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' RESPONSE TO APPELLEES' MOTION FOR TEMPORARY ORDER REINSTATING TEMPORARY INJUNCTION AND EXPEDITED CONSIDERATION

TO THE HONORABLE THIRD COURT OF APPEALS:

On October 15, three days into the in-person early voting period, the trial court below enjoined the implementation and enforcement of a proclamation issued by Governor Abbott to broadly expand mail-in voting options prior to election day. Although the Texas Election Code disallows mail-in ballots to be hand-delivered before election day, Governor Abbott used his authority under the Texas Disaster Act to suspend that limitation and allow eligible voters to hand-deliver their mail-in ballots to the local county's designated office at any time *for as many as forty days* leading up to election day. Nevertheless, Plaintiffs filed a lawsuit to enjoin the

October 1 Proclamation, which clarified the prior proclamation to create uniformity and ensure ballot integrity during this greatly expanded period. The trial court entered a temporary injunction, effectively rewriting the Governor's proclamations to allow county clerks to establish as many ballot-delivery locations as they please.

"It is beyond cavil that voting is of the most fundamental significance under our constitutional structure" because it is the right that secures all others. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted). It is equally clear, however, that "[e]lections are political matters"; "courts may take jurisdiction of political matters only if the law has specifically granted such authority." *Johnson v. Williams*, No. 02-19-00089-CV, 2019 WL 6334689, at *2 (Tex. App.—Fort Worth Nov. 27, 2019, pet. denied) (mem. op.) (citing *Thiel v. Oaks*, 535 S.W.2d 1, 2 (Tex. App.—Houston [14th Dist.] 1976, no writ)). As the Governor and Secretary of State ("State Officials") explain in their principal brief, the trial court should have dismissed the entire case for lack of jurisdiction. Moreover, the flawed remedy issued by the trial court creates dis-uniformity across the State, thereby doing great damage to the State's obligations to make elections "fair and honest" and to bring "order, rather than chaos, [to] the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The State Officials immediately filed an accelerated interlocutory appeal in this Court. This Court should reject Appellees' request for relief under Rule 29.3 because it is foreclosed by both the terms of the Rule and Texas Government Code section 22.004(i).

Background

The COVID-19 pandemic represents a "public health crisis of unprecedented magnitude." *In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020). On March 13, 2020, Governor Abbott exercised his authority under the Texas Disaster Act to declare that COVID-19 "poses an imminent threat of disaster in all Texas counties." *In re Hotze*, No. 20-0739, 2020 WL 5919726, at *1 (Tex. Oct. 7, 2020); *see* CR.123–25 (Proclamation of March 13, 2020). During such a disaster, the Texas Legislature has expressly authorized the Governor to suspend the provisions of regulatory statutes prescribing the procedure for conduct of state business and the orders and rules of state agencies if they would "in any way prevent, hinder, or delay necessary action in coping with [the] disaster." Tex. Gov't Code § 418.016(a). The Legislature has also granted the Governor the power to "control . . . the movement of persons and occupancy of premises" during such a disaster. Tex. Gov't Code § 418.018(c).

The Governor has exercised these authorities on several occasions to protect Texans statewide, including when they go to the polls. He expanded the early-voting period for all July 14 elections so "election officials can implement appropriate social distancing and safe hygiene practices." *See* CR.126–29 (Proclamation of May 11, 2020). The Governor then issued the July 27 Proclamation, which not only increased the number of days of in-person early voting for the November 3 elections—adding a week to the two-week period set by the Texas Election Code—but also greatly expanded the ability for eligible mail-ballot voters to hand-deliver their ballots. *See* CR.130–33 (Proclamation of July 27, 2020).

