(a-1) of the Election Code unchanged on election day. The Governor has thus safeguarded the health and well-being of Texas voters while providing them with an additional level of certainty that this election will be fair and secure.

Plaintiffs mischaracterize the Governor's proclamations—which *expanded* voting opportunities beyond what is contemplated by statute—as disenfranchisement. From that misunderstanding, they request that the Court enjoin enforcement of the proclamation, but only in part. They ask the Court to keep intact the expansion of time in which a voter can deliver a marked mail ballot in person, but to enjoin the requirement that the voter deliver the ballot to a single early voting site prior to election day. That is not how the Disaster Act works. The Governor's actions must be considered holistically. Either the Governor has the authority to suspend certain provisions of the Election Code pursuant to his Disaster Act authority, or he does not. The Court cannot enjoin only one aspect of his proclamations pertaining to the return of marked mail ballots.

Multiple other jurisdictional hurdles prevent this Court from granting Plaintiffs' requested relief. No plaintiff has standing, and sovereign immunity bars the claims. Thus, Plaintiffs are not entitled to temporary injunctive relief. Instead, this suit should be dismissed.

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SUMMARY OF THE ARGUMENT

Plaintiffs bring three claims challenging the Governor's proclamation allowing voters to deliver marked mail ballots prior to election day if they do so at a single early voting clerk's office location: first, Plaintiffs contend that the proclamation is *ultra vires*; second, they contend that the proclamation infringes on the right to vote in violation of Article 1, Section 3 of the Texas Constitution; and third, they contend that the proclamation violates equal protection and constitutes arbitrary disenfranchisement in violation of Article 1, Section 3.

The Court cannot reach Plaintiffs' arguments because Plaintiffs' claims are jurisdictionally barred. Robert Knetsch, the only individual named as a plaintiff, has not established that he is unable to vote by other means and thus has not established a concrete and particularized injury. Likewise, the organizational plaintiffs have not demonstrated an injury to any of their purported members or identified a sufficient injury that would give them standing to sue on their own behalf as organizations. And even if Plaintiffs could establish an injury, they have not shown that the Governor is a proper party. The Governor does not have the authority to enforce the proclamation, and therefore, an injunction against him would not redress Plaintiffs' alleged injuries. For related reasons, Plaintiffs' claims against the Governor are barred by sovereign immunity.

On the merits, the Governor did not act *ultra vires* in amending the scope of his prior proclamation, which expanded the time period for individuals to deliver a marked mail ballot to the early voting clerk's office pursuant to his Disaster Act authority. Nor did the Governor infringe on Plaintiffs' right to vote or violate equal protection principles. The proclamation ensures consistency across the State's counties and works in tandem with other provisions of the Election Code, as well as the Governor's proclamations, to ensure robust opportunities for Texans to exercise the franchise in the forthcoming general election. Finally, the equitable factors that the

Court must consider weigh decisively against issuing injunctive relief; the State has a strong interest in ensuring the integrity of its elections, and Governor Abbott's proclamation furthers that aim. Plaintiffs have therefore not met their burden of showing an entitlement to an injunction. For these reasons and those discussed below, Plaintiffs' claims should be dismissed for lack of jurisdiction, and no injunction should issue.

BACKGROUND

A. Under state law, voting by delivery of a marked ballot in person is only permitted on election day.

"The history of absentee voting legislation in Texas shows that the Legislature has been both engaged and cautious in allowing voting by mail." *In re State*, 602 S.W.3d 549, 558 (Tex. 2020). Texas law allows voting by mail for registered voters who meet one of the qualifications stated in the Election Code. *See* TEX. ELEC. CODE Ch. 82. A voter is qualified to vote by mail if he (1) anticipates being absent from his county of residence on election day; (2) has an illness or other physical condition that disables him from appearing at the polling place; (3) is 65 or older; or (4) is confined in jail. TEX. ELEC. CODE §§ 82.001–.004. The early-voting clerk is responsible for conducting early voting and must "review each application for a ballot to be voted by mail." *Id.* § 86.001(a). Each early-voting clerk is responsible for determining whether an application to vote by mail complies with all requirements, providing notice and cure instructions to a voter who submits a noncompliant application, and "provid[ing] an official ballot envelope and carrier envelope with each ballot provided to a voter" who properly completes an application. *Id.* §§ 86.001(a), .008, .009, .002(a). After a voter marks their mail-in ballot, they must return it to the early-voting clerk in the official carrier envelope. *Id.* § 86.006(a).

Prior to 2015, the Texas Election Code provided voters with only two methods by which to return their ballots: mail, and common or contract carrier. That changed with the passage of House Bill 1927, which amended Section 86.006 to give voters a limited option of in-person delivery. *See* Acts 2015, 84th Leg., ch. 1050 (H.B. 1927), § 7, eff. Sept. 1, 2015.[1] Specifically, the provision states, "The 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) (emphasis added). "A voter who delivers a marked ballot in person must present an acceptable form of identification described by Section 63.0101." *Id.* According to the Statement of Intent, the bill's purpose was to "ensure that voters who submit applications for a mail-in ballot are able to vote in every election for which they are eligible." Appx.021. In -person delivery was made available when circumstances make it all but impossible for voters to deliver their ballots on time through another method. Until this year, no early voting clerk organized multiple drop-off locations for mail-in ballots in a single county during a general election.

B. During the pandemic, the Governor has acted to ensure the safety and integrity of Texas elections—including by expanding early voting and permitting voting by delivery of marked ballots before election day.

The coronavirus pandemic reached American shores in early 2020 and Texas in March. The Governor first declared a statewide disaster on March 13, 2020. Appx.002–04 (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* Appx.013–15 (Proclamation of Sept. 7, 2020). As the Fifth Circuit explained early in the pandemic:

[1] *See also* Texas Legislature Online, HB 1927 (84th Regular Session) Bill History, publicly available here: https://capitol.texas.gov/BillLookup/History.aspx?LegSess=84R&Bill=HB1927 (last accessed October 5, 2020); HB 1927 text as enrolled, https://capitol.texas.gov/tlodocs/84R/billtext/pdf/HB01927F.pdf#navpanes=0 (last accessed October 5, 2020).

> [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 expanded the early-voting period for all July 14 elections so "election officials can implement appropriate social distancing and safe hygiene practices." Appx.007 (Proclamation of May 11, 2020). On July 27, the Governor issued a proclamation (hereafter, "the July 27 Proclamation") extending the early voting options for the November general election. In the July 27 Proclamation, 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." Appx.010 (Proclamation of July 27, 2020).

