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THIRD COURT OF APPEALS
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No. 03-20-00498-CV

IN THE COURT OF APPEALS

THIRD JUDICIAL DISTRICT OF TEXAS—AUSTIN

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

Appellant,

v.

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

Appellees.

On Appeal from the 353rd Judicial District Court, Travis County
Cause No. D-1-GN-20-005550

BRIEF OF APPELLEES

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ORAL ARGUMENT NOT REQUESTED

Identity of Parties and Counsel

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STATEMENT OF THE CASE

Nature of the Case	Governor Abbott issued a Proclamation on October 1, 2020 limiting each county to a single ballot return location for eligible absentee voters to return their ballots in-person in the period prior to Election Day. This sudden reversal of the status quo in Texas was not rationally related to the COVID-19 pandemic, despite being promulgated under the Texas Disaster Act, and substantially burdened Plaintiffs-Appellees' right to vote. Plaintiffs-Appellees challenged the act as *ultra vires* and under the Texas Constitution.
Trial Court	353rd Judicial District, Travis County The Honorable Tim Sulak
Course of Proceedings	Plaintiffs-Appellees filed this action shortly after the Governor issued the Proclamation. Appellant Abbott filed a plea to the jurisdiction. Plaintiffs-Appellees then moved to amend to add the Secretary of State as a defendant. The trial court held an evidentiary hearing on October 13, 2020. The trial court ordered temporary injunctive relief in Plaintiffs-Appellees' favor on October 15. Appellants immediately appealed, which superseded the injunction. On October 19, Plaintiffs-Appellees moved this Court for reinstatement of the injunction under Rule 29.3 of the Texas Rules of Civil Procedure and requested expedited consideration of the appeal. On October 19, this Court set a briefing schedule for Plaintiffs-Appellees' 29.3 motion and the merits briefing.

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Did the trial court correctly determine that Plaintiffs-Appellees[1] have standing to challenge the Governor's October 1, 2020 Proclamation, given that the Proclamation impermissibly and unconstitutionally burdens their right to vote, the Governor is the proper party to rescind or amend the Proclamation, and the Secretary of State is the chief election officer of the State?

2. Did the trial court correctly determine that the Governor and Secretary are not immune from suit?

3. Did the trial court abuse its discretion when enjoining the provision in the October 1, 2020 Proclamation limiting each county to a single ballot return location for marked mail ballots in the period prior to Election Day?

STATEMENT OF FACTS

I. Background Facts

A. Relevant Provisions of the Texas Election Code

Eligibility to Vote By Mail. Under Texas law, a voter is eligible to vote by mail if he or she meets any of the following requirements: (1) the voter is 65 or older; (2) the voter has a sickness or physical condition that prevents the voter from appearing at the polls; (3) the voter will be outside his or her county of

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

residence for all of the Early Voting period and on Election Day; or (4) the voter is in jail, but otherwise eligible to vote. TEX. ELEC. CODE § 82.001-004. Earlier this year, the Texas Supreme Court ruled that "a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of disability." *In re State*, 602 S.W.3d 549, 560 (Tex. 2020). Thus, while a lack of immunity to COVID-19 "is not itself a 'physical condition' that renders a voter eligible to vote by mail," a voter with a physical condition that puts himself or herself at greater risk of contracting COVID-19 may vote by mail. *Id*.

Voters' In Person Delivery Of Marked Ballots. The Election Code provides that voters eligible to vote by mail may deliver their marked ballots in person. Section 86.006(a-1) provides that eligible voters "may deliver a marked ballot in person to the early voting clerk's office only while the polls are open on election day. A voter who delivers a marked ballot in person must present an acceptable form of identification described by Section 63.0101." TEX. ELEC. CODE § 86.006(a-1).

Local Election Officials' Authority. The Texas Election Code designates local election officials as the officials "in charge of and responsible for the management and conduct of the election at the polling place of the election

precinct that the judge serves." *Id*. § 32.071. That authority extends to early voting. *Id*. §§ 83.001(c), 83.002.

B. Texas Disaster Act and Governor's Declaration of Disaster

Texas's Disaster Act is derived from the Model Emergency Health Powers Act ("MEHPA"). 3.RR.164 ¶ 16 (expert report of Professor Stephen Vladeck). While the MEHPA allows an executive to suspend statutes in the face of disaster, it also requires a relationship between an underlying emergency and the suspension. *Id.* The Texas Disaster Act's suspension provision derives from the MEHPA and so any suspensions under that provision are also required to be related to the underlying emergency. 3.RR.164 ¶ 15; *see* 2.RR.160:1-3 (testimony from Prof. Vladeck that "the core suspension provision in Section 418.016 of the Texas Government Code is just about a carbon copy of the model statute"); *see also* TEX. GOV'T CODE § 418.016(a).

On March 13, 2020, Governor Abbott issued a disaster proclamation certifying that the COVID-19 pandemic posed an imminent threat of disaster under TEX. GOV'T CODE § 418.014. 3.RR.211.

C. Governor's July 27, 2020 Proclamation

On July 27, 2020, Appellant Abbott issued an executive order extending the early voting period in light of the COVID-19 pandemic. 3.RR.219. Specifically,

to "ensure that elections proceed efficiently and safely when Texans go to the polls" this election cycle, Appellant Abbott suspended Section 85.001(a) of the Texas Election Code and extended in-person early voting to begin on October 13, 2020 instead of October 19, 2020. 3.RR.220.

In the same order, Appellant Abbott suspended the restriction in Texas Election Code 86.006 that only allows in-person delivery of ballots on Election Day: "I further suspend Section 86.006(a-1) of the Texas Election Code, for any election ordered or authorized to occur on November 3, 2020, to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early voting clerk's office prior to and including on election day." 3.RR.220.

In so doing, Appellant Abbott specifically found that this suspension was necessary because "strict compliance" with these provisions "would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster[.]" 3.RR.220.

D. Early Voting Clerks Make Preparations To Receive Ballots At Satellite Offices, Consistent With State Guidance

On August 14, 2020, the Harris County Clerk announced that "[v]oters concerned with mail delays will be able to drop off their marked ballot in-person at

any of the County's eleven offices and annexes."[2] Consistent with the Governor's July 27, 2020 Proclamation, eligible absentee voters could return their ballots to any of these drop-off locations "beginning whenever [voters] receive their ballots and continuing through Election Day, November 3, at 7:00 PM."[3] Harris County, in fact, had accepted mail-in ballots at its 11 annex locations on the day of the July primary runoff election.

On August 26, 2020, an attorney in Defendant Hughs' Elections Division responded to a question regarding voters' return of their ballots to county clerk annex offices:

> Election Code 86.006(a-1) provides that the voter may hand-deliver a marked ballot by mail to the early voting clerk's office while the polls are open on election day, but they must present voter ID at the time that they do so. Under the Governor's July 27, 2020 proclamation, for this November election, that hand-delivery process is not limited to election day and may occur at any point after the voter receives and marks their ballot by mail.
>
> Because this hand-delivery process can occur at the early voting clerk's office, this may include satellite offices of the early voting clerk.

CR.78.

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[2] Statement: Harris County Clerk Chris Hollins on Expected USPS Delivery Delays in November (Aug. 14, 2020), available at: https://bit.ly/2GqFAPD.

[3] Statement: Harris County Clerk Chris Hollins on Expected USPS Delivery Delays in November (Aug. 14, 2020), available at: https://bit.ly/2GqFAPD.

On September 30, 2020, the Attorney General advised the Texas Supreme Court in an official filing responding to a question from the Supreme Court as follows:

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

CR.46 (emphasis added).

E. Governor's October 1, 2020 Proclamation

On October 1, 2020, after counties had already started accepting absentee ballots from voters at ballot return locations, Defendant-Appellant Abbott issued another Proclamation, which prohibited county election officials from operating more than one early voting drop-off location in each county prior to the Election Day. 3.RR.226-29. The Proclamation provided:

> I further suspend Section 86.006(a-1) of the Texas Election Code, for any election ordered or authorized to occur on November 3, 2020, to the extent necessary to allow a voter to deliver a marked mail ballot in person to

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

3.RR.228.

In this Proclamation, Appellant Abbott claimed this suspension of the Texas Election Code was necessary to "add ballot security protocols." 3.RR.226. Appellant also claimed to have authority to issue the Proclamation to "control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area" under Texas Government Code § 418.018(c). 3.RR.227.