Before the July 27 Proclamation, eligible voters could cast a mail-in ballot in one of two ways: (1) mail it in; or (2) hand-deliver it "in person to the early voting clerk's office only while the polls are open *on election day*." Tex. Elec. Code § 86.006(1)-(2), (a- 1) (emphasis added). Voters choosing the latter option must present a valid form of identification along with the marked ballot. *Id.* § 86.006(a-1). The July 27 Proclamation changed nothing about the ability to put a mail-in ballot in the mail or how to hand-deliver it on election day, but it expanded options by also allowing hand-delivery of mail-in ballots at any point prior to election day. *See* CR.132. Absent that Proclamation, local election officials would have had no authority to accept hand-delivered ballots at *any* location before election day. *See State v. Hollins*, No. 20-0729, 2020 WL 5919729, at *4 (Tex. Oct. 7, 2020) (discussing limits of authority delegated to early-voting clerks under Tex. Elec. Code § 32.071). *Contra* Mot. 5–6.

While most counties have only one location at which mail-in ballots may be hand-delivered—and until this year, *no* county has used more than one location for hand-delivery of mail-in ballots on election day—several counties, including Harris, Travis, and Fort Bend, recently announced plans to open multiple mail-in ballot delivery locations at satellite offices or annexes. Harris County did so for "[t]he first time in recent history" before the July 14 primary runoff.[1] Travis and Fort Bend

[1] Chris Hollins, *Harris County Clerk Chris Hollins Announces Vote by Mail Drop-Off Locations Voters Can Drop Off Their Vote by Mail Ballots at 11 Locations Across the County on Election Day*, Harris County Clerk (press release) (July 13, 2020), https://www.harrisvotes.com/PressReleases/Vote%20By%20Mail%20Drop-off_en-US.pdf.

Counties proposed to follow suit during the general election.[2] But it soon became clear that these counties would not provide adequate election security, including the opportunity for poll watchers to observe hand-deliveries of ballots, at these annexes. *See* 2.RR.238. Additionally, Fort Bend County's intended annex locations did not meet the Election Code's definition for an early voting office, raising a question about whether ballots delivered to those locations could legally be counted and creating a risk of a potential election contest. 2.RR.230–32. These types of inconsistencies impede the uniform conduct of the election and introduce a risk to ballot integrity, such as by increasing the possibility of ballot harvesting. *See* Tex. Elec. Code § 33.051; *see also Tex. League of United Latin Am. Citizens v. Hughs*, 20-50867, 2020 WL 6023310, at *6–7 (5th Cir. Oct. 12, 2020) (*LULAC*) (discussing importance of State's interest in preserving uniformity and integrity of election).[3]

To address these disparate and potentially dangerous practices, the Governor issued his October 1 Proclamation, clarifying that his suspension of Election Code section 86.006(a-1) to allow more time for hand-delivery of mail-in ballots applies

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[2] Plaintiffs have suggested that Dallas County also had plans to open multiple locations, but "Judge Clay Jenkins said in a statement that Dallas County won't be affected." Jacob Vaughn, *Abbott's Limits on Drop-off Locations for Mail-In Ballots Won't Affect Dallas County Directly*, Dallas Observer (Oct. 5, 2020), https://www.dallasobserver.com/news/trumps-diagnosis-flings-more-doubt-in-coronavirus-debate-11949951.

[3] On several occasions, the Motion refers to the trial court's order in a parallel federal case, which also enjoined the October 1 Proclamation. *LULAC*. *E.g.* Mot. at 19, 21. They neglect to mention, however, that the Fifth Circuit immediately stayed that order, rejecting many of the same arguments Appellees lodge here on the merits. *LULAC*, 2020 WL 6023310, at *4.

only when an eligible mail-ballot voter is, prior to election day, hand-delivering a mail ballot (1) at a county's single designated delivery location, which (2) can be monitored by poll watchers. CR.140. Taken together, the Governor's proclamations add substantially more time for eligible voters to hand-deliver mail-in ballots leading up to election day, and do not address or affect what the election code allows on Election Day itself or the ability of any eligible mail-in ballot voter to simply place the ballot in the mail.

Despite this unprecedented expansion of early voting, Plaintiffs sued the State Officials to temporarily enjoin the enforcement of the Governor's October 1 Proclamation. The trial court issued a signed letter ruling on October 15, indicating that a further, more formal injunction would follow. S.CR.498–500. The trial court also denied the State Officials' jurisdictional pleas without explanation. *Id.* The trial court followed up with the foreshadowed injunction later in the afternoon on October 15. CR.205–07.

