No. 20-___

# In the Supreme Court of Texas

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

*Petitioners*,

*v.*

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

*Respondents.*

On Petition for Review
from the Third Court of Appeals, Austin

## EMERGENCY PETITION FOR REVIEW


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## Statement of the Case

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| *Nature of the Case*: | On July 27, 2020, Governor Abbott suspended two provisions of the Election Code to extend early voting by six days and to allow eligible voters to hand deliver mail-in ballots to the early-voting clerk on any day prior to Election Day (rather than limiting such delivery to Election Day, as required by the Election Code). CR.132. The Governor later issued a Proclamation on October 1 which amended and replaced the July 27 Proclamation, clarifying one suspension in response to reports that counties were applying it in a way that might undermine the integrity of and confidence in the election. CR.140. Plaintiffs, who include one voter and two non-membership-based organizations, sued the Governor and Secretary of State ("State Officials"), asserting that the Governor exceeded his authority under the Texas Disaster Act and the Texas Constitution when he issued the amended suspension in the October 1 Proclamation, which imposed certain conditions. CR.3. |
| *Trial Court*: | Honorable Tim Sulak, 353d District Court, Travis County |
| *Disposition in the Trial Court*: | The trial court denied separate jurisdictional pleas filed by the State Officials. CR.205. He also enjoined the State Officials from enforcing a single paragraph in the October 1 Proclamation, which limited hand-delivery of mail-in ballots to one location per county, on the ground that it unconstitutionally infringed the right to vote. CR.206. |
| *Parties in the Court of Appeals*: | The State Officials were the appellants in the Third Court of Appeals, and Plaintiffs were the appellees. |
| *Disposition in the Court of Appeals*: | The court of appeals affirmed in a per curiam opinion joined by Justices Goodwin, Kelly, and Smith. |

## Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.001(a).

## Issues Presented

The Plaintiffs in this case argue that Governor Abbott's recent proclamations expanding early-voting options unconstitutionally burden their right to vote. They sued the Governor and Secretary of State, effectively asking the trial court to rewrite the Governor's October 1 proclamation to expand voting options *even more* by eliminating one of the conditions that was part of a lawful suspension of Section 86.006(a-1) done pursuant to the Disaster Act. The trial court agreed and entered an injunction against the Governor and Secretary of State (the "State Officials"). The Third Court of Appeals affirmed earlier today. The State Officials now respectfully request this Court's emergency review. The issues presented are:

1. Whether Plaintiffs have standing to sue to enjoin the State Officials from enforcing a Proclamation that neither Official enforces and that expands voting opportunities beyond what is ordinarily permitted by the Election Code;
2. Whether Plaintiffs have overcome the State Officials' sovereign immunity where they have not pleaded a viable claim that (1) the Governor exceeded his authority under the Disaster Act, or (2) either State Official has violated the Texas Constitution under the prevailing *Anderson/Burdick* test;[1]
3. Whether Plaintiffs are entitled to a temporary injunction in the absence of concrete evidence of irreparable harm and a viable claim; and
4. Whether the temporary injunction was improper because it ordered the wrong remedy and failed to satisfy the Texas Rules of Civil Procedure.

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[1] *See Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

## To the Honorable Supreme Court of Texas:

Through a series of the issuance of the October 1 proclamation, Governor Abbott has offered eligible mail-in-ballot voters the most expansive array of opportunities to return their ballots in Texas history. Under the Election Code, eligible mail-in-ballot voters have two options for submitting their marked ballots: (1) by mail, or (2) by hand-delivery *on Election Day*. Exercising the authority conferred on him under the Texas Disaster Act, Governor Abbott has offered those eligible mail-in-ballot voters a third option: They may hand-deliver their marked ballots to one designated location per county any time leading up to Election Day. Governor Abbott's proclamation thus "effectively gives voters forty extra days to hand-deliver a marked mail-in ballot to an early voting clerk." *Tex. League of United Latin Am. Citizens v. Hughs*, 20-50867, 2020 WL 6023310, at *1 (5th Cir. Oct. 12, 2020) (*LULAC*).

Despite that unprecedented expansion of voting opportunities, Plaintiffs below sued, claiming that Governor Abbott's October 1 Proclamation expanding voting options somehow burden their right to vote. The Fifth Circuit recently rejected this same argument: "How this expansion of voting opportunities burdens anyone's right to vote is a mystery." *Id.* at *5, *9 (granting stay pending appeal). Yet the trial court below entered an injunction anyway, effectively rewriting Governor Abbott's suspension in the proclamation by removing one condition to allow eligible mail-in-ballot voters to hand-deliver their ballots to *any* county office (rather than one designated office). This afternoon, the court of appeals affirmed that injunction. The Governor and the Secretary of State now seek this Court's immediate emergency review.

The injunction against the Governor and Secretary is unlawful for multiple reasons. It rewrites the rules for the ongoing election, even millions of voters have already cast their ballots.[2] It thus flouts this Court's command from just two weeks ago that "[c]ourt changes of elections laws close in time to the election are strongly disfavored" due to the risk of disruption and confusion. *In re Hotze*, No. 20-0739, 2020 WL 5919726, at *3 (Tex. Oct. 7, 2020) (quotes omitted). In the process, it ignores well-established law from this Court regarding a plaintiff's standing to sue state officials and the scope of an official's sovereign immunity. And it is indefensible on the merits: A proclamation that expands voting options does not burden the right to vote. Indeed, the Governor's Proclamation strikes an eminently reasonable balance between broadening early-voting options for eligible voters while at the same time safeguarding the integrity of elections and combating voter fraud.

The temporary injunction is plainly unlawful. The Governor and Secretary therefore respectfully request that this Court grant review, summarily reverse the injunction below, and render judgment for the State Officials.

## Statement of Facts

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.

[2] Tex. Secretary of State, *General Election: Cumulative Totals,* https://earlyvoting.texas-election.com/Elections/getElectionEVDates.do.

CR.123-25. During such a disaster, the Legislature has expressly authorized the Governor to suspend "any regulatory statute prescribing the procedures for conduct of state business" when necessary to respond to a declared disaster. Tex. Gov't Code § 418.016(a). 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. The Governor authorized postponement of elections scheduled for May until July 14. Tex. Gov. Proclamation of Mar. 20. He also expanded the early-voting period for all July 14 elections so "election officials can implement appropriate social distancing and safe hygiene practices." CR.126-28. 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 Election Code—but also greatly expanded the ability for eligible mail-in-ballot voters to hand-deliver their ballots. *See* CR.130-32.

Before the July 27 Proclamation, an eligible voter 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(a)(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 a voter's ability to put a mail-in ballot in the mail or how to hand-deliver it on Election Day, but it expanded options

for eligible voters by allowing hand-delivery of mail-in ballots *at any point prior to Election Day*.[3] 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).

While almost all 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—a handful of 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" before the July 14 primary runoff. Harris County Clerk, Press Release, *Harris County Clerk Chris Hollins Announces Vote by Mail Drop-Off Locations* (July 13, 2020), https://www.cclerk.hctx.net/PressReleases/Vote%20By%20Mail%20Drop-off_en-US.pdf. Travis and Fort Bend Counties proposed to follow suit during the general election.[4] But it soon became clear that these counties were not following state law, including regarding the proper designation of annex locations

[3] Millions of Texans took advantage of these extra early-voting days by voting before the date on which the Election Code typically allows early voting to begin. *See* Cayla Harris, *Texas leads nation in early voting totals, with 4 million ballots cast*, Houston Chronicle (Oct. 19, 2020), https://www.houstonchronicle.com/politics/texas/article/Texas-leads-nation-early-voting-totals-4-million-15658301.php.

[4] 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.

and providing adequate election security, such as the opportunity for poll watchers to observe hand-deliveries of ballots, at these annexes. In particular, Fort Bend County proposed to use locations as delivery locations that were not the office of the Elections Administrator, which the administrator *knew* was unlawful under the Election Code. 2.RR.232. 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 LULAC*, 2020 WL 6023310, at *6-7.