The July 27 Proclamation suspended two provisions of the Election Code:

- "Section 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"; and
- "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."

Appx.011 (Proclamation of July 27, 2020). Whereas Section 86.001(a-1) would otherwise permit this only on election day, the July 27 Proclamation's second suspension thus allowed a voter who

was otherwise eligible to vote by mail to personally return the marked mail ballot *at any time up to* and including election day. *See id.* The Governor did so by suspending the limitation that a voter can return the marked mail ballot only on election day. The July 27 Proclamation did not address election day and did not alter or otherwise affect the other applicable requirements stipulated in the Election Code, which include the requirement that an individual returning a marked mail ballot in person to the early voting clerk's office present a valid form of photo identification.

Over the last few weeks, some counties have announced that they will have multiple drop-off locations for individuals who are returning marked mail ballots prior to election day. On October 1, the Governor issued the proclamation that is the subject of this lawsuit (hereafter, "the October 1 Proclamation"). *See generally* Appx.016–20 (Proclamation of October 1, 2020). The October 1 Proclamation clarifies that the suspension of Section 86.006(a-1) to allow this form of in-person delivery prior to election day applies only when: (1) voters return their marked ballots at a single early voting clerk's office location that is publicly designated; 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 in-person delivery. Appx.019. In doing so, the Governor advanced the State's weighty interests in clarifying any confusion, reintroducing uniformity in the interpretation and application of the Election Code, and ensuring ballot security.

PLEA TO THE JURISDICTION

A. Standard of Review

A plea to the jurisdiction challenges the court's authority to determine the subject matter of the controversy. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000). Subject-matter jurisdiction is "never presumed and cannot be waived." *Tex. Ass'n of Bus. v. Tex. Air Ctr. Bd.*, 852 S.W.2d 440, 443–44 (Tex. 1993). "Subject-matter jurisdiction is a multiple choice

question with only two answers: yes or no." *City of Anson v. Harper*, 216 S.W.3d 384, 390 (Tex. App.—Eastland 2006, no pet.). "When a plea to the jurisdiction challenges the pleadings, [the court] determine[s] if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). "If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend." *Id.* at 227.

B. Arguments & Authorities

1. Plaintiffs lack standing to sue the Governor.

"The Constitution is not suspended when the government declares a state of disaster." *In re Abbott*, 601 S.W.3d 802, 805 (Tex. 2020) (orig. proceeding) (per curiam). And because the Constitution is not suspended, "constitutional limitations on the jurisdiction of courts" remain in force. *Id.* As the Texas Supreme Court recently reaffirmed, "[o]ne such limitation is the requirement that a plaintiff establish standing." *Id.* The Texas Constitution's separation of powers "prohibit[s] courts from issuing advisory opinions because such is the function of the executive rather than judicial department." *Tex. Ass'n of Bus. v. Tex. Air Ctr. Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). "The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties." *Id.* Here, Plaintiffs lack standing to sue the Governor, and the Constitution requires dismissal.

"Subject matter jurisdiction requires that the party bringing the suit have standing, that there be a live controversy between the parties, and that the case be justiciable." *State Bar of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). "A court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it." *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012). Standing "require[s] an actual, not merely hypothetical or generalized grievance." *Brown*

v. Todd, 53 S.W.3d 297, 302 (Tex. 2001). To the extent not contradicted by state law, Texas courts "look to the more extensive jurisprudential experience of the federal courts on the subject [of standing] for any guidance it may yield." *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993).

To have standing, the plaintiff must meet three elements:

1. The plaintiff must have suffered an injury in fact—an invasion of a legally protected or cognizable interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;

2. There must be a causal connection between the injury and the conduct complained of—that is, the injury must be fairly traceable to the challenged action of the defendant and not the independent action of a third party not before the court; and

3. It must be likely, and not merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defs of Wildlife, 504 U.S. 555, 560–61 (1992); *Brown*, 53 S.W.3d at 305 (referencing *Lujan*); *Heckman*, 369 S.W.3d at 155.

a. Plaintiffs have not alleged an individualized, non-speculative harm sufficient to support standing.

It is well-settled that to establish standing to seek redress for injury, "a plaintiff must be personally aggrieved." *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008) (citing *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996)). In addition, "his alleged injury must be concrete and particularized, actual or imminent, not hypothetical." *Id.* at 304–05 (citing *Raines v. Byrd*, 521 U.S. 811, 819 (1997)); *see Lujan*, 504 U.S. at 560–561; *Brown*, 53 S.W.3d at 305; *Tex. Ass'n of Bus.*, 852 S.W.2d at 444. Even in voting cases, the Supreme Court's "decisions have always required a plaintiff to allege some injury distinct from that sustained by the public at large." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 8 (Tex. 2011) (quoting *Brown*, 53 S.W.3d at 302). This requirement "ensures that 'there is a real need to exercise the power of

judicial review' in a particular case, and it helps guarantee that courts fashion remedies 'no broader than required by the precise facts to which the court's ruling would be applied.'" *Id.* (quoting *Lance v. Coffman*, 549 U.S. 437, 441 (2007)) (additional citations omitted). Plaintiffs offer no more than speculative allegations, which are insufficient to state injury-in-fact.

Andrade illustrates this principle. That case involved the requirement that the Secretary of State certify all voting systems used in Texas. *Id.* at 4. The plaintiffs challenged the Secretary's certification of eSlate, an electronic voting system used in Travis County, under a handful of legal theories. *See id.* The Supreme Court held that those plaintiffs who were Travis County voters had standing to maintain an equal-protection challenge that was separate from the generalized concern that all legally cast votes should be counted because "[t]hey assert that it is less probable that their votes will be counted than will the votes of residents of other Texas counties" not using eSlate. *Id.* at 10. The Court ultimately concluded that plaintiffs' equal-protection claim was not viable and dismissed it on that basis,[2] but recognized that if being required to vote via eSlate "does produce a legally cognizable injury, [plaintiffs] are among those who have sustained it." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 207–08 (1962)).[3]

By contrast, *Andrade* explains, status as a voter is insufficient to confer standing without more particularized allegations of harm. For example, the Court dismissed the claim that eSlate violates the right to vote a secret ballot guaranteed by the Texas Constitution as a hypothetical "generalized grievance shared in substantially equal measure by all or a large class of citizens." *Id.*

[2] *Andrade*, 345 S.W.3d at 13–14 (concluding that "Secretary made a reasonable, nondiscriminatory choice to certify the eSlate, a decision justified by the State's important regulatory interests," and therefore not violative of equal protection).