Recognizing that the trial court's temporary injunction would inject confusion into the *already ongoing* early-voting process, the State Officials immediately filed notices of appeal upon receipt of the trial court's letter ruling (and before entry of the formal injunction). CR.208–13; *contra* Mot. 17 (describing general election as "quickly approaching"). Doing so stayed the trial-court proceedings, Tex. Civ. Prac. & Rem. Code § 51.014(b), and superseded the temporary injunction, *id.* § 6.001(b); Tex. R. App. P. 24.2(a)(3), 29.1(b).

Plaintiffs now ask the Court to grant relief under Rule 29.3, but such relief is unavailable. The Legislature has explicitly provided that "the trial court must permit

a judgment to be superseded" when entered against government appellants. Tex. R. App. P. 24.2(a)(3). This Court lacks authority to disregard that directive, either under Rule 29.3 or its inherent authority.

ARGUMENT

When and how governmental appellants may supersede a trial court's order or judgment pending appeal is "a policy question peculiarly within the legislative sphere." *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 482 (Tex. 1964) (orig. proceeding). The Texas Legislature has chosen to allow governmental appellants to supersede trial-court orders and judgments as a matter of right. *See* Tex. Civ. Prac. & Rem. Code § 6.001(a), (b). And the Legislature recently reaffirmed that right and provided that *no* rule of procedure may give a trial court discretion to deny supersedeas to a governmental appellant except under limited circumstances not applicable here. Tex. Gov't Code § 22.004(i); *see also* Tex. R. App. P. 24.2(a)(3). The State Officials validly exercised that right when they filed their notices of appeal. This Court may not grant relief under Rule 29.3 that would vitiate that right.

I. The State Officials Properly Exercised Their Statutory Right to Supersede the Temporary Injunction.

For well over a century, the law has been clear that a state appellant's notice of appeal stays any coercive effect of the trial court's letter ruling or subsequent injunction.[4] "Since 1838, the State and its departments have been exempt from filing

[4] It is unclear whether the trial court's initial letter ruling constitutes an injunction as it contemplates a further order and does not appear to meet the specificity requirements of Texas Rule of Civil Procedure 683. If it does not, then the injunction issued later on October 15 was improper in violation of the automatic stay.

a bond to appeal an adverse judgment." *In re State Bd. for Educator Certification*, 452 S.W.3d at 804; *see also Tex. Educ. Agency v. Houston ISD* ("*TEA*"), No. 03-20-00025-CV, 2020 WL 1966314, at *1 (Tex. App.—Austin Apr. 24, 2020, mand. pet. pending) (stating that "a judgment debtor is entitled to supersede a judgment or an interlocutory order, and thus defer its enforcement while pursuing an appeal"). "Before 1984 the State's right to suspend a final judgment during appeal was close to absolute." *In re State Bd. for Educator Certification*, 411 S.W.3d 576, 577 (Tex. App.—Austin 2013, orig. proceeding) (Jones, C.J., concurring). This is "because the law in effect before 1984 had only one prerequisite for suspending any final judgment: filing a supersedeas bond." *Id.* "This single prerequisite applied not only to judgments for the recovery of money or property, but also to 'other judgments.'" *Id.* And state appellants were (and are) entitled to supersedeas without bond.

In 1984, the rules were amended to give the trial court discretion whether to allow a supersedeas bond when the judgment did not involve money, property, or foreclosure. *See id.* Under the new rule, the trial court could decline to permit the judgment to be superseded if the party opposed to a state appellant posted its own bond deemed sufficient to "secure the defendant in any loss or damage occasioned by any relief granted if it is determined on final disposition that such relief was improper." *Id.* That bond is what we now refer to as "counter-supersedeas."

In re Tex. Educ. Agency, 441 S.W.3d 747, 750 (Tex. App.—Austin 2014, no pet.). For present purposes, however, the Court need not decide that issue. The notice of appeal was proper, Tex. R. App. P. 17.1, and it applied to any injunction the court entered, *Id.* R. 29.2.

