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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

RESPONSE TO PETITION FOR REVIEW

Lindsey B. Cohan
State Bar No. 24083903
Dechert LLP
515 Congress Avenue, Suite 1400
Austin, TX 78701-3902
(512) 394-3000
lindsey.cohan@dechert.com

Myrna Pérez
State Bar No. 24041676
THE BRENNAN CENTER FOR
JUSTICE AT NYU LAW SCHOOL
120 Broadway, Suite 1750
New York, New York 10271
perezm@brennan.law.nyu.edu

Counsel for Respondents

ORAL ARGUMENT NOT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Petitioners:
Greg Abbott, in his official capacity as Governor of Texas
Ruth Hughs, in her official capacity as Texas Secretary of State

Appellate and Trial Counsel for Petitioners:
Ken Paxton
Brent Webster
Ryan L. Bangert
Kyle D. Hawkins
Lanora C. Pettit (lead counsel)
Beau Carter
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
Lanora.Pettit@oag.texas.gov

Respondents:
The Anti-Defamation League Austin, Southwest, and Texoma Regions
Common Cause Texas
Robert Knetsch

Appellate and Trial Counsel for Respondents:
Lindsey B. Cohan (lead counsel)
Dechert LLP
515 Congress Ave., Suite 1400
Austin, Texas 78701-3902
(512) 394-3000
Lindsey.Cohan@dechert.com

Myrna Pérez
Maximillian L. Feldman
The Brennan Center for Justice at NYU Law School
120 Broadway, Suite 1750
New York, New York 10271
perezm@brennan.law.nyu.edu

Erik Snapp
DECHERT LLP
35 West Wacker Drive, Suite 3400
Chicago, IL 60601
(312) 646-5828

Neil Steiner
May Chiang
Julia Markham-Cameron
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036-6797

Sarah Magen
DECHERT LLP
Cira Centre, 2929 Arch Street
Philadelphia, Pennsylvania 19104

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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 Respondents' right to vote. Respondents challenged the act as *ultra vires* and under the Texas Constitution.
Trial Court	353rd Judicial District, Travis County The Honorable Tim Sulak
Disposition in the Trial Court	Following an evidentiary hearing on October 13, 2020, the trial court denied Petitioners' pleas to the jurisdictions and ordered temporary injunctive relief in Respondents' favor. The October 15 Order stated 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." It therefore provided relief on all of Respondents' claims.
Parties in the Court of Appeals	Governor Abbott and Secretary Hughs were the appellants in the Third Court of Appeals. Plaintiffs Anti-Defamation League Austin, Southwest, and Texoma Regions, Common Cause Texas, and Robert Knetsch were the appellees.
Disposition in the Court of Appeals	On October 23, the Court of Appeals affirmed the trial court's order of temporary injunctive relief in a per curiam opinion.

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Did the trial court correctly determine that Respondents[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 exercise appropriate 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?

4. Did the trial court order the appropriate remedy by enjoining the portion of the October 1 Proclamation limiting ballot return locations, where Respondents only challenged that portion of the order?

TO THE HONORABLE SUPREME COURT OF TEXAS:

This case concerns the limits that constrain the Governor's authority under the Texas Disaster Act. The Disaster Act allows the Governor to temporarily "suspend"

[1] "Respondents" include the members, supporters, and constituents of The Anti-Defamation League Austin, Southwest, and Texoma Regions ("ADL") and Common Cause Texas.

statutes to facilitate the state's response to a declared disaster, but only where such action is necessary to cope with the disaster. TEX. GOV'T CODE § 418.016(a). Respondents contend, and two courts have now agreed, that when the Governor issued his October 1 Proclamation limiting in-person ballot return locations, he took action that was unrelated to the COVID-19 pandemic and impermissibly burdened Respondents' right to vote in the ongoing general election.

In March, the Governor declared a disaster in Texas due to the novel coronavirus (COVID-19). He has since issued a number of Proclamations in connection with the state's response to the pandemic, including an order on July 27 extending the period for early voting to promote greater social distancing and safe hygiene practices for Texas voters. But on October 1, the Governor purported to exercise his authority again in a proclamation entirely unrelated to the COVID-19 pandemic. The October 1 Proclamation suspends Texas Election Code Section 86.006(a-1) to limit each county to a single in-person ballot return location for the collection of marked mail-in ballots 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). It was a stark and late-breaking reversal from the Governor's earlier order on July 27, 2020. State and local elections

officials understood the July 27 Proclamation to allow voters to return ballots to any office of the early voting clerk, including satellite offices of the county clerk. This understanding was so uncontroversial that the Attorney General invoked it in a filing to this Court on September 30, the day before the Governor's new order.

Petitioners essentially argue that the Governor may lawfully exercise his authority under the Disaster Act even where the justification for acting has nothing to do with the declared disaster and the adopted action would in fact exacerbate the crisis. Ballot security has nothing to do with a novel respiratory illness, and Petitioners' opening brief does not pretend otherwise. Petitioners similarly have no response to the common sense conclusion that the October 1 Proclamation results 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. Instead, they continually repeat the refrain that the Governor has expanded voting opportunities through other executive orders not challenged by Respondents. But it would not be proper to view this case as not a referendum on the totality of the Governor's actions during the pandemic; the issue before the Court is whether the Governor can suspend state law as he did in the October 1 Proclamation when the suspension bears no relationship, as Petitioners concede, to the reigning public health crisis.

The trial court found it likely did not, issuing a temporary injunction order after a day-long evidentiary hearing where Respondents presented nine witnesses and Petitioners presented just one. 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 Respondents, who had asserted an *ultra vires* claim against Petitioners 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.

In a unanimous opinion, the Court of Appeals, Third District, affirmed. The Court of Appeals rejected Petitioners' arguments as to standing and sovereign immunity, and determined that the trial court did not abuse its discretion when ordering temporary injunctive relief.

This Court should deny the petition for review and affirm the temporary injunction order.

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 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, this 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) of the Texas Election Code 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).

State and Local Election Officials' Authority. The Secretary of State is the chief election officer of the state. TEX. ELEC. CODE § 31.001. Local election officials, however, are "in charge of and responsible for the management and conduct of the election" at the election precinct that they serve. *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

The Texas Disaster Act allows the Governor to take certain actions in the face of a declared disaster. Under Section 418.016 of the Texas Government Code, 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, order, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster. TEX. GOV'T CODE § 418.016(a). By the very terms of the statute, the Governor's authority to suspend statutes must be tied to a "necessary action in coping with [the] disaster." *Id.*

This provision derives from the Model Emergency Health Powers Act ("MEHPA"), a model statute adopted by a number of states to facilitate emergency powers in the face of a declared crisis. 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). 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. 3.RR.164 ¶ 16.

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, Governor 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, Governor 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, Governor 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, Governor 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.

The Travis County Clerk similarly made plans to offer ballot return locations at their business office locations. On August 31, its website provided public notices indicating where voters could hand deliver their mail-in ballots, and on September 14, the Travis County Clerk updated its website to provide hours for those locations.

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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.