To address these disparate and potentially dangerous practices, the Governor issued his October 1 Proclamation to amend and replace the July 27 Proclamation. The October 1 Proclamation clarified the suspension of Election Code section 86.006(a-1), which allowed more time for hand-delivery of mail-in ballots, applies only when an eligible absentee voter is, prior to Election Day, hand-delivering a mail-in ballot (1) at a county's single designated delivery location, which (2) can be monitored by poll watchers. CR.137-40. The October 1 Proclamation adds substantially more time for eligible voters to hand-deliver mail-in ballots leading up to Election Day, and does not address or affect what the Election Code allows on Election Day itself or the ability of any eligible absentee 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. CR.3-28. The trial court held a hearing at which Plaintiffs offered no evidence that any voter had been unable to vote as a result of the October 1 Proclama-

tion—or even that the Proclamation had resulted in lines at delivery locations. Nevertheless, the trial court enjoined enforcement of just one condition of the suspension—the condition that counties limit delivery to a single location—because the court said it "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 votes." CR.206. The trial court denied the State Officials' jurisdictional pleas without explanation. CR.205. The State Officials immediately appealed. CR.208-12.

The court of appeals affirmed the injunction. App. A. It wrote that "appellees have stated 'viable' ultra vires constitutional claims" because the October 1 Proclamation "limits the early voting clerks' statutory authority to accept mail ballots at multiple return locations." *Id.* at 14. In its view, the Proclamation changed the law by limiting the meaning of an "early voting clerk's office," as that term is used in Texas Election Code section 86.006(a-1) in a way that is "contrary to the Attorney General's September 30 representation to the Texas Supreme Court." *Id.* at 18.

## Summary of the Argument

Review is necessary in this case because the courts below have seriously confused whether or when a plaintiff may sue a statewide official based on disagreements with generally applicable law. This is so for two reasons.

*First*, Plaintiffs' claims fail on jurisdictional grounds, including that Plaintiffs lack standing because they have not suffered any concrete injury. Moreover, because neither the Governor nor the Secretary enforces the October 1 Proclamation, any

injury is not traceable to their actions. The State Officials' lack of authority to enforce the Proclamations is also critical because it shows Plaintiffs did not meet their burden to establish a waiver of sovereign immunity.

*Second*, Plaintiffs have not stated a viable claim that the Governor violated the Disaster Act or that either State Official burdened Plaintiffs' right to vote. The lower courts' decision that the Governor may not issue a suspension with conditions or amend a prior suspension made available by an Executive Order or Proclamation creates a pernicious one-way ratchet that finds no support in the Disaster Act. Moreover, until now, "Texas cases [have] echo[ed] federal standards when determining whether a statute violates" the constitutional provision Plaintiffs invoke in support of their undue-burden claims. *Rose v. Doctors Hosp.*, 501 S.W.2d 841, 846 (Tex. 1990). The Fifth Circuit has already examined the *exact same claims* and held that the October 1 Proclamation is constitutional because it is "part of an *expansion* of absentee voting in Texas, not a *restriction* of it." *LULAC*, 2020 WL 6023310 at *1. The lower courts' opposite conclusion both creates confusion and invites forum shopping when a plaintiff claims that a governmental action burdens his or her right to vote. This error implicates both sovereign immunity and Plaintiffs' ability to obtain injunctive relief.

## Standard of Review

This Court reviews issues pertaining to its jurisdiction and Plaintiffs' entitlement to a temporary injunction de novo. *See EBS Sols., Inc. v. Hegar*, 601 S.W.3d

744, 749 (Tex. 2020); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). It reviews the temporary injunction itself for abuse of discretion. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

## ARGUMENT

### I. Review Is Necessary Because the Lower Courts Have Misapplied this Court's Standing Jurisprudence, Exacerbating Existing Confusion.

Review is necessary because the decision below exacerbates already existing confusion about when plaintiffs may sue the Governor or Secretary of State based on generally applicable law. "[S]tanding is a constitutional prerequisite to maintaining a suit" in Texas courts. *Tex. Ass'n. of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). It requires "a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Heckman v. Williamson County*, 369 S.W.3d 137, 154 (Tex. 2012). To meet those requirements, the party invoking the court's jurisdiction must show (1) an "injury in fact" that is both "concrete and particularized" and "actual or imminent"; (2) that the injury is "fairly traceable" to the defendant's challenged actions; and (3) that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 154-55.

**A.** The court of appeals found standing based entirely on a single voter: Robert Knetsch. App. A 12-13. He lacks standing, however, because he has not shown evidence of anything more than an "undifferentiated public interest in executive officers' compliance with the law," which does not confer standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992); *see also Brown v. Todd*, 53 S.W.3d 297, 302 (Tex.

2001). It is undisputed that every voter who is affected by the suspension at issue in the October 1 Proclamation may vote by mail. *E.g.*, 2.RR.74; 2.RR.86-87. Knetsch has acknowledged that he had his mail-in ballot as of the hearing date, three weeks before Election Day, 2 RR.139-40, and could return that ballot via mail at any time. 2.RR.151. He simply prefers to return the ballot in person because "there's been discussion about potential issues with the postal service's ability to serve election mail." 2.RR.140. But there is no evidence in the record that any such "issues" would result in *three-week* delays. And his concerns about catching COVID-19 do not satisfy standing, *contra* App. A at 13, because the same risks apply both if Knetsch drops off his ballot in person and if he votes in person—under both scenarios he has to interact with other voters and with poll workers. Indeed, the only medical testimony in the record is that the way to avoid the spread of COVID-19 is for Knetsch to mail in his ballot. 2.RR.132-33. That stated desire and speculation about "potential issues" do not show a cognizable injury sufficient to confer standing. *Waco ISD v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000).

**B.** The court of appeals did not reach the Organizational Plaintiffs' standing because of its conclusion that Knetsch had standing, but they lacked standing too. App. A at 12. The two Organizational Plaintiffs have failed to show standing because they have not alleged that they have any members. "[A]n association has standing to sue on behalf of its members when '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Tex. Ass'n of Bus.*,

852 S.W.2d at 446 (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). To be a "member" under the *Hunt* test, an individual must be one of those who "elect the members of the [organization's leadership]; they alone may serve on the [body leading the organization]; they alone finance [the organization's] activities, including the costs of this lawsuit, through assessments levied upon them." 432 U.S. at 344.

The Organizational Plaintiffs *admitted* that they do not satisfy this test. ADL's vice president testified that ADL "is not a traditional membership organization." 2.RR.121. Indeed, ADL represented to the IRS that it has no members, stockholders, or other persons with the power to elect or appoint one or more members of the governing body. 2.RR.121; 3.RR.311. ADL's "constituents" do not elect the leadership, 2.RR.122; or pay membership dues to fund ADL's activities, 2.RR.123; 3.RR.308.

Similarly, Common Cause has admitted that it does not have members who have the power to elect its leadership. 2.RR.72; 3.RR.404. Its decisions are not subject to approval by anyone other than the governing body. 2.RR.72–73; 3.RR.404. Common Cause collects zero dollars in membership dues. 2.RR.73; 3.RR.408. It did present the testimony of one self-described member, but assuming she is a "member" within the meaning of *Hunt*, she has not been injured because she too could return her ballot at any time. 2.RR.83-84.

**C.** Finally, none of the Plaintiffs showed that any injury was traceable to or redressable by *these defendants.* The court of appeals excused Plaintiffs from demonstrating that either State Official enforced the Proclamation because "appellees are

not complaining about the threat of enforcement for non-compliance with the proclamation but the proclamation *itself*, and the proclamation has the force of law." App. A at 13. That is a misapplication of the Court's standing jurisprudence.

This Court has held that to challenge an executive order (or, as here, a proclamation), the plaintiff must sue the party responsible for the enforcement of the particular order, *not* the Governor. *See In re Abbott*, 601 S.W.3d. 802, 812 (Tex. 2020). The Secretary does not enforce the Election Code writ large and does not enforce section 86.006(a-1) in particular. *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972). That is the job of local early-voting clerks, Tex. Elec. Code § 83.001, and refusal to comply may be prosecuted by local prosecutors. Tex. Gov't Code §§ 418.012, 418.016. The Secretary similarly does not enforce the Governor's Proclamations. CR.140 (requiring only that Secretary "take notice" and "transmit" the Proclamation to local authorities). That means "the effect of the court's judgment on the [Secretary]" would not provide relief. *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (emphasis omitted). Plaintiffs cannot show that ordering the Governor or Secretary to refrain from enforcing the Proclamation will "significantly increase the likelihood" that local election officials will ignore it. *Id.*[5]

These standing issues are dispositive and an appropriate basis to render judgment to the State Officials.

[5] For similar reasons, the courts below misapplied this Court's sovereign immunity jurisprudence.

## II. Review is Necessary Because the Lower Courts Misapplied the Relevant Legal Tests to Both of Plaintiffs' Claims.

**A.** Plaintiffs have not pleaded, let alone proven, a likelihood of demonstrating that either the Governor or the Secretary acted *ultra vires* here. The Governor acted under the powers expressly granted to him by the Disaster Act, and the Secretary did not take any relevant action at all.

