No. 03-20-00498-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF TEXAS; RUTH HUGHS, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,

Appellants,

v.

THE ANTI-DEFAMATION LEAGUE AUSTIN, SOUTHWEST, AND TEXOMA REGIONS; COMMON CAUSE TEXAS; ROBERT KNETSCH,

Appellees.

On Appeal from the
353d Judicial District Court, Travis County

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Governor Abbott's proclamations have offered eligible mail-in-ballot voters an unprecedented array of delivery options for the upcoming election. Before the Governor's proclamations, an eligible mail-in-ballot voter had only two ways to return his marked ballot: the postal service or hand-delivery *only* on election day. The Governor has given voters the additional option to hand-deliver their ballots to their county's designated location any time between when they receive their ballots and election day. The Governor's proclamations fall squarely within the power conferred on him by the Texas Disaster Act, and courts may not "second-guess [his] policy choices in crafting emergency public health measures." *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905)).

Plaintiffs have not overcome the multiple jurisdictional hurdles barring this suit, and even if they had, Plaintiffs did not demonstrate a probable right to the relief sought, nor a probable, imminent, and irreparable injury. The trial court's temporary injunction should be vacated, and this case should be dismissed.

ARGUMENT

A. Plaintiffs lack standing to sue either the Governor or the Secretary.

1. Plaintiffs have not shown an injury in fact sufficient to support standing.

Plaintiffs' response brief only reinforces the speculative and subjective nature of Plaintiffs' claimed injuries. As an initial matter, Robert Knetsch is the only individual named as a plaintiff, but his testimony did not establish that he has a concrete and particularized injury resulting from the Governor's proclamations. He testified that he already had his mail-in ballot as of the hearing date, three weeks before election day, 2.RR.139–40, and could return that ballot via mail at any time. 2.RR.151. He did not testify that he was waiting to deliver his ballot because he was unsure who to vote for or needed additional time to make that decision. And Plaintiffs still have not explained how Mr. Knetsch would be unable to utilize the multiple other voting options available to him, such as the in-person early-voting location roughly one mile from his home. 2.RR.151–54.

Instead, Plaintiffs cite Mr. Knetsch's testimony that "I want to minimize my exposure to other people, whether it be voters or poll workers." Resp. Br. at 9. But the way to "minimize" such exposure is to return his marked ballot in the mail, a method of delivery that is unaffected by the October 1 Proclamation. Indeed, Plaintiffs did not put on any evidence that delivering a ballot by hand delivery—Mr.

Knetsch's preferred method of voting—is any safer from a COVID-19 transmission perspective than voting in person. Both options involve "exposure" to other voters at the delivery location and showing identification to a poll worker. Indeed, Plaintiffs did not demonstrate that he would have any less exposure to others while hand-delivering his ballot than if he were to vote in person. Instead, the only testimony at the hearing was that the way to minimize such interaction was to deliver a ballot in the mail. 2.RR.133. Accordingly, Mr. Knetsch's preferences and speculative fears cannot support his standing to challenge the Governor's proclamations.

Plaintiffs also point to the testimony of Joanne Richards, who is not a named plaintiff but who asserts that she is a member of Common Cause. Resp. Br. at 10. As discussed in Appellants' opening brief (at 28–29), her testimony cannot support standing because she is not a "member" of either Plaintiff Organization under the relevant legal test. Even if that were not the case, her testimony is also driven by speculative concerns. She stated that she is worried about her health and the reliability of the post office delivery system, but without more, those fears, although sincerely held, do not support her standing, and by extension, Common Cause's standing. *See DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304–05 (Tex. 2008) (noting that the "alleged injury must be concrete and particularized, actual or imminent, not hypothetical"); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418

(2013) ("Subjective fear . . . does not give rise to standing."). If Ms. Richards chose not to place her ballot in the mail some three weeks before election day—as she originally intended to do and could easily have done (2.RR.85)—based only on speculative concerns about a delay in the postal service, such a "self-inflicted injur[y] [would] not [be] fairly traceable to the Government's purported activi[ty]." *See Clapper*, 568 at 418.

Finally, Plaintiffs also briefly reference the proffered testimony of Randy Smith, a voter in Harris County. *See* Resp. Br. at 9. But he is not a named plaintiff and did not testify that he a member of Common Cause or the Anti-Defamation League. 2.RR.169–70. Accordingly, his testimony cannot establish Plaintiffs' standing. *Tex. Ass'n of Bus. v. Texas Air Ctr. Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). To the contrary, the fact that Plaintiffs called a member of the general public who professes no affiliation with either ADL or Common Cause to testify regarding his purported injury only reinforces Plaintiffs' lack of particularized injury, and thus standing. *See Grossman v. Wolfe*, 578 S.W.3d 250, 256 (Tex. App.—Austin 2019, pet. denied) ("To have standing to assert a public right or to challenge government action, . . . an individual must show that he has suffered a particularized injury distinct from that suffered by the general public.").