Resp. App. Tab A, DeBeauvoir Amicus Letter at 2-3. A number of news article publicized these options to voters in Travis County. *Id*. at 3-4.

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.

E. Challenge Brought To Extension Of The Early Voting Period

On September 23, 2020, a petition for mandamus was filed in this Court challenging the Governor's extension of the early voting period under the July 27 Proclamation. On September 28, this Court invited the State to file a brief expressing the views of the State on the issues presented in the mandamus petition. In the State's response, filed on September 30, 2020, the Attorney General advised this 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).

F. Governor's October 1, 2020 Proclamation

A week after the filing of the challenge to the July 27 Proclamation and a day after the Attorney General's representation to this Court that the legislature allows multiple early voting clerk offices, the Governor issued a new Proclamation suspending Section 86.006(a-1). The October 1 Proclamation 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.

Governor Abbott claimed this suspension of the Texas Election Code was necessary to "add ballot security protocols." 3.RR.226. Governor Abbott 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. Procedural History

Respondents filed their original petition and application for temporary injunctive relief on October 5, 2020. CR.3-82. Governor Abbott filed a plea to the jurisdiction and opposition on October 6, 2020. CR.83-165.

On October 12, 2020, Respondents amended their original petition and application to name Secretary Hughs as an additional defendant. CR.166-172. At the October 13, 2020 temporary injunction hearing, Secretary 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. Secretary 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 Respondents. *See generally* 2.RR.

Representatives from Respondents 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.").

Respondent 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* 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 head of the division of elections 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

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[4] In Dr. Chatman's declaration, he opined on his analysis of queues and wait times resulting from a limit of one drop-off location 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 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.

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 Governor 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 ballot 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 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 Governor 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.").

Petitioners' 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 in Harris County prior to the October 1 Proclamation, and that counties operating multiple ballot return locations were in compliance with the statewide guidance on ballot collection and security procedures. 2.RR.235:15-237:17. 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 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 Petitioners' pleas to the jurisdiction and granted Respondents' Application for Temporary Injunction. CR.205-206. The trial court enjoined Petitioners 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.

Petitioners immediately appealed. CR.208-11. On October 23, the Court of Appeals, Third District, affirmed the trial court's ruling in a unanimous opinion, and directed the clerk to issue the mandate. Petitioners immediately filed an emergency petition for review and a petition for mandamus. This Court granted expedited review and temporarily stayed the issuance of the mandate.

SUMMARY OF THE ARGUMENT

The lower courts properly determined that Respondents have standing to challenge the October 1 Proclamation. Despite the fact that the Proclamation limits Respondents' and voters' ability to cast their ballots in a safe and efficient manner during a global pandemic, Petitioners claim that the Proclamation does not implicate

the right to vote because Petitioners have other options for voting.[5] But Petitioners' argument is out of step with the testimony presented to the trial court, which demonstrated that Respondents are personally aggrieved by the limit on ballot return locations because they are particularly vulnerable to adverse health risks from COVID-19 (a risk from voting in person) and they fear that mailing their ballots will result in their votes being lost.

The lower courts also properly determined that the Governor and the Secretary of State are the proper defendants to redress Respondents' injury, given that the Governor is the only party who may amend or rescind the Proclamation and the Secretary is the chief election officer of the state. And, as correctly determined by the lower courts, neither the Governor nor the Secretary is immune from suit.

The trial court also exercised appropriate discretion when weighing the evidence at the evidentiary hearing, and the Court of Appeals properly affirmed the trial court's order of temporary injunctive relief. Because Respondents have only challenged the October 1 Proclamation, the trial court's remedy only enjoined the

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[5] Petitioners argue that the U.S. Supreme Court has distinguished the right to vote from the claimed right to receive absentee ballots. Petition at 15. But they cite to a case involving an Illinois statute that declined to extend absentee voting privileges to unsentenced inmates awaiting trial in county jail. *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 803 (1969). *McDonald* is a far cry from the Proclamation at issue here, which impacts all voters across Texas and involves the Governor's unilateral reduction of ballot return locations during a global health crisis.

provision of that Proclamation limiting ballot return locations in the period prior to Election Day.

STANDARD OF REVIEW

Petitioners' 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."). The Court "determine[s] 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 Lower Courts Correctly Determined That Respondents Have Standing

A. Respondents Have Demonstrated Injury-In-Fact

Petitioners' assertion that Respondents 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. Respondent 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.

Petitioners' argument that Respondents' fears are too generalized or speculative is incorrect under Texas law. Petitioners rely upon two Texas cases, neither of which supports their position. Petition at 8-9. In *Brown v. Todd*, 53 S.W.3d 297 (Tex. 2001), the harm alleged had nothing to do with the plaintiff's ability to cast a ballot. Indeed, it was undisputed that the defendants in that case had done nothing to interfere with the voter-plaintiff's ability to (successfully) vote in the subject referendum. *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000) is even further removed from the present situation. That case involved a challenge to a school district's policy of refusing to promote certain students, which this court held 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 Respondents' ballot access, resulting in real and present harm. As the record makes clear, Respondents' 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

Petitioners are dismissive of Respondents' stated injury does not change the fact that a cognizable injury has been alleged.

It is settled law that Respondents 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, Respondents 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. Indeed, the testimony

offered by various witnesses directly rebuts Petitioners' assertion that Respondents "do not show a cognizable injury." Petition at 9. 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. Likewise, Witness Joanne Richards testified that prior to the Governor's Proclamation, she was planning to utilize a drive-through location to drop off her ballot, which would allow her to minimize any in-person contact. 2.RR.85:13-19. This testimony directly contradicts Petitioners' assertion that "the same risks apply" whether a voter drops off their ballot in person or if they vote in person. Petition at 9.

Petitioners attempt to dismiss voters' injuries by asserting that voters should simply mail their ballots back three weeks early (Petition at 9) 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 Petitioners' argument, 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. In any event, Plaintiffs' arguments are in regard to voters who decide to send in their ballots three days in advance of Election Day, not one day.

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 Court of Appeals rightfully upheld the Trial court's finding that Respondents have standing.

B. ADL And Common Cause Have Both Associational And Organizational Standing

The Court of Appeals correctly concluded that it did not need to reach the question whether ADL and Common Cause (the "Organizational Plaintiffs") have standing because Robert Knetsch has standing and all of the plaintiffs seek the same relief. Pet. App. Tab A at 12 (citing *Patel v. Texas Dep't of Licensing & Reg.*, 469 S.W.3d 69, 77-78 (Tex. 2015) and *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 6 (Tex. 2011)). Nevertheless, contrary to Petitioners' assertion, ADL and Common Cause plainly have standing to bring this lawsuit.

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)). Petitioners do not dispute that the second and

third prongs of the *Hunt* test are met.[6] Rather, they assert that the Organizational Plaintiffs do not have members, for purposes of associational standing. This argument misconstrues the law and the record evidence. It should be rejected.

This 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. 2.RR.65.[7] That is enough to establish that it has members for purposes of associational standing – indeed, courts have repeatedly found that Common Cause can establish associational standing under *Hunt*. *See Common Cause Indiana v. Lawson*, No. 120CV01825RLYTAB, 2020 WL 5671506, at *3 (S.D. Ind. Sept. 22, 2020), *rev'd on other grounds*, No. 20-2877, 2020 WL 6255361 (7th Cir. Oct. 23,

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[6] 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 Respondents seek is to enjoin the Governor's October 1 Proclamation.