[3] *See also, e.g.*, *id.* at 8–9 (collecting cases recognizing that a claim that ballots cast by voters in a particular region are not counted can be a particularized—if widely-shared—injury that may support standing).

at 15 (citing TEX. CONST. art. VI, § 4) (additional citations omitted). The plaintiffs argued that eSlate was "vulnerable to hackers, compromising vote secrecy" and that "eSlate's audio output, available for disabled voters, can be overheard at a significant distance using only a shortwave radio." *Id.* at 15. But the Court recognized that "[t]he voters' secret ballot allegations involve only hypothetical harm, not the concrete, particularized injury standing requires." *Id.* at 15 (citing *DaimlerChrysler Corp.*, 252 S.W.3d at 304–05). It considered that, while "[a]ll voting systems are subject to criminal manipulation, [] there is no evidence or allegation that the eSlate has ever been manipulated in any Travis County election." *Id.*

Thus, the Supreme Court concluded, "[n]ot only does this [] allegation fall within the generalized grievance category, but it violates the prudential standing requirement that a plaintiff 'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Id.* at 15–16 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)) (citing *United States v. Hays*, 515 U.S. 737, 745 (1995); WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3531.10 (3d ed. 2008) (noting that "absent a more direct individual injury, violation of the Constitution does not itself establish standing"); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.")).

In addition to requiring a personal injury not shared with the broader public, the plaintiffs' alleged injury must also be "actual or imminent," not "conjectural or hypothetical." *Pub. Citizen, Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2001) (citing *Lujan*, 504 U.S. at 560); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) (distinguishing between a certainly impending injury

and one built on subjective fear). "Subjective fear . . . does not give rise to standing." *Clapper*, 568 U.S. at 418. When, as here, the plaintiffs seek prospective relief, they must establish an "imminent" future injury to satisfy standing. *Lujan*, 504 U.S. at 564. The Supreme Court has repeatedly interpreted this to mean that a "threatened injury must be *certainly impending* to constitute injury in fact"—"[a]llegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (emphasis in original) (quotations omitted).

Here, Plaintiffs lack an individualized injury that is anything more than hypothetical or speculative. Plaintiffs admit that they (or their members) "are eligible to vote by mail." Pls.' Pet. ¶7. But Plaintiffs do not want to vote by mail. Instead, Plaintiffs want to utilize the suspension of Section 86.006(a-1), which expands the time period to allow an individual to return a marked mail ballot to the early voting clerk's office prior to election day, but without abiding by the Proclamation's restrictions. The stated basis for this preference is the fear that USPS may not deliver ballots. *See* Pls.' Pet. ¶¶51–55. Plaintiffs allege that USPS recommends that voters submit their absentee ballot applications by mail at least 15 days before Election Day (according to a Washington Post article cited in a footnote). *Id.* ¶52. But such "general data [] does not establish a substantial risk that Plaintiffs themselves will [be injured]; Plaintiff-specific evidence is needed." *Stringer v. Whtiley*, 942 F.3d 715, 722 (5th Cir. 2019).

When Plaintiffs filed their lawsuit on October 5, it was almost 30 days before the election—plenty of time for Plaintiffs to submit their ballots by mail even according to recommendations. (And an inability to comply with an "in an abundance of caution"-style recommendation falls far short of establishing an imminent injury.) Alternatively, Plaintiffs (or their members) could go to a

county drop-off site—either early or on election day. Or they could vote early in person, starting October 13 (courtesy of the October 1 Proclamation).

The individual plaintiff, Robert Knetsch, attests that he intended to vote at the drop-off location for Harris County. *See* Declaration of R. Knetsch. The post-October 1 drop-off location designated by Harris County is only 12.7 miles from his house. *Id.* ¶9. While he says he is "worried about long lines and crowd congestion," he does not presume to contend that long lines and crowd congestion are genuinely present on site. This omission is particularly notable given the multitude of options that Harris County voters have in exercising their right to vote: (1) early by mail (if the voters meet the criteria); (2) early through the drop-off site (if the voters meet the criteria); (3) early and in person; (4) any drop-off sites on election day (if the voters meet the criteria); or (5) in-person and on election day. The concern that long lines *may* exist for the entire month of October is just the type of speculation that is *not* sufficient for standing.

In short, Plaintiffs have not alleged facts showing an imminent injury specific to them, and therefore have not met the requirements to demonstrate standing.

b. Plaintiffs do not meet the fairly traceable or redressability requirements for standing because the October 1 Proclamation is not enforced by the Governor.

To establish standing to challenge an executive order or, here, a proclamation, the plaintiff must sue the party responsible for the enforcement. *See In re Abbott*, 601 S.W.3d. 802, 812 (Tex. 2020) (per curiam) (holding that Executive Order GA-13's enforcement did not come from the Governor or the Attorney General and therefore the plaintiffs lacked standing to bring claims against them); *City of El Paso v. Tom Brown Ministries*, 505 S.W.3d 124, 147 (Tex. App.—El Paso 2016, no pet.) (holding that the City of El Paso lacked the requisite enforcement connection to the challenged statute); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) ("Because

the plaintiffs have pointed to nothing that outlines a relevant enforcement role for Governor Abbott, the plaintiffs' injuries likely cannot be fairly traced to him."); *Lone Starr Multi Theatres, Inc. v. State*, 922 S.W.2d 295, 297–98 (Tex. App.—Austin 1996, no writ) (holding that, in a statutory challenge, the plaintiff must sue the party "with authority to enforce [the] particular statute" because otherwise the declaration would be an advisory opinion). Because the Governor will not be the party responsible for enforcing the October 1 Proclamation, Plaintiffs lack standing to bring their challenge to that proclamation against him.

The plaintiff cannot establish standing by relying on the Governor's generalized power or duty to enforce state law. *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc). Instead, the plaintiff must plead that the named "official can act" with respect to the specific challenged law *and* that "there's a significant possibility that he or she will act to harm [the] plaintiff." *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019). Here, the Governor does not enforce the October 1 Proclamation. *See* Appx.019 (providing that 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 . . ."). Texas law "empowers the Governor to 'issue,' 'amend,' or 'rescind' executive orders, not to 'enforce' them." *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020) (quoting Tex. Gov't Code § 418.012). "The power to promulgate law is not the power to enforce it." *Id.* (holding that Governor Abbott was not a proper defendant in the plaintiffs' challenge to Executive Order GA-09). The same applies to proclamations.