2. Plaintiffs' purported injury is neither fairly traceable to, nor redressable against, the Governor or the Secretary.

a. Plaintiffs have not demonstrated their standing to sue the Governor.

Plaintiffs have not demonstrated standing to sue the Governor, and their arguments run contrary to the applicable precedent. "[T]he long-standing rule [is] that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute." *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (distinguishing between the coercive impact of the statute from the coercive power of state officials). Standing jurisprudence requires "'an actual enforcement connection—some enforcement power or act that can be enjoined—between the defendant official and the challenged statute.'" *City of El Paso v. Tom Brown Ministries*, 505 S.W.3d 124, 147 (Tex. App.—El Paso 2016, no pet.) (quoting *Okpalobi*, 244 F.3d at 419).

Plaintiffs contend that the Governor exceeded his legal authority in issuing the October 1 Proclamation. Resp. Br. at 26. Thus, they reason, they must be able to bring an *ultra vires* claim against him directly. Resp. Br. at 26–27. This circular conclusion that the "proclaimer" must be an appropriate defendant when challenging that official's "proclamation" is the equivalent of arguing that the Legislature must be an appropriate defendant to challenge an unconstitutional statute. But that argument has been squarely foreclosed by both the Texas Supreme

Court and the Fifth Circuit in this very context—that is, an executive order issued by the Governor in response to COVID-19. *In re Abbott*, 601 S.W.3d 802, 812 (Tex. 2020) (orig. proceeding) (per curiam) (recognizing that the plaintiffs lacked standing to sue the Governor because, among other reasons, the challenged executive order envisioned no enforcing role for him); *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020) (noting that Texas law "empowers the Governor to 'issue,' 'amend,' or 'rescind' executive orders, not to 'enforce' them"). Plaintiffs do not distinguish this precedent because they cannot.

Moreover, Plaintiffs' argument runs squarely into the limitation that an *ultra vires* claim authorizes only prospective relief. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 368–69 (Tex. 2009). Here, Plaintiffs cannot enjoin the Governor from prospectively enforcing the October 1 Proclamation because he has no enforcement authority. *See In re Abbott*, 601 S.W.3d at 812. A declaration that the Governor acted unlawfully when issuing the challenged proclamation on October 1, 2020 is not prospective either. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (noting that "prospective relief" does not encompass "judgments against state officers declaring that they violated [the] law in the past").[1]

[1] On appeal, Plaintiffs also complain that Appellants' Brief suffers from too much authority involving federal *Ex parte Young* cases, rather than state *ultra vires* claims. *See* Resp. Br. at 27–28. But both federal claims relying on the *Ex parte Young* exception and state claims relying on the *ultra vires* exception permit only prospective relief. *Compare Heinrich*, 284 S.W.3d at 368–69, *with City*

An *ultra vires* claim does not authorize retrospective declarations. *E.g. Texas Educ. Agency v. American YouthWorks, Inc.,* 496 S.W.3d 244, 265–66 (Tex. App.—Austin 2016) (holding that sovereign immunity barred the declaratory remedies sought in the charter holder's *ultra vires* claims because they related to prior acts or events, and were retrospective in nature), *aff'd sub nom.*, *Honors Acad., Inc. v. Texas Educ. Agency*, 555 S.W.3d 54 (Tex. 2018).

As such, Plaintiffs lack an injury fairly traceable to the Governor that is redressable by this Court. And thus, consistent with the Texas Supreme Court's jurisprudence, Plaintiffs lack standing to bring their challenge to the October 1 Proclamation against the Governor.

b. Plaintiffs have not demonstrated standing to sue the Secretary.

Plaintiffs rest their standing argument against the Secretary on Section 31.005(b) of the Texas Election Code (Resp. Br. at 30–32), which provides:

> If the secretary determines that a person performing official functions in the administration of any part of the electoral processes is exercising the powers vested in that person in a manner that impedes the free exercise of a citizen's voting rights, the secretary may order the person to correct the offending conduct. If the person fails to comply, the secretary may seek enforcement of the order by a temporary restraining

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of Austin v. Paxton, 943 F.3d 993, 998 (5th Cir. 2019). Moreover, the Fifth Circuit "has acknowledged that [its] Article III standing analysis and *Ex parte Young* analysis 'significantly overlap,'" making citations to *Ex parte Young* jurisprudence at least persuasive authority in this context. *See City of Austin*, 943 F.3d at 1002.

> order or a writ of injunction or mandamus obtained through the attorney general.

TEX. ELEC. CODE § 31.005(b). Plaintiffs' argument misses the mark for three independent reasons.