[7] *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).

2020)*; Common Cause of Colorado v. Buescher*, 750 F. Supp. 2d 1259, 1272 (D. Colo. 2010); *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161, 170 n.1 (2d Cir. 2006), *rev'd on other grounds*, 552 U.S. 196 (2008).[8] Petitioners assert that this Court should apply *Hunt*'s "indicia of membership" test to Common Cause, Pet. 10, but the Court should reject that assertion. The *Hunt* Court introduced the test to determine whether organizations that lacked traditional members nevertheless had standing. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 261 F. Supp. 3d 99, 108 (D. Mass. 2017) ("In introducing the indicia-of-membership test, *Hunt* expanded the category of organizations that could have associational standing, rather than limiting it."); *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). Therefore, "[t]he inquiry into the 'indicia of membership'…is necessary only when an organization is not a 'traditional membership organization.'" *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 29 (D.D.C. 2009).

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[8] In any event, the evidence shows that 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.

ADL is not a traditional voluntary membership organization, 2.RR.121, but it nevertheless has standing because its constituents are functionally equivalent to members – or, in the language of *Hunt*, they have adequate "indicia of membership" to establish standing. Petitioners 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 U.S. 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* have looked to a much wider set of criteria to determine whether an organization has standing. *See, e.g.*, *AARP v. United States Equal Employment Opportunity Comm'n*, 226 F. Supp. 3d 7, 17 (D.D.C. 2016); *Envtl. Conservation Org. v. City of Dallas*, No. 3-03-CV-2951-BD, 2005 WL 1771289, at *2 (N.D. Tex. July 26, 2005). Moreover, an organization need not meet every one of these criteria in order to establish standing. *See Envtl. Conservation Org*, 2005 WL 1771289, at *2 ("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*, 226 F. Supp. 3d at 16 ("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).

Below, Petitioners argued that the Organizational Plaintiffs did not have standing because, Petitioners' claimed, they had failed to identify individual members affected by the Governor's October 1 Proclamation. Petitioners have, appropriately, abandoned that claim here. As Respondents explained, this argument is inconsistent with Texas law. In *Texas Workers' Compensation Commission v.*

Garcia, this 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).

In any event, Common Cause *did in fact* identify an individual, injured member. Joanne Richards, a longtime Common Cause member, testified regarding the injury caused her by the Governor's October 1 Proclamation. Petitioners' 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 Respondents' standing. *See* Part I.A, *supra*.

Finally, Petitioners have also abandoned the argument they made below that the Organizational Plaintiffs cannot establish standing to sue based on a direct injury to the organizations as a result of the Governor's October 1 Proclamation. As Respondents alleged and offered evidence to support, 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. Standing based on this type of injury, commonly

referred to as "organizational standing," is a well-established doctrine that has been widely applied.[9]

C. Injuries Are Traceable To Petitioners

The Court of Appeals correctly affirmed the trial court's ruling that Respondents sued the proper parties in this case, finding that the Governor is liable for his *ultra vires* conduct and that the Secretary of State possesses the authority to enforce the Proclamation. App. A at 13-14.

An *ultra vires* claim must be brought against "state officials who allegedly act without legal or statutory authority." *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432 (Tex. 1994); *accord City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009). Respondents pleaded and proved that the Governor exceeded his authority when he issued the Proclamation because the Proclamation bears no relationship to mitigating the effects of the current COVID-19 crisis as the Texas Disaster Act

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[9] *See, e.g.*, *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 324 (D. Mass. 2013); *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017); *Disability Rights Pa. v. Pa. Dep't of Human Servs.*, No. 1:19-CV-737, 2020 U.S Dist. LEXIS 53415 (M.D. Pa. Mar. 27, 2020); *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); *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 916-17 (S.D. Iowa 2018); *Smith v. Pac. Properties & Dev. Corp.*, 358 F.3d 1097, 1105-06 (9th Cir. 2004); *Common Cause of Colorado v. Buescher*, 750 F. Supp. 2d 1259, 1271 (D. Colo. 2010); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014); *Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994).

requires. The Governor is therefore a proper defendant. Indeed, if he were not, it would mean that he could never be liable for exceeding his constitutional authority. No one, including the Governor, is above the law in the State of Texas.

Petitioners cite to this Court's recent ruling in *In re Abbott*, 601 S.W.3d 802 (Tex. 2020), to argue that Respondents were required to "sue the party responsible for the enforcement of the [Proclamation]." Pet. at 11. But in *In re Abbott*, the Court held only that when the injury alleged is the threat of criminal prosecution, the enforcing actor is a necessary party because there is otherwise no evidence of a "credible threat of prosecution." *Id.* at 812. As the court of appeals correctly noted, Respondents "are not complaining about the threat of enforcement for non-compliance with the proclamation but the proclamation *itself*." App. A at 13. Thus, Respondents were not required to see anyone other than the Governor.

Even assuming *arguendo* that Respondents were required to sue the enforcing party, as the court of appeals rightly held, they did so here. App. A at 13-14. The Proclamation has the "force and effect of law" and therefore acted to supersede the Election Code to the extent required to bring the law into compliance with the Proclamation. TEX. GOV'T CODE § 418.012. The Election Code expressly authorizes the Secretary of State to enforce the election laws of the State:

> 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.

TEX. ELEC. CODE § 31.005(b) (emphasis added). Indeed, as this Court is well-aware, just weeks ago, the Secretary invoked section 31.005(b) to direct the Attorney General to seek injunctive relief against the Harris County Clerk in connection with alleged violations of the Election Code. *State v. Hollins*, No. 20-0729, 2020 WL 5919729 (Tex. Oct. 7, 2020). The Secretary of State therefore has the authority to compel the early voting clerks to comply with the Proclamation's restriction on ballot drop-off locations.[10]

D. Petitioners Are Not Immune From Suit

The lower courts correctly determined that Respondents' claims were not barred by sovereign immunity. Respondents alleged an *ultra vires* claim, and it is well-established that claims for *ultra vires* acts are not shielded 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

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[10] Petitioners confusingly argue that enforcement of the Proclamation's limitation on drop-off locations "is the job of local early-voting clerks." Pet. at 11. But the Proclamation is directed at the early voting clerks—that is, it limits their authority to designate more than one drop-off location under the Election Code that the State conceded to this Court they had prior to the Proclamation. CR.46. It makes no sense that the early voting clerks would be responsible for enforcing the Proclamation against themselves.

official-capacity suits against government actors who violate statutory or constitutional provisions"). Respondents further alleged that the October 1 Proclamation violated their rights under the Texas Constitution, and this Court has long recognized that sovereign immunity does not bar "suits for equitable remedies for violation of constitutional rights." *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995).