II. Trial Court's Evidentiary Hearing and Ruling

Plaintiffs-Appellees filed their original petition and application for temporary injunctive relief on October 5, 2020. CR.3-82. Appellant Abbott filed a

plea to the jurisdiction and opposition on October 6, 2020. CR.83-165.

On October 12, 2020, Plaintiffs-Appellees amended their original petition and application to name Appellant Hughs as an additional defendant. CR.166-172. At the October 13, 2020 temporary injunction hearing, Appellant Hughs agreed to waive service of the amended petition and to appear at the hearing through the Attorney General's Office. 2.RR.33:10-18. Appellant Hughs reserved her right to file a plea to jurisdiction, 2.RR.33:21-24, and filed said plea on October 14, 2020, following the temporary injunction hearing. CR.223-51.

At the October 13, 2020 evidentiary hearing, the trial court heard testimony from ten live witnesses, nine of which were presented by Appellees. *See generally* 2.RR.

Representatives from Appellees ADL and Common Cause Texas testified as to the significant impairment to voter education and voter mobilization efforts—both of which are core to their organizational mission—caused by the October 1 Proclamation. *See, e.g.*, 2.RR.119:8-24 (testimony from Cheryl Drazin of ADL that "the October 1st order definitely created some confusion [among ADL constituents] . . . I've had to divert staff resources to this"); 2.RR.69:12-70:23 (testimony from Anthony Gutierrez, the Executive Director of Common Cause Texas, that Common Cause Texas has had to divert resources to retrain volunteers

"on a law that keeps on changing," divert volunteer placements at poll sites, and "divert[] resources in . . . the paid public education piece."). Appellee Knetsch, Common Cause member Joanne Richards, and individual voter Randy Smith each testified as to the burden placed on their individual right to vote as a result of the limit on drop-off locations to one per county. *See, e.g.*, 2.RR.142:24-143:10 (Knetsch testimony that the Proclamation makes "the health risks that I'll have to expose myself to far less predictable . . . I want to minimize my exposure to other people, whether it be voters or poll workers"); 2.RR.84:17-22 (Richards testimony that "I'm concerned about two things; one is my health and -- because of my age; and the other is there seems to be some confusion about whether the post office can be reliable, so I'm concerned about whether there would be a delay in receiving my ballot in a timely manner."); 2.RR.169:21-170:6 (testimony from Smith that "Since I can't go drive five minutes to drop my ballot off to the County Clerk's office, . . . I would have to drive 31 miles to NRG Stadium, which is about 45 minutes in traffic in order to do that from where I live, and I don't drive that far. Given the situation that I have and the recovering from the surgery that I have, I can't drive for 45 minutes.") More specifically, these witnesses discussed their well-founded fear of COVID-19 transmission at in-person polling locations given their age and (with respect to witnesses Richards and Smith) underlying health conditions, both

of which make them more susceptible to the risk of severe infection, and both of which make them eligible to vote by mail. *See* 2.RR.142.142: 2.RR.89:17-25 (Richards testimony that "I happen to be going in to see a surgeon tomorrow about a rather painful right hip, so I am in the process of looking into surgery" and answering that it was "absolutely" a health concern that there is a global pandemic happening); 2.RR.167:10-21 (Smith testimony that "My wife also is 72, but beyond the fact of our ages, both of us are cancer patients . . . So we're kind of compromised in terms of our health and don't go out very much for anything.") They also testified as to their inability to travel long distances or wait in long lines as a result of their age and health.

The Court also heard and considered evidence from four different experts at the hearing. Dr. Daniel Chatman, an expert in travel behavior, conducted a travel burden and queuing analysis to assess the effects of limiting drop-off locations for mail-in ballots to one per county. As Dr. Chatman explained, as a result of limiting drop-off locations to one per county, 13.5 percent of eligible mail-in voters would experience a travel burden of more than 70 minutes roundtrip to deliver their ballot. 2.RR.188:21-189:5. These burdened voters are concentrated in more populated counties, and in particular, Harris County, where 38% of eligible vote by mail voters would suffer a travel burden of 70 minutes or more.

2.RR.190:16-22.

Dr. Chatman further explained that 89 percent of eligible absentee voters without access to a vehicle will have to travel more than 90 minutes roundtrip to deliver their ballot. 2.RR.91:21-192:1. This is significant because individuals 65 or older and individuals with a disability—both of whom qualify to vote by mail in Texas—are respectively 2.8 and 3.75 times more likely to lack vehicle access than those that are younger than 65 and without a disability. 3.RR.64 ¶ 49 (Declaration of Dr. Chatman); *see also* 2.RR.192:19-193:3. Thus, the eligible mail-in voting population is particularly burdened by the one-drop-off-location limit because of their disproportionate lack of access to a vehicle. 2.RR.193:23-25 (Chatman testimony that "basically between three and four times as high, the likelihood is, between these two groups versus the general non-disabled/under-65 population.")

Finally, Dr. Chatman testified that tens of thousands of eligible vote by mail voters may forgo casting their ballots at all due to the long vehicle lines and wait times on Election Day, when demand for drop-off locations is at its highest.[4] *See*

[4] In Dr. Chatman's declaration, he opined on his analysis of queues and wait times resulting from a limit of one drop box per county on Election Day. Following the completion of his analysis, the State in parallel federal litigation and then at the October 13 temporary injunction hearing represented that it did not interpret the Proclamation to limit drop-off locations on Election Day and that counties could provide multiple drop-off locations on Election Day. Dr. Chatman testified that he reanalyzed the data based on this representation and that, while queues and wait times would be reduced as the result of additional locations being open, there would nevertheless remain wait times of 30 to 40 hours at drop-off locations in many

2.RR.203:15-204:9 (testifying that "in that first hour," Harris County could see "queue lengths where the wait time is about 20 hours" and "what these queues really mean is that there will be traffic jams and people being driven away and news reports that will inform people that they're not going to get near the drop boxes.")

Mr. Edgardo Cortés, the former chief election official for the state of Virginia and the former Deputy Director for Policy at the U.S. Election Assistance Commission, testified that mail-in voting using drop-off locations is safe and secure, particularly in Texas—the only state to require mail-in voters to show photo ID if they choose to drop-off their ballot at one of the designated drop-off locations. 2.RR.96:4-8. Having reviewed the plans for additional ballot drop-off locations developed by Travis and Harris Counties prior to Appellant Abbott's Proclamation prohibiting the availability of those additional locations, Mr. Cortés found that those plans provided more than adequate ballot security measures and that there was no election security related basis for limiting counties to one drop-off location. 2.RR.103:8-16 ("there are quite a number of different approaches in

counties, including Harris County. 2.RR.208:6-20. As Dr. Chatman explained, the availability of additional locations on Election Day would drive up demand for Election Day use of drop-off locations because voters would seek to limit their travel burden by dropping off their ballot at a closer location on Election Day.

maintaining security of the process in absentee voting . . . it is my understanding, based on what I reviewed, that Harris and Travis County have quite a number of those provisions in place."); 2.RR.110:20-24 ("from a security standpoint, if you are able to operate the sites on election day, there doesn't seem to be a security-based reason for not operating those sites in advance of the election as well."). Mr. Cortés concluded that because demand for mail-in ballot drop-off locations is particularly high this year due to the pandemic and concerns regarding the reliability of the U.S. Postal Service, the limit on drop-off locations would unreasonably burden both voters and election administrators. 2.RR.106:13-107:1 ("if there's only a single location, it may be quite an extraordinary effort on the part of the voter to figure out a means to get transportation to the site to drop off . . . [and] you could have a situation where you are then creating a line at the singular drop-off location; and so people will have to wait in line in close proximity to others, which, in many cases in this pandemic situation, is a main driver for people that are eligible to vote absentee, so as not to have that level of exposure."); 2.RR.105:23-106:4 ("It's my opinion that, at this point in the proximity to the election, changing it to limit it to just one drop-off location may actually prove more time-consuming and increase the potential for election administration errors."). Mr. Cortés also testified that there is sufficient time for Texas county

election officials to implement secure, additional absentee ballot drop-off locations, as counties have already identified these locations, created procedures necessary to operate them, and educated voters on their ability to drop off their absentee ballots at these additional sites. 2.RR.105:3-23.