First, Section 31.005(b) gives the Secretary authority to "order" a person to correct conduct that impedes the free election of a citizen's voting right. *Id.* But the Secretary does not have authority to "enforce" her own order if the person simply ignores it. *Id.* Instead, enforcement authority lies with the Attorney General. *Id.* There is a vast difference between issuing an order and enforcing it. *In re Abbott*, 956 F.3d at 709 ("The power to promulgate law is not the power to enforce it."). Indeed, the fact that the Secretary must ask the Attorney General to seek judicial relief proves that she *does not have authority* to coerce local election officials, much less enforce the October 1 Proclamation. *See* TEX. ELEC. CODE § 31.005(b); *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972).

Second, Plaintiffs have not shown a likeliness that the Secretary would, in fact, issue an order to an official who violated the October 1 Proclamation or, should they ignore it, seek actual enforcement from the Attorney General. It is well established that "in order to demonstrate standing to bring a pre-enforcement review of a statute, the plaintiff must show not only an intention to engage in the proscribed conduct, but that there is a credible threat of prosecution thereunder." *Tom Brown*

Ministries, 505 S.W.3d at 145; *see also City of Austin*, 943 F.3d at 1001–03. But central to Plaintiffs' theory that the Proclamation is unlawful is that the Secretary does *not* believe that Section 86.006(a-1) limits in-person delivery of mail-in ballots to a single early-voting office. *E.g.* Resp. Br. at 5 (citing CR.78). Plaintiffs point to no evidence that the Secretary has indicated she would issue a Section 31.005 order to an election official if they were to open multiple early voting offices in defiance of the October 1 Proclamation. The evidence suggests just the opposite: The Secretary's Director of Elections testified that the Secretary does *not* have enforcement authority and did not believe the Secretary could compel Fort Bend to close its unauthorized early delivery sites. 2.RR.232, 235–37.

Third, Plaintiffs cite the example of the Attorney General filing an application for temporary restraining order when Harris County prepared to send out applications for mail ballots without legal authority. *See* Resp. Br. 31; *see State v. Hollins*, No. 20-0729, 2020 WL 5919729, *6 (Tex. Oct. 7, 2020). But the Attorney General is not a defendant, and his actions to enforce state law do nothing to advance Plaintiffs' standing argument as to the Secretary. While the Secretary did send a letter to the Harris County Clerk citing section 31.005, the "State sued Hollins in his official capacity, alleging that mass mailing applications would be an *ultra vires* action." *Hollins*, 2020 WL 5919729, at *2. The State expressly disclaimed a

"Section 31.005 Claim" in its petition for review.[2] Thus, far from suggesting that the Secretary has authority to enforce a gubernatorial proclamation under Section 31.005 and would likely exercise it here,[3] this example suggests only that the Attorney General could bring an *ultra vires* action to enforce the October 1 Proclamation on his own authority.

Plaintiffs have not demonstrated their standing to challenge the October 1 Proclamation by suing the Secretary. And the Secretary's position that she lacks legal authority to enforce the October 1 Proclamation is far from "remarkable." *Contra* Resp. Br. at 30. Instead, the Secretary's legal position in this litigation is simply an acknowledgement of the limits of her authority under Texas law. *E.g.*, *In re Hotze*, No. 20-0739, 2020 WL 5919726, at *6 (Tex. Oct. 7, 2020) (Blacklock, J. concurring); *Mi Familia Vota v. Abbott*, No. 20-50793, 2020 WL 6058290, at *4–5 (5th Cir. Oct. 14, 2020) (holding that plaintiffs lack standing because "[t]he Secretary of State of Texas . . . has no connection to the enforcement of Executive Order GA-29, or Texas Election Code §§ 85.062–85.063").

State's Pet. & Brief, 11 n.2, filed on September 22, 2020, *State of Texas v. Hollins*, No. 20-0729, in the Supreme Court of Texas, accessible at https://tinyurl.com/PetForReview (last accessed October 22, 2020).

c. Purported absence of another defendant does not give Plaintiffs standing to sue the Governor or the Secretary.

To avoid this conclusion, Plaintiffs argue that they must have standing because if they do not, then the Governor could *never* be "liable" for *ultra vires* conduct.[4] Resp. Br. at 25. "But '[t]he assumption that if [Plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.'" *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)). "This view would convert standing into a requirement that must be observed only when satisfied." *Id.*

Regardless, Plaintiffs are mistaken in asserting that there is no official responsible for enforcing the Governor's executive orders or proclamations (and thus they must be completely immune from judicial review). For example, as discussed above, if a county clerk were to violate the October 1 Proclamation, the Attorney General could potentially file suit against them under an *ultra vires* theory. *See Hollins*, 2020 WL 5919729, at *4. But Plaintiffs are master of their pleadings and they chose to sue the Governor and Secretary. Plaintiffs lack standing to sue either

[4] To the extent Plaintiffs mean to say that the Governor can never be liable for *ultra vires* conduct in the sense that retrospective monetary relief can never be awarded, then they are correct. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 368–69 (Tex. 2009).

of those defendants because no individual voter (whether Mr. Knetsch or a member of the Organizational Plaintiffs) has standing.