For the thirty years between 1984 and 2014, the interplay between this new rule and the longstanding state exemption from a bond created uncertainty and split appellate authorities regarding whether a trial court had discretion to deny supersedeas to a state defendant entitled to automatic supersedeas upon perfecting an appeal. *See id.* at 578. In December 2014, the Texas Supreme Court resolved this question by holding that trial courts had discretion, under Rule 24.2(a)(3), to deny supersedeas to a state defendant-appellant upon request and sufficient bond posted by the plaintiff-appellee. *In re State Bd. for Educator Certification*, 452 S.W.3d at 803.

In response to this ruling, the 85th Texas Legislature passed House Bill 2776, which directed the Texas Supreme Court to "adopt rules to provide that the right of an appellant under Section 6.001(b)(1), (2), or (3), Civil Practice and Remedies Code, to supersede a judgment or order on appeal is not subject to being counter-superseded under Rule 24.2(a)(3), Texas Rules of Appellate Procedure, or any other rule." Tex. Gov't Code § 22.004(i). On April 12, 2018, the Texas Supreme Court amended Rule 24.2 of the Texas Rules of Appellate Procedure to provide:

> When the judgment debtor is the state, a department of this state, or the head of a department of this state, the trial court *must* permit a judgment to be superseded except in a matter arising from a contested case in an administrative enforcement action.

Tex. Supreme Ct., Order Adopting Amendments to Tex. R. App. P. 24.2, Misc. Docket No. 18-9061, 43 Tex. Reg. 2633 (Apr. 12, 2018) (emphasis added); Tex. R. App. P. 24.2(a)(3) (effective May 1, 2018). As a result, any discretion that the trial court *may* have had to award Appellees relief has been legislatively eliminated.

This Court recently addressed a state appellant's supersedeas right in a case where the trial court awarded a temporary injunction to halt allegedly *ultra vires* actions. *TEA*, 2020 WL 1966314. In that case, the Court traced the long history of supersedeas in the State of Texas, *id.* at *3, and examined its purpose "to preserve the status quo of the matters in litigation as they existed before the issuance of the judgment from which appeal is taken," *id.*at *1. The Court acknowledged that while "Rule 24.2(a)(3) governs the supersedeas issue in [an] interlocutory appeal," "if appellant is entitled to supersede without security by filing a notice of appeal, perfecting appeal from [an] interlocutory order suspends [the] challenged order." *Id.* (citing Rule 29.1(b)).

Under this well-established rule, the State officials have a right—guaranteed by statute—to supersede the coercive effect of the temporary injunction pending appeal.

II. The Court Should Deny Appellees' Request for Relief Under Rule 29.3.

Appellees nonetheless ask that this Court reinstitute the temporary injunction under Rule 29.3. But the State Officials' statutory right to supersede the temporary injunction cannot be trumped by procedural rules. And even if this Court were to assume the authority to keep the injunction in place, it should decline Appellees' invitation to do an end-run around the entire supersedeas framework constructed by the Legislature and the Texas Supreme Court.

A. Rule 29.3 does not authorize this Court to deny the State's right to supersede the temporary injunction.

Contrary to Appellees' assertion (at 15-16), Rule 29.3 does not provide this Court with "inherent authority to reinstate the temporary injunction ordered by the district court." Instead, Rule 29.3 provides limited authority, "[w]hen an appeal from an interlocutory order is perfected," to "make any temporary orders necessary to preserve the parties' rights until disposition of the appeal." Tex. R. App. P. 29.3. Importantly, the Texas Supreme Court recently and unanimously held that Rule 29.3 does *not* enable a court of appeals to lift the automatic stay guaranteed by Texas Civil Practice and Remedies Code section 51.014(b). *See In re Geomet Recycling LLC*, 578 S.W.3d 82, 88 (Tex. 2019) (orig. proceeding). The Court explained that "procedural rules cannot authorize courts to act contrary to a statute" and that a court may not invoke Rule 29.3 to deny a party "its statutory right." *Id.*