Dr. Krutika Kuppalli, an infectious disease expert, testified to the current state of the COVID-19 crisis in Texas: as of the date of Dr. Kuppalli's report, nearly 800,000 confirmed cases and more than 500 deaths. 3.RR.135 at ¶ 15. As Dr. Kuppalli testified, limiting each county to one drop-off location for mail-in ballots will result in longer lines and greater congestion at polling locations, both of which will exacerbate the COVID-19 crisis, and likely lead to suppressed voter turnout because of transmission fears. 2.RR.129:11-19.

Prof. Stephen Vladeck, an emergency powers expert, testified that Appellant Abbott's October 1 Proclamation would be out of sync with how experts interpret MEHPA or how states interpret their own similarly worded health emergency statutes because "ballot security" is not a basis that has been used by others to justify invocation of state emergency health powers statutes, and in any event, restrictions on the number of drop-off ballot locations has no connection with addressing any current health concern. 2.RR.161:13-20 (testifying that he is "not aware of another example where ballot security was offered as the specific reason

for a measure tied to a state law that was itself modeled on the model statute."); *see also* 2.RR.160:23-24 ("the authorities [the MEHPA] was granting were meant to be tied to the public health crisis.").

Defendants-Appellants' sole witness, Texas Secretary of State Elections Division Director Keith Ingram, testified that the Secretary of State had previously certified each of the contemplated additional drop-off locations prior to the October 1 Proclamation's prohibition on these locations, and that counties operating multiple ballot return locations were in compliance with the statewide guidance on ballot collection and security procedures. 2.RR.235:15-236:1. As Mr. Ingram testified, even under the October 1 Proclamation, the counties are permitted to use these same additional drop-off locations on Election Day and therefore will already be receiving ballots in connection with the November 3 Election. 2.RR.237:18-25.

On October 15, 2020, the trial court issued its order. CR.205-06. The Order denied Appellants' pleas to the jurisdiction and granted Plaintiffs-Appellees' Application for Temporary Injunction. CR.205-206. The trial court enjoined Defendants from implementing or enforcing the following paragraph on page 3 of the October 1, 2020 Proclamation:

> "(1) the voter delivers the marked mail ballot at a single early voting clerk's office location that is publicly

> designated by the early voting clerk for the return of marked mail ballots under Section 88.006(a-1) and this suspension,"

The trial court found that the Proclamation's limit to a single drop-off location "would likely needlessly and unreasonably increase risks of exposure to COVID-19 infections, and needlessly and unreasonably substantially burden potential voters' constitutionally protected rights to vote, as a consequence of increased travel and delays, among other things." CR.206.

Appellants immediately appealed. CR.208-11.

SUMMARY OF THE ARGUMENT

Based on the ongoing COVID-19 pandemic, the Governor exercised his authority under the Texas Disaster Act to suspend Section 86.006(a-1) of the Texas Election Code with his July 27 Proclamation. That Proclamation, among other things, allowed voters to return their marked mail-in ballots to the early voting clerk's office in the period prior to Election Day. State and local officials, including the Attorney General and as late as September 30, understood the July Proclamation to allow voters to be returned to "any early clerk office" in the county in the period prior to Election Day.

On October 1, the Governor purported to exercise his authority again in a proclamation entirely unrelated to the COVID-19 pandemic to now limit each

county to a single in-person ballot return location for the collection of absentee ballots in the period before Election Day. The October 1 Proclamation's stated rationale for this limitation was "ballot security" and the Governor's authority to "control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area" under Texas Government Code § 418.018(c). Yet these interests have nothing to do with the COVID-19 pandemic, and the Governor's action will result in increased occupancy at the remaining ballot return locations—the exact opposite of what public health experts and government officials recommend during the current public health crisis.

Appellees brought an action in the district court of Travis County, challenging the Proclamation's limitation as *ultra vires* by the Governor and the Secretary of State (Texas's chief election officer), as well as imposing an unconstitutional burden on Appellees' right to vote. After a day-long evidentiary hearing, where Appellees presented nine witnesses and Appellants presented just one, the trial court granted a temporary injunction against the Proclamation's limit on ballot return locations. Specifically, the trial court found that "the limitation to a single drop-off location for mail ballots would likely needlessly and unreasonably increase risks of exposure to COVID-19 infections, and needlessly and unreasonably substantially burden potential voters' constitutionally protected

rights to vote, as a consequence of increased travel and delays, among other things." In so doing, the trial court determined that Plaintiffs-Appellees, who had asserted an *ultra vires* claim against Defendants as well as equal protection claims under the Texas Constitution, had stated a cause of action, established a probable right to relief, and would suffer irreparable harm in the absence of an injunction.

Appellants inaccurately attempt to paint Appellees as mounting a broad attack on Appellants' authority to suspend statutes during a declared disaster. This is not the position of Appellees. Moreover, the trial court's order appropriately ensures that when the Governor exercises his authority under the Disaster Act, he and his agents operate within the proper boundaries of the law and in a manner that is rationally tailored to the disaster. The October 1, 2020 Proclamation (the "Proclamation") limiting each county to one ballot return location during the early voting period fails on both counts.

The trial court did not abuse its discretion in awarding the injunction, and this Court should affirm the injunction.

STANDARD OF REVIEW

Appellants' plea to the jurisdiction is based on two theories: standing and sovereign immunity. This Court reviews both de novo. *Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004) ("As a component of

subject matter jurisdiction, we review a claimant's standing de novo."); *Hoff v. Nueces Cty.*, 153 S.W.3d 45, 48 (Tex. 2004) ("We review a plea to the jurisdiction based on sovereign immunity de novo because the question of whether a court has subject matter jurisdiction is a matter of law.")). Texas appellate courts "determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause," construing the pleadings "liberally in favor of the plaintiffs and look[ing] to the pleaders' intent." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009). The *ultra vires* exception to governmental immunity permits a plaintiff to claim relief against a government actor who has violated statutory or constitutional provisions if the plaintiff is able to "allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Id.* at 372.

This Court reviews the trial court's order granting the temporary injunction for clear abuse of discretion. *Henry v. Cox*, 520 S.W.3d 28, 33 (Tex. 2017). This Court reviews the evidence in the light most favorable to the trial court's ruling, drawing all reasonable inferences from the evidence, and deferring to the trial court's resolution of conflicting evidence. *Taylor Hous. Auth. v. Shorts*, 549 S.W.3d 865, 878 (Tex. App. – Austin 2018, no pet.). This Court's review is limited "to the validity of the order, without reviewing or deciding the underlying

merits, and will not disturb the order unless it is so arbitrary that it exceeds the bounds of reasonable discretion," *Henry*, 520 S.W.3d at 33-34, or "without reference to guiding rules or principles." *Ron v. Ron*, 604 S.W.3d 559 (Tex. App. – Houston [14th Dist.] 2020, no pet.).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED APPELLANTS' PLEAS TO JURISDICTION

A. Plaintiffs Have Standing

1. Plaintiffs have demonstrated an injury in fact

Appellants' assertion that Appellees have not established concrete, particularized standing ignores the testimony of actual voters that the Governor's Proclamation has forced them to choose between protecting their health during a global pandemic and ensuring that their vote is counted. Appellee Knetsch and Common Cause Texas member Joanne Richards each testified that their age made them eligible to vote by mail and that they faced a greater risk of adverse health outcomes from COVID-19, which made them fear voting in-person. 2.RR.84:17-22; 2.RR.142:12-18. Witness Randy Smith testified that he and his wife were both cancer patients with compromised immunity. 2.RR.167:6-21. As a result, he feared the health risk from voting in-person, particularly because polling places are exempt from statewide mask mandates. 2.RR.170:10-171:15.

Appellants ignore the proffered testimony, focusing instead on wait times and alternate in-person voting locations. Appellants' Br. 17-18. But Appellees' alleged injury is not simply about long lines and the time it takes to cast one's ballot. Appellees' injury stems from the burden that the Proclamation imposes on their right to vote ***during a global pandemic***, when social distancing and limiting contact with possibly infected individuals is of utmost importance to those who face a heightened risk from COVID-19. Just because Appellants are dismissive of Appellees' stated injury does not mean that injury has not been alleged.