3. ADL and Common Cause Texas lack standing.

Plaintiffs' response similarly fails to establish that the Organizational Plaintiffs have either representative or organizational standing.

a. "[A]n 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.'" *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Critically, to be a membership organization under this test, the members must "alone elect the members of the [organization's leadership]; they alone may serve on the [body leading the organization]; they alone finance [the organization's] activities, including the costs of this lawsuit, through assessments levied upon them." *Id.*

Plaintiffs claim that they do not have to satisfy the indicia-of-membership test because *Hunt* only applies when then the plaintiff is not a traditional membership organization, and they are traditional membership organizations. Resp. Br. at 27. But

this is belied by the record. ADL's vice president acknowledged that ADL "is not a traditional membership organization." 2.RR.121. And Common Cause's representations to the IRS demonstrate the same thing. 2.RR.73; 3.RR.408.

Moreover, *Hunt* is designed to capture the important aspects of membership, regardless of whether the group has a formal membership structure, and it has not been applied as narrowly as Plaintiffs suggest. As one court put it, Plaintiffs' "view, however, seems to beg the question: what then defines a 'traditional membership organization,' if not the 'indicia of membership' identified in *Hunt*? What does it mean to be a 'member' of an organization?" *AARP v. United States Equal Employment Opportunity Comm'n*, 226 F. Supp. 3d 7, 16 (D.D.C. 2016).

Indeed, the Fifth Circuit has used the *Hunt* test to reject a plaintiff's claim that an identified individual was a "member." *Ass'n for Retarded Citizens of Dallas v. Dallas Cty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994). And merely asserting that an organization is a membership organization is not enough. *See, e.g.*, *Texas Indigenous Council v. Simpkins*, No. SA-11-CV-315-XR, 2014 WL 252024, at *3 (W.D. Tex. Jan. 22, 2014) ("Although Mr. Diaz referenced other 'members' in his deposition, no other individual has testified that they consider themselves to be a 'member' of TIC."). A plaintiff might try to show that some individuals qualify as members under the legal documents that

organize their groups, but neither Common Cause nor ADL introduced evidence to that effect. 2.RR.72; 2.RR.121; *see Washington Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 208 (D.D.C. 2007) ("WLF agrees that they are not members as defined by WLF's Articles of Incorporation.").

Plaintiffs similarly overstate the Texas Supreme Court's holding in *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504 (Tex. 1995). *See* Resp. Br. at 38–39. In that case, the Texas Supreme Court found that a union had established associational standing because even through "there was no showing of specific members who have suffered a compensable injury since the effective date" of the challenged law, "we may fairly assume the existence of such members based on the size of the union." *Garcia*, 893 S.W.2d at 518. It is well established that in establishing standing, a plaintiff may rely "on the predictable effect of Government action." *Dep't of Comm. v. New York*, 139 S. Ct. 2551, 2566 (2019). Here, by contrast, where there is no evidence that Common Cause and ADL have members or that any voter has been injured, it cannot be "fairly assume[d]" that a voter who is a Common Cause or ADL member has suffered an injury. Indeed, the evidence presented suggests just the opposite. *See* Section A.1, *supra*.

b. Finally, Plaintiffs also assert (at 39) that they independently have standing to sue as organizations based on conclusory assertions that they "have been forced

to divert resources." But that argument fails to show injury to Common Cause and ADL *as organizations* because they have not identified any organizational priority that they have had to divert resources *from* in order to address the Proclamation. *Tex. Dep't of Family & Protective Servs. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 WL 6187433, at *5 (Tex. App.—Austin Nov. 28, 2018, no pet.) (mem. op.), *reconsideration en banc denied*, No. 03-18-00261-CV, 2019 WL 6608700 (Tex. App.—Austin Dec. 5, 2019) (rejecting the notion that an organization can meet establish standing by making the "choice" to "divert volunteer and financial resources from its other work," to counteract a provision that does not impact "any legally protected interest" of the organization). Without some testimony about specific projects that had to be put on hold, allegations that defendants' actions frustrate an organization's general mission do not demonstrate a concrete and particularized injury. *E.g.*, *La. ACORN Fair Housing v. LeBlanc*, 211 F.3d 298, 305 (5th Cir. 2000).

Accordingly, Common Cause and ADL lack standing under both the associational and organizational framework, and therefore cannot pursue claims challenging the Governor's proclamations.