**1.** *The Governor did not act ultra vires.* The Governor, under the powers expressly granted to him by the Disaster Act, has the authority to suspend "any *regulatory statute* prescribing the *procedures* for conduct of state business" when necessary to respond to a declared disaster. Tex. Gov't Code § 418.016(a) (emphases added). "The July 27 and October 1 Proclamations . . . must be read together to make sense." *LULAC*, 2020 WL 6023310, at *5. The only suspension at issue *expanded* early-voting options. *Id.* Contrary to Plaintiffs' theory, the Governor's suspension of certain Election Code provisions did not *become* unlawful merely because the Governor amended that expansion to ensure electoral integrity. And Plaintiffs' position that this Court should judge this suspension as two separate proclamations, or as three separate suspensions because of two conditions, is wrong. There is only one suspension at issue here. The Governor's authority to add conditions to a suspension is undisputedly supported by Section 418.016(a) of the Texas Government Code, the same authority that supported the July 27 Proclamation's suspension of the temporal restriction to Election Day.

Further, the Court should grant review because the court of appeals adopted a theory that not even the Plaintiffs seriously advocated: namely that by limiting his

suspension to counties with only one drop-off location, he changed the meaning of "early-voting clerk's office" in the Election Code. The court of appeals' decision to was based on a misinterpretation of a brief that this office filed in *In re Hotze*, 20-0751. In *Hotze*, this Court asked whether, consistent with the terms of the July 27 Proclamation, a county clerk who operates multiple offices in the ordinary course of business may collect ballots at these other locations. He could because, by default under the Election Code, "[t]he county clerk is the early voting clerk for the county." Tex. Elec. Code § 83.002. When the county clerk serves as the early-voting clerk, a county clerk's office constitutes an "early voting clerk's office" under Section 86.006(a-1), and when the county clerk has more than one office in the ordinary course, those offices can accept ballots. The October 1 Proclamation was aimed at a different scenario: Rather than modifying the meaning of the Election Code, its conditions clarified that during the suspension's expanded period for hand-delivery of mail-in ballots, delivery could occur only at designated locations. This was warranted to facilitate the allowance of poll watchers at the delivery locations and to address other reports about certain counties. Fort Bend County was prepared to accept ballots at locations that were *not* the early-voting clerk's ordinary offices. 2RR.228-31. As the Election Code plainly states, only an "early voting office" is authorized to receive in-person delivery of mail-in ballots, meaning that any votes cast in such locations were liable not to be counted. Tex. Elec. Code § 86.006(a-1). Nothing in the Election Code, however, prevents the Governor from conditioning his suspension of the Election Code under the Disaster Act to prevent such unlawful procedures. Indeed, Plaintiffs' own purported expert acknowledged that this was not the case; that

if the Governor had only issued his October 1 Proclamation, it would have been legal. 2.RR.164-65. Plaintiffs' only theory was that the October 1 Proclamation was unlawful because it cut back on the July 27 Proclamation. Such a theory is without merit because it creates a pernicious one-way ratchet unsupported by the text of the Disaster Act. There is only one suspension before the Court—that contained in the October 1 Proclamation—and it was valid under the Texas Disaster Act.

**2.** *The Secretary could not have acted ultra vires.* The Plaintiffs' amended complaint does not allege that the Secretary has done anything that exceeds her statutory authority. CR.196-97. The Plaintiffs have not identified any authority that would authorize the Secretary to take any action in contravention of the Governor's proclamations, so any *ultra vires* claim against her must fail. *See In re Hotze*, 2020 WL 5919726, at *6 (Blacklock, J., concurring). The court of appeals' conclusion to the contrary is particularly troubling because Plaintiffs added the Secretary after the federal district court concluded, similar to this Court, that the Governor is not a proper defendant to challenge the October 1 Proclamation because he does not enforce it. *Tex. League of United Latin Am. Citizens*, No. 1:20-CV-1006-RP, 2020 WL 5995969, at *15 (W.D. Tex. Oct. 9, 2020). Allowing a court to second-guess the Governor's judgment is no more consistent with the Disaster Act because Plaintiffs named the Secretary as a defendant than it was when they named only the Governor.

**B.** Plaintiffs' two closely related "right to vote" claims similarly do not state viable claims for relief. Plaintiffs argue that the Governor's October 1 Proclamation violates article I, section 3 the Texas Constitution. As we will explain in our forthcoming briefs, that argument fails for at least three reasons.

*First*, the Proclamation does not even implicate, much less burden, the right to vote. In examining voter-rights claims under the Texas Constitution, this Court has looked to how federal courts have dealt with similar voting-rights claims under the Equal Protection Clause of the United States Constitution. *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 11-14 (Tex. 2011). The United States Supreme Court has distinguished "the right to vote" from the "claimed right to receive absentee ballots." *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). Because the Plaintiffs here have numerous other options for casting their ballot early or on Election Day, Plaintiffs have "overstated the 'character and magnitude' of the burden allegedly placed on voting rights by the October 1 Proclamation." *LULAC*, 2020 WL 6023310, at *5. Indeed, the Fifth Circuit noted, "one strains to see how it burdens voting at all." *Id.* (quoting *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387–88 (5th Cir. 2013)); *see also id.* ("How this expansion of voting opportunities burdens anyone's right to vote is a mystery.").

*Second*, the Proclamation survives any *Anderson-Burdick* review, which is the prevailing test under both federal and state law. *Andrade*, 345 S.W.3d at 11-14. Plaintiffs' professed burden is at best minimal, and more likely non-existent. Plaintiffs continue to have numerous options for returning their mail-in ballot (either early or on Election Day), and many of those options were provided by the very Proclamations that they now challenge. *See LULAC*, 2020 WL 6023310, at *6. The State's interests, by contrast, more than justify the supposed burden. The State's interests in uniform application of the Election Code, eliminating potential for voter fraud,

and ensuring that every ballot is counted (and avoiding an election contest) all shift the scale decidedly in the State Officials' favor.

*Third*, the October 1 Proclamation does not implicate the right to vote at all, and as a result, it does not cause any disenfranchisement. Plaintiffs' entire argument to the contrary depends on *Bush v. Gore*, 531 U.S. 98 (2000). But, even in federal courts, *Bush* has been limited to its facts. *LULAC v. Abbott*, 951 F.3d 311, 317 (5th Cir. 2020). Even if this Court were to conclude that such a claim was viable under federal law (and it is not), those facts do not exist here: In *Bush*, the State was trying to intuit the subjective intent of the voter based on standards that "might vary not only from county to county but indeed within a single county." 531 U.S. at 106. Here, the Proclamation is trying to *eliminate* disparate treatment driven by the subjective preferences of local election officials by establishing a single, statewide rule that is easily administrable. It is for that reason the Fifth Circuit rejected this claim too. *LULAC*, 2020 WL 6023310, at *8. Because the State Officials' reasons for creating such a statewide rule are legitimate, they cannot be arbitrary. *Id.*

The court of appeals' decision to the contrary is highly problematic for the management of elections in this State. Until now, Texas courts have long followed federal standards in interpreting article I, section 3 of the Texas Constitution. *Andrade*, 345 S.W.3d at 11-14. The decision below, by contrast, sets up a direct conflict with the Fifth Circuit about the legality of the *exact same executive action.* This Court should intervene.

## III. Summary Reversal Is Warranted.

For the reasons described above, the temporary injunction cannot be defended on the merits, exceeds the trial court's jurisdiction, and flouts this Court's frequent admonishments not to interfere in ongoing elections. The State Officials therefore respectfully request that the Court summarily reverse the court of appeals and vacate the injunction without further briefing and render judgment for the State Officials.[6]

## Prayer

The Court should grant the petition for review, summarily reverse the court of appeals, vacate the injunction, and render judgment for the State Officials.

Respectfully submitted.


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[6] In the alternative, the Court should treat this Petition as the State Officials' opening brief on the merits or allow them to rely on the briefs they filed in the court of appeals without the necessity of further filings. *See* Tex. R. App. P. 2, 55.5.

## Certificate of Service

On October 23, 2020, this document was served electronically on Lindsey B. Cohan, lead counsel for Respondents, via lindsey.cohan@dechert.com.