Appellants' argument that Appellees' fears are too generalized or speculative is incorrect under Texas law. Appellants rely upon two cases, neither of which supports their position. Appellants' Br. 16. In *Garcia v. City of Willis*, 593 S.W.3d 201 (Tex. 2019), the Supreme Court held that vehicle owners challenging the city's red light camera ordinance only had standing to bring claims for retrospective—rather than prospective—relief, because they had already paid any civil penalties for violations and there was no showing that they were likely to re-violate traffic laws in the future. Likewise, in *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000), the Supreme Court held that standing to challenge a school district's policy of refusing to promote certain students had not yet accrued because no student in the district had yet been retained. The opposite

is true in the present case: the Governor's Proclamation is currently limiting Appellees' ballot access, resulting in real, present and ongoing harm.

Contrary to Appellants' brief, it is settled law that Appellees need not demonstrate that it is impossible for them to vote as a result of the Proclamation to establish standing. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981)); *see also Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 2349, 1352 (11th Cir. 2005) ("A plaintiff need not have the franchise wholly denied to suffer injury. Any concrete, particularized, non-hypothetical injury to a legally protected interest is sufficient."); *Gwinnett Cty. NAACP v. Gwinnett Cty. Bd. of Registration & Elections*, 446 F. Supp. 3d 1111, 1120 (N.D. Ga. 2020) (finding standing where satellite voting locations were not operational during the first week of early voting); *Bear v. Cty. of Jackson*, 2015 WL 1969760, at *4 (D.S.D. May 1, 2015) (finding standing where plaintiffs alleged that "the location of in-person absentee voting is remote and that the distance makes it more difficult for them personally to vote absentee compared to other residents of Jackson County."); *Mich. State A. Philip Randolph Inst. v. Johnson*, 209 F. Supp. 3d 935, 945 (E.D. Mich. 2016); *Common Cause of Colorado v. Buescher*, 750 F. Supp. 2d 1259, 1272 (D. Colo. 2010).

Instead, Appellees need only show that they are personally aggrieved by the

Proclamation, and they have done so by alleging particular, concrete burdens resulting from the closure of additional ballot return locations. For example, Witness Randy Smith testified that before the Governor's Proclamation, he and his wife, both of whom are current cancer patients, had the option of dropping their ballots at a location five minutes from their home. 2.RR.169:18-170:9. Under the terms of the Governor's Proclamation, they would now be required to drive 45 minutes in traffic in order to drop off their ballots, a distance that was too far for them to drive given their health conditions. *Id.* Smith further testified that he did not feel comfortable mailing his ballot given that one of his friends didn't receive mail for 24 days. 2.RR.168:12-169:3. As a result of concerns over delayed mail and an inability to reach the sole ballot drop-off location permitted by the Governor's Proclamation, Smith stated that he would likely be forced to utilize an early voting location, despite his concerns that doing so might expose him to COVID-19, particularly because polling places are exempt from statewide mask mandates. 2.RR.170:10-171:15.

Appellants' attempt to dismiss voters' injuries by asserting that voters should simply mail their ballots back earlier harms voters by denying them the time necessary to make an informed decision. Witness Joanne Richards testified as much, stating that her desire to be an informed voter made it unlikely that her

ballot would be received on time if she mailed it. 2.RR.89:10-16. This past month, a Washington D.C. court rejected an argument similar to Appellants, holding that,

> [i]n suggesting that voters should cast their ballots earlier than required, Defendants ignore Plaintiffs' "essential" interest in making "informed choices among candidates for office." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995). As the Supreme Court has recognized, "[i]n election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time." *Anderson*, 460 U.S. at 790. Many individuals, including Plaintiffs in this case, rely on the efficient delivery of their mail-in ballots so that they make take the time available to consider the issues and candidates in an election. *See, e.g., Datta Decl*., ECF No. 16-23 ¶¶ 3-5. Accordingly, any argument that Plaintiffs inflict injury on themselves by not voting earlier does not significantly lessen their harms in this situation.

Vote Forward v. DeJoy, 2020 WL 5763869, at *9 (D.D.C. Sept. 28, 2020). The court in *Vote Forward* also noted that policy changes like those required by the Governor's Declaration "place an especially severe burden on those who have no other reasonable choice than to vote by mail, such as those who may be at a high risk of developing a severe case of COVID-19 should they become exposed to the virus at the polling place, and those who are not physically able to travel to the polls due to disability." *Id.* The same is true here. Accordingly, the trial court rightfully rejected Appellants' claim that Appellees lacked standing.

2. Plaintiffs' injuries are traceable to Defendants

The trial court correctly denied Defendants' pleas to the jurisdiction, rejecting the same arguments that Defendants raise again on appeal. Plaintiffs' injuries are not premised on the threat of enforcement of the Proclamation, and therefore the extent to which Defendants "enforce" the Proclamation is irrelevant. Instead, as demonstrated to the trial court, Plaintiffs' injuries are the direct result of the Governor's *ultra vires* conduct, and he is the ***only*** party that can be liable for that conduct. Indeed, Defendants' tortured reading of traceability and redressability would mean that the Governor could ***never*** be liable for *ultra vires* conduct because he does not enforce his executive orders. That is not the law.

Moreover, even if enforcement were the talisman of traceability and redressability as Defendants claim—which it is not—the Secretary of State is a proper party because she does, in fact, enforce election law, as demonstrated by her recent invocation of that enforcement authority to direct the Attorney General's Office to sue county election officials on the State's behalf.

a. The Governor is Liable for his *Ultra Vires* Acts.

Defendants' claim that the Governor is not liable for his *ultra vires* conduct because he does not "enforce" the Proclamation demonstrates a fundamental lack of understanding of an *ultra vires* claim and the relief to which Plaintiffs are

entitled. As the Texas Supreme Court has explained, "*ultra vires* suits do not attempt to exert control over the state—they attempt to reassert the control of the state." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009). The purpose of an *ultra vires* suit, therefore, is to bring an actor that has acted beyond his or her authority "into compliance with the law." *PermiaCare v. L.R.H.*, 600 S.W.3d 431, 442 (Tex. App.—El Paso 2020, no pet.). Thus, the proper party to an *ultra vires* suit is always "the state actor[]" who exceeded his authority. *Heinrich*, 284 S.W.3d at 373; *see also City of Houston v. Little Nell Apartments, L.P.*, 424 S.W.3d 640, 647 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) ("[Ultra vires suits] must be brought against the allegedly responsible government actors in their official capacities."). And the proper remedy is "prospective injunctive relief . . . to require compliance with their duties going forward." *PermiaCare*, 600 S.W.3d at 442.

As set out more fully below, Plaintiffs established that Defendant Abbott exceeded his authority when he issued the Proclamation because he does not have authority to manage and conduct the early voting process, and his emergency powers extend only to alleviating the effects of a disaster—not exacerbating them. *See supra* at Section I.B.1. Thus, Defendant Abbott is the proper party to Plaintiffs' *ultra vires* suit, and the appropriate remedy, as issued by the trial court,

is injunctive relief bringing him back into compliance with his authority, i.e., terminating his unlawful intrusion on the authority of the Early Voting Clerks by enjoining further "implementat[ion]" of his Proclamation. S.CR.498-99.

The cases cited by Plaintiffs in support of their claim that Defendant Abbott cannot be sued because he does not "enforce" his Proclamation are inapposite.

First, several of the cases cited by Defendants do not involve state law *ultra vires* claims, but instead are federal cases applying the *Ex Parte Young* framework to determine whether a plaintiff has Article III standing to maintain a federal *constitutional* claim against a state actor. *See Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) ("[T]he question raised before this en banc court is whether the *Young* [framework] requires that the defendant state official have some enforcement powers with respect to the particular statute at issue . . . ."); *City of Austin v. Paxton*, 943 F.3d 993, 997-98 (5th Cir. 2019) ("In conducting our *Ex parte Young* analysis, we first consider whether the plaintiff has named the proper defendant or defendants."); *In re Abbott*, 956 F.3d 696, 708-09 (5th Cir. 2020) ("*Ex parte Young* allows suits for injunctive or declaratory relief against state officials, provided they have sufficient "connection" to enforcing an allegedly unconstitutional law."). The *Ex Parte Young* doctrine "does not directly apply" to an *ultra vires* state lawsuit where the claim is not whether the challenged act was

constitutional, but instead whether the state court official exceeded his or her authority. *Schraer v. Texas Health & Human Servs. Comm'n*, 2014 WL 586036, at *5 (Tex. App.—Corpus Christi Feb. 13, 2014, no pet.).[5] As discussed, the proper party to an *ultra vires* state law suit is always the official who exceeded his or her authority, not the official charged with enforcing the unlawful act. *Hall v. McRaven*, 508 S.W.3d 232, 240 (Tex. 2017) ("[A]n *ultra vires* claim . . . must be confined to conduct pursuant to [the officer's] authority."). And this makes sense: if another government official had "nothing to do with the allegedly *ultra vires* actions," that official cannot be held liable for it. *Id*.

