



October 26, 2020

VIA ELECTRONIC FILING

Blake A. Hawthorne
Clerk
The Supreme Court of Texas
P.O Box 12248
Austin, Texas 78711

Re: *Abbott, et al. v. Anti-Defamation League Austin, Southwest, and Texoma, et al.*,
Case Number 20-0846

Dear Mr. Hawthorne,

Earlier this evening, Respondents filed a response to the Emergency Petition for Review and adhered to the word limitations governing merits briefing in Texas Rule of Appellate Procedure 9.4(i)(2)(B) based on Petitioners' request for relief seeking a ruling on the merits, as well as their request in the Petition for Review that the Court "treat this Petition as the State Officials' opening brief on the merits." Pet. at 17 n.6. The Court directed Respondents to file a motion to exceed the word limit provided for by Texas Rule of Appellate Procedure 9.4(i)(2)(D), and filed that motion shortly thereafter. In that motion, Respondents represented that if the Court denied Respondents' motion to exceed the word limit, Respondents would file a brief consistent with the word limitations of Rule 9.4(i)(2)(D) by midnight tonight. While the Court has not yet ruled on Respondents' motion, in an abundance of caution, Respondents are filing this brief of 4,466 words, consistent with Rule 9.4(i)(2)(D), in the event that the Court denies Respondents' motion.

Thank you for your time and consideration.

Respectfully,

/s/ Lindsey Cohan

Lindsey Cohan
Counsel

cc: All parties by electronic filing

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

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

TABLE OF CONTENTS

	Page
IDENTITY OF PARTIES AND COUNSEL	I
STATEMENT OF THE CASE.....	VIII
COUNTER-STATEMENT OF ISSUES PRESENTED	1
STATEMENT OF PROCEDURAL HISTORY.....	2
STATEMENT OF FACTS	5
A. Texas Disaster Act And Governor’s Declaration Of Disaster.....	5
B. Governor’s July 27, 2020 Proclamation	5
C. Governor’s October 1, 2020 Proclamation	6
SUMMARY OF THE ARGUMENT	7
ARGUMENT	8
I. The Lower Courts Correctly Determined That Respondents Have Standing	8
A. Respondents Have Demonstrated Injury-In-Fact	8
B. ADL And Common Cause Have Both Associational And Organizational Standing.....	10
C. Injuries Are Traceable To Petitioners.....	12
D. Petitioners Are Not Immune From Suit.....	14
II. The Court Should Affirm The Lower Courts’ Rulings.....	14
A. Respondents Demonstrated A Probable Right To Relief And Irreparable Harm	15
1. The Governor’s Limit On Ballot Return Locations Is Ultra Vires.....	15
2. The Lower Courts Properly Determined That Respondents Had A Probable Right To Relief And Would Be Irreparably Harmed By Petitioners’ Actions	18
B. Equities Overwhelmingly Favor Multiple Ballot Return Locations	21
C. The Trial Court’s Remedy Was Appropriate.....	22