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/s/ Lanora C. Pettit
Lanora C. Pettit

No. 20-___

# In the Supreme Court of Texas

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

*Petitioners*,

*v.*

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

*Respondents.*

On Petition for Review
from the Third Court of Appeals, Austin

## APPENDIX

# Tab A:
# Court of Appeals' Order

# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-20-00498-CV**

**Greg Abbott, in his Official Capacity as the Governor of Texas; and 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; and Robert Knetsch, Appellees**

**FROM THE 353RD DISTRICT COURT OF TRAVIS COUNTY**
**NO. D-1-GN-20-005550, THE HONORABLE TIM SULAK, JUDGE PRESIDING**

## MEMORANDUM OPINION

**PER CURIAM**

In this accelerated appeal, Greg Abbott, in his official capacity as the Governor of Texas, and Ruth Hughs, in her official capacity as the Texas Secretary of State, (collectively the State Officials) appeal the trial court's interlocutory order that denied their respective pleas to the jurisdiction and granted temporary injunctive relief. For the following reasons, we affirm the trial court's order.[1]

[1] On October 19, the notice of appeal was filed, and appellees filed an unopposed motion for expedited consideration. In response, we requested an expedited schedule for briefing, and the appeal has proceeded in an expedited manner. *See* Tex. R. App. P. 2 (authorizing appellate court to suspend rule's operation to expedite decision or for other good cause).

## BACKGROUND

"The secretary of state is the chief election officer of the state." Tex. Elec. Code § 31.001; *see, e.g.*, *id.* § 31.004(a) ("The secretary of state shall assist and advise all election authorities with regard to the application, operation, and interpretation of this code and of the election laws outside this code."). Local election officials, however, are designated as the officials "in charge of and responsible for the management and conduct of the election" in the election precinct that they serve. *Id.* § 32.071 ("The presiding judge is 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."); *see id.* § 32.031(a) (requiring presiding judge for each election precinct to appoint election clerks to assist in conducting election). And the early voting clerks, who are the county clerks for general elections, are the officials who are responsible for managing and conducting early voting. *Id.* §§ 83.001(c) (stating that early voting clerk generally "has the same duties and authority with respect to early voting as a presiding election judge has with respect to regular voting"), .002(1) (stating that county clerk is early voting clerk for county in general election).

To vote early by mail, a registered voter must meet specific eligibility requirements, *see id.* §§ 82.001–.004 (providing eligibility requirements), and comply with other provisions, such as applying for the ballot, *see id.* § 84.001, and returning the marked ballot to the early voting clerk in the official carrier envelope, *see id.* § 86.006(a). Among the voter's options for returning the ballot to the early voting clerk is delivering it "in person to the early voting clerk's office [but] only while the polls are open on election day." *Id.* § 86.006(a-1). The parties agree that when the early voting clerk is the county clerk, the "early voting clerk's office"

includes the clerk's main and satellite offices. *See* Tex. Gov't Code § 311.012(b) (stating that singular includes plural).

On March 13, 2020, the Governor issued a proclamation certifying that "COVID-19 poses an imminent threat of disaster" in this state and declaring "a state of disaster for all counties in Texas." *See id.* § 418.014(a) ("The governor by executive order or proclamation may declare a state of disaster if the governor finds a disaster has occurred."). He has renewed the disaster declaration monthly, *see id.* § 418.014(c) (requiring governor to renew state of disaster every thirty days), and issued subsequent proclamations addressing the disaster. On July 27, the Governor issued a proclamation because of the COVID-19 pandemic to "ensure that elections proceed efficiently and safely when Texans go to the polls." Relevant here, the Governor "suspend[ed] 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." As support for the partial suspension of this statutory provision, the Governor cited his powers under the Texas Disaster Act of 1975, expressly citing sections 418.014 and 418.016, *see id.* §§ 418.014, .016(a) ("The governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster."); *see also id.* § 418.011 (stating that governor is responsible for meeting dangers to state and people presented by disaster). The Governor also found, in "consultation" with the Secretary, that for the November 3 election, "strict compliance with the statutory requirements" in section 86.006(a-1) "would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster."

The Governor's July 27 Proclamation was challenged by a petition for writ of mandamus filed directly with the Texas Supreme Court on September 23. *See generally In re Hotze*, __ S.W.3d __, No. 20-0739, 2020 Tex. LEXIS 927 (Tex. Oct. 7, 2020) (orig. proceeding). The Texas Supreme Court denied the petition, explaining that the relators' delay in bringing the challenge precluded consideration of their claims. *Id.* at *4. The Court observed that "the election [was] already underway," that the "Harris County Clerk has represented to the Court that his office would accept mailed-in ballots beginning September 24," and that "[t]o disrupt the long-planned election procedures as relators would have us do would threaten voter confusion." *Id.* Neither party in this case has challenged the July 27 Proclamation. Thus, for purposes of this appeal, it has "the force and effect of law." *See* Tex. Gov't Code § 418.012 (authorizing governor to issue proclamations that have "the force and effect of law").

After several Texas counties, including Harris and Travis, announced their intentions to have multiple ballot return locations in their counties, and shortly before the Texas Supreme Court's disposition of the *In re Hotze* original proceeding declining to overturn the July 27 Proclamation, *see* 2020 Tex. LEXIS 927, at *4, the Governor issued a proclamation on October 1 that amended the July 27 Proclamation to require the early voting clerk to designate a single location for returning a mail ballot beginning on October 2, as follows:

> 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 . . . .[2]

Included in this amendment, the Governor declared that "an amendment to the suspension of the limitation on the in-person delivery of marked mail ballots, as made in the July 27 proclamation, is appropriate to add ballot security protocols for when a voter returns a marked mail ballot to the early voting clerk's office" and also cited provisions of the Texas Disaster Act, including sections 418.011, 418.012, 418.016 and 418.018(c). *See* Tex. Gov't Code §§ 418.011, .012, .016(a), .018(c) ("The governor may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area."); *see also id.* § 418.012 (authorizing governor to amend proclamations issued under chapter).

On October 5, the Anti-Defamation League Austin, Southwest, and Texoma Regions; Common Cause Texas; and Robert Knetsch sued the Governor, seeking declaratory and injunctive relief from the October 1 Proclamation.[3] They sought declarations that "Texas law, including Texas Election Code § 86.006(a-1), does not limit the number or locations of early voting drop-off sites that the statutory Early Voting Clerks may provide to the voters of their respective counties" and that the October 1 Proclamation was "an unconstitutional infringement of equal protection and voting rights as protected by Article 1, Section 3 of the Texas Constitution." They further sought temporary and permanent injunctive relief to enjoin "the

[2] The October 1 Proclamation also requires the early voting clerk to allow "poll watchers the opportunity to observe any activity conducted at the early voting clerk's office location related to the in-person delivery of a marked mail ballot," but this requirement has not been challenged.

[3] The amendment in the October 1 Proclamation at issue here also has been challenged in the federal courts. *See generally Texas League of United Latin Am. Citizens v. Hughs*, No. 20-50867, 2020 U.S. App. LEXIS 32211 (5th Cir. Oct. 12, 2020).

enforcement of [the Governor]'s proclamation forcing the statutory Early Voting Clerks to operate only one drop-off location for vote-by-mail ballots." Appellees attached exhibits to their petition, including the Attorney General's September 30 letter with attachments that was filed with the Texas Supreme Court in *In re Hotze*. In that letter, the Attorney General represented to the Texas Supreme Court that "office," as used in section 86.006(a-1) of the Election Code, includes its plural, "offices," and that "the Secretary of State has advised local officials that the Legislature has permitted ballots to be returned to any early-voting clerk office." One of the attachments to the letter was an August 26 email sent from the Secretary of State's office that confirmed: "Because the hand-delivery process can occur at the early voting clerk's office, this may include satellite offices of the early voting clerk."

The Governor answered and filed a plea to the jurisdiction, and appellees filed an amended petition that added the Secretary as a defendant. On October 13, the trial court held a remote hearing on appellees' request for temporary injunctive relief and the State Officials' pleas to the jurisdiction. The Secretary waived service during the hearing and subsequently filed her plea to the jurisdiction. Appellees' witnesses during the hearing were the Executive Director of Common Cause Texas; one of Common Cause Texas's members; a Vice President of the Anti-Defamation League's Central Division; Knetsch, a registered voter in Harris County over the age of 65; Thomas Randall Smith, a registered voter in Harris County over the age of 65 with compromised health; and experts Edgardo Cortés, Dr. Krutika Kuppalli, Stephen Vladeck, and Dr. Daniel Chatman. The exhibits included the experts' respective reports. The State Officials' sole witness was Keith Ingram, the Director of the Elections Division for the Secretary.