Second, Defendants rely on cases where the party responsible for enforcement was the proper party because the plaintiff's injury was the enforcement or threat of enforcement for non-compliance with the challenged law.[6]

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[5] The only context in which the *Ex Parte Young* framework has been applied to a state court *ultra vires* suit is to require that the relief sought by the plaintiff be prospective, not retrospective. *See Heinrich*, 284 S.W.3d at 376 ("The best way to resolve this conflict is to follow the rule, outlined [by the federal courts], that a claimant who successfully proves an *ultra vires* claim is entitled to prospective injunctive relief.").

[6] Defendants spend much of their argument attempting to analogize this case to *In re Abbott*, 601 S.W.3d 802 (Tex. 2020), a case involving a challenge by county judges to a directive limiting the availability of bail for certain offenders. *Id*. at 805. But the injury alleged was the threat of criminal prosecution if the judges did not comply with the directive. *Id.* at 812. The Texas Supreme Court held that because defendants in that case did not have or otherwise had disclaimed enforcement authority, there was no "credible threat of prosecution," and thus plaintiffs did not have a legally cognizable injury. *Id*.; *see also Lone Staff Multi Theaters, Inc.*, 922 S.W.2d 295, 297 (Tex. App.—Austin 1996, no writ) (finding that plaintiff required to sue party with authority to bring criminal charges in a challenge to constitutionality of *criminal*

Here, Plaintiffs have been harmed by *the Proclamation itself*, rather than by the threat of enforcement for non-compliance with the Proclamation. Accordingly, Plaintiffs' *ultra vires* claim is properly asserted against the Governor because he is the officer who issued the Proclamation.[7]

Defendants' arguments would ultimately preclude any attempts to hold the Governor liable for his *ultra vires* conduct in issuing the Proclamation. If standing to sue must be predicated on the threat of enforcement, voters and organizations would be precluded from ***ever*** bringing a challenge to the Proclamation: because the Plaintiffs exert no control over voting procedures, they have no opportunity for non-compliance under the Proclamation and therefore cannot allege a credible threat of prosecution. That result is not only untenable, it is not the law: the Texas Supreme Court has previously rejected any such "blanket rule that would ensure no voter ever has standing to challenge a voting system." *Andrade v. NAACP of*

obscenity statute); *Garcia v. City of Wills*, 593 S.W.3d 201, 206-07 (Tex. 2019) (finding no standing to pursue prospective injunctive relief against City where there was no imminent threat of future prosecution).

[7] Defendants' reliance on *OHBA Corp. v. City of Carrollton*, 203 S.W.3d 1, 3 (Tex. App.—Dallas 2006) is also misplaced. There, the court unremarkably concluded that there was "no live controversy" where the plaintiff did not "challenge the validity or constitutionality" of any ordinance. Plaintiffs here directly challenge the validity of Defendant Abbott's Proclamation as outside the scope of his authority.

Austin, 345 S.W.3d 1, 8 (Tex. 2011).[8]

Likewise, Defendant's claim that he is not a proper party to an *ultra vires* suit challenging his legal authority to issue an executive order would mean that he could *never* be liable for *ultra vires* conduct because he does not enforce his executive orders. Such a result would effectively place the Governor above the law.

b. The Secretary of State Enforces Election Laws.

The State takes the remarkable position that the Secretary of State is not charged with enforcing the Texas Election Code. But Texas Election Code § 31.005(b) 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 order or a writ of injunction or mandamus obtained through the attorney general.

[8] In fact, the only party who could potentially not comply with the Proclamation would be early voting clerks insofar as the Proclamation usurps their authority under the Texas Election Code by requiring them to establish a single office for absentee ballot drop-offs. But Defendant has recently asserted that "a theory of injury based on one government actor usurping another actor's authority is too generalized to confer standing to sue." *In re Abbott*, 601 S.W.3d 802, 808 (Tex. 2020). Thus, Defendant's argument would put the Proclamation beyond legal recourse.

(emphasis added).

Indeed, in a recent lawsuit brought against the Harris County Clerk in Harris County District Court, the Secretary invoked her authority under Texas Election Code § 31.005(b) to both ***order*** and ***seek enforcement*** of the Texas Election Code. As the Court in *Richardson v. Texas Sec'y of State* explained:

> On August 27, 2020, Keith Ingram, the Secretary's Director of Elections sent a letter to the Harris County Clerk—pursuant to § 31.005—ordering Harris County to "halt any plan to send an application for ballot by mail to all registered voters" because such an action would be, according to the Secretary, "an abuse of voters' rights." The Secretary also stated that its office would "request that the Texas Attorney General take appropriate steps under Texas Election Code 31.005" in the event Harris County failed to comply with the Secretary's order. Sure enough, on August 31, 2020, the Texas Attorney General filed an application for temporary restraining order against Harris County, and in doing so, cited § 31.005(b) as the authority under which it sought its requested relief.

2020 WL 5367216, at *13 n.19 (W.D. Tex. Sept. 8, 2020) (internal citations omitted). The Secretary cannot have it both ways—she either has authority to direct enforcement actions against county election officials for violations of state election law, or she does not.

Defendants attempt to sidestep the inescapable conclusion that the Secretary does have enforcement authority by suggesting that there is some distinction between her ability to enforce the Election Code and the Proclamation. But the

Proclamation makes clear that, pursuant to Texas Government Code § 418.012, it is to have "the force and effect of law." CR.38. Thus, to the extent the Proclamation altered or suspended a provision of the Election Code, it serves as the operative Election Code. And counsel for Defendants here previously represented as much to the Texas Supreme Court on September 30, 2020, when arguing that the Governor's proclamations may serve to alter or suspend the Election Code. *See* CR.42-44.

3. ADL and Common Cause have standing

Contrary to Appellants' contention, ADL and Common Cause have standing to bring this lawsuit.[9] An organization may sue on behalf of its members if "(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. v. Texas 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) (internal quotation marks omitted)). Defendants do not

[9] For the reasons that follow, the Organizational Plaintiffs clearly have standing to sue. Because Robert Knetsch also has standing, however, the Court need not even reach this issue. *See Mitz v. Texas State Bd. of Veterinary Med. Examiners*, 278 S.W.3d 17, 27 (Tex. App. – Austin 2008).

dispute that the second and third prongs of the *Hunt* test are met.[10] Rather, they argue that the Organizational Plaintiffs do not have members, for purposes of associational standing, and that they have not adequately identified injured members. These arguments misconstrue the law and the record evidence. They should be rejected.

First, both ADL and Common Cause have established that they have "members" for purposes of establishing associational standing. The Texas Supreme Court has made clear that "[t]his requirement should not be interpreted to impose unreasonable obstacles to associational representation." *Texas Ass'n of Bus.*, 852 S.W.2d at 447. Rather, "the purpose of the first part of the *Hunt* test is simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *Id.* (quoting *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 9 (1988)).

Common Cause is a traditional voluntary membership organization.

[10] Nor could they. The pleadings and evidence establish that this lawsuit, which seeks to protect the rights of Texas voters, is germane to the purpose of both organizations, which include protecting voters and encouraging participation in the democratic process. 2.RR.63, 115-17. Moreover, individual participation is not necessary, given that the remedy Plaintiffs seek is to enjoin the Governor's October 1 Proclamation.

2.RR.65.[11] That is enough to establish that it has members for purposes of associational standing – contrary to Defendant's importuning, this Court need not apply *Hunt*'s "indicia of membership" test to Common Cause. *See, e.g.*, *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 29 (D.D.C. 2009) ("The inquiry into the 'indicia of membership'… is necessary only when an organization is not a 'traditional membership organization.'"); *see also Hunt*, 432 U.S. at 344 ("The only question presented, therefore, is whether, on this record, the Commission's status as a state agency, *rather than a traditional voluntary membership organization*, precludes it from asserting the claims of the Washington apple growers and dealers who form its constituency. We think not.") (emphasis added). Indeed, a federal court has specifically found that Common Cause can establish associational standing under *Hunt*. *See Common Cause of Colorado v. Buescher*, 750 F. Supp. 2d 1259, 1272 (D. Colo. 2010).[12]

ADL is not a traditional voluntary membership organization, 2.RR.121, but it nevertheless has standing because its constituents are functionally equivalent to

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[11] *See also* 3.RR.404 (indicating on line 6 of Part VI, Section A of Common Cause's Form 990 that the organization had members).