In arguing for the application of sovereign immunity, Petitioners make an argument as to the merits of Respondents' claims, not the adequacy of how they were pled. *See* Petition at 12-16 (arguing that Respondents have failed to plead viable claims). But Texas courts have never required a party to show that it is likely to prevail on the merits to maintain its claims against state officials; all that is required is that such claims be properly pled.[11] *Patel v. Texas Dep't of Licensing & Regulation,* 469 S.W.3d 69, 77 (Tex. 2015) ("[*Andrade v. NAACP of Austin*] 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."). Having easily cleared this threshold,

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[11] As further discussed below in Section II.A, the lower courts correctly determined that Respondents had shown a probable right to relief on their claims. Thus, even if viability were the standard (which it is not), Respondents have met that threshold as well.

the lower courts appropriately declined to bar Respondents' claims on immunity grounds.

II. The Court Should Affirm The Lower Courts' Rulings

The Court of Appeals properly determined that the trial court did not abuse its discretion when ordering temporary injunctive relief. As the Court of Appeals noted, a trial court "'does not abuse its discretion if some evidence reasonably supports the trial court's decision.'" Pet. App. Tab A at 16 (quoting *Butnaru*, 84 S.W. 3d at 211); *see also id*. (quoting *Fox*, 12 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.")).

Here, the record amply supports Respondents' claims.[12] While Petitioners cross-examined Respondents' witnesses, they did not present evidence contradicting Dr. Kuppalli's conclusions on the COVID-19 pandemic, Professor Vladeck's testimony on the Model Emergency Health Powers Act, Dr. Chatman's travel burden analysis, or Mr. Cortés's conclusions as to ballot security. *See, e.g.*, Pet. App. Tab A at 7 n.4 (noting the State Officials did not offer evidence to contradict Mr. Cortés); *id*. at 8 n.5 (noting the State Officials did not offer evidence to contradict Dr. Chatman). Further, Petitioners' lone witness conceded that: counties would be

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[12] For the same reasons that Respondents have standing and that Petitioners are not immune from suit, the lower courts properly found that Respondents adequately pled a cause of action against Governor Abbott and Secretary Hughs.

permitted to operate ballot return locations at county clerk annex sites on Election Day; that the Secretary of State had previously certified the additional drop-off locations in Harris County, and that counties operating multiple ballot return locations were in compliance with the statewide guidance on ballot collection and security procedures. 2.RR.235:15-237:17; 2.RR.237:18-25.

A. Respondents Demonstrated A Probable Right To Relief And Irreparable Harm

The Court of Appeals correctly affirmed the trial court in determining that Respondents demonstrated a probable right to relief and irreparable harm on all three of Respondents' claims.

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

Under the *ultra vires* doctrine, "a suit . . . 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). Respondents clearly alleged, and evidence at the hearing established, that the Governor exceeded his authority under the Disaster Act when issuing the October 1 Proclamation because his stated interests in adopting the limit on ballot return locations had nothing to do with the COVID-19 pandemic.

As the Court of Appeals determined, the trial court reasonably credited evidence supporting findings that:

> (i) the challenged portion of the [October 1] proclamation was unnecessary for ballot security, (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.

Pet. App. Tab A at 19.

These findings demonstrate that Respondents have a probable right to relief on their *ultra vires* claim against the Governor, because they support the determination that the Proclamation's limit on ballot returns locations was not rationally related to the COVID-19 pandemic, as required by Section 418.016 of the Texas Disaster Act and the Model Emergency Health Powers Act.

Ballot security. Petitioners' interest in "ballot security" plainly has nothing to do with an airborne pathogen. And even if it did, while Petitioners repeatedly invoke "ballot security" to this Court, they failed to put forth evidence before the trial court demonstrating that the Governor's October 1 Proclamation enhances ballot security. Petitioners' only witness, Keith Ingram, conceded 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. 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.

Ingress and Egress Provision. While the Proclamation claims authority under the Disaster Act's "ingress and egress" provision, Petitioners have all but abandoned trying to justify the October 1 Proclamation under this section of the statute. That is because the limit on ballot return locations does not limit occupancy but instead increases it. 2.RR.129. And as evidence at the hearing established, increased occupancy of premises is what poses a danger to Texans in the current pandemic.

Impact of the October 1 Proclamation. By limiting the number of ballot return locations in the period before Election Day, there is no question that the Governor's act made it more difficult for Respondents to cast their ballots in a safe and efficient manner in light of the current pandemic. *See* 2.RR.84:17-22; 2.RR.142:12-18; 2.RR.167:6-21; 2.RR.170:10-171:15. As the Court of Appeals recognized, "[g]iven 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." Pet. App. Tab A at 20. Thus, the limit on ballot return locations imposes a particular burden on those voters most vulnerable to adverse health incomes from COVID-19—a proposition that Petitioners have never disputed.

Early Voting Clerk's Office. The Court of Appeals noted the parties' understanding that Section 86.006(a-1)'s reference to the "early voting clerk's office" included a county clerk's main and satellite offices when the county clerk is the early voting clerk. Pet. App. Tab A at 19. It determined that the Proclamation "changed the law to limit the meaning of [early voting clerk's office] to only the singular, contrary to the Attorney General's September 30 representation to the Texas Supreme Court." Pet. App. Tab A at 18.

Petitioners now argue that the Court of Appeals' finding was "based on a misinterpretation of a brief that [the Attorney General] filed in *In re Hotze*." Petition at 13. But the language in that brief is plain:

> 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).

Election Day Operation of Multiple Ballot Return Locations. Finally, any notion that the ballot return location limitation is necessary to further the State's

interests in ballot security, statewide uniformity, or addressing the COVID-19 pandemic is belied by Petitioners' critical concession that counties may operate multiple ballot return locations on Election Day. Petitioners have never attempted to explain why they have a distinct concern about the period "prior to" Election Day in comparison to Election Day.

Petitioners mischaracterize Respondents' claims as a broad challenge to the Governor's legal authority under the Texas Disaster Act. Petitioners imply that, if the Proclamation's limit is found to be *ultra vires*, they would never be able to relax or amend restrictions adopted during a disaster. Petition at 14 (characterizing Respondents' argument as a "pernicious one-way ratchet"). This is not so. The Governor's suspension authority under the Texas Disaster Act must be exercised consistent with and in response to the declared disaster. The Governor's authority to relax or amend any adopted restrictions if the disaster conditions abate is not at issue in this case. But the Governor by his own admission did not issue the October 1 Proclamation to ease any disaster but instead justified his actions by "ballot security." With COVID-19 still prevalent in Texas, 2.RR.128-129, the Governor's reduction of ballot return locations is incompatible with the current conditions on the ground.

Two courts have now found that Respondents are likely to succeed on their claim that the October 1 Proclamation had no "real or substantial relation to the

public health crisis." *See In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020). Because there was no abuse of discretion, this Court should affirm.

2. The Lower Courts Properly Determined That Respondents Had A Probable Right To Relief And Would Be Irreparably Harmed By Their Constitutional Claims

Petitioners urge this Court to follow the Fifth Circuit's determination in a parallel case on the October 1 Proclamation, but as the Court of Appeals correctly determined, its review was "limited to the evidence before us in the interlocutory appeal, applying the applicable standard of review." Pet. App. Tab A at 18 n.6. Thus, the fact that another court found differently on a different record does not require reversal of the trial court's injunction in this case. Moreover, the federal action was a challenge only under the United States Constitution; it did not and could not bring an *ultra vires* claim, which is a question of state law reserved for state court determination.