The Texas Supreme Court has already held that a plaintiff seeking to enjoin enforcement of an executive order does not have standing to sue the Governor. In *In re Abbott*, the plaintiffs were judges who challenged GA-13, an executive order that "change[d] the rules applicable to judges'

decisions regarding pretrial bail" in response to the COVID-19 disaster. 601 S.W.3d at 805. The plaintiffs argued that they had standing to sue the Governor because he had "the power to enforce GA-13 against the judiciary" under the Disaster Act. *Id.* at 811. The Texas Supreme Court disagreed, concluding that there was "no credible threat of prosecution." *Id.* at 812 (quotation marks omitted). The Court noted that "[t]he State . . . readily concedes that the Governor cannot initiate such prosecutions" and that "the State in its briefing disclaims any intention by the Governor or the Attorney General to affirmatively enforce GA-13." *Id.* Although the Court recognized that the executive order was not "toothless," it focused its analysis on the State's acknowledgment "that GA-13's enforcement will not come in the form of criminal prosecutions by the Governor or the Attorney General." *Id.* Because the Governor disavowed any authority to initiate prosecutions for violations of the executive order, the Court concluded that the plaintiffs lacked standing and that the trial court therefore lacked subject-matter jurisdiction to enjoin the Governor. *Id.* at 812–13.

As in *In re Abbott*, the Governor acknowledges here that he has neither the authority nor the intention to enforce the October 1 Proclamation. Any injunction prohibiting the Governor from enforcing the October 1 Proclamation—something he cannot and will not do—would not redress any harm alleged by the Plaintiffs. *See Abbott*, 601 S.W.3d at 807 (explaining that, to have standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct *and likely to be redressed by the requested relief*" (emphasis added)); *see also Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) ("Because the plaintiffs have pointed to nothing that outlines a relevant enforcement role for Governor Abbott, the plaintiffs' injuries likely cannot be fairly traced to him.").

Moreover, the redressability requirement for standing applies with equal force to requests for declaratory judgments. "A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). For example, in *Garcia*, the plaintiff sought: "(1) declaratory relief that certain statutes and the city's ordinance are unconstitutional; (2) declaratory relief that city officials acted ultra vires in implementing and enforcing the ordinance; and (3) injunctive relief prohibiting future enforcement of certain statutes and the city's ordinance." 593 S.W.3d at 207 (citation omitted). The Texas Supreme Court concluded that, because the plaintiff had failed to establish an imminent threat of prosecution that the Court could redress, the plaintiff lacked standing to seek injunctive or declaratory relief. *Id.* at 207-08.

In *Lone Starr Multi Theaters, Inc.*, the Third Court of Appeals aptly summarized the standing requirement as follows: "In a declaratory judgment action, there must exist *between the parties* a justiciable controversy that will be determined by the judgment; otherwise the judgment amounts to no more than an advisory opinion, which a court does not have the power to give." 922 S.W.2d at 297 (emphasis in original). The Third Court of Appeals recognized that "the trial court in the present cause was without jurisdiction to declare the obscenity statutes unconstitutional and enjoin their enforcement because authority to enforce the statutes is constitutionally vested not in the attorney general but in district and county attorneys." *Id.* at 298. Similarly, in *OHBA Corp. v. City of Carrollton*, the plaintiff "filed suit seeking a declaratory judgment and an injunction regarding the City of Carrollton's enforcement of its housing code." 203 S.W.3d 1, 3 (Tex. App.—Dallas 2006, pet. denied). The Fifth Court of Appeals recognized that because the plaintiff had

"merely a theoretical dispute," the trial court "lacked subject matter jurisdiction over the declaratory judgment claim." *Id.* at 6.

Like the plaintiffs in *Garcia*, *City of Carrollton*, and *Lone Starr Multi Theaters, Inc.*, Plaintiffs here have not established that their requested declaratory relief will remedy an actual or imminent harm. Because the Governor has no role in enforcing the October 1 Proclamation, any harm the proclamation may allegedly cause Plaintiffs cannot be redressed by declarations entered against the Governor. Accordingly, Plaintiffs lack standing to obtain declaratory relief. "Because the plaintiffs have pointed to nothing that outlines a relevant enforcement role for Governor Abbott, the plaintiffs' injuries likely cannot be fairly traced to him." *See Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020). The Governor respectfully asks the Court to grant the plea and dismiss all claims against him for lack of jurisdiction.

c. Plaintiff Organizations lack standing.

The three plaintiffs in this case include only one actual voter. *See* Pls.' Pet., ¶¶15–22. The other two plaintiffs are the Anti-Defamation League Austin, Southwest, and Texoma Regions ("ADL") and Common Cause Texas. Neither organization (hereafter, "Plaintiff Organizations") meets the requirements for associational standing: that is, the standing of an organization to sue on behalf of its members. Texas courts generally follow federal standing jurisprudence with respect to associational standing. Under the *Hunt* test incorporated into this state's jurisprudence by the Texas Supreme Court, "an association has standing to sue on behalf of its members when '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Texas Ass'n of Bus.*,

852 S.W.2d at 446 (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Organizational Plaintiffs lack standing.

The Court can begin and end its standing analysis at the first factor—whether any of the Plaintiffs Organizations' members would "otherwise have standing to sue in their own right." *Id.* Neither Plaintiff Organizations have identified any individual members at all, let alone members who have standing to sue. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (requiring organizations to "identify members who have suffered the requisite harm" for injury-in-fact); *see also NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010) (requiring evidence of "a specific member"); *cf. Tex. Ass'n of Bus.*, 852 S.W.2d at 444 ("[W]e look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield."). ADL alleges it 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." Pls.' Pet. ¶18. Common Cause Texas alleges that it has 36,000 members and supporters in Texas, some of whom are registered to vote in Texas an eligible to vote by mail. *Id.* ¶21. These allegations are insufficient.

To establish associational standing, the plaintiff must establish that it has "members" within the meaning of the associational standing test articulated in *Hunt*, 432 U.S. at 344 (requiring "indicia of membership"). Such members must "participate in and guide the organization's efforts," as required for associational standing. *Ass'n for Retarded Citizens of Dall. v. Dall. Cty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994). The Supreme Court has unequivocally held that the "requirement of naming the affected members has

never been dispensed with" except "where *all* the members of the organization are affected by the challenged activity." *Summers*, 555 U.S. at 498–99 (emphasis in original). And that conclusion is belied by the petition—which indicates that only a fraction of Plaintiff Organizations' respective membership resides in Texas and are eligible to vote by mail (such that they could drop off marked ballot under the October 1 Proclamation). *See* Pls.' Pet. ¶¶18, 21.