Cortés testified about ballot security, describing the security measures in place at the early voting clerks' offices, the necessity of providing additional methods for voters to return

mail ballots in person in light of the COVID-19 pandemic, and the reasons behind his opinion that the security measures in place in Travis and Harris Counties were adequate to protect the integrity of the electoral process at their return locations for mail ballots. He explained that the mail ballots are logged and placed in secured and sealed ballot containers by a bipartisan team. He further testified that limiting the return of the mail ballots to one drop-off location would be a "barrier" to voting and explained his reasoning for his opinion.[4]

Kuppalli, an assistant professor in the field of infectious disease, testified that COVID-19 is a concern in Texas and that increased concentrations of people that leads them to be closer together facilitates the transmission of COVID-19 and will exacerbate the COVID-19 crisis. She testified: "We know that decreasing the number of individuals that have to stand in line and the density of individuals congregating in general reduces the risk of COVID-19 transmission." In her report, she further stated: "Changing the rules for voting one month prior to election day serves to not only disenfranchise voters but will cause individuals to unnecessarily place themselves at risk for COVID-19." Vladeck, a law professor, testified as an expert on the Texas Disaster Act and its relation to the Model Emergency Health Powers Act

[4] He testified to the reasons behind his opinion as follows:

> The—the geographical size of the counties in Texas is pretty substantial. And so, for a voter to reach one of—if there's only a single location, it may be quite extraordinary effort on the part of the voter to figure out a means to get transportation to the site to drop off. In addition to that, if you are funneling voters into one just location for in-person drop-off, because of the way the processes and procedures work, especially with the logging and provision of photo I.D., you could have a situation where you then are 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.

The State Officials did not offer contradicting evidence.

(MEHPA). He was not aware of another example where ballot security was offered as the specific reason for a measure tied to a state disaster act that is "largely derived" from the MEHPA. In his opinion, section 418.016 requires a relationship between the underlying emergency and the suspension and the challenged portion of the October 1 Proclamation "lack[ed] such a connection to the underlying disaster."

Chatman provided analysis concerning the increased travel burden and length of lines at the ballot return locations that are permitted under the October 1 Proclamation. It was his opinion that the reduction of return locations had a disparate impact on minority communities.[5] Smith also testified about his specific travel and health problems and that the October 1 Proclamation had made it harder for him to vote. His travel time increased from five minutes to drop off his ballot to having to drive for forty-five minutes, and he testified that he "can't drive for 45 minutes."

[5] For example, based on his study, Chatman determined that there was a 90-minute travel burden for some absentee eligible voters and that this burden on a statewide basis had a disparate impact among African Americans and Hispanics. He testified:

> I looked at the major race ethnicity groups in the state to determine whether or not there was a disparate impact among African Americans and Hispanics. And what I found was that, indeed, African Americans, due to the fact that they were less likely to have auto access in the household, were also twice as likely as whites, who are also eligible for an absentee ballot, to have a roundtrip exceeding 90 minutes. So there was around 14 and a half percent for African Americans compared to around 7 percent for whites. The multiplier for Hispanics was not quite as stark, but it was 24 percent higher than whites.

He further testified that it varied by counties, providing specific examples, such as in Harris County, "African Americans are 1.5 times as likely to have a travel burden exceeding 90 minutes; whereas, Hispanics are 90 percent as likely, so probably within statistical bounds of being roughly the same as whites." The State Officials did not offer contradicting evidence.

On behalf of the State Officials, Ingram testified that the October 1 Proclamation did not affect election day; that "[i]n the July 14th primary runoff, Harris County used its annex offices as hand-delivery locations on election day"; that this use was "within the language of the statute"; and that, on the general election day, "early voting clerk's office" as used in section 86.006(a-1) includes the county clerks' satellite offices and that mail ballots returned to the satellite offices on election day "should be" counted. He explained that they "have continued with our interpretation that Early Voting Clerk's office includes offices of the County Clerk in the county." He also agreed from his perspective that "security was capable of being covered at the satellite offices" during the early voting period because, among other reasons, poll watchers were allowed to observe the process at each location under the October 1 Proclamation. The State Officials, however, did not present evidence to contradict appellees' evidence about the COVID-19 pandemic.

On October 15, the trial court signed the order denying the State Officials' respective pleas to the jurisdiction and granting temporary injunctive relief as follows:

> Plaintiffs' Application for Temporary Injunction is GRANTED, enjoining Defendants, their officers, agents, servants, employees, attorneys, and those inactive concert or participation with them from implementing or enforcing the following paragraph on page 3 of Defendant Abbott's 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 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.

The State Officials filed their notice of interlocutory appeal on October 19.

## ANALYSIS

In three issues, the State Officials challenge the trial court's jurisdiction and the temporary injunction. We begin with their jurisdictional issues that challenge the trial court's denial of their pleas to the jurisdiction.

### Plea to the Jurisdiction

"A plea to the jurisdiction challenges the court's authority to decide a case." *Heckman v. Williamson County*, 369 S.W.3d 137, 149 (Tex. 2012). We review a plea questioning the trial court's subject matter jurisdiction de novo. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–28 (Tex. 2004). We focus first on the plaintiff's petition to determine whether the facts that were pled affirmatively demonstrate that subject matter jurisdiction exists. *Id.* at 226. We construe the pleadings liberally in favor of the plaintiff. *Id.*

If a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court may consider evidence and must do so when necessary to resolve the jurisdictional issues raised. *Id.* at 227; *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). When evidence is submitted that implicates the merits of the case, our standard of review generally mirrors the summary judgment standard under Texas Rule of Civil Procedure 166a(c). *Miranda*, 133 S.W.3d at 228; *see also* Tex. R. Civ. P. 166a(c). The burden is on the defendant to present evidence to support its plea. *Miranda*, 133 S.W.3d at 228. If the defendant meets this burden, the burden shifts to the plaintiff to show that a disputed material fact exists regarding the jurisdictional issue. *Id.* We take as true all evidence that is favorable to the plaintiff and indulge

every reasonable inference and resolve any doubts in the plaintiff's favor. *Id.* If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact question will be resolved by the fact finder. *Id.* at 227–28. If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, however, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228.

Sovereign immunity from suit deprives a court of subject matter jurisdiction and is therefore properly asserted in a plea to the jurisdiction. *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); *Miranda*, 133 S.W.3d at 225–26. While sovereign immunity bars actions against the state absent a legislative waiver, *Sykes*, 136 S.W.3d at 638, requests for declaratory relief that do not attempt to control state action do not implicate governmental immunity, *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Suits against governmental officials alleging that they "acted without legal authority" and seeking to compel the officials "to comply with statutory or constitutional provisions" fall within the "ultra vires" exception to governmental immunity because they "do not attempt to exert control over the state—they attempt to reassert the control of the state." *Id.*; *see Houston Belt & Terminal Ry. v. City of Houston*, 487 S.W.3d 154, 158, 161–64 (Tex. 2016) (discussing ultra vires standard).

**Standing**

In their first issue, the State Officials argue that appellees lack standing. "In Texas, the standing doctrine requires that there be: (1) 'a real controversy between the parties,' that (2) 'will be actually determined by the judicial declaration sought.'" *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005) (quoting *Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996)). A plaintiff must therefore be "personally

aggrieved" by the defendant's action. *Id*. (quoting *Nootsie*, 925 S.W.2d at 661). The State Officials challenge whether appellees have shown that they were "personally aggrieved." They contend that appellees do not have an actual or imminent injury-in-fact that is fairly traceable to the Governor or the Secretary given that the July 27 and October 1 Proclamations read together expand voting rights and that neither of the State Officials has the authority to enforce the October 1 Proclamation.

The State Officials also challenge the Anti-Defamation League's and Common Cause Texas's organizational or representative standing to bring claims on behalf of their members. We, however, need not analyze the standing of Anti-Defamation League and Common Cause Texas because Knetsch seeks the same injunctive and declaratory relief, and we conclude that he has established his standing. *See Patel v. Texas Dep't of Licensing & Reg.*, 469 S.W.3d 69, 77–78 (Tex. 2015) (explaining reasons behind requirement that only one plaintiff needs to have standing when multiple plaintiffs seek the same injunctive or declaratory relief); *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 6 (Tex. 2011) ("Because the voters seek only declaratory and injunctive relief, and because each voter seeks the same relief, only one plaintiff with standing is required.").