TABLE OF CONTENTS

	Page
PRAAYER.....	22
CERTIFICATE OF SERVICE.....	24
CERTIFICATE OF COMPLIANCE.....	25

TABLE OF AUTHORITIES

CASES

<i>AARP v. United States Equal Employment Opportunity Comm’n</i> , 226 F. Supp. 3d 7 (D.D.C. 2016).....	11, 12
<i>Brady Campaign to Prevent Gun Violence v. Salazar</i> , 612 F. Supp. 2d 1 (D.D.C. 2009).....	11
<i>Brown v. Todd</i> , 53 S.W.3d 297 (Tex. 2001).....	8
<i>Charles H. Wesley Educ. Found., Inc. v. Cox</i> , 408 F.3d 2349 (11th Cir. 2005)	9
<i>City of Beaumont v. Bouillion</i> , 896 S.W.2d 143 (Tex. 1995)	14
<i>City of El Paso v. Heinrich</i> , 284 S.W.3d 366 (Tex. 2009)	14
<i>Common Cause Indiana v. Lawson</i> , No. 120CV01825RLYTAB, 2020 WL 5671506 (S.D. Ind. Sept. 22, 2020), <i>rev’d on other grounds</i> , No. 20-2877, 2020 WL 6255361 (7th Cir. Oct. 23, 2020).....	10
<i>Deerfield Med. Ctr. v. City of Deerfield Beach</i> , 661 F.2d 328 (5th Cir. 1981)	9
<i>Envtl. Conservation Org. v. City of Dallas</i> , No. 3-03-CV-2951-BD, 2005 WL 1771289 (N.D. Tex. July 26, 2005)	11
<i>Flyers Rights Educ. Fund, Inc. v. United States Dep’t of Transportation</i> , 957 F.3d 1359 (D.C. Cir. 2020).....	11
<i>Frederick v. Lawson</i> , 2020 WL 4882696 (S.D. Ind. Aug. 20, 2020)	19
<i>Friends of the Earth, Inc. v. Chevron Chem. Co.</i> , 129 F.3d 826 (5th Cir. 1997)	12

<i>Garbett v. Herbert</i> , 2020 WL 2064101 (D. Utah Apr. 29, 2020).....	19
<i>Harding v. Edwards</i> , 2020 WL 5543769 (M.D. La. Sept. 16, 2020).....	19
<i>In re Abbott</i> , 601 S.W.3d 802 (Tex. 2020)	12
<i>Lopez Torres v. New York State Bd. of Elections</i> , 462 F.3d 161 (2d Cir. 2006), <i>rev'd on other grounds</i> , 552 U.S. 196 (2008).....	10
<i>LWV of Va. v. Bd. of Elections</i> , 2020 WL 2158249 (W.D. Va. May 5, 2020).....	19
<i>State v. Hollins</i> , No. 20-0729, 2020 WL 5919729 (Tex. Oct. 7, 2020)	13
<i>Texas Ass'n of Bus. v. Texas Air Control Bd.</i> , 852 S.W.2d 440 (Tex. 1993)	10
<i>Texas Educ. Agency v. Leeper</i> , 893 S.W.2d 432 (Tex. 1994)	12
<i>Thomas v. Andino</i> , 2020 WL 2617329 (D.S.C. May 25, 2020)	19
<i>Turner v. Robinson</i> , 534 S.W.3d 115 (Tex. App. 2017).....	15
<i>Vote Forward v. DeJoy</i> , 2020 WL 5763869 (D.D.C. Sept. 28, 2020).....	9
<i>Waco Indep. Sch. Dist. v. Gibson</i> , 22 S.W.3d 849 (Tex. 2000).....	8
STATUTES	
TEX. ELEC. CODE § 31.005(b)	13
TEX. ELEC. CODE § 86.006(a-1)	passim
TEX. GOV'T CODE § 418.012.....	13

TEX. GOV'T CODE § 418.016(a)3, 5
TEX. GOV'T CODE § 418.018(c)7

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 <i>ultra vires</i> 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 Respondents¹ 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?

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

STATEMENT OF PROCEDURAL HISTORY

Respondents filed their original petition and application for temporary injunctive relief on October 5, 2020. CR.3-82.

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.

On October 15, 2020, the trial court issued its order denying Petitioners' pleas to the jurisdiction and granted Respondents' Application for Temporary Injunction. CR.205-206. 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.

The trial court entered a temporary injunction enjoining Petitioners from implementing or enforcing the following portion of the October 1, 2020 Proclamation limiting early voting clerks to a single office.

On October 23, the Court of Appeals, Third District, affirmed the trial court's ruling in a unanimous opinion. This Petition followed.

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” 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 the Governor’s October 1 Proclamation limiting in-person ballot return locations 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 statewide disaster due to COVID-19. On July 27, he issued an order extending the period for early voting to promote greater social distancing and safe hygiene practices for Texas voters. But on October 1, he issued another proclamation limiting 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 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.”

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 exacerbate the crisis.