Because Plaintiff Organizations have not alleged the existence of any specific member, let alone any specific member with standing to sue "in their own right," their claims should be dismissed. *Texas Ass'n of Bus.*, 852 S.W.2d at 446; *City of Kyle*, 626 F.3d at 237 (requiring "a specific member"); *see also, e.g.*, *Ga. Republican Party v. SEC*, 888 F.3d 1198, 1203 (11th Cir. 2018) (holding that Georgia Republican Party lacked associational standing because it "has failed to allege that a specific member will be injured by the rule, and it certainly offers no evidence to support such an allegation"); *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (dismissing lawsuit because plaintiff failed to identify a member who was affected by the challenged regulation); *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (Souter, J.) ("[T]he complaint did not identify any member of the group" and "where standing is at issue, heightened specificity is obligatory at the pleading stage); *N.J. Physicians, Inc. v. President of U.S.*, 653 F.3d 234, 241 (3d Cir. 2011) (holding that the plaintiffs lacked standing because the only member identified in the compliant did not suffer an injury in-fact); *Disability Rights Wis., Inc. v. Walworth Cty. Bd. of Supervisors*, 522 F.3d 796, 804 (7th Cir. 2008) ("[A]dvocacy is only appropriately—and constitutionally—undertaken on behalf of another when that other has suffered an injury.").

Plaintiffs' petition also seems to suggest that they separately have standing to sue for harm to the organizations themselves as opposed to their members. *E.g.* Pls.' Pet. ¶¶17, 20 (discussing

a diversion of resources). But Texas courts do not recognize organizational standing as separate from representative standing. The United States Supreme Court has recognized organizational standing as a separate ground for jurisdiction, but only in one circumstance: In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Court allowed an entity that provided housing counseling and referral services to bring claims for damage to the organization under the federal Fair Housing Act. This is a controversial ruling that has not been broadly applied even in federal courts. *See* Ryan Baasch, *Reorganizing Organizational Standing,* 103 Va. L. Rev. Online 18, 21–24 (2017). And it has never been adopted in Texas courts. To the contrary, in *Texas Department of Family and Protective Services v. Grassroots Leadership*, the Third Court of Appeals rejected the "contention that [an organization's] advocacy expenditure" creates standing under Texas law. No. 03-18-00261-CV, 2018 WL 6187433, at *5 (Tex. App.—Austin Nov. 28, 2018, no pet.) (mem. op.). So too here.

2. Sovereign immunity bars Plaintiffs' claims in their entirety.

Even assuming Plaintiffs had standing, their claims would still be barred by the Governor's sovereign immunity. "Sovereign immunity implicates a court's subject matter jurisdiction." *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 749 (Tex. 2020). The doctrine provides immunity both from suit and from liability. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). It preserves the separation of powers and protects public funds. *Univ. of Incarnate Word v. Redus*, 602 S.W.3d 398, 404 (Tex. 2020). In suits against the State, the plaintiff's "burden to affirmatively demonstrate the trial court's jurisdiction" "encompasses the burden of establishing a waiver of sovereign immunity." *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019). Here, Plaintiffs have not met that burden and therefore the Court lacks subject-matter jurisdiction over their claims.

It is well-established that public officials sued in their official capacities are protected by the same sovereign or governmental immunity as the governmental unit they represent. *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843–44 (Tex. 2007) (holding that "an official sued in his official capacity would assert sovereign immunity[,]" and that "[w]hen a state official files a plea to the jurisdiction, the official is invoking the sovereign immunity from suit held by the government itself"). The Governor in his official capacity is entitled to sovereign immunity. *Machete's Chop Shop, Inc. v. Tex. Film Comm'n*, 483 S.W.3d 272, 275, 286 (Tex. App.—Austin 2016, no pet.). No waiver of sovereign immunity applies to Plaintiffs' lawsuit. Instead, Plaintiffs rely on the *ultra vires* exception to sovereign immunity. But the *ultra vires* exception does not apply to this case and therefore the claims remain barred.

"To fall within the *ultra vires* exception, a suit . . . must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Heinrich*, 284 S.W.3d at 373. If the plaintiff has not actually alleged such an action, the claims remain barred by sovereign immunity from suit. *Andrade*, 345 S.W.3d at 11; *Hall v. McRaven*, 508 S.W.3d 232, 240–41 (Tex. 2017) (holding that the official-capacity defendant acted within his legal authority and was therefore still entitled to sovereign immunity). "[T]he jurisdictional inquiry may unavoidably implicate the underlying substantive merits of the case when, as often happens in *ultra vires* claims, the jurisdictional inquiry and the merits inquiry are intertwined." *Chambers-Liberty Ctys. Navigation Dist. v. State*, 575 S.W.3d 339, 345 (Tex. 2019) (citing *Miranda*, 133 S.W.3d at 228). And even a viable *ultra vires* action does not permit monetary damages, which remain barred. *Heinrich*, 284 S.W.3d at 369–70.

Critically, "merely asserting legal conclusions or labeling a defendant's actions as 'ultra vires,' 'illegal,' or 'unconstitutional' does not suffice to plead an ultra vires claim—what matters is whether the facts alleged constitute actions beyond the governmental actor's statutory authority, properly construed." *Tex. Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 702 (Tex. App.—Austin 2011, no pet.); *see also Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality*, 307 S.W.3d 505, 515–16 (Tex. App.—Austin 2010, no pet.) (noting that "if the claimant is attempting to restrain a state officer's conduct on the grounds that it is unconstitutional, it must allege facts that actually constitute a constitutional violation" to fall within the ultra vires exception). Here, Plaintiffs do not plead a viable claim against the Governor and therefore they cannot rely on the *ultra vires* exception.

a. The Governor did not act *ultra vires* because he had statutory authority to limit the scope of his own suspension of state law.

The October 1 Proclamation was within the Governor's legal authority to issue. The July 27 Proclamation and October 1 Proclamation both suspended Section 86.006(a-1) of the Texas Election Code to add more days on which eligible voters may hand-deliver their marked mail ballots. Without these proclamations, a voter would only be able to deliver a marked mail ballot to the early voting clerk's office *while the polls are open on election day*. *Compare* Appx.011, *with* TEX. ELEC. CODE § 86.006(a-1). The actions taken in the July 27 Proclamation and October 1 Proclamation are authorized by the Texas Disaster Act of 1975, in which 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).