[12] In any event, Common Cause satisfies the "indicia of membership" test. For example, one tranche of members pays dues and, more generally, members help to finance the organization. 2.RR.65, 76.

members – or, in the language of *Hunt*, they have adequate "indicia of membership" to establish standing. Defendants quote *Hunt* to for the proposition that *only if* the members "alone" elect the organization's leadership, serve on the governing body, and finance the organization can the organization satisfy the "indicia of membership" test. Appellants' Br. 27. But that is not what *Hunt* says. The quoted language was used by the Supreme Court to describe the characteristics of the specific organization at issue in *Hunt*; it is not a comprehensive set of requirements that must be met in order to establish standing. *See Hunt*, 432 U.S. at 344-45. Courts applying *Hunt* over the past four decades have looked to a much wider set of criteria to determine whether an organization has standing. Moreover, an organization need not meet every one of these criteria in order to establish standing. *See Envtl. Conservation Org. v. City of Dallas*, No. 3-03-CV-2951-BD, 2005 WL 1771289, at *2 (N.D. Tex. July 26, 2005) ("No court has ever required an organization to satisfy each and every indicia of membership.").

Properly understood, ADL plainly meets the "indicia of membership" test. For example, ADL's constituents voluntarily associate with the organization. 3.RR.305, 307, 360, 385; *see, e.g.*, *Envtl. Conservation Org.*, 2005 WL 1771289, at *2 ("Among the factors a court must consider are…whether the members voluntarily associate themselves with the organization…."). They participate in

guiding the policy of the organization. Indeed, ADL regional boards, including those in Texas, are routinely consulted on issues of national ADL policy. 2.RR.117-18; *see, e.g., Flyers Rights Educ. Fund, Inc. v. United States Dep't of Transportation*, 957 F.3d 1359, 1362 (D.C. Cir. 2020) (finding associational standing where, among other things "[t]he structure of the organization enables FlyersRights members to have direct input, and member input guides the organization's activity"); *cf. 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). ("The organization bears no relationship to traditional membership groups because most of its 'clients'…are unable to participate in and guide the organization's efforts."). They have input in selecting the organization's leadership. 2.RR.122; *see, e.g., AARP v. United States Equal Employment Opportunity Comm'n*, 226 F. Supp. 3d 7, 16 (D.D.C. 2016) ("Indicia of membership include: whether members play a role in selecting the organization's leadership…."). They sit on committees that oversee local and regional activities of the organization, provide input for its national committees that advise the Board of Directors on overall policy, and in general, play an active role in the governance of the organization. 2.RR.117-18; *see, e.g., id.* And they help to fund the organization (and in fact are the primary source of revenue for ADL). 2.RR.118;

3.RR.347; *see, e.g.*, *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 829 (5th Cir. 1997) ("The Court in *Hunt* looked to who elected the governing body of the organization and who financed its activities."). In addition, ADL's Board of Directors consists of ADL constituents, 2.RR.118, and the Board governs the organization, including selection of new members of the Board (and, before 2018, its prior governing body, the ADL National Commission), 3.RR.388 ("Commencing in 2018, ADL is governed by its Board of Directors."); *see, e.g.*, *AARP*, 226 F. Supp. 3d at 16 ("Although the wider AARP membership does not elect AARP's governing Board of Directors, directors are required to be AARP members, and are chosen by other members of the Board, i.e., by other AARP members."). Taken together, these indicia of membership are more than adequate to establish that ADL "is sufficiently identified with and subject to the influence of those it seeks to represent as to have a personal stake in the outcome of the controversy." *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 111 (9th Cir. 2003) (internal quotation marks omitted).

Second, contrary to Appellants' claims, the Organizational Plaintiffs have adequately pled and proved that their members have been injured by the Governor's October 1 Proclamation. Representatives from both organizations testified that their members included voters who were qualified to vote by mail,

lived in counties that previously offered satellite absentee ballot return locations, and were adversely affected by the Governor's October 1 Proclamation. 2.RR.65-69, 117-19, 124.

Nevertheless, Defendants argue that the Organizational Plaintiffs were required to name at least one individual member injured by the Governor's *ultra vires* act, because, according to Defendants, the U.S. Supreme Court has "unequivocally" held that naming an individual is required, except where all of an organization's members are injured by the challenged act. Appellants' Br. 27 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 498–99 (2009)). As an initial matter, Appellants' contention that the U.S. Supreme Court has "unequivocally" imposed this requirement is incorrect. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) ("We are not convinced that *Summers*…stands for the proposition that an injured member of an organization must always be specifically identified in order to establish Article III standing for the organization."). More importantly, Appellants' argument is inconsistent with Texas law. In *Texas Workers' Compensation Commission v. Garcia*, the Texas Supreme Court held that a labor union had standing to challenge the constitutionality of the Texas Workers' Compensation Act on behalf of its members, "[a]lthough there was no showing of specific members who have

suffered a compensable injury since the effective date of the Act[.]" 893 S.W.2d 504, 518 (Tex. 1995). Regardless of what the federal courts may require, the Texas Supreme Court has made clear that organizations do not need to identify specific members in order to establish standing in Texas state courts.

In any event, as Defendants concede, Common Cause *has in fact* identified an individual, injured member. Joanne Richards, a longtime Common Cause member, testified regarding the injury caused her by the Governor's October 1 Proclamation. Appellants' argument that Ms. Richards' testimony is inadequate to establish Common Cause's standing because she has not been injured by the Governor's Proclamation fails for the same reason as their more general attacks on the injury-in-fact prong of Plaintiffs' standing. *See* Part I.A.1, *supra*.

Finally, in addition to associational standing, the Organizational Plaintiffs have standing to sue because they have been directly injured by the Governor's October 1 Proclamation. Specifically, they have been forced to divert resources – including staff time and money – to counteract the adverse effects of the Proclamation. 2.RR.69-70,119-20.

Appellants' argument that these injuries are not cognizable should be rejected. Their supposition that the U.S. Supreme Court's recognition of organizational standing in *Havens Realty Corporation v. Coleman*, 455 U.S. 363

(1982) "is a controversial ruling that has not been broadly applied even in federal courts" is incorrect. Appellants' Br. 30-31. Organizational standing is a well-established federal court doctrine that has been widely applied.[13]

Furthermore, this Court's decision in *Texas Department of Family & Protective Services. v. Grassroots Leadership* is distinguishable. In *Grassroots Leadership*, an organization sought to establish organizational standing on the basis that it had diverted resources from its normal operations to advocating against the challenged rule. *See* No. 03-18-00261-CV, 2018 WL 6187433, at *5 (Tex. App.—Austin Nov. 28, 2018, no pet.) (mem. op.). This Court held that this "advocacy expenditure" was "too attenuated from any legally protected interest" the organization might have. *Id.* Here, by contrast, the Organizational Plaintiffs' claim to standing is not based on their expenditure of resources on advocacy against the challenged action. Rather, these organizations have had to, and will continue to have to, expend resources to directly ameliorate the effects of the Governor's Proclamation on their members. Because access to the ballot and, more

[13] *See, e.g.*, *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017); *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 98 (4th Cir. 2011); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 609 (5th Cir. 2017); *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 547 (6th Cir. 2004); *Common Cause Indiana v. Lawson*, 937 F.3d 944, 950 (7th Cir. 2019); *Smith v. Pac. Properties & Dev. Corp.*, 358 F.3d 1097, 1105-06 (9th Cir. 2004); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014).

generally, voting rights in Texas are top priorities of Organizational Plaintiffs, the resulting expenditures and diversion of resources to ameliorate the Governor's Proclamation have pronounced consequences for both Common Cause and ADL. This case is, therefore, more closely analogous to *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017). In that case, the Fifth Circuit held that the Organization of Chinese Americans had standing to challenge Texas's ballot translation assistance requirements based on the additional time and resources the organization would have to spend educating voters and volunteers about those requirements. *See id.* at 612.