Concerning Knetsch's standing, he is a registered voter in Harris County who is eligible to vote by mail because he is over 65, and he testified at trial about the adverse effect on him of the reduced number of mail ballot return locations under the October 1 Proclamation. At the time of the temporary injunction hearing, he had received his ballot to vote by mail, but he had not decided how he was going to vote. He testified that he had identified one of the Harris County Clerk's return locations to deliver his mail ballot, but the location was no longer available because of the October 1 Proclamation. He also testified about his concerns with

mailing his ballot and traveling to the only return location that remains available after the October 1 Proclamation because of the COVID-19 pandemic. He was concerned about "potential congestion at one drop-off location" and his "health risks that [he]'ll be having to expose [himself] to." He explained that his "objective [was] to minimize contact with other people in the process of casting [his] ballot" and, when explaining the burden to him from the proclamation, he testified that he "want[ed] to minimize [his] exposure to other people whether it be voters or poll workers." We conclude that this evidence satisfied the "personally aggrieved" component of standing. *See Lovato*, 171 S.W.3d at 849.

The State Officials also argue that appellees do not have standing because the State Officials are not the parties who are responsible for enforcing the proclamation and therefore are the wrong defendants for this suit. Here, however, appellees are not complaining about the threat of enforcement for non-compliance with the proclamation but the proclamation *itself*, and the proclamation has the force of law. *See* Tex. Gov't Code § 418.012 (stating proclamation has "force and effect of law"). Appellees alleged in their pleadings that the proclamation is unconstitutional and the Governor exceeded his authority in issuing it to the extent it does not allow the County Clerks' multiple return locations under section 86.006(a-1) because, among other grounds, having fewer locations burdens eligible voters' right to vote during the global COVID-19 pandemic and it is early voting clerks who are the designated officials for managing and conducting early voting.

In this context, we conclude that appellees' claims, including ultra vires claims of exceeded authority, have been properly asserted against the Governor, who is the state official who issued the October 1 Proclamation and has the authority to amend it, and the Secretary, who is the chief election officer of the state with enforcement authority. *See id.* § 418.012 (stating

that governor may amend proclamation issued under chapter); Tex. Elec. Code §§ 31.001 (designating secretary of state as chief election officer), .003 ("The secretary of state shall obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code."), .005(b) (authorizing secretary to order person to correct offending conduct and seek enforcement of order); *Heinrich*, 284 S.W.3d at 373 (explaining that proper party to ultra vires suit is "state actors in their official capacity" who exceeded authority).

Viewing the evidence under our standard of review, we overrule the State Officials' first issue challenging the trial court's jurisdiction based on the standing doctrine. *See Andrade*, 345 S.W.3d at 10 ("It is not necessary to decide whether the voters' claims will, ultimately, entitle them to relief, in order to hold that they have standing to seek it.").

**Sovereign Immunity**

In their second issue, the State Officials argue that they are entitled to sovereign immunity because appellees do not state a "viable" ultra vires claim. *See id.* at 11 (explaining that government official "retains immunity from suit unless the voters have pleaded a viable claim"). Appellees, however, pleaded facts and presented evidence that support their claims challenging the constitutionality of the October 1 Proclamation to the extent it limits the early voting clerks' statutory authority to accept mail ballots at multiple return locations. Based on our review of the evidence as stated below and our standard of review, we conclude that appellees have stated "viable" ultra vires constitutional claims. *See id.*; *see also Patel*, 469 S.W.3d at 77 ("*Andrade* stands for the unremarkable principle that claims against state officials—like all claims—must be properly pleaded in order to be maintained, not that such claims must be viable on their merits to negate immunity."); *see, e.g.*, *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392

(Tex. 2007) (per curiam) (concluding "that the court of appeals did not err by refusing to dismiss the plaintiffs' claims [against the city] for injunctive relief based on alleged constitutional violations"); *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995) (determining that plaintiff whose constitutional rights have been violated may sue state for equitable relief). We overrule the State Officials' second issue.

**Temporary Injunction**

In their third issue, the State Officials challenge the trial court's temporary injunction. They argue that appellees did not demonstrate a probable right to the relief sought, nor a probable, imminent, and irreparable injury; that the public interest is disserved by the injunction sought; and that the trial court's chosen remedy is improper.

**Standard of Review and Applicable Law**

"A temporary injunction is an extraordinary remedy and does not issue as a matter of right." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (citing *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993)). When considering a request for temporary injunctive relief, the question before the trial court is whether the applicant is entitled to preserve the status quo of the litigation's subject matter pending a trial on the merits. *Id.*; *see State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975) (defining status quo as "last, actual, peaceable, non-contested status that preceded the pending controversy"); *Tom James of Dall., Inc. v. Cobb*, 109 S.W.3d 877, 882 (Tex. App.—Dallas 2003, no pet.) (noting that underlying merits of controversy are not legal issues before trial court during temporary injunction hearing). "To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief

sought; and (3) a probable, imminent, and irreparable injury in the interim." *Butnaru*, 84 S.W.3d at 204; *see Southwestern Bell Tel. Co.*, 526 S.W.2d at 528 (explaining that applicant seeking temporary injunction is not required to establish that it will ultimately prevail in litigation).

We review a trial court's order granting temporary injunctive relief under an abuse-of-discretion standard. *See Butnaru*, 84 S.W.3d at 204 (citing *Walling*, 863 S.W.2d at 58; *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984)). A trial court abuses its discretion when it acts unreasonably or in an arbitrary manner or without reference to any guiding rules and principles. *See id.* at 211. We will not disturb the trial court's decision to grant injunctive relief absent a clear abuse of discretion. *Reagan Nat'l Advert. v. Vanderhoof Fam. Tr.*, 82 S.W.3d 366, 370 (Tex. App.—Austin 2002, no pet.) (citing *Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 576 (Tex. App.—Austin 2000, no pet.)). The scope of review is limited to the validity of the order granting or denying temporary injunctive relief. *See id.* (citing *Walling*, 863 S.W.2d at 58; *Thompson*, 24 S.W.3d at 576). When reviewing such an order, we view the evidence in the light most favorable to the order, indulging every reasonable inference in its favor, and "determine whether the order was so arbitrary that it exceeds the bounds of reasonable discretion." *Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 857 (Tex. App.—Fort Worth 2003, no pet.); *see Thompson*, 24 S.W.3d at 576. "The trial court does not abuse its discretion if some evidence reasonably supports the trial court's decision." *Butnaru*, 84 S.W.3d at 211; *see Fox*, 121 S.W.3d at 857 ("A trial court does not abuse its discretion if it bases its decision on conflicting evidence and evidence in the record reasonably supports the trial court's decision.").

Further, our decision today is only a review of "the validity of the temporary injunction order; we do not review the merits of the underlying case." *See Stewart Beach Condo. Homeowners Ass'n v. Gili N. Prop. Invs., LLC*, 481 S.W.3d 336, 343 (Tex. App.—Houston [1st

Dist.] 2015, no pet.); *see also Davis v. Huey*, 571 S.W.2d 859, 861 (Tex. 1978) (noting that "review of the entire case on its merits" "far exceed[s] the proper scope of appellate review of a temporary injunction" and "the merits of the underlying case are not presented for appellate review"). With these standards in mind, we turn to the State Officials' challenges to the temporary injunction.

**Trial Court's Temporary Injunction**

In its order, the trial court's stated reason for enjoining the October 1 Proclamation's amendment limiting the number of locations to return mail ballots to one per county is as follows:

> 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.

*See* Tex. R. Civ. P. 683 (requiring order granting injunction to "set forth the reasons for its issuance"). We turn then to whether appellees showed a probable right to recover on a claim that would support the trial court's stated reasons for granting injunctive relief and a "probable, imminent, and irreparable injury in the interim." *Butnaru*, 84 S.W.3d at 204; *see Fox*, 121 S.W.3d at 857.

"The right to vote is fundamental, as it preserves all other rights." *Andrade*, 345 S.W.3d at 12 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); *see also* Tex. Const. art. I, § 3 (providing equal rights). But that does not prevent states from regulating the franchise. *Andrade*, 345 S.W.3d at 12 (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). The Texas Supreme Court has applied the federal *Anderson-Burdick* balancing test to evaluate whether an

election regulation impinges a fundamental right, considering "'the character and magnitude of the asserted injury'" to the plaintiffs' fundamental right against "'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *State v. Hodges*, 92 S.W.3d 489, 496 (Tex. 2002) (quoting *Burdick*, 504 U.S. at 434).