Significantly, the July 27 Proclamation and October 1 Proclamation's suspension of Section 86.006(a-1) of the Texas Election Code were both authorized by the constitutionally delegated authority in Section 418.016(a) of the Texas Government Code. The two Proclamations allow voters to personally return their completed mail ballots at any time up to and including election day. This suspension has significant implications, allowing people to return marked ballots days or weeks before the election—whereas without the suspension, the return of a marked mail ballot was permitted exclusively on the day of the election while polls were open. *See* TEX. ELEC. CODE § 86.006(a-1). In other words, the Governor's Proclamations took a mechanism for submitting ballots that has only existed since September 1, 2015 and expanded its availability—making it easier for voters to vote.

But to avoid any ballot security concerns with this expansion of voting opportunities, the October 1 Proclamation made clear that the requirement in Section 86.006(a-1) of checking the voter's identification has not been suspended—the presentation of an acceptable form of identification is still required. Appx.019. Further, it made clear that on the days prior to election, poll watchers can be present and the ballot must be returned to a single early voting clerk's office designated by the county—which ensures the security of the site. The Governor's authority to add limitations to a previously-issued suspension is supported by Sections 418.016(a) of the Texas Government Code, the same authority that supported the July 27 Proclamation's suspension of the temporal restriction to election day.

And in any event, regardless of whether Plaintiffs' 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.

Plaintiffs contend that the Governor acted *ultra vires* by limiting the scope of his waiver of Section 86.006(a-1) to a single site. Under their theory, the Governor has legal authority to suspend state law and expand a method of voting that—by statute—is only available on election day itself, but does *not* have legal authority to limit, or condition the use of, that suspension to a single early voting clerk's office location. *See generally* Pls.' Pet. ¶¶71–80. Plaintiffs characterize the October 1 Proclamation as a limitation on early voting locations where a voter may return a marked mail ballot. But Plaintiffs ignore the fact that the Governor is *expanding* the time period for early voting delivery locations from a single day to effectively an entire month. The Disaster Act does not limit the Governor's legal discretion to choose how to balance (1) expanding voting opportunities to reduce pressure on election day and thereby maintain social distancing during voting; and (2) in the context of such an expansion, maintaining ballot security. While Plaintiffs would draw that line in a different place, their policy preference does not mean that the Governor's line-drawing is unlawful.

b. The October 1 Proclamation does not violate Article I, Section 3 of the Texas Constitution.

By alleging that the Proclamation violates the right to vote, Plaintiffs effectively argue that requiring counties to follow the practice that has been in place (until this year) since the enactment of Section 86.006(a-1)—one drop-off location per county—imposes an undue burden. That argument fails for two independent reasons: (1) the Proclamation does not encroach on the right to vote whatsoever; and (2) the Proclamation survives any *Anderson-Burdick* review because any burden is miniscule.

There is no freestanding right to vote in whatever manner Plaintiffs deem most convenient. When considering a challenge to the limited availability of absentee ballots, the Supreme Court distinguished "the right to vote" from the "claimed right to receive absentee ballots." *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). It concluded that the plaintiffs' inability to vote by mail did not implicate the right to vote because it did not "preclude[] [the plaintiffs] from voting" via other methods. *Id.* at 808. That holding dooms Plaintiffs' *Anderson-Burdick* claim. *See also Crawford v. Marion County 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.").

Texas law provides several opportunities for eligible voters to cast their ballot. Voting by mail is but one. Texas has scheduled the early voting period to commence on October 13, 2020 and continue through the fourth day before election day. *See* Proclamation of the Governor, Oct. 1, 2020. This will furnish voters 19 days in which to cast an in-person ballot, including election day. Voters may cast their ballot in-person or curbside at any polling location in their home county

during the early voting period (and often on election day).[4] Many voters will have the option of a hundred or more polling locations in which to choose,[5] each one of which will be open a minimum of eight hours each day. *See* TEX. ELEC. CODE § 85.064.

In addition, Texas provides multiple options by which qualified voters may deliver a marked mail ballot, including by mail, by common or contract carrier, and by in-person delivery. TEX. ELEC. CODE § 86.006(a). Because the October 1 Proclamation does not affect Plaintiffs' numerous other options for voting, it does not affect the "right to vote," only the "claimed right" to have multiple options for in-person delivery of a mail-in ballot. *McDonald*, 394 U.S. 802, 807 (1969).

Moreover, the Governor's Proclamations make voting easier, not harder. Plaintiffs cannot reasonably claim that in-person delivery of mail-in ballots during the early voting period (an option that did not exist before the Governor's Proclamations) is impermissibly infringed by the Governor's Proclamation clarifying its scope. Plaintiffs' theory—that the July 27 Proclamation created a new "right to vote" that cannot be amended—would impose significant burdens on Texas's ability to respond to the pandemic, and it is not required by *Anderson-Burdick*.

However, even if this Court concludes that the right to vote is implicated, the Proclamation easily passes muster under *Anderson-Burdick*, as any burden is *de minimis*, and the statute advances weighty State interests. As Plaintiffs acknowledge, "[w]hen resolving a challenge to a provision of Texas election laws under the state constitution, the Texas Supreme Court has adopted the

[4] A list of all counties participating in the Countywide Polling Place Program can be found at the Secretary of State's websites, https://www.sos.state.tx.us/elections/laws/countywide-polling-place-program.shtml.
[5] Harris County, for example, has announced that it will host 120 early voting polling locations and 767 election day polling locations for the November general election, with the possibility of adding more between now and the start of the in-person voting period.

balancing test set forth by the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)." Pls.' Pet. ¶83 (citing *State v. Hodges*, 92 S.W.3d 489, 496 (Tex. 2002)); *see also Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 266 (Tex. 2002).

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*, 460 U.S. at 789). 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 First and Fourteenth Amendment rights of voters, "the state's important regulatory interests are generally sufficient to justify" the restrictions. *Anderson*, 460 U.S. at 788.

Addressing each element in turn, the Governor's actions *expanded* Plaintiffs' ability to vote by mail. He did not curtail or burden it. Prior to his July 27 and October 1 proclamations, voters could deliver their ballots in-person only on election day. TEX. ELEC. CODE § 86.006(a-1). The Governor suspended that limitation, permitting voters to deliver their ballots to the early voting clerk as soon as their ballots were marked and ready. Significantly, the Proclamation did not eliminate any practice previously available to voters during a general election including on election day. Further, in-person delivery became an option only in 2015, and the State is aware of any county or political subdivision offering more than one delivery location before this year.