Ballot security has nothing to do with a novel respiratory illness, and 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. 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 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. 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

A. 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: 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). The Governor's authority to suspend statutes, therefore, must be tied to a "necessary action in coping with [the] disaster." *Id.*

B. 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 to "ensure that elections proceed efficiently and safely when Texans go to the polls." 3.RR.219-20.

In the same order, Governor Abbott suspended the restriction in Texas Election Code § 86.006 that allows in-person delivery of ballots only on Election

Day, stating that “strict compliance” with these provisions “would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster.” 3.RR.220.

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

The Travis County Clerk similarly made plans to offer ballot return locations at their business office locations. Resp.App.A at 2-3.

On August 26, 2020, a representative from the Secretary of State’s Office confirmed “hand-delivery process can occur at the early voting clerk’s office [and] this may include satellite offices of the early voting clerk.” CR.78.

On September 30, 2020, the Attorney General advised this Court that “nothing in section 86.006(a-1) ... 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).

C. Governor’s October 1, 2020 Proclamation

On October 1, the Governor issued a new Proclamation suspending Section 86.006(a-1), and prohibiting county election officials from operating more than “a

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

single early voting clerk's office" for the hand delivery of mail-in ballots.

3.RR.226-29.

Governor Abbott claimed this suspension 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.

SUMMARY OF THE ARGUMENT

The lower courts properly determined that Respondents have standing to challenge the October 1 Proclamation because they are personally aggrieved by the limit on ballot return locations because they are particularly vulnerable to adverse health risks from COVID-19 and 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, and that neither 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 was appropriately directed to enjoining the relevant provision of that Proclamation.

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. Three witnesses who are eligible to vote by mail, including named Respondent Knetsch, testified 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; 2.RR.167:6-21; 2.RR.170:10-171:15.

Petitioners' argument that these 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 and it was undisputed that defendants had done nothing to interfere with the plaintiff's ability to vote. And *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000) 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. 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.

Contrary to Petitioners' claim, 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); *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."). Moreover, 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. 2.RR.89:10-16. Just this past month, a federal court rejected the very same argument that Petitioners advance here. *See Vote Forward v. DeJoy*, 2020 WL 5763869, at *9 (D.D.C. Sept. 28, 2020) (internal citations omitted). 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.A at 12. Nevertheless, ADL and Common Cause have standing to bring this lawsuit.

Petitioners claim that the Organizational Plaintiffs do not have members, and therefore cannot establish associational standing. But 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. v. Texas Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993). Rather, it is intended “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.* (internal quotation marks omitted).

Common Cause is a traditional voluntary membership organization. 2.RR.65; *see also* 3.RR.404. That is enough to establish that it has members for purposes of associational standing and courts have repeatedly found that Common Cause can establish associational standing. *See, e.g., Common Cause Indiana v. Lawson*, 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, 2020); *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). Petitioners assert that this Court should apply the “indicia of membership” test to Common Cause, Pet. 10, but that test 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). Common Cause Texas has members.

ADL is not a traditional voluntary membership organization, 2.RR.121, but it nevertheless has standing because its constituents have adequate “indicia of membership” to establish standing. Petitioners claim 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 the law, and courts look to a much wider set of criteria to determine whether an organization has standing. *See 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*, 2005 WL 1771289, at *2 (N.D. Tex. July 26, 2005).

ADL plainly meets the “indicia of membership” test. ADL’s constituents voluntarily associate with the organization, participate in guiding its policy, have input selecting its leadership, play an active role in the organization’s governance, and help fund the organization. 3.RR.305, 307, 360, 385; 2.RR.117-18, 122, 117-

18; *see, e.g., Env'tl. Conservation Org.*, 2005 WL 1771289, at *2; *Flyers Rights Educ. Fund, Inc. v. United States Dep't of Transportation*, 957 F.3d 1359, 1362 (D.C. Cir. 2020); *AARP*, 226 F. Supp. 3d at 16 (“Indicia of membership include: whether members play a role in selecting the organization’s leadership...”); *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 829 (5th Cir. 1997) (Courts should “look[]to who elected the governing body of the organization and who financed its activities”). Taken together, these indicia of membership are more than adequate to establish ADL’s standing.