B. The Governor and Secretary are entitled to sovereign immunity.

1. Neither the Governor nor the Secretary acted *ultra vires*.

a. The Governor did not act ultra *vires* because the Disaster Act authorized the suspension of state law.

Plaintiffs' *ultra vires* claim against the Governor fails to overcome sovereign immunity for many of the same reasons discussed in the context of standing.[5] Since the *ultra vires* exception to sovereign immunity permits only prospective relief, and no prospective relief is available based on the *issuance* of the October 1 Proclamation, the *ultra vires* claim remains entirely barred by sovereign immunity. *See Heinrich*, 284 S.W.3d at 368–69; *supra*.

Regardless, Plaintiffs have not demonstrated a viable claim that the Governor acted without statutory authority in issuing the October 1 Proclamation. The Parties agree that the July 27 Proclamation expanded hand delivery of mail-in ballots from election day to up to 40 days before election day by allowing the voter to return the ballot as soon as he receives it. The Parties also agree that the July 27 Proclamation's suspension of the timing limitation of Section 86.006(a-1) was authorized by the Disaster Act; it decreased crowding on election day and thus the COVID-19 risks

[5] While the Parties have been referring to the claim that the October 1 Proclamation exceeded the Governor's statutory authority as "the *ultra vires* claim" as a convenient shorthand, technically all three of Plaintiffs' claims are *ultra vires* claims. *See*, *e.g.*, *Caleb v. Carranza*, 518 S.W.3d 537, (Tex. App.—Houston [1st Dist.] 2017, no pet.) ("An allegation that a government officer violated the Texas Constitution is an allegation that the officer acted *ultra vires*, that is, in conflict with the law constraining his discretion.").

associated with large groups of people congregating together. The October 1 Proclamation clarified the suspension of Section 86.006(a-1). It retained the full expansion on the *timing* of voting by in-person delivery of mail-ballots but limited that expansion to a single early voting location per county. According to Plaintiffs' reasoning, this could not have been authorized by the Disaster Act because it could not decrease voter congestion on election day *relative to the July 27 Proclamation*.

This is the core error in Plaintiffs' legal argument: asking the Court to evaluate each order or proclamation relative to its predecessor rather than relative to the state law being suspended. *See* Resp. Br. at 42–45. Under Section 86.006(a-1), voters are not permitted deliver their mail ballots in person before election day. The October 1 Proclamation expands voting opportunities relative to this baseline, even though it authorizes only one early-voting office per county prior to election day for reasons of uniformity and ballot security. Relative to Section 86.006(a-1), the October 1 Proclamation is directly related to the ongoing COVID-19 disaster because the temporal expansion for delivery of mail ballots will decrease crowding on election day and minimize the COVID-19 risks associated with large groups of people congregating together. And thus, the October 1 Proclamation's suspension of Section 86.006(a-1) is *still* authorized by the Disaster Act for the same reason as the July 27 Proclamation.

To measure proclamations relative to each other, or to measure only their aggression in combating the disaster, would invite absurdity. For example, Executive Order GA-09 limited elective surgeries in order to preserve personal protective equipment because of a shortage in the early days of the pandemic. That limitation was gradually reduced and eventually lifted as supply chains for personal protective equipment were able to adjust. *See* GA-15;[6] GA-19;[7] GA-27;[8] GA-31.[9] Under Plaintiffs' theory, however, such orders were improper because "COVID-19 [is] still prevalent in Texas." Resp. Br. at 44.

Plaintiffs attempt to minimize the implications of their argument by saying "the Governor plainly has authority to relax or amend any adopted restrictions if the disaster conditions abate." Resp. Br. at 44. This argument is, however, self-defeating and shows that the October 1 Proclamation is legal: By almost every metric (daily new reported cases, fatalities by date of death, hospitalization rates), the COVID-19

[6] Subject to judicial notice and available at https://gov.texas.gov/uploads/files/press/EO-GA-15_hospital_capacity_COVID-19_TRANS_04-17-2020.pdf (last accessed October 23, 2020).
[7] Subject to judicial notice and available at https://gov.texas.gov/uploads/files/press/EO-GA-19_hospital_capacity_COVID-19.pdf (last accessed October 23, 2020).
[8] Subject to judicial notice and available at https://gov.texas.gov/uploads/files/press/EO-GA-27_hospital_capacity_COVID-19.pdf (last accessed October 23, 2020).
[9] Subject to judicial notice and available at https://gov.texas.gov/uploads/files/press/EO-GA-31_hospital_capacity_COVID-19.pdf (last accessed October 23, 2020).

disaster conditions decreased from their all-time peak around July 27 to a relative low around October 1.[10]

Plaintiffs clearly think that the conditions have not abated *enough*—just as the Governor suspended election laws to allow more people to vote, but evidently did not suspend the laws *enough*. Resp. Br. at 44 (asserting that the October 1 Proclamation is unlawful "with COVID-19 still prevalent in Texas"). But that is, at heart, a request for the Court to second-guess Executive judgment about the proper balance between competing policy interests during a pandemic. Such difficult policy-making decisions are within the discretion of the Executive pursuant to the authority the Legislature gave to the Governor in the Disaster Act. *See S. Bay United Pentecostal Church v. Newsom,* 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) ("When those officials 'undertake[] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'") (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). The Governor did not exceed his statutory authority in issuing the October 1 Proclamation.