Petitioners make the stunning and nonsensical argument that the October 1 Proclamation "does not even implicate, much less burden, the right to vote." Petition at 15. In doing so, they essentially ask this Court to find that the trial court abused its discretion in crediting testimony from witnesses who stated that voting in-person put them at a higher risk for contracting COVID-19, that the Governor's limit on ballot return locations made it harder for them to cast their ballot in a safe and efficient manner, and that they were concerned that their ballots would not be

delivered in time by USPS, given the many problems that USPS has been having. Petitioners' discussion of the October 1 Proclamation's burden on voters tellingly omits any reference to the current public health crisis. But the lower courts correctly did not ignore the fact that the election is taking place amidst a global pandemic, and this Court should not either.

As a matter of law, the fact that a voter can vote by alternate means does not cure the burdens that the October 1 Proclamation imposes on Respondents' ability to vote by using a ballot return location. 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).

The trial court found a substantial burden to Respondents' constitutionally protected right to vote, "as a consequence of increased travel delays, among other things." Petitioners conveniently ignore the evidence presented on these burdens, because it demonstrated the burden is far from *de minimis*. Respondents' 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. Respondent'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 drop off their mail ballots prior to Election Day. 2.RR.207-209.

Petitioners invoke the State's interest in uniformity to justify the limit on ballot return locations, but it is an illogical kind of uniformity. Ironically, Petitioners argue that the October 1 Proclamation eliminates disparate treatment by establishing a single statewide rule, Petition at 16, even though the limit on ballot return locations imposes disproportionate burdens on Texas voters depending on their county of residence. 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, and so faces a greater travel burden and crowd congestion in attempting to utilize his or her county's single ballot return location.[13] Petitioners 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 Petitioners 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 Petitioners have not prohibited local election officials from operating ballot return locations at multiple polling places *on Election Day*.

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[13] Petitioners argued below that an unauthorized ballot return location in Fort Bend County somehow proves that uniformity across the state was needed, without considering the fact that other remedies short of burdening voters' right to vote could address such a situation.

Petitioners also reference voting fraud as a possible justification for the Proclamation, but their rhetoric is inconsistent with the testimony presented at the evidentiary hearing. Petitioners presented no evidence that voter fraud would 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, Petitioners 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, all while the election was already underway and with only one day's notice. Pet. App. Tab A at 20. Indeed, as the

Court of Appeals astutely recognized, "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." *Id*. Voters, however, are the collateral damage and the Texas Constitution does not allow that. The Court should therefore affirm the lower courts' finding that Petitioners' claimed interests do not justify the burden on Respondents' voting rights, and that the October 1 Proclamation cannot withstand rational basis review. The October 1 Proclamation impermissibly burdens Respondents' right to vote and arbitrarily disenfranchises them.

B. Equities Overwhelmingly Favor Multiple Ballot Return Locations

The equities overwhelmingly favor multiple ballot return locations, particularly in light of the current public health crisis. There is still time for counties to operate ballot return locations at their satellite offices prior to Election Day,[14] and offering this option will be particularly critical at a time when COVID-19 infections are plateauing,[15] and by some indices, increasing.[16] Texas is already seeing

[14] Resp. App. Tab A, DeBeauvoir Amicus Letter at 5.

[15] 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

[16] Texas Department of State Health Services, COVID-19 Case Counts, *available at* https://bit.ly/3kwZ5oG (last viewed Oct. 25, 2020)

unprecedented levels of voter turnout during the early voting period,[17] and with Election Day drawing near, more voters will seek to return their ballots in person to avoid problems with USPS delivery.[18]

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.[19] Harris County has more than 2.38 million registered voters—more than the number of registered voters in the 200 least-populated counties *combined*.[20] Travis County had nearly 823,000 registered voters.[21] Yet Harris and Travis counties may only operate the same number of ballot return locations prior to Election Day as counties with fewer than 5,000 voters: one. And Harris is both the most populous Texas county and one of the state's geographically largest, as well as one of the most

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[17] The Travis County Clerk's amicus brief to the Court of Appeals noted that it had received 15,999 mail-in ballots by hand delivery at just one location between October 2 and October 23. Resp. App. Tab A, DeBeauvoir Amicus Letter at 4.

[18] Resp. App. Tab A, DeBeauvoir Amicus Letter at 4.

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

[20] *Id.*

[21] *Id.*

diverse. Only 28.7% of Harris County's residents are white – which means that the burdens of the Proclamation will be disproportionately felt by Black and Hispanic Texans.[22]

Finally, in the absence of an injunction, Respondents 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 of Appeals rejected the notion that the executive should be able to rewrite the rules of an election that is already underway, and this Court should as well. Pet. App. Tab A at 20. Petitioners urge this Court not to interfere with an ongoing election, but ignore the fact that interference first came from the Governor, whose last-minute action sent local election officials scrambling during a high turnout election taking place amid a pandemic. By urging this Court to reverse the trial court's injunction, Petitioners essentially ask this Court to abdicate its role as a co-equal branch of government ensuring the separation of powers.

C. The Trial Court's Remedy Was Appropriate

The Court of Appeals summarily rejected Petitioners' argument that the trial court ordered the wrong remedy, and this Court should reject it as well. As the Court

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[22] U.S. Census Bureau, QuickFacts – Harris County, Texas, https://www.census.gov/quickfacts/fact/table/harriscountytexas/PST045219

of Appeals found, "neither party challenged the July 27 Proclamation . . . 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." Pet. App. Tab A at 21. Indeed, for the purposes of a temporary injunction, the status quo is the "last, actual, peaceable, non-contested status that preceded the pending controversy." *State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975). The status quo here is thus the state of affairs under the Governor's July 27 Proclamation, which was so uncontroversial that the Attorney General invoked it in a judicial filing to this Court the day before the Governor's Proclamation limiting ballot return locations. To do as Petitioners suggest, which is to revert to Section 86.006(a-1) as written, would not redress the injury to Respondents from the October 1 Proclamation. Petitioners cannot fashion their preferred remedy simply because they lost before the trial court.

PRAYER

Governor's Abbott's October 1 Proclamation disrupted the well-settled status quo while the election was underway, 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 lower courts' rulings 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 based 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 deny the Petition and affirm the Court of Appeals' ruling upholding the trial court's entry of temporary injunctive relief.