That principle applies here: The State Officials have a statutory right to supersedeas. *See* Tex. Civ. Prac. & Rem. Code § 6.001(a); *In re State Bd. for Educator Certification*, 452 S.W.3d at 804. To the extent there was ever any doubt, the Legislature has now made that right abundantly clear. Tex. Gov't Code § 22.004(i) (directing the Texas Supreme Court to "adopt rules to provide that *the right of an appellant* under Section 6.001(b)(1), (2), or (3), Civil Practice and Remedies Code, to supersede a judgment or order on appeal is not subject to being counter-superseded under Rule 24.2(a)(3), Texas Rules of Appellate Procedure, *or any other rule*" (emphases added)). And, in the same section directing the Supreme Court to protect the government's supersedeas rights, the Legislature also provided that the

Court does not have the authority to nullify statutory rights through procedural rules. *Id.* § 22.004(a) ("The supreme court has the full rulemaking power in the practice and procedure in civil actions, *except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant*." (emphasis added)).

To adopt Appellees' view would be to vitiate a state appellant's statutory right to supersedeas in any case involving a temporary injunction. Much of Appellees' motion is devoted to how they have shown a probable right to relief and will show irreparable harm. Mot. 17-25. But by definition, when a trial court grants a temporary injunction, it has concluded that the plaintiff has shown a probable right of recovery and that absent relief that plaintiff would suffer irreparable harm. Those are two of the three elements that a plaintiff must show to obtain a temporary injunction. *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 437 (Tex. App—Austin 2018, pet. denied). If that "burden is not discharged as to any one element," that plaintiff "is not entitled to extraordinary relief." *Dall. Anesthesiology Assocs., P.A. v. Tex. Anesthesia Grp., P.A.*, 190 S.W.3d 891, 898 (Tex. App.—Dallas 2006, no pet.). If merely satisfying that burden sufficed to justify relief from supersedeas, it would eviscerate the Legislature's decision to guarantee state appellants an automatic right to supersede a temporary injunction.

Similarly without merit is Appellees' resort (at 25-27) to the equities; the Texas Legislature has balanced these equities in favor of the State. The Legislature has provided that ballots should only be deliverable in person "while the polls are open on election day." Tex. Elec. Code. § 86.006(a-1). Appellees have not challenged that statute—only the Governor's decision to suspend that law to make voting *easier*. But

as the Texas Supreme Court has recognized "[f]or well over 150 years" the Legislature can "limit judicial review of executive actions." *Morath v. Sterling City ISD*, 499 S.W.3d 407, 412-13 (Tex. 2016) (plurality op.) (collecting cases). "This principle was added to the Texas Constitution in 1985." *Id.* Following this amendment, the "Legislature's power to limit judicial review of executive action" extends to all claims except "violations of constitutional rights and infringement of vested property rights." *Id.* (citing *inter alia In re Office of Att'y Gen.*, 456 S.W.3d 153, 157 (Tex. 2015) (orig. proceeding) (describing principle as "well settled")). This case does not involve such a claim because: (1) there is no constitutional or property right to vote by mail, *McDonald v. Bd. of Elec. Comm'n of Chi.*, 394 U.S. 802, 807 (1969)—let alone a right to hand-deliver your mail-in ballot, *LULAC*, 20-50867, 2020 WL 6023310, at *1; and (2) the October 1 Proclamation does not burden Appellees' right to vote by other means. *Id.*

Indeed, Appellees can cite only three cases in support of the notion that appellate courts retain the ability to effectively order counter-supersedeas: this Court's decision in *TEA*, 2020 WL 1966314, at *5, and two cases that applied that decision, *Tex. Gen. Land Office v. City of Houston*, No. 03-20-00376-CV, 2020 WL 4726695, at *2 (Tex. App.—Austin July 31, 2020) and *State v. Texas Democratic Party*, No. 14-20-00358-CV, 2020 WL 3022949, at *1 (Tex. App.—Houston [14th Dist.] May 14, 2020). The State sought review of each of those decisions by a petition for writ of mandamus in the Texas Supreme Court. *In re Tex. Educ. Agency*, No. 20-0404 (filed May 15, 2020); *In re State*, No. 20-0401 (filed May 15, 2020); *In re Tex. Gen. Land Office*, No. 20-0609 (filed Aug. 5, 2020). The Supreme Court has agreed