The State Officials argue that the challenged portion of the October 1 Proclamation "does not encroach on the right to vote whatsoever," that it "survives any *Anderson-Burdick* review because any burden is miniscule," and that any barriers to voting created by this portion of the proclamation are "incidental." They focus on the multiple options for voting in the upcoming election, the overall impact of the July 27 and October 1 Proclamations that expanded the early voting period and the ability to return marked ballots prior to election day, the State's interests in clarifying the law and ensuring "uniformity in election administration" among early voting clerks, and the lack of a "freestanding right to vote in whatever manner [appellees] deem most convenient." The October 1 Proclamation, however, did not clarify the law by explaining the meaning of "early voting clerk's office" but changed the law to limit the meaning of that phrase to only the singular, contrary to the Attorney General's September 30 representation to the Texas Supreme Court. And the stated reasons in the October 1 Proclamation for amending the July 27 Proclamation were not so expansive; rather, they were "to add ballot security protocols"[6] and to "control ingress and egress to and from a

[6] To support their rationale for "ballot security," the State Officials rely heavily on the opinion in *Texas League of United Latin American Citizens*. *See generally* 2020 U.S. App. LEXIS 32211. Our review here, however, is limited to the evidence before us in the interlocutory appeal, applying the applicable standard of review. Whatever the evidence that may have been admitted in that case is not before us and, in this case, the evidence supported a

disaster area and the movement of persons and the occupancy of premises in the area." *See* Tex. Gov't Code § 418.018(c).

In reaching its decision to grant the temporary injunctive relief, the trial court reasonably could have credited the evidence that appellees presented, including expert testimony, that supported findings that: (i) the challenged portion of the proclamation was unnecessary for ballot security[7]; (ii) the "ingress and egress" provision of the Texas Disaster Act supported more, not fewer, locations for returning ballots; (iii) the impact from the challenged portion of the proclamation was immediate and irreparable because of the ongoing COVID-19 pandemic, (iv) the general understanding among the parties that the term "early voting clerk's office" in section 86.006(a-1) includes a county clerk's main and satellite offices when the county clerk is the early voting clerk, and (v) the State Officials' position that the October 1 Proclamation does not prohibit local election officials from operating multiple return locations for mail ballots on election day.

The trial court could have credited the evidence that decreasing the number of return locations leading up to election day would significantly increase congestion and wait times at the single designated location in some counties, which in turn would increase the risk of the voters utilizing this method of contracting COVID-19. The trial court also could have

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finding that increased return locations for mail ballots did not correlate with increased ballot security concerns.

[7] For example, in his report, Cortés concluded that "[f]rom both a security and public perception standpoint," it "does not provide any benefit to limit in-person early voting drop off locations to just one per county." He further concluded: "Limiting drop off locations in the manner described in the Governor's declaration serves no valid election administration or election security purpose." In his report and testimony, he also identified the statutory security measures that were required at each early voting clerk's location.

reasonably inferred from the evidence that the practical impact of the challenged portion of the October 1 Proclamation would be to reduce the number of cast ballots from voters,[8] particularly voters at high risk of serious health concerns, including death, if they contracted COVID-19, and voters from minority communities. Given the COVID-19 pandemic, it is reasonable to assume that voting in person is not a reasonable option for many of the voters who are eligible to vote by mail. *See* Tex. Elec. Code §§ 82.001–.004.

The State Officials focus on the timing of the trial court's temporary injunction "after voting has started." The trial court, however, could have considered the timing of the October 1 Proclamation that was issued after the return of mail ballots at early voting clerk's offices "was already underway." *See In re Hotze*, 2020 Tex. LEXIS 927, at *4 (noting that Harris County Clerk represented that his office would accept mailed-in ballots beginning September 24 and "election [was] already underway"). Additionally, the trial court could have considered that the October 1 Proclamation gave only one day's notice of when it went into effect on October 2 and that some counties had already announced the return locations, for example, Harris County announced the return locations in July. *See id.* Some of the same reasons that the judiciary should be reluctant to interfere in an election that is imminent or ongoing apply equally to the executive branch. *See id.* (observing that "court changes of election laws close in time to the election are strongly disfavored" and explaining in context of denying mandamus relief concerning July 27 Proclamation that it would "disrupt the long-planned election procedures" and "threaten voter confusion"); *see, e.g.*, *Texas League of United Latin Am. Citizens v. Hughs*, No. 20-50867, 2020 U.S. App. LEXIS 32211, at *36–38 (Ho, J.,

[8] For example, Chatman testified that "tens of thousands" of eligible voters by mail would forgo casting their ballots because of "long lines" and "waiting times" on election day.

concurring) (addressing concerns with unilateral changes to election law by single elected official and observing good reasons for vesting control over election laws in state legislatures).

These concerns are particularly valid in this case where the legislature has designated the early voting clerks as the officials in charge of managing and conducting early voting. *See* Tex. Elec. Code §§ 83.001(c) (stating that early voting clerk generally "has the same duties and authority with respect to early voting as a presiding election judge has with respect to regular voting"), .002(1); *see also id.* § 32.071 ("The presiding judge is 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."). And the State Officials affirmatively represent that when the early voting clerk is the county clerk, the "early voting clerk's office" includes the clerk's main and satellite offices and that, on election day, the county clerks may accept mail ballots at their satellite offices. *See* Tex. Gov't Code § 311.012(b) (stating that singular includes plural).

Finally, the State Officials argue that the appropriate remedy would have been to enforce the statute, not eliminate the suspension of the statute. But neither party challenged the July 27 Proclamation before the trial court and, in that context, enjoining the challenged portion of the October 1 Proclamation effectively reinstated the July 27 Proclamation concerning authorized return locations for mail ballots and preserved the status quo of the subject matter of this litigation pending a trial on the merits. *See Southwestern Bell Tel. Co.*, 526 S.W.2d at 528 (defining status quo as "last, actual, peaceable, non-contested status that preceded the pending controversy"); *see also Huey*, 571 S.W.2d at 861 (noting that "review of the entire case on its merits" "far exceed[s] the proper scope of appellate review of a temporary injunction" and "the merits of the underlying case are not presented for appellate review").

Viewing the evidence in the light most favorable to the trial court's temporary injunction, we cannot conclude that the trial court abused its discretion. *See Fox*, 121 S.W.3d at 857. We overrule the State Officials' third issue.

## CONCLUSION

For these reasons, we affirm the trial court's order.[9]

Before Justices Goodwin, Kelly, and Smith

Affirmed

Filed: October 23, 2020

[9] Because the general election is eleven days from today, we direct this Court's clerk to issue the mandate with the release of this Court's opinion and judgment, and we will not consider motions for rehearing. *See* Tex. R. App. P. 2 (authorizing appellate court to suspend rule's operation in particular case to expedite decision or for good cause), 18.6 (authorizing appellate court to issue mandate with judgment in accelerated appeals).

# Tab B:
# Trial Court's Letter Ruling

# 353RD DISTRICT COURT

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Judge
(512) 854-9380

**MEGAN JOHNSON**
Staff Attorney
(512) 854-4281

**PAMELA SEGER**
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Official Court Reporter
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**ERICA SALINAS**
Court Clerk
(512) 854-5886

October 15, 2020

***VIA E-MAIL***

Ms. Lindsey B. Cohan
*Lindsey.cohan@dechert.com*

Mr. Benjamin L. Dower
*Benjamin.dower@oag.texas.gov*

Mr. Erik Snapp
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Mr. Michael R. Abrams
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Mr. Neil Steiner
*Neil.steiner@dechert.com*

Re: Cause No. D-1-GN-20-005550; *The Anti-Defamation League Austin, Southwest, and Texoma Regions, et al v. Greg Abbott, in his official capacity as the Governor of Texas;* in the 353rd Judicial District Court, Travis County, Texas

Dear Counsel:

Having considered the pleadings, evidence, arguments, and authorities, I make the following determinations:

(1) Defendant Greg Abbott's Plea to the Jurisdiction is DENIED;
(2) Defendant Ruth Hughes' Plea to the Jurisdiction is DENIED:
(3) Plaintiffs' Application for Temporary Injunction is GRANTED, enjoining Defendants, their officers, agents, servants, employees, attorneys, and those in active concert or participation with them from implementing or enforcing the following paragraph on page 3 of the October 1 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, "

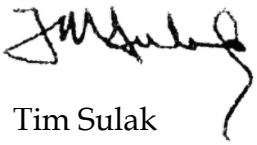
The limitation to a single drop-off location for mail ballots would likely needlessly and unreasonably increase risks of exposure to COVID-19 infections, and needlessly and unreasonably substantially burden potential voters' constitutionally protected rights to vote, as a consequence of increased travel and delays, among other things.

(4) No bond is required.
(5) Plaintiffs' Application for a Permanent Injunction is set for hearing on November 9, 2020, unless the parties and the Court find a mutually agreeable alternate date.

I request that Plaintiffs' counsel draft, circulate, and submit Orders in conformity with these determinations and Rule 683, for my signature and filing with the Clerk.