Dated: October 26, 2020

Respectfully submitted,

/s/ Lindsey B. Cohan

Lindsey B. Cohan
State Bar No. 24083903
Dechert LLP
515 Congress Avenue, Suite 1400
Austin, TX 78701-3902
(512) 394-3000
lindsey.cohan@dechert.com

Myrna Pérez
THE BRENNAN CENTER FOR
JUSTICE AT NYU LAW SCHOOL
120 Broadway, Suite 1750
New York, New York 10271
perezm@brennan.law.nyu.edu

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that, on October 26, 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 12,678 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

5806485.7.ADMINISTRATION

No. 20-0846

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

RESPONDENTS' APPENDIX

Tab

Amicus Curiae Travis County Clerk's Letter Brief in Support of Plaintiffs-Appellees in Case No. 03-20-00498-CV..A

TAB A

Amicus Curiae Travis County Clerk's Letter Brief in Support of Plaintiffs-Appellees in Case No. 03-20-00498-CV

ACCEPTED
03-20-00498-CV
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THIRD COURT OF APPEALS
AUSTIN, TEXAS
10/23/2020 12:04 PM
JEFFREY D. KYLE
CLERK

DAVID A. ESCAMILLA
COUNTY ATTORNEY

DAN HAMRE
FIRST ASSISTANT

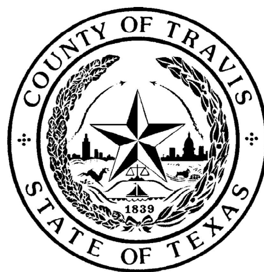
SHERINE E. THOMAS†
EXECUTIVE ASSISTANT

314 W. 11TH, STREET
GRANGER BLDG., SUITE 500
AUSTIN, TEXAS 78701

P. O. BOX 1748
AUSTIN, TEXAS 78767

(512) 854-9513
FAX: (512) 854-4808

†MEMBER OF THE COLLEGE
OF THE STATE BAR



LITIGATION DIVISION

LESLIE W. DIPPEL
DIRECTOR

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*BOARD CERTIFIED-LABOR & EMPLOYMENT
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TEXAS BOARD OF LEGAL SPECIALIZATION

October 23, 2020

Via Electronic Filing
Jeffrey D. Kyle, Clerk of the Court
Court of Appeals, Third District of Texas
P.O. Box 12547
Austin, Texas 78711

RE: *Amicus Curiae* Travis County Clerk's Letter Brief in Support of Plaintiffs-Appellees in Case No. 03-20-00498-CV, *Greg Abbott, in His Official Capacity as the Governor of Texas, et al. v. The Anti-Defamation League, Austin, Southwest, and Texoma Regions, et al.*; in the Third Judicial District Court of Appeals, Austin

To the Honorable Justices of the Third Court of Appeals:

The Travis County Clerk, Dana DeBeauvoir, respectfully submits this Letter Brief as *amicus curiae* in the above styled case.[1] Ms. DeBeauvoir sends you her best wishes and thanks you for your service to the State of Texas during these extraordinary times.

Throughout the pandemic, this Honorable Court, Governor Greg Abbott, and many other elected officials throughout the State have been called upon repeatedly to navigate the unique and tumultuous waters of the seemingly endless impacts of the public health crisis caused by COVID-19. We must honor both the letter and

[1] Pursuant to Texas Rule of Appellate Procedure 11(c), the undersigned counsel of record certify that they authored this brief in whole (consulting with Travis County Clerk Dana DeBeauvoir), that they have endeavored to add novel arguments rather than merely recite those already advanced, that no party or any party's counsel authored any part of this brief, and that no other person or entity made a monetary contribution to the preparation of any portion of this brief aside from the undersigned governmental entities.

the spirit of the law, while also finding practical solutions to immediate concerns such as the fair and just administration of elections. I write to offer insight from the trenches as to the implications of the matter pending before this Court. I hope it will be of some assistance in understanding the practicalities involved in conducting a General Election and the difficulties created by making changes, and more changes, once voting has already begun.

Voter Confusion Caused by Last-Minute Changes in Texas' Widely Reported Expanded Voting Procedures. The Governor's Order concerning the number of mail-in ballot hand delivery locations issued *after* early voting was already underway confused voters, limited access, and undermined the public information campaigns that began weeks ago to ensure voters know when and how they can cast their votes.

Specifically, under section 418.016 of the Texas Government Code, the Texas Governor issued a proclamation on July 27, 2020, extending the early voting period for the November 3rd General Election ("Original Proclamation"). This Proclamation also permitted voters to hand deliver a marked mail-in ballot to the Early Voting Clerk's Office prior to and including Election Day, rather than only on Election Day as set forth in section 86.001(a-1) of the Texas Election Code. As stated in the Proclamation, these extensions were made in order to establish procedures for eligible voters to exercise their right to vote in person during the COVID-19 pandemic and allow election officials to implement health protocols to conduct the General Election safely. These protocols, including appropriate social distancing and safe hygiene practices, protect election workers and voters, and at the same time, ensure the election proceeds efficiently and safely when Texans go to the polls to cast a vote in person during whether during early voting or on Election Day.

Multiple news outlets and other groups reported on the Governor's Original Proclamation and on Travis County's implementation of that Original Proclamation shortly after it was issued. This further set voters' expectations when making their plans to vote in person or by mail during the early voting period rather than on Election Day. Examples of these reports include the following:

a. The Travis County Clerk's website provided public notices on its Elections page on August 31, 2020, identifying the locations where voters could hand delivery their mail-in ballots in person during the extended early voting period. The website was subsequently updated on September 14, 2020, to provide notice of the hours of operations

for these hand delivery locations. A copy of that website page as it appeared between September 14, 2020, and October 1, 2020, is attached hereto as Appendix A.

b. On or about August 26, 2020, the Austin Monitor published an article by Jessi Devenyns entitled, "Travis County plans for drive-thru voting drop-off for mail-in ballots," which described the Travis County Clerk's plans for permitting voters to hand delivery their mail-in ballots in person at any of its business office locations. https://www.austinmonitor.com/stories/2020/08/travis-county-plans-for-drive-thru-voting-drop-off-for-mail-in-ballots/.

c. On August 27, 2020, the Austin American-Statesman published an article by Ken Herman entitled, "Herman: You'll be able to submit your mail ballot via drive-through in Travis County," which described the Governor's Original Proclamation and Travis County's plans to implement it. https://www.statesman.com/news/20200827/herman-yoursquoll-be-able-to-submit-your-mail-ballot-via-drive-through-in-travis-county.

d. On September 15, 2020, the Austin Monthly magazine published an article by Hunter Bergfeld entitled, "Your Guide to Voting in Travis County," which described Travis County's plans to implement the Governor's Original Proclamation, including links to a number of resources for voters, such as the Travis County Clerk's website for specific information allowing each voter to prepare an individualized plan for voting safely during the COVID-19 pandemic. https://www.austinmonthly.com/your-guide-to-voting-in-travis-county/.

e. On September 17, 2020, Fox 7 Austin published an article by Jennifer Kendall entitled, "Travis County to add unique polling locations for November election," which provided information about Travis County's plans for implementing the Governor's Original Proclamation. https://www.fox7austin.com/news/travis-county-to-add-unique-polling-locations-for-november-election.

f. On September 22, 2020, KXAN published an article by Candy Rodriguez entitled, "LIST: Travis County Election Day, early voting polling locations for 2020 presidential election," which described

Travis County's plans to implement the Governor's Original Proclamation. https://www.kxan.com/news/your-local-election-hq/travis-county-looks-to-get-creative-with-polling-locations-for-november-election/.

g. On September 29, 2020, Community Impact Newspaper published an article by Olivia Aldridge entitled, "Expecting 100,000 mail-in ballots, Travis County expands voting options," which described Travis County's plans to implement the Governor's Original Proclamation. https://communityimpact.com/austin/central-austin/vote/2020/09/29/expecting-100000-mail-in-ballots-travis-county-expands-voting-options/.

h. On September 30, 2020, Fox 7 Austin published another article entitled, "Travis County voters can hand deliver personal mail in ballots starting Oct. 1," which described Travis County's plans to begin accepting voter's personal delivery of their mail-in ballots at numerous locations the very next day in accordance with the Governor's Original Proclamation. https://www.fox7austin.com/news/travis-county-voters-can-hand-deliver-personal-mail-in-ballots-starting-oct-1.