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. Pet.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). Here, Respondents demonstrated that the Governor exceeded his authority because the Proclamation bears no relationship to mitigating the effects of the current COVID-19 crisis as the Texas Disaster Act 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.

Petitioners cite to 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 there, 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*.” Pet.App.A at 13. Thus, Respondents were not required to sue anyone other than the Governor.

Even assuming that Respondents were required to sue the enforcing party, they did so here, as the Court of Appeals rightly held. Pet.App.A at 13-14. The Proclamation has the “force and effect of law” and therefore acted to supersede the Election Code. TEX. GOV’T CODE § 418.012. Section 31.005(b) of the Election Code expressly authorizes the Secretary of State to enforce the election laws of the State. 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.

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 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). Respondents further alleged that the October 1 Proclamation violated their rights under the Texas Constitution, and 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).

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.A at 16 (quoting *Butnaru*, 84 S.W. 3d at 211).

Here, the record amply supports Respondents' claims. Petitioners 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.A at 7 n.4, 8 n.5 Further, Petitioners' lone witness conceded that counties can operate multiple ballot return locations 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 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

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.—Houston [14th Dist.] 2017, pet. denied). Respondents 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.A at 19.

Ballot security. Petitioners’ interest in “ballot security” has nothing to do with COVID-19. And even if it did, Petitioners failed to put forth evidence demonstrating that the Governor’s October 1 Proclamation enhances ballot security. Petitioners’ only witness, Keith Ingram, conceded that the Proclamation’s limit was not necessary for ballot security because “security was capable of being covered at satellite offices.” 2.RR.246-247. Mr. Ingram 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.” 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 that justification—as they must—because the limit on ballot return locations does not limit occupancy but instead increases it, which increases exposure to COVID-19. 2.RR.129.

Impact of the October 1 Proclamation. 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.A at 20. Thus, the limit on ballot return locations imposes a particular burden on the most vulnerable voters—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.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.A at 18.

Petitioners now argue that the Court of Appeals' finding was "based on a misinterpretation" of the Attorney General's statement before this Court. Pet. at 13. But the language in that brief is plain: "Nothing in section 86.006(a-1) ... 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.

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' 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 Disaster Act and 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. Pet. at 14. This is not so. The Governor’s suspension authority under the Disaster Act must be exercised in response to the declared disaster. With COVID-19 still prevalent in Texas, the Governor’s reduction of ballot return locations is incompatible with that mandate.

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. This Court should affirm.

2. The Lower Courts Properly Determined That Respondents Had A Probable Right To Relief And Would Be Irreparably Harmed By Petitioners’ Actions

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*. The trial court reasonably credited the evidence regarding travel burdens, crowd congestion and wait times.

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.A at 18 n.6. Moreover, the federal action was a challenge only under the United States Constitution; it did not and could not bring a state law *ultra vires* claim.

Petitioners argue that the October 1 Proclamation “does not even implicate, much less burden, the right to vote.” Pet. at 15. A voter’s ability to vote by alternate means does not cure the burdens that the October 1 Proclamation imposes on Respondents. 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). 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); *Garbett v. Herbert*, 2020 WL 2064101, at *12 (D. Utah Apr. 29, 2020); *Frederick v. Lawson*, 2020 WL 4882696, at *16 (S.D. Ind. Aug. 20, 2020); *Harding v. Edwards*, 2020 WL 5543769, at *4, *18 (M.D. La. Sept. 16, 2020).

Petitioners argue that the October 1 Proclamation eliminates disparate treatment by establishing a statewide rule, Pet. at 16, even though the limit on ballot return locations imposes disproportionate burdens on 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. Petitioners also neglect to mention that, prior to the Proclamation, there *was* a statewide rule in place: local election officials had the authority to operate more than one "early voting clerk's office" to receive ballots. CR.46.

Petitioners also reference voting fraud as a possible justification for the Proclamation, but Petitioners presented no evidence to the trial court that voter fraud would result from operating multiple ballot return locations in the period prior to Election Day, but not on Election Day. 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.

These inconsistencies expose the October