Nor is there any reason to suspect that voters will be unable to return their ballots by the deadline on account of the Proclamation. In addition to having an expanded in-person early voting period, Texas has taken care to ensure that voters who vote by mail have sufficient time to cast their ballot. The Election Code permits voters to submit their application for a ballot by mail as early as January 1 of the calendar year in which the election will be held. For voters who qualify by reason of age or disability, the State offers voters the option to submit an annual application, meaning that voters will receive a ballot for every relevant election held that year. If voters submit their application in a timely fashion, the Election Code requires the early voting clerk to distribute ballots to voters no less than 30 days before election day. Even assuming *arguendo* that complications from COVID-19 could cause intermittent delays, nothing in the Complaint suggests that a month is insufficient time for Plaintiffs to review, mark, and then return their ballots.

Moving on to the next *Anderson-Burdick* prong, the State's interests more than justify the supposed burden placed on voters. Election fraud, specifically vote-by-mail election fraud, has proven to be a frequent and enduring problem in Texas. *See Crawford*, 553 U.S. 181, 196 n.12 (2008) (plurality) (noting that most of the documented cases of voter fraud were related to absentee voting); *Veasey v. Abbott*, 830 F.3d 216, 263 (5th Cir. 2016) (en banc) (noting that mail-in voting is "far more vulnerable to fraud, particularly among the elderly"). In the last Legislative Session alone, the Texas Legislature heard testimony from district attorneys and law enforcement about coordinated efforts to steal and harvest votes. Appx.026–29, 39–42 (Transcription of Texas Senate Committee on State Affairs, Senate Bill 9, March 18, 2019, Testimony of Omar Escobar at 14–17; Testimony of Robert Caples at 81–84). Limiting the number of locations serving as the early voting clerk's office reduces the risk of any criminal acts succeeding. *Crawford*, 553 U.S. at 196 (plurality)

("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."). It enables election personnel to focus their resources and attention on a single location, and it prevents any wrongdoers from forum shopping should one delivery site have fewer safeguards or its personnel exhibit less prudence.

In addition, because the historical practice was to have only one early voting clerk's office location per county, there is little uniformity among early voting clerks in interpreting and implementing Section 86.006(a-1). This discrepancy has two chief consequences. First, there is no set standard on what precautions the county should take to ensure that the delivery process is both accessible and resistant to fraud. Hence, procedures will vary between counties and even between delivery locations within a single county. Second, the impromptu and haphazard implementation of additional delivery locations could result in disparate treatment among Texas voters because not every county has interpreted Section 86.006(a-1) the same way. The State therefore has an acute interest in clarifying the law, including the Governor's July 27 proclamation, and establishing uniformity in the manner in which counties administer the election.

c. The October 1 Proclamation does not constitute arbitrary disenfranchisement in violation of Article I, Section 3 of the Texas Constitution.

Plaintiffs contend that the Proclamation violates equal protection principles, but this claim also fails as a matter of law. To start with, Plaintiffs' reliance on *Bush v. Gore* is misplaced. 531 U.S. 98, 104-05 (2000). The opinion in *Bush v. Gore* was "limited to the present circumstances" because "the problem of equal protection in election processes generally presents many complexities." *Id.* at 109. And as such the opinion has limited precedential value. *See League of United Latin Am. Citizens v. Abbott*, 951 F.3d 311, 317 (5th Cir. 2020) (doubting that *Bush v. Gore* could apply outside of those specific facts considering the Court's "express pronouncement").

The case is also readily distinguishable from the current controversy, as is the other case Plaintiffs cite, *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966). In *Bush v. Gore*, the Court confronted a unique situation, where the "standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another." 531 U.S. at 106. Here, in contrast, the Proclamation reestablishes a single universal rule that is easily administrable and applies statewide. The Proclamation in fact was issued in part to eliminate disparate treatment and advance uniformity by requiring each county to have the same number of drop-off locations.

In *Harper*, meanwhile, the Court overturned a direct poll tax, which invidiously discriminated between voters. 383 U.S. at 668. Here, however, the argument is that the State has not gone far enough in removing incidental barriers to voting, not that the State imposed an additional qualification that invidiously denies voters the franchise. At most, Plaintiffs claim that the Proclamation will have a disparate impact on voters based on their geography. Pls.' Pet. ¶ 92. But that triggers no more than rational-basis review, which the Proclamation more than satisfies. *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).

The fact that the Proclamation would survive rational basis review leads to the final reason why Plaintiffs' claim fails as a matter of law. Namely, an action taken by the government cannot arbitrarily disenfranchise voters when it advances legitimate government interests. As explained above, the Governor had good reasons for clarifying that his earlier proclamation did not permit the early voting clerk to organize multiple drop-off locations per county in the added time period

before election day. Plaintiffs may disagree with these reasons, but the Proclamation is reasonable in light of the State's interests in preserving uniformity and integrity in its elections.

RESPONSE TO PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTIVE RELIEF

A. Standard of Review

To obtain a temporary restraining order, a plaintiff must show that he "is entitled to preservation of the status quo of the subject matter of the suit pending trial on the merits." *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1980). The plaintiff may not use a request for a temporary restraining order as a means "to obtain an advance ruling on the merits." *Id.* If an order does more than merely maintain the status quo, then it is not a temporary restraining order at all. *Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 n.2 (Tex. 1992).

To obtain a temporary injunction, a plaintiff must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); *see also In re Tex. Nat. Res. Conserv. Comm'n*, 85 S.W.3d 201, 204 (Tex. 2002) (noting a request for a temporary injunction "has more stringent proof requirements" than a request for a temporary restraining order). Moreover, "the proof required to support a judgment issuing a writ of temporary injunction may not be made by affidavit." *Millwrights Local Union No. 2484 v. Rust Eng'g Co.*, 433 S.W.2d 683, 687 (Tex. 1968). Instead, a temporary injunction may issue only after the court conducts a hearing and only if the plaintiff offers evidence that "establishes a probable right of recovery" on the merits. *Id.* Absent that showing, "no purpose is served" by the issuance of a temporary injunction because its purpose is likewise to maintain the status quo pending a trial on the merits. *In re Tex. Nat. Res. Conserv. Comm'n*, 85 S.W.3d at 204 (quotation omitted).