B. Defendants Abbott and Hughs Are Not Entitled to Sovereign Immunity

1. The Governor's Limit on Ballot Return Locations Is *Ultra Vires*

It is well-established that claims for *ultra vires* acts are not barred by sovereign immunity. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 368 (Tex. 2009) (finding sovereign immunity "does not preclude prospective injunctive remedies in official-capacity suits against government actors who violate statutory or constitutional provisions."). Under the *ultra vires* doctrine, "a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Turner v. Robinson*, 534 S.W.3d 115, 126 (Tex.

App. 2017). Appellees' Petition clearly alleged, and evidence at the hearing established, that the Governor exceeded his authority under the Disaster Act when limiting ballot return locations.

Appellant Abbott does not have limitless authority to suspend statutes in the midst of a declared disaster. The suspension provision of the Texas Disaster Act is modeled off the suspension provision from the Model Emergency Health Powers Act, and that provision requires a relationship between the underlying emergency and the suspension. 2.RR.159-60.[14] Here, however, none of Appellants' claimed justifications for the limitation on ballot return locations are rationally related to the COVID-19 pandemic.

The Proclamation itself cites "ballot security" as the justification for limiting counties to a single ballot return location, but this interest plainly has nothing to do with an airborne pathogen. Nor did Appellants even attempt to put forth evidence demonstrating that ballot security motivated the Governor's promulgation of this limit. In fact, Appellants' own witness, Keith Ingram, agreed that the Proclamation's limit on ballot return locations was not necessary for ballot security because "security was capable of being covered at satellite offices." 2.RR.246-247.

[14] Appellants moved to exclude testimony from Appellee's expert in state and federal emergency powers, but the district court denied their motion. 2.RR.52-53.

Mr. Ingram further agreed that if counties followed statewide guidance on ballot collection and chain of custody at the satellite offices, then there would be "sufficient security in those service offices" for ballots collected at those locations to be counted. 2.RR.238. Appellants have also admitted that counties may operate multiple ballot return locations on Election Day, and have not demonstrated any distinct concern about the period "prior to" Election Day in comparison to Election Day itself.

The Proclamation also claims authority to limit the number of ballot return locations because Governor Abbott "may 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).[15] But the Governor's authority under this provision must also be exercised in a manner rationally related to the disaster – and here, the Governor's action does not limit occupancy but instead increases it. 2.RR.129.

Appellants attempt to correct this fundamental defect of the October Proclamation by arguing that it must be read together with the July 27 Proclamation, which Appellees have not challenged in this action. Appellants Br.

[15] This provision is also derived from the MEHPA, and so governed by the same rational relationship requirement as the suspension provision. 3.RR.166 (Vladeck Report ¶ 19).

39-40 (citing *Texas LULAC*, 2020 WL 6023310, at *5). The Fifth Circuit, however, was not opining as to whether authority exercised properly in the July 27 Proclamation could be imported to the October 1 Proclamation to cure it. And even if it had been, there is no way to reconcile the limitation in the October 1 Proclamation with the July 27 Proclamation's recognition that "social distancing and safe hygiene practices" are necessary to cope with the COVID-19 disaster. Simply put, Appellees did not challenge the July 27 Proclamation because the Governor exercised his suspension authority under the Disaster Act in a manner rationally related to the disaster. That is not the case with respect to the October 1 Proclamation.

Appellants mischaracterize Appellees' claims as a broad challenge to the Governor's legal authority under the Texas Disaster Act, and imply that, if the Proclamation's limit is found to be *ultra vires*, then Appellants would never be able to relax or amend restrictions adopted during a disaster. Appellants Br. 37-38. This is not so. Because the Governor's suspension authority under the Texas Disaster Act must be exercised consistent with and in response to the declared disaster, the Governor plainly has authority to relax or amend any adopted restrictions if the disaster conditions abate. But with COVID-19 still prevalent in Texas, the Governor's reduction of ballot return locations is incompatible with the

current conditions on the ground.

Appellants' action has no "real or substantial relation to the public health crisis." *See In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020). Appellants' reliance on ballot security and Tex. Gov't Code § 418.018(c) is merely a pretext, and therefore Appellants are not immune from suit.

2. Secretary Hughs Is Not Immune from Suit

The trial court properly denied the plea for jurisdiction as to Secretary Hughs for a separate reason: Hughs is the chief election officer of Texas. As already noted above, in that capacity, Hughs is the proper party to enjoin with respect to enforcement of the October 1 Proclamation. *See Texas League of United Latin Am. Citizens v. Abbott*, No. 1:20-CV-1006-RP, 2020 WL 5995969, at *15 (W.D. Tex. Oct. 9, 2020) (finding immunity did not bar suit against Secretary Hughs because "Hughs bears a sufficient enforcement connection to the October 1 Order under either the Election Code or the Texas Disaster Act")[16]; *OCA-Greater Houston v. Texas*, 867 F.3d at 613 (finding Secretary of State to be the proper defendant on a challenge to Texas voting law).

[16] The Fifth Circuit stayed the order on other grounds and "express[ed] no opinion about[] the Secretary's arguments concerning standing." *Texas League of United Latin Am. Citizens v. Hughs*, No. 20-50867, 2020 WL 6023310, at *4 (5th Cir. Oct. 12, 2020).

3. The October 1 Proclamation's Limit on Ballot Return Locations Fails Both The *Anderson-Burdick* Test And Rational Basis Review

Appellants argue that the October 1 Proclamation does not violate Appellees' right to vote, because there is no freestanding right to vote in the manner of one's choice. Appellants' Br. 57. But the fact that a voter can vote by alternate means does not cure the burdens that the October 1 Proclamation imposes on Appellees' ability to vote by using a ballot return location. In fact, courts around the country have held state-imposed burdens on the right to vote unconstitutional even when they only affected one option for voting, like absentee ballots. *See, e.g.*, *Thomas v. Andino*, 2020 WL 2617329, at *20 (D.S.C. May 25, 2020) (witness requirements for absentee ballot significantly burdened the plaintiffs' right to vote). This is particularly so during the current public health crisis. *See, e.g.*, *LWV of Va. v. Bd. of Elections*, 2020 WL 2158249, at *1, *8 (W.D. Va. May 5, 2020) ("In ordinary times, Virginia's witness signature requirement may not be a significant burden on the right to vote," but "these are not ordinary times."); *Garbett v. Herbert*, 2020 WL 2064101, at *12 (D. Utah Apr. 29, 2020) ("On balance, considering the current pandemic and the totality of the State's emergency measures to combat it, Utah's ballot access framework as applied this year imposed a severe burden…."); *Frederick v. Lawson*, 2020 WL

4882696, at *16 (S.D. Ind. Aug. 20, 2020) (state's rejection of absentee ballots for signature-matching without notice and opportunity to cure placed significant burden on the right to vote, especially during a pandemic); *Harding v. Edwards*, 2020 WL 5543769, at *4, *18 (M.D. La. Sept. 16, 2020) (ordering state to expand who can vote absentee and early voting period during COVID-19 pandemic).

Appellants' discussion of the October 1 Proclamation's burden on voters tellingly omits any reference to the current public health crisis. But this Court should not ignore the fact that the election is taking pace amidst a global pandemic. As a result, as already discussed above, Appellees face unique risks to their health from the closure of additional ballot return locations. Appellees originally sought to cast their ballots at ballot return locations because, as residents of populous counties, the presence of multiple ballot return locations ensured an efficient, secure, and safe means of voting. The October 1 Proclamation, however, resulted in the closure of those additional ballot return locations—meaning that Appellees will now face heightened health risks if they vote in person or use the single ballot return location (if they can access it all), or face the risk that USPS does not deliver their mail-in ballot in time.

The trial court found a substantial burden to Appellees' constitutionally protected right to vote, "as a consequence of increased travel delays, among other

things." Appellants' brief conveniently ignores the evidence presented on these burdens, because it demonstrated the burden is far from *de minimis*. Appellees' expert testified that 38 percent of eligible absentee voters in Harris County would face a travel burden of 70 minutes or more to return their ballots at the single ballot return location. 2.RR.188-190. Statewide, 90% of voters without access to a vehicle who are eligible to vote by mail would have to travel 90 or more minutes roundtrip to cast their ballots at the single return location. 2.RR.192. Appellee's expert also explained that tens of thousands of eligible vote by mail voters may forgo casting their ballots at all due to the long vehicle lines and wait times on Election Day, when demand for drop-off locations is at its highest – and that the October 1 Proclamation's ballot return limit will increase demand and concomitant congestion on Election Day, by reducing the proportion of voters who would otherwise cast drop off their mail ballots prior to Election Day. 2.RR.207-209.