In accordance with the Governor's Original Proclamation, Travis County accepted mail-in ballots voters by hand delivery at multiple locations beginning October 1, 2020. Later that day, the Governor issued a second Proclamation that *inter alia* limited the hand delivery locations to one per county. This Proclamation was effective the following morning. With voting already underway, changing the procedure literally overnight disrupted the election process. My office is complying with the Governor's October 1, 2020, proclamation and has accepted mail-in ballots by hand delivery at only one location beginning October 2, 2020. Since October 2, 2020, and as of the date of this Letter Brief, my office has received a total of 15,999 mail-in ballots by hand delivery, just at this one location. This is an unprecedented amount.

Need to Reinstate Multiple Hand-Delivery Locations for Populous Counties. Early voting will continue until October 30, 2020. The closer we get to the end of the early voting period, the more likely it is that a person choosing to vote by mail-in ballot will have insufficient time for their ballot to be delivered to the Early Voting Clerk through the United States Postal Service in order to ensure it will be counted. Mail-in ballots postmarked on or before election day must be received no

later than 5:00 p.m. on the day after election day to be counted. *See* Tex. Elec. Code Ann. § 86.007.

Travis County and Other Populous Counties Require Hand delivery Locations for Mail-in Ballots to Conduct a Safe and Fair General Election. Travis County is the 5th most populous county in Texas and has, like most of the other counties, experienced a large increase in the number of registered voters (over 844,000, which is approximately 97% of all potential eligible voters in the County), and the number of voters who are seeking to vote by mail rather than in person. This is particularly true among eligible voters aged 65 and older who are most at risk for experiencing harmful effects from contracting COVID-19, including a high percentage of reported deaths. Permitting voters who are eligible to vote by mail to choose between more than one location to hand deliver their mail-in ballots during the early voting period increases efficiency and reduces the number of persons who would otherwise have to vote in person. This is particularly true in light of news reports that the United States Postal Service has experienced significant delays in delivering mail such as vote-by-mail applications and ballots. To date, our office has received more than 74,000 applications for mail in ballots for the November 3, 2020 election. In response to the increased number of requests for mail-in ballots, as well as wide-spread concern over the delays in the United States mail, Travis County has made arrangements to accommodate an unprecedented utilization of the mail-in ballot and ballot hand delivery provisions of the Election Code and the Governor's Original Proclamation. If this Court reinstates the lower court's temporary injunction, Travis County could quickly implement those procedures and provide multiple hand delivery locations.

Ballot Security Was *Enhanced* under the Governor's Original Proclamation. The Appellants urge the Governor's October 1, 2020, proclamation to remove multiple hand delivery locations was necessary to enhance ballot security. However, as described below, having multiple hand delivery locations *increases* ballot security.

Once removed from the locked ballot boxes, a mail-in ballot is processed in the same way a mail-in ballot received through the Postal Service is processed, including signature verification to ensure that the person who hand delivered the mail-in ballot is an eligible voter. However, in addition to these security protocols, when a voter *hand delivers* their mail-in ballot rather than mailing it in, the voter must demonstrate they are eligible to vote, sign a roster, and present valid identification to an election official at the time they delivery their ballot. Increasing the number of places and the number of days during which a voter can hand deliver their mail-in ballot does not reduce any of the security procedures to prevent voter

fraud; it *enhances* security by requiring the voter to show identification at the time they hand delivery their ballot—a step not taken when simply mailing their ballot in.

Benefits of Retaining Expanded Early In-Person Voting and Expanded Hand Delivery Locations for Mail-In Ballots. There is a significant and very necessary benefit to expanding the number of days and locations for voters to hand deliver their mail-in ballots. Both measures enhance the safe and efficient processing of voters and ballots. Both the expansion of early voting and permitting ballot hand delivery at multiple locations during early voting increase voters' opportunities to safely exercise their right to vote. Specifically, by spreading out the risks, reducing the number of in-person voters waiting in lines and spending time inside polling places on Election Day, Travis County will be able to minimize Election Day wait times and delays as a result of long lines at election day polling places, resulting in fewer persons congregating at in-person polling places, and decreased exposure to COVID-19.

The multiple locations for hand delivering a mail-in ballot increases voter safety and convenience. Travis County has fewer polling locations throughout the county than it ordinarily would because many of the locations usually used, such as grocery stores schools, are not available. Spreading out both the early voting period and the locations at which voters can return a mail-in ballot, reduces the number of voters congested in on area on Election Day. Furthermore, allowing a voter to hand deliver their mail-in ballot "in person at an early voting clerk's office" in more than one location will reduce the risk of traffic congestion, reduce wait times, and reduce the risk to voters. The use of more than one site for hand delivery is consistent with current Election Code provisions and is also consistent with the Attorney General's previous interpretation of the statute and the Secretary of State's previous guidance. Multiple locations ease the burden on those most clearly entitled to and mostly likely to need this accommodation – the disabled and the elderly.

Due to the unique and historically unprecedented circumstances presented by the ongoing COVID-19 pandemic, including medical advice and concomitant emergency proclamations issued by federal, State, and local government officials that residents must shelter in place, stay at home, and practice social distancing to prevent the rapid spread of COVID-19, Travis County has experienced a shortage of poll workers available for the early voting periods associated with the November 3rd General Election and on Election Day. I anticipate the shortage of poll workers because of my experience with the March 3, 2020, primary elections

and the July 14, 2020, primary runoff and special elections. In light of reports of unprecedented, high voter turnout in both Travis County and nationwide during this presidential general election, I reasonably anticipate this issue to increase to a level that will be very challenging to manage and that will expose waiting voters and poll workers to even greater risk.

The Governor's Original Proclamation expanding the period for early voting in person and the provisions for hand delivering mail-in ballots instead of returning them via the U.S. Post Office offered relief for these anticipated challenges. Even so, finding appropriate polling places and appropriate levels of staffing was difficult due to the challenges of conducting such a large election in a pandemic. The polling places and staffing levels we have in place were based on the rules that existed when we were required to make those decisions, make the necessary contractual arrangements, seek commissioners court approval, and publish notices. That time is past. I do not believe it is possible to change all that has been done at this late date to safely accommodate more voters at in-person early voting and Election Day polling places. I fear the increased number of interactions at in-person polling places, which require more time and will also result in longer wait times for voters, will make both election workers and voters less safe.