B. Arguments & Authorities

As explained above, the Court lacks subject-matter jurisdiction and should dismiss the action in its entirety. But even if the Court concludes otherwise, Plaintiffs are not entitled to the relief sought. Plaintiffs have not shown a probable right to recovery or success on the merits, the injuries they allege do not show a threat of irreparable harm, the balance of the equities greatly favors protecting the public interest over granting a private benefit to Plaintiffs, and they have not met their evidentiary burden for this Court to issue injunctive relief.

1. Plaintiffs are not entitled to a temporary injunction because they have not—and cannot—demonstrate a probable right to the relief sought.

For the reasons set forth in the Plea to the Jurisdiction above, Plaintiffs cannot demonstrate a probable right to the relief sought and, accordingly, are not entitled to a temporary injunction. *Butnaru*, 84 S.W.3d at 204 (holding a plaintiff "must plead *and prove* . . . a cause of action against the defendant" to be entitled to a temporary injunction (emphasis added)). While "unlawful acts of public officials may be restrained when they would cause irreparable injury," a plaintiff must do more than name a cause of action and assert a constitutional violation. *See Tex. State Bd. of Exam'rs in Optometry v. Carp*, 343 S.W.2d 242, 245 (Tex. 1961).

Plaintiffs have not demonstrated the Court's subject-matter jurisdiction over, or the viability of, any claim—even in the context of the pleadings, much less to the extent required for issuance of a temporary injunctive relief. Other courts have already determined that the Governor acted within the scope of his authority by ordering safety measures with an aim to protect the public from COVID-19. *See*, *e.g.*, *In re Abbott*, 954 F.3d at 783. Where, as here, the government actions at

issue are legal, an injunction against enforcement will not lie.[6] Plaintiffs have not demonstrated a probable likelihood of success on the merits.

2. Plaintiffs cannot demonstrate a probable, imminent, and irreparable injury.

Temporary injunctions will not be granted "where there is a plain and adequate remedy at law." *Tex. Dept. of Pub. Safety v. Salazar*, 304 S.W.3d 896, 909 (Tex. App.—Austin 2009, no pet.) (citations omitted). "An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard." *Butnaru*, 84 S.W.3d at 204 (citing *Canteen Corp. v. Republic of Tex. Props., Inc.,* 773 S.W.2d 398, 401 (Tex. App.—Dallas 1989, no writ)). The plaintiff bears the burden to prove his damages are incalculable. *N. Cypress Med. Ctr. Operating Co. v. St. Laurent*, 296 S.W.3d 171, 177 (Tex. App.—Houston 2009, no pet.). Here, Plaintiffs have failed to demonstrate an irreparable injury sufficient to justify extraordinary emergency relief. The Governor's proclamations have expanded access to the vote. Texas voters will have multiple ways of safely and securely exercising the franchise. Plaintiffs have not met their burden of showing an irreparable injury because they have not shown that the other means of voting that Texas offers will be inadequate.

3. The public interest is in denying injunctive relief.

In issuing the "extraordinary equitable remedy" of temporary injunctive relief, courts must "weigh the harm or injury to the applicant if the injunctive relief is withheld against the harm or injury to the respondent if the relief is granted." *Seaborg Jackson Partners v. Beverly Hills Sav.*, 753 S.W.2d 242, 245 (Tex. App.—Dallas 1988, writ dism'd). A trial court must consider the equities

[6] "Injunction against the enforcement or execution of a valid statute or ordinance would encroach upon legislative functions, and a writ will not be granted for such purpose however unwise or inexpedient the law may be." *Southwestern Assoc. Tel. Co. v. City of Dalhart*, 254 S.W.2d 819, 826 (Tex. App.—Amarillo 1952, writ ref'd n.r.e.) (quoting 24 Tex. Jur. 62, Section 44).

on both sides, and abuses its discretion if it fails to do so. *See id.*; *NMTC Corp. v. Conarroe*, 99 S.W.3d 865, 869 (Tex. App.—Beaumont 2003, no pet.). "[I]f public necessity, public health and convenience outweigh any resulting private injury, or if granting the writ will cause great harm to the public, the writ will be refused." *Mitchell v. City of Temple*, 152 S.W.2d 1116, 1117 (Tex. Civ. App.—Austin 1941, writ ref'd w.o.m.) (holding "that the trial court was authorized to refuse the temporary injunction applied for" because the granting the injunction would inflict a greater injury on the public).

The State has a strong interest in ensuring orderly and secure elections. *See Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (Texas "indisputably has a compelling interest in preserving the integrity of its election process."). State officials play an "active role" in managing elections, *see Storer v. Brown*, 415 U.S. 724, 730 (1974), and it would inflict a significant injury on the State if the Court were to prevent the State from prescribing the conduct of its elections. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (citations omitted)). 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); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (recognizing that, when a duly enacted law cannot be enforced, "the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws").

4. Plaintiffs are not entitled to maintain the "status quo" of normal operations during a worldwide pandemic.

Finally, it bears repeating that the purpose of a temporary injunction is to preserve the status quo of the subject matter of the suit pending a trial on the merits. *See In re Tex. Nat. Res. Conserv. Comm'n*, 85 S.W.3d at 204. But the status quo has been in a constant state of flux during this pandemic. As Chief Judge Rosenthal noted in denying a motion for preliminary injunction, this pandemic presents a "complex, rapidly evolving situation." *Russell v. Harris Cty.*, 2020 WL 1866835, at *13 (S.D. Tex. April 14, 2020). "The Executive Order is not permanent." *Id.* "Disrupting a process that strives to recognize the different interests and concerns is an added risk of intruding with a temporary restraining order that is backed by the threat of contempt." *Id.* "Institutions charged with safeguarding the public and upholding the Constitution have an extraordinary and difficult task, made more difficult and more consequential during this pandemic." *Id.* The Governor's "ability to continue to adjust its policies [would be] significantly hampered by [a] [temporary] injunction, which locks in place a set of policies for a crisis that defies fixed approaches." *See Valentine v. Collier*, 956 F.3d 797, 803 (5th Cir. 2020). Defendants ask this Court to deny Plaintiffs' request for temporary injunctive relief that would "freeze" a status quo that is anything but static.

PRAYER

For these reasons, the Governor respectfully asks the Court to grant this Plea to the Jurisdiction, dismiss Plaintiffs' claims against him, and deny Plaintiffs' application for temporary injunctive relief.

Respectfully submitted,

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