Appellants invoke the State's interest in uniformity to justify the limit on ballot return locations, but it is a peculiar kind of uniformity. Appellants Br. 49. Ironically, Appellants argue that the counties' discretion to set up additional delivery locations "could result in disparate treatment among Texas voters," *id*., ignoring the fact that the limit on ballot return locations results in just that, because a voter in a larger, more populous county does not have the same access to a single

ballot return location as a voter located in a smaller, less populated county. Appellants argue that an unauthorized ballot return location in Fort Bend County somehow proves that uniformity across the state is needed, without considering the fact that other remedies short of burdening voters' right to vote could address such a situation. Appellants' Br. 50. Appellants also neglect to mention that, prior to the Proclamation, there *was* a statewide understanding of Texas Election Code § 86.006(a-1)—an understanding set forth by the Secretary of State in August 2020 and reaffirmed by Appellants in a judicial admission on September 30, 2020. CR.46. That understanding was that, under Texas code, local election officials had the authority to operate more than one "early voting clerk's office" to receive ballots. *Id*. This is underscored by the fact that Appellants have not prohibited local election officials from operating ballot return locations at multiple polling places *on Election Day*.

Appellants argue that voting fraud justifies the limit but their rhetoric is inconsistent with the testimony presented at the evidentiary hearing. Appellants presented no witnesses establishing that voter fraud was a likely result from operating multiple ballot return locations in the period prior to Election Day. To the contrary, the state provides guidance to counties on ballot security and ballot collection procedures, thus ensuring a consistent approach to ballot security across

the state. 2.RR.238; *see also* 3.RR.93 (Cortés Report ¶¶ 12-13) (identifying security protocols including storage in secure, sealed containers, maintenance of chain of custody documentation identifying those who safeguard and transport ballots, and voter identification procedures). The Texas Election Code already contains safeguards to protect against voter fraud because it requires voters returning ballots to a ballot return location to provide identification. TEXAS ELECTION CODE § 86.006(a-1). Voters must also sign a roster when delivering their ballots.

By invoking the interests of election fraud and uniformity, but not mentioning the pandemic, Appellants concede that the Proclamation's limit on ballot return locations has nothing to do with the current public health crisis. For this reason alone, the October 1 Proclamation cannot even pass rational basis review.

These inconsistencies expose the October 1 Proclamation for what it is: a power grab away from local election officials. Voters, however, are the collateral damage and the Texas Constitution does not allow that. The Court should therefore find that Appellants' claimed interests do not justify the burden on Appellees' voting rights, and further that the October 1 Proclamation cannot withstand rational basis review. The October 1 Proclamation impermissibly

burdens Appellees' right to vote and arbitrarily disenfranchises them.

II. THE COURT SHOULD AFFIRM THE TRIAL COURT'S INJUNCTION

A. Plaintiffs-Appellees have established a probable right to relief and irreparable harm

For the same reasons that Appellees have standing and that Appellants are not immune from suit, the trial court properly found that Appellees have a cause of action against Appellants, a probable right to relief, and would suffer irreparable harm in the absence of a temporary injunction. Here, the trial court's order stated that "the limit to a single drop-off location for mail ballots would likely needlessly and unreasonably increase risks of exposure to COVID-19 infections, and needlessly and unreasonably substantially burden potential voters' constitutionally protected rights to vote, as a consequence of increased travel and delays, among other things." It reached this conclusion after reviewing the parties' briefs and hearing testimony from ten witnesses in a day-long evidentiary hearing. Accordingly, the trial court did not abuse its discretion in ordering temporary injunctive relief. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002) ("The trial court does not abuse its discretion if some evidence reasonably supports the trial court's decision."); *Mattox v. Jackson*, 336 S.W.3d 759, 762 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

B. Equities Overwhelmingly Favor Multiple Ballot Return Locations

The Proclamation's limitation on ballot return locations is incompatible with the COVID-19 pandemic. By forcing more people to visit a single location – during a time when COVID-19 infection rates are plateauing, not improving[17] – the Proclamation significantly hinders the ability of voters and poll workers to protect themselves from COVID-19. Voters who previously were able to drop off their ballots at one of multiple return locations will now be forced to travel to just one return location. Texas is already seeing unprecedented levels of voter turnout during the early voting period; by limiting a safe and efficient option for voters to return their mail-in ballots, Appellants' action has impaired its own ability to keep voters safe.

The Proclamation's limit also imposes discriminatory burdens on voters based on where voters live and has a disparate impact on minority communities. Texas has 254 counties, most with substantially fewer voters and precincts than Texas's top 10 most populous counties, which include Harris, Travis, and Fort Bend.[18] Harris County has over 2.38 million registered voters—more than the

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[17] 3.RR.135 ¶¶ 13, 15; New Coronavirus Cases, Hospitalizations Plateau after Falling from Record Highs in July, TEXAS TRIBUNE (Apr. 14, 2020, last updated Oct. 7, 2020), available at: https://bit.ly/2IakXbn

[18] Tex. Sec'y of State, March 2020 Voter Registration Figures, https://www.sos.texas.gov/elections/historical/mar2020.shtml (last accessed Oct. 10, 2020).

number of registered voters in the 200 least-populated counties *combined*—and 1,012 precincts. Travis County had nearly 823,000 registered voters and 247 precincts. Yet Harris and Travis counties may only operate the same number of ballot return locations prior to Election Day as counties with less than 5,000 voters: one. And Harris is both the most populous Texas county and one of the state's geographically largest, but only 29.54% of its residents are white – which means that the burdens of the Proclamation will be disproportionately felt by Black and Hispanic Texans.

Finally, in the absence of an injunction, Appellees expect that 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 Election Day – because any action will escape judicial review under even an expedited timeline. The Court should firmly reject this notion by reinstating the injunction ordered by the trial court and providing voters with relief.

To be clear, any interest the Governor or SOS has in "ballot security"—the stated interest in the Oct 1 Proclamation—is not furthered by the Proclamation, nor is it a legitimate interest justifying the invocation of the state's Emergency Disaster Act. And the Proclamation would exacerbate health concerns due to COVID, not alleviate them.

C. The Trial Court's Order Is Proper

Contrary to Appellants' brief, there was nothing improper with the trial court's order. The order complies with Rule 683 of the Texas Rules of Civil by describing "in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained." Tex. R. Civ. P. 683. Paragraph 3 of the Order enjoins Appellants from implementing or enforcing the provision in the October 1 Proclamation that limits each county to a "single early voting clerk's office location that is publicly designated by the early voting clerk for the return of marked mail ballots under Section 86.006(a-1)." CR.206. The Order further referenced the needless and unreasonable increase of "risks of exposure to COVID-19 infections", and the needless and unreasonable burden to voters' rights to vote "as a consequence of increased travel and delays[.]" *Id*.

Relief in this instance would provide voters more options and thus would only ease the burdens imposed by the October 1 Proclamation. While time is running short, there is still time to reinstate ballot return locations prior to Election Day and provide this critical option to voters who are contending with unprecedented levels of voter turnout amidst a global pandemic.

Appellants harbor no confusion about what the trial court ordered them to do; they simply do not like the result. They now argue that the appropriate remedy

would have been to enforce Section 86.006(a-1) as written, but this would not redress the injury to Appellees from the October 1 Proclamation. Appellants cannot fashion their preferred remedy simply because they lost before the trial court.

CONCLUSION

Governor's Abbott's October 1 Proclamation disrupted the well-settled status quo at the eleventh hour before the upcoming election, and it upended the rules that local election officials and voters relied on in formulating their election plans. The trial court's temporary injunction restored the status quo that existed prior to the Governor's *ultra vires* act. Affirming the injunction will ease burdens on both voters and election administrators, in particular by restoring to local election officials the power and flexibility committed to them by the Texas Election Code. Moreover, it will discourage what would otherwise become an accepted practice of waiting until the last minute to enact impermissible restrictions on the right to vote on the misguided notion that the courts will not and cannot act merely because it is too close in time to the election.

The Court should affirm the trial court's temporary injunction order.

Dated: October 22, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 22, 2020, a true and correct copy of the foregoing document was served on all counsel of record using the Court's electronic case filing system.

/s/ Lindsey B. Cohan

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 12,554 words. All text appears in 14-point typeface, except for footnotes which are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Lindsey B. Cohan

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