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[10] *See* Texas COVID-19 Dashboard, Texas Department of State Health Services, *Daily New Confirmed Cases in Texas, Fatalities by Date of Death in Texas, and Total Confirmed Cases Per 1,000 persons in Texas*, available at https://tinyurl.com/DSHSDashboard1; Texas COVID-19 Dashboard, Texas Department of State Health Services, *Testing Data*, *Hospitals – Statewide*, available at https://tinyurl.com/DSHSDashboard2; The Texas Tribune, *Texas COVID-19 cases and hospitalizations increase after September's plateau*, last updated on October 22, 2020, available at https://tinyurl.com/TribuneCOVID19 (last visited October 22, 2020).

b. The Secretary did not act *ultra vires* because there is neither allegation nor evidence that she acted unlawfully.

Plaintiffs argue that the Secretary is an appropriate defendant for their *ultra vires* claim because she is the chief election officer of Texas. Resp. Br. at 45. But they identify no authority suggesting that the Secretary acted unlawfully—as required for an *ultra vires* claim. *Hall v. McRaven*, 508 S.W.3d 232, 241 (Tex. 2017) (noting that "an *ultra vires* suit must lie against the 'allegedly responsible government actor in his official capacity,' not a nominal, apex representative who has nothing to do with allegedly *ultra vires* actions"). Were the Secretary were genuinely enforcing the October 1 Proclamation, Plaintiffs could point to that enforcement action as the basis for their *ultra vires* claim against her. That they cannot only further reinforces the Secretary's standing argument. The Secretary did not act *ultra vires* and therefore Plaintiffs' claim does not overcome sovereign immunity.

2. The October 1 Proclamation survives rational basis and *Anderson-Burdick* review.

Plaintiffs similarly have not identified a constitutional violation sufficient to overcome sovereign immunity. Plaintiffs do not cite, let alone distinguish, *McDonald v. Board of Election Commissioners*, which establishes that any supposed right to receive a mail-in ballot does not implicate the right to vote. 394 U.S. 802, 807 (1969) ("[T]here is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus

not the right to vote that is at stake here but a claimed right to receive absentee ballots."). The Fifth Circuit has expressly relied on *McDonald* to reach its conclusion that the right to vote is not "abridged" unless the State "creates a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative to the status quo." *Texas Democratic Party v. Abbott*, -- F.3d --, 2020 WL 5422917, at *10, *17 (5th Cir. Oct. 14, 2020). And it has relied on the same principle to hold that no such barrier exists under the October 1 Proclamation. *Tex. LULAC v. Hughs*, No. 20-50867, 2020 WL 6023310, at *6 (5th Cir. Oct. 12, 2020).

As explained extensively above and in the State's opening brief, Plaintiffs have more voting options today than they had on July 26. Accordingly, rational basis review applies, and, for reasons stated in the State's opening brief and those discussed below, the Governor's proclamations more than meet rational basis scrutiny. But even if the right to vote is implicated, Plaintiffs misunderstand *Anderson-Burdick*. As the Fifth Circuit recently explained, "the severity analysis is not limited to the impact that a law has on a small number of voters." *Richardson v. Hughs*, -- F.3d --, 2020 WL 6127721, at *11 (5th Cir. Oct. 19, 2020). "[M]ail-in ballot rules that merely make casting a ballot more inconvenient for some voters"—like the October 1 Proclamation—"are not constitutionally suspect." *Tex. LULAC*, 2020 WL 6023310, at *6.

And the evidence demonstrates that the burden imposed by the voters potentially affected by the October 1 Proclamation has been minimized before the proclamation was even issued by expanding early voting times, offering hundreds of early voting locations, authorizing curbside voting for eligible voters, and providing a significantly increased number of days that voters can hand-deliver their ballots. Appellants' Br. at 3–4, 44; TEX. ELEC. CODE § 64.009(a). There is no "authority suggesting that a State must afford every voter . . . infallible ways to vote." *Tex. LULAC*, 2020 WL 6023310, at *6.