Thank you for your patience, preparation, presentation, and professionalism.

Sincerely,



Tim Sulak

TS:ps

Orig: Ms. Velva L. Price, District Clerk

# Tab C:
# Trial Court's Temporary Injunction Order

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

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

**ORDER GRANTING PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTIVE RELIEF**

The above cause came before this Court for hearing on October 13, 2020. Plaintiffs, The Anti-Defamation League Austin, Southwest, and Texoma Regions; Common Cause Texas; and Robert Knetsch, appeared by its attorneys from Dechert LLP and the Brennan Center for Justice. Defendants, Governor Greg Abbott and Secretary of State Ruth Hughs, appeared, in their official capacities, by their attorneys from the Office of the Attorney General of Texas.

The Court has considered Plaintiffs' Application for Temporary Injunctive Relief and Plaintiffs' First Amended Application for Temporary Injunctive Relief, Defendants' Pleas to the Jurisdiction, the briefs submitted in support of and in opposition to said motions, and the evidence and arguments of counsel. After consideration of the foregoing, it is hereby ORDERED that

1. Defendant Abbott's Plea to the Jurisdiction is DENIED.

2. Defendant Hughs's Plea to the Jurisdiction is DENIED.

3. Plaintiffs' Application for Temporary Injunction is GRANTED, enjoining Defendants, their officers, agents, servants, employees, attorneys, and those inactive concert or participation with them from implementing or enforcing the following paragraph on page 3 of Defendant Abbott's 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 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.

4. No bond is required.
5. Plaintiffs' Application for a Permanent Injunction is set for hearing on November 9, 2020, unless the parties and the Court find a mutually agreeable alternate date.

Signed this 15th day of October, 2020.

Honorable Tim Sulak

# Automated Certificate of eService

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Associated Case Party: Anti-Defamation League Austin, Southwest, and Texoma Regions

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| Lindsey Cohan | 24083903 | lindsey.cohan@dechert.com | 10/15/2020 5:20:43 PM | SENT |

Associated Case Party: Greg Abbott

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| Benjamin Dower | 24082931 | Benjamin.Dower@oag.texas.gov | 10/15/2020 5:20:43 PM | SENT |
| Patrick Sweeten | 798537 | Patrick.Sweeten@oag.texas.gov | 10/15/2020 5:20:43 PM | SENT |
| Michael Abrams | | michael.abrams@oag.texas.gov | 10/15/2020 5:20:43 PM | SENT |

Associated Case Party: Disability Rights Texas

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| Marisol McNair | | mmcnair@disabilityrightstx.org | 10/15/2020 5:20:43 PM | SENT |
| Lia Davis | | ldavis@disabilityrightstx.org | 10/15/2020 5:20:43 PM | SENT |

Case Contacts

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| LASHANDA GREEN | | lashanda.green@oag.texas.gov | 10/15/2020 5:20:43 PM | SENT |

# Tab D:
# Tex. Elec. Code § 86.006

V.T.C.A., Election Code § 86.006

# § 86.006. Method of Returning Marked Ballot

Effective: December 1, 2017 to November 30, 2020
Currentness

(a) A marked ballot voted under this chapter must be returned to the early voting clerk in the official carrier envelope. The carrier envelope may be delivered in another envelope and must be transported and delivered only by:

(1) mail;

(2) common or contract carrier; or

(3) subject to Subsection (a-1), in-person delivery by the voter who voted the ballot.

(a-1) The voter may deliver a marked ballot in person to the early voting clerk's office only while the polls are open on election day. A voter who delivers a marked ballot in person must present an acceptable form of identification described by Section 63.0101.

(b) Except as provided by Subsection (c), a carrier envelope may not be returned in an envelope or package containing another carrier envelope.

(c) The carrier envelopes of persons who are registered to vote at the same address may be returned in the same envelope or package.

(d) Each carrier envelope that is delivered by a common or contract carrier must be accompanied by an individual delivery receipt for that particular carrier envelope that indicates the name and residence address of the individual who actually delivered the envelope to the carrier and the date, hour, and address at which the carrier envelope was received by the carrier. A delivery of carrier envelopes is prohibited by a common or contract carrier if the delivery originates from the address of:

(1) an office of a political party or a candidate in the election;

(2) a candidate in the election unless the address is the residence of the early voter;

  

(3) a specific-purpose or general-purpose political committee involved in the election; or

(4) an entity that requested that the election be held, unless the delivery is a forwarding to the early voting clerk.

(e) Carrier envelopes may not be collected and stored at another location for subsequent delivery to the early voting clerk. The secretary of state shall prescribe appropriate procedures to implement this subsection and to provide accountability for the delivery of the carrier envelopes from the voting place to the early voting clerk.

(f) A person commits an offense if the person knowingly possesses an official ballot or official carrier envelope provided under this code to another. Unless the person possessed the ballot or carrier envelope with intent to defraud the voter or the election authority, this subsection does not apply to a person who, on the date of the offense, was:

(1) related to the voter within the second degree by affinity or the third degree by consanguinity, as determined under Subchapter B, Chapter 573, Government Code; [1]

(2) physically living in the same dwelling as the voter;

(3) an early voting clerk or a deputy early voting clerk;

(4) a person who possesses a ballot or carrier envelope solely for the purpose of lawfully assisting a voter who was eligible for assistance under Section 86.010 and complied fully with:

(A) Section 86.010; and

(B) Section 86.0051, if assistance was provided in order to deposit the envelope in the mail or with a common or contract carrier;

(5) an employee of the United States Postal Service working in the normal course of the employee's authorized duties; or

(6) a common or contract carrier working in the normal course of the carrier's authorized duties if the official ballot is sealed in an official carrier envelope that is accompanied by an individual delivery receipt for that particular carrier envelope.

(g) An offense under Subsection (f) is a Class A misdemeanor unless the defendant possessed the ballot or carrier envelope without the request of the voter, in which case it is a felony of the third degree. If conduct that constitutes an offense under this section also constitutes an offense under any other law, the actor may be prosecuted under this section, the other law, or both.

(g-1) An offense under Subsection (g) is increased to the next higher category of offense if it is shown on the trial of an offense under this section that:

  

(1) the defendant was previously convicted of an offense under this code;

(2) the offense involved an individual 65 years of age or older; or

(3) the defendant committed another offense under this section in the same election.

(h) A ballot returned in violation of this section may not be counted. If the early voting clerk determines that the ballot was returned in violation of this section, the clerk shall make a notation on the carrier envelope and treat it as a ballot not timely returned in accordance with Section 86.011(c). If the ballot is returned before the end of the period for early voting by personal appearance, the early voting clerk shall promptly mail or otherwise deliver to the voter a written notice informing the voter that:

(1) the voter's ballot will not be counted because of a violation of this code; and

(2) the voter may vote if otherwise eligible at an early voting polling place or the election day precinct polling place on presentation of the notice.

(i) In the prosecution of an offense under Subsection (f):

(1) the prosecuting attorney is not required to negate the applicability of the provisions of Subsections (f)(1)-(6) in the accusation charging commission of an offense;

(2) the issue of the applicability of a provision of Subsection (f)(1), (2), (3), (4), (5), or (6) is not submitted to the jury unless evidence of that provision is admitted; and

(3) if the issue of the applicability of a provision of Subsection (f)(1), (2), (3), (4), (5), or (6) is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.

**Credits**

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 1987, 70th Leg., ch. 431, § 1, eff. Sept. 1, 1987; Acts 1987, 70th Leg., ch. 472, § 28, eff. Sept. 1, 1987; Acts 1991, 72nd Leg., ch. 203, § 1.18; Acts 1991, 72nd Leg., ch. 554, § 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 1381, § 15, eff. Sept. 1, 1997; Acts 2003, 78th Leg., ch. 393, § 14, eff. Sept. 1, 2003; Acts 2007, 80th Leg., ch. 238, § 1, eff. Sept. 1, 2007; Acts 2011, 82nd Leg., ch. 1159 (H.B. 2449), § 1, eff. Sept. 1, 2011; Acts 2015, 84th Leg., ch. 1050 (H.B. 1927), § 7, eff. Sept. 1, 2015; Acts 2017, 85th Leg., 1st C.S., ch. 1 (S.B. 5), § 12, eff. Dec. 1, 2017.

**Footnotes**

1 V.T.C.A., Government Code § 573.021 et seq.

  

V. T. C. A., Election Code § 86.006, TX ELECTION § 86.006
Current through the end of the 2019 Regular Session of the 86th Legislature

**End of Document**