to hear *TEA* on the merits with argument to be heard next week.[5] And the Supreme Court granted temporary relief in the other two cases.[6] Such relief is only permissible when the Supreme Court has reached "the tentative opinion that relator is entitled to the relief sought" and "the facts show that relator will be prejudiced in the absence of such relief." *Republican Party of Tex. v. Dietz*, 924 S.W.2d 932, 932–33 (Tex. 1996) (per curiam) (citing former Tex. R. App. P. 121). That the Supreme Court has ordered such relief repeatedly is strong evidence that *TEA* was incorrectly decided and should be neither be applied nor extended.[7]

Even if the Supreme Court were to uphold this Court's ruling in *TEA*, that would not control here. This Court was careful to limit its holding to "th[e] situation" then in front of the Court. *TEA*, 2020 WL 1966314, at *5. Specifically, that case involved an administrative action that, if consummated, would not be subject to judicial review. *Id.* Appellees have alleged nothing of the sort here: For the reasons the State Officials will discuss in their briefing, Appellees are seeking to force the State Officials to further change the Election Code to apply Appellees' policy preferences, not an order stopping any violation of a state statute.

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[5] https://tinyurl.com/SubmissionSchedule (oral argument submission schedule issued in Case Number No. 20-0404).

[6] https://tinyurl.com/Stay200609 (Stay Order issued in Case Number 20-0609); https://tinyurl.com/Stay200401 (Stay Order issued in Case Number 20-0401).

[7] *In re Texas General Land Office*, No. 20-0609, remains pending—presumably so the Supreme Court can resolve it consistently with its ruling in *TEA*. *In re State*, No. 0401, was dismissed as moot after the plaintiffs in that case voluntarily nonsuited their claims with prejudice.

Appellees have asserted that due to the date of the election, this appeal is likely to become moot as a result of the passage of time. But that cuts *against* awarding relief. As the Texas Supreme Court stated just two weeks ago: "The United States Supreme Court has repeatedly warned against judicial interference in an election that is imminent or ongoing. 'Court changes of election laws close in time to the election are strongly disfavored.'" *In re Hotze*, No. 20-0739, 2020 WL 5919726, at *3 (Tex. Oct. 7, 2020) (citing *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (noting Supreme Court's repeated emphasis that "lower federal courts should ordinarily not alter the election rules on the eve of an election.")); *see also North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (staying a lower court order that changed election laws thirty-three days before the election); *Husted v. Ohio State Conference of N.A.A.C.P.*, 573 U.S. 988 (2014) (staying lower court order that changed election laws sixty days before election); *Veasey v. Perry*, 135 S. Ct. 9 (2014) (denying application to vacate court of appeals' stay of district court injunction that changed election laws on eve of election); *Purcell v. Gonzalez*, 549 U.S. 1 (staying a lower court order changing election laws twenty-nine days before election); *Andino v. Middleton*, No. 20A55, slip op. at 2 (U.S. Oct. 5, 2020) (Kavanaugh, J., concurring); *Tex. Alliance for Retired Americans v. Hughs*, No. 20-40643, slip op. at 3-4 (5th Cir. Sept. 30, 2020). It would be perverse in light of that law to use that same exigency to create a judicial exception to the "Legislature's statutory directive . . . that the State's right to supersede a judgment is not subject to counter-supersedeas under Rule 24.2(a)(3) or any other rule." *TEA*, 2020 WL 1966314, at *5.

B. Even if the Court has the authority to grant Appellees' request for relief under Rule 29.3, it should decline to exercise that authority.

Even if this Court did have authority under Rule 29.3—or some latent spring of inherent judicial authority—to order that the trial court's temporary injunction remain in effect during interlocutory appeal, it should still deny Appellees' request. Though the merits of Appellees' claims are not at issue, they are not likely to prevail in this appeal for the reasons set out more thoroughly in Appellants' Brief, and the equities do not favor their requested relief.