In my opinion, based on my 33 years of experience in running elections, failing to provide for increased days and locations for voters to hand deliver their mail-in ballots will: (l) confuse the voters as to where they may hand deliver their mail-in ballot, (2) cause voters to have difficulty locating the ballot hand delivery locations, especially since procedures adopted for mail-in ballot hand delivery were well publicized and already underway when the Governor issued the October 1, 2020 proclamation, (3) increase the number of election workers, employees, and poll workers necessary to conduct the General Election on Election Day thereby increasing the amount of people in one indoor space, (4) increase the exposure of voters to potentially infected individuals due to increased wait times caused by staffing difficulties and limiting all hand delivered mail-in ballots to only one location, and (5) cause significant disruption not only to voters trying to exercise their right to vote, but to the ordinary course of business, traffic, and the other functions of my office not related to elections.

In my opinion, the Governor's changes made after the election had already begun threatens my ability to conduct a safe and fair General Election. This is true especially considering the risks to public health and safety of voters and poll workers, the reduction in the number of poll workers willing to risk their health and the health of others, and the difficulty in finding an adequate number of polling

locations that provided sufficient space to comply with social distancing protocols. The voters, the election workers, and the community as a whole would greatly benefit from reinstatement of the ability to hand deliver mail-in ballots at more than one location. This can be readily accomplished without risking ballot security because each voter is required to undergo careful and specific verification measures required under Texas' existing statutes when hand delivering a marked mail-in ballot.

In conclusion, we all share the goal of putting measures in place that permit the maximum number of voters to exercise their most profound right as a citizen without risking their health and safety and those of the public servants who will be working the polls. Allowing multiple locations to hand deliver a mail-in ballot accomplishes that goal.

Respectfully submitted,

DAVID A. ESCAMILLA
County Attorney, Travis County
P. O. Box 1748
Austin, Texas 78767
Telephone: (512) 854-9513
Facsimile: (512) 854-9316

By: /s/ Leslie W. Dippel
SHERINE E. THOMAS
State Bar No. 00794734
sherine.thomas@traviscountytx.gov
LESLIE W. DIPPEL
State Bar No. 00796472
leslie.dippel@traviscountytx.gov

ATTORNEYS FOR AMICUS CURIAE, TRAVIS COUNTY CLERK, DANA DEBEAUVOIR

CERTIFICATE OF COMPLIANCE

By my signature below, pursuant to Tex. R. App. P. 9.4(i)(3), I hereby certify that the foregoing Letter Brief of Amicus Curiae Travis County Clerk Dana DeBeauvoir, contains 2,656 words and is compliant as to form pursuant to Tex. R. App. P. 9.4.

/s/Leslie W. Dippel
LESLIE W. DIPPEL

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October 2020, a true and correct copy of the above and foregoing was forwarded to all counsel and/or parties of record by electronic filing and/or electronic service to:

Benjamin L. Dower
Benjamin.Dower@oag.texas.gov
Michael R. Abrams
michael.abrams@oag.texas.gov
Office of the Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Attorneys for Appellants

Jessica N. Witte
Thompson & Horton, LLP
8300 N. MoPac Expwy, Suite 220
Austin, Texas 78759
jwitte@thompsonhorton.com

Jonathan B. Miller
LiJia Gong
Victoria Stilwell
Sophia TonNu
Public Rights Project
4096 Piedmont Avenue, #149
Oakland, California 94611
Attorneys for Amici Curiae 17 Cities, Counties, and Elections Administrators

Lindsey B. Cohan
lindsey.cohan@dechert.com
Dechert LLP
515 Congress Avenue, Suite 1400
Austin, Texas 78701-3902

Myrna Pérez
Maximillian L. Feldman
The Brennan Center for Justice
at NYU Law School
120 Broadway, Suite 1750
New York, New York 10271

Neil Steiner
May Chiang
Julia Markham-Cameron
Dechert LLP
1095 Avenue of the Americas
New York, New York 10036-6797

Erik Snapp
Erik.Snapp@dechert.com
Dechert LLP
35 West Wacker Drive, Suite 3400
Chicago, IL 60601

Sarah Magen
Dechert LLP
Cira Centre, 2929 Arch Street
Philadelphia, Pennsylvania 19104
Attorneys for Appellees

/s/Leslie W. Dippel
SHERINE E. THOMAS
LESLIE W. DIPPEL
Assistant County Attorneys

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Sara Boltin on behalf of Leslie Dippel
Bar No. 00796472
sara.boltin@traviscountytx.gov
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Lindsey Cohan	24083903	lindsey.cohan@dechert.com	10/23/2020 12:04:52 PM	SENT
Michael Abrams		michael.abrams@oag.texas.gov	10/23/2020 12:04:52 PM	SENT
Kathleen Morris		kathleen.morris@oag.texas.gov	10/23/2020 12:04:52 PM	SENT
Benjamin Dower		Benjamin.Dower@oag.texas.gov	10/23/2020 12:04:52 PM	SENT
Myrna Perez		perezm@brennan.law.nyu.edu	10/23/2020 12:04:52 PM	SENT
LASHANDA GREEN		lashanda.green@oag.texas.gov	10/23/2020 12:04:52 PM	SENT
Kristy Alonzo		kalonzo@thompsonhorton.com	10/23/2020 12:04:52 PM	SENT
Lanora Pettit		lanora.pettit@oag.texas.gov	10/23/2020 12:04:52 PM	SENT
Wolfgang PHirczy de Mino, PhD		wphdmphd@gmail.com	10/23/2020 12:04:52 PM	SENT
Erik Snapp		Erik.Snapp@dechert.com	10/23/2020 12:04:52 PM	SENT
Maximillian Feldman		feldmanm@brennan.law.nyu.edu	10/23/2020 12:04:52 PM	SENT
neil steiner		neil.steiner@dechert.com	10/23/2020 12:04:52 PM	SENT
Jessica Witte		jwitte@thompsonhorton.com	10/23/2020 12:04:52 PM	SENT

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Lindsey Cohan
Bar No. 24083903
lindsey.cohan@dechert.com
Envelope ID: 47536019
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Lindsey Cohan	24083903	lindsey.cohan@dechert.com	10/26/2020 4:27:57 PM	SENT
Myrna Perez	24041676	myrnaperez@aya.yale.edu	10/26/2020 4:27:57 PM	SENT
Wolfgang PHirczy de Mino, PhD		wphdmphd@gmail.com	10/26/2020 4:27:57 PM	SENT
Cecilia Hertel		cecilia.hertel@oag.texas.gov	10/26/2020 4:27:57 PM	SENT
Anne LSchievelbein		anne.schievelbein@oag.texas.gov	10/26/2020 4:27:57 PM	SENT
Maria Williamson		maria.williamson@oag.texas.gov	10/26/2020 4:27:57 PM	SENT
Beau Carter		Beau.Carter@oag.texas.gov	10/26/2020 4:27:57 PM	SENT
Kyle Hawkins		kyle.hawkins@oag.texas.gov	10/26/2020 4:27:57 PM	SENT
Lanora Pettit		lanora.pettit@oag.texas.gov	10/26/2020 4:27:57 PM	SENT