The only putative burden Plaintiffs identify attributable to the October 1 Proclamation is that—assuming they choose not to mail their mail-in ballots—some voters might have to drive farther to hand-deliver their ballots. But this is the type of incidental inconvenience that will not support a constitutional claim. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008); *A. Philip Randolph Inst. of. Ohio v. Larose*, 2020 WL 6013117, at *2 (6th Cir. Oct. 9, 2020). Plaintiffs try to avoid this conclusion by asserting that the October 1 Proclamation will cause "heightened health risks if they vote in person or use the single ballot return location." Resp. at 47. But the October 1 Proclamation does not create that risk; the *voter's* choice to hand-deliver his marked ballot rather than mail it does. Defendants cannot be

charged with unconstitutional activity based on Plaintiffs' own private decisions. *See Thompson v. DeWine*, 959 F.3d 804, 810 (6th Cir. 2020) (per curiam).

Moreover, Plaintiffs point to no evidence in the record that there are ongoing lengthy wait times for voters who are hand delivering their ballots. Indeed, one of Plaintiffs' own experts acknowledged that he had heard of no reports of delays at any ballot return center since the October 1 proclamation went into effect. 2.RR.109:19-25-110:1-4.

Because they lack evidence of any ongoing problems or examples of significant wait times at ballot-delivery locations, Plaintiffs instead rely on flawed testimony provided by Dr. Daniel Chatman for the proposition that there will be long lines at those locations as the election draws closer. Dr. Chatman's testimony was deeply problematic, and thus unreliable, in multiple respects, three of which are of particular note.

First, Dr. Chatman failed to consider Texas-specific data when making his calculations, and, by extension, data specific to the four counties at issue in this case. 2.RR.218. He estimated that "varying by county, between 1.5 and 6 percent of registered voters, could attempt to deliver their absentee ballots to a county drop box location on the day of the election," and that approximately 625,000 voters in the most populous counties in Texas would be affected. 3.RR.47. But he based that

estimate on data from Denver, Colorado and King County, Washington. Colorado and Washington are both jurisdictions where elections are conducted entirely by mail. Colo. Rev. Stat. § 1-5-401; Wash. Rev. Code 29A.40.010. Their experience cannot and should not be extrapolated to Texas, where the Legislature has limited mail-in ballots, and where in-person delivery has either not existed or been an exception. 3.RR.71; 3.RR.72.

Second, Dr. Chatman failed to consider or try to incorporate pertinent information that could have changed his analysis. For example, he did not take into account how many voters without a car may use a ride-sharing app or drive with a friend to a ballot delivery location. 2.RR.244. Likewise, Dr. Chatman made assumptions about the capacity and speed each ballot-delivery location can process voters, but he failed to reference any data from actual ballot-delivery locations in Texas, past or present. 3.RR.73–74. And the expert report that he submitted was based on the mistaken assumption that counties cannot operate multiple ballot delivery locations on election day itself. 3.RR.80.

Third, Dr. Chatman also opined on matters in areas he does not claim any expertise by asserting, without any evidence, that "it appears likely that absentee voters may have a strong tendency to distrust returning absentee ballots by mail due to widespread publicity about the possible inability of the U.S. postal service to

return ballots on time," 3.RR.71, and that travel times "may consequently discourage voting altogether, given reasonable fears of COVID-19 infection at in-person polling places, and skepticism that the postal service will deliver ballots on time if they are put in a mailbox." 3.RR.82. Dr. Chatman is not an expert in sociology, psychology, or political science, and was not admitted as an expert on those subjects. *See* 2.RR.184. Accordingly, Dr. Chatman used data that does not translate to the Texas election setting, made hazy, incomplete estimates based on that data, and then supplemented those estimates and arrived at by opining on matters about which he has no special knowledge or expertise.

To the extent Plaintiffs' assert a risk to their health due to voting in person or hand-delivering their ballots, Plaintiffs' medical expert, Dr. Krutika Kuppalli testified that the safest method of voting, at least from the perspective of the risk of transmission of COVID-19, is by mail. 2.RR.133. Delivering a ballot in person, which Plaintiffs claim is safer than voting in person, carries most of the same risks of COVID-19 transmission because of the interaction between the voter and person checking the voter's identification. 2.RR.132.[11] As discussed above, every voter who

[11] The only difference appears to be whether the voter must touch the ballot machine, but the CDC has stated that "[s]pread from touching surfaces is not thought to be the main way the virus spreads." Center for Disease Control, Coronavirus Disease 2019 (COVID-19): Frequently asked questions, https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread (last accessed Oct. 23, 2020). Instead, the greatest risk comes from "people who are in close contact with one another," *id.*—a risk that exists with either in-person voting or in-person delivery of marked ballots.

can hand deliver a ballot can also put their ballot in the mail. And critically, to that end, Plaintiffs offered no evidence—only speculation—that postal delays in Texas will prevent ballots delivered via mail from being counted. *Tex. LULAC*, 2020 WL 6023310, at *6 ("We cannot conclude that speculating about postal delays for hypothetical absentee voters somehow renders Texas's absentee ballot system constitutionally flawed.").