In their motion, Appellees have tried to portray their claim as being about the fundamental right to vote. It is not. The State does not dispute that the right to vote is indeed precious, but as Appellees admit (at 22–23), Texas cases follow federal standards in assessing whether such constitutional rights are implicated. *E.g.*, *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 12–14 (Tex. 2011); *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 846 (Tex. 1990) (citing *Spring Branch ISD v. Stamos*, 695 S.W.2d 556, 559-60 (Tex. 1985)). And federal law recognizes that the right to vote *does not include* a right to vote by mail—let alone a right to hand-deliver mail-in ballots at multiple locations. *See McDonald*, 394 U.S. at 807; *see also Tully v. Okeson*, No. 20-2605, 2020 WL 5905325, at *1 (7th Cir. Oct. 6, 2020) ("The Supreme Court [has] told us that the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail.").

Indeed, though the Motion does not even mention it, the Fifth Circuit just considered whether the right to vote was implicated by the Governor's October 1 Proclamation, and concluded in no uncertain terms that it was not. Considering the

very same arguments that Appellees raise here, the Fifth Circuit agreed that "the October 1 proclamation is part of an *expansion* of absentee voting in Texas, not a *restriction* of it." *LULAC*, 20-50867, 2020 WL 6023310, at *1 (5th Cir. Oct. 12, 2020). It correctly noted that "[t]he July 27 and October 1 Proclamations . . . must be read together to make sense." *Id.* at *5. And read in that context, "one strains to see how [the October 1 Proclamation] burdens voting at all." *Id.* But, "even if [it] focused myopically on the voting options restricted by the October 1 Proclamation, as the district court did" (and as the trial court did here), "it would still find no more than a *de minimis* burden on the right to vote" in light of the numerous options that Texas has provided to voters to cast their ballots this year. *Id.* at *6.

Moreover, Appellees' assertions that they should be allowed yet more options to exercise the privilege of voting by mail ignore that they are not the only individuals whose rights are at issue in this appeal. "[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." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quotation marks omitted). And that harm is not an abstract injury to some disembodied concept. Courts do not protect the State's "intrinsic right to enact, interpret, and enforce its own laws" for the benefit of the State as an entity, or even state officials. *Naylor*, 466 S.W.3d at 790; *see also Hollins*, No. 20-0729, 2020 WL 5919729, at *6-7. Instead, courts protect the ability of the State to enforce its laws to protect the rights of its citizens in whose name, on whose behalf, and at whose direction those laws were created. *Cf. New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself," but "secures to citizens the

liberties that derive from the diffusion of sovereign power."). When an appellate court refuses to allow the State to enforce its law pending appeal, all citizens suffer.

To balance these competing interests, the Legislature and the Texas Supreme Court have crafted a detailed framework for requesting and obtaining supersedeas and counter-supersedeas. This framework, embodied in such provisions as section 6.001, Rule 24, and Rule 29, represents a careful balancing of legal, policy, and equitable considerations. Were this Court to accept Appellees' invitation to make an end-run around this entire framework and effectively grant Appellees the counter-supersedeas they could not otherwise obtain, the Court would upset this balance and arrogate to itself sole discretion over when supersedeas is appropriate.

The Court should decline Appellees' invitation. Under any circumstance, supersedeas involves a set of policy decisions that fall uniquely within the sphere of the political branches. *Ammex Warehouse*, 381 S.W.2d at 482. Here, that control over supersedeas is doubly important because Appellees are asking this Court to interfere with the course of an election *once voting is already under way.* As the Fifth Circuit just reiterated, "[s]tates have critically important interests in the orderly administration of elections and in vigilantly reducing opportunities for voting fraud." *LULAC*, 2020 WL 6023310, at *7. That risk is particularly acute for mail-in ballots. *Id.* "While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Id.* (alteration omitted) (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008)). And the October 1 Proclamation, which was part of an expansion of mail-in ballot voting options accomplished pursuant to the Governor's pandemic-related orders using

authorities granted by the Texas Legislature, was justified by the State's interests in election integrity during the expanded period of time for hand-delivery of mail-in ballots. The plaintiffs clearly disagree with those policy choices, but they must be respected, particularly while the State exhausts its appeals.

PRAYER

The Court should deny Appellees' request for relief under Rule 29.3 and grant the State any other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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