Even assuming that Plaintiffs had demonstrated some burden for purposes of *Anderson-Burdick*, the State's interests more than justify the October 1 proclamation. Texas has "critically important interests in the orderly administration of elections and in vigilantly reducing opportunities for voting fraud." *Tex. LULAC*, 2020 WL 6023310, at *7; *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"). Limiting the number of in-person delivery locations reduces the risk of 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.").

The October 1 Proclamation also enables poll-watchers to focus their

resources and attention on a single location, *see* 2.RR.247, and it prevents fraudsters from forum shopping should one in-person delivery site have fewer safeguards or its personnel exhibit less prudence. Plaintiffs fault the State for not offering specific evidence of voter fraud, Resp. Br. at 49, but States have "never been required to justify [their] prophylactic measures to decrease occasions for vote fraud." *Tex. LULAC*, 2020 WL 6023310, at *7.

The prophylactic measures here are well-supported in the record. In their brief, Plaintiffs largely ignore evidence that Fort Bend County was on the precipice of setting up an illegal ballot-delivery site that would have risked the votes of every voter who delivered their ballots at that location. 2.RR.232. And the Secretary of State does not know how each county would handle the operations of multiple ballot delivery locations. 2.RR.232. Those concerns go to the heart of the State's interest in ensuring a secure election and warrant the preemptive measures the Governor's proclamation ensured would prevent similar risks to the general election. The October 1 Proclamation thus easily survives rational basis review, and, to the extent the Court determines it is applicable, review under the *Anderson-Burdick* framework.

3. The October 1 Proclamation does not disenfranchise voters.

Plaintiffs do not specifically address or differentiate their arbitrary disenfranchisement claim under Article 1, Section 3, from the *Anderson-Burdick*

claim that is the primary focus of their response brief. To the extent they still intend to advance a separate equal protection claim, their arguments are unavailing. The Fifth Circuit has already explained why the October 1 Proclamation is not arbitrary: "The proclamation establishes a uniform rule for the entire State: each county may designate one early voting clerk's office at which voters may drop off mail ballots during the forty days leading up to the election." *Tex. LULAC*, 2020 WL 6023310, at *8. 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 in-person delivery locations.

The fact that the Proclamation would survive rational basis review leads to the final reason why Plaintiff's 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 the Fifth Circuit explained, the State "has articulated important state interests in ensuring election uniformity and integrity that the October 1 Proclamation furthers." *Id.* at *9. And Plaintiffs' Brief almost completely ignores the undisputed evidence that one-fourth of the counties who had declared their intent to open multiple locations for in-person delivery of mail-in ballots planned to do so in a manner not authorized by state law.

For these reasons, Plaintiffs' arbitrary disenfranchisement claim fails and does not meet the viability threshold required to overcome Appellants' sovereign immunity from suit.

C. Plaintiffs did not meet their burden to demonstrate entitlement to a temporary injunction.

Having failed to establish the court's subject-matter jurisdiction, Plaintiffs did not demonstrate entitlement to an injunction. *See Tex. Educ. Agency*, 496 S.W.3d at 270 ("Having so determined [that the plaintiffs' claims were barred by sovereign immunity], we need not address the State Parties' challenge to the temporary injunctions."). Plaintiffs argue that because the court granted the injunction "after reviewing the parties' briefs and hearing testimony from ten witnesses in a day-long evidentiary hearing[,]" "the trial court did not abuse its discretion in ordering temporary injunctive relief." Resp. Br. at 51. But this begs the question. *Every* temporary injunction is issued after argument and evidence. And a district court has no discretion to misinterpret or misapply the law. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding).

Plaintiffs predict that "in the absence of an injunction, [they] expect state officials will conclude that they may take almost any action to limit voters' access to the ballot under the Disaster Act as long as they do so close to Election Day." Resp. Br. at 53. But Texas law has long presumed that state officials pursue their official

actions in good faith. *E.g.*, *State v. Whittenburg*, 265 S.W2d 569, 572-73 (Tex. 1954) (collecting cases). Plaintiffs' "expectation" to the contrary rests on speculation belied by the evidence. The Governor has repeatedly *expanded* voting opportunities beyond what is contemplated by state law: from increasing early voting days in the July special elections (CR.128), to increasingly early voting days during the November general election (CR.132; CR.140), to authorizing in-person delivery of mail-in ballots for nearly 40 days before election day (CR.132; CR.140).

PRAYER

Appellants respectfully ask the Court to vacate the injunction, reverse the trial court's decision, and dismiss this suit for lack of jurisdiction.

Respectfully submitted,

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Microsoft Word reports that this brief contains 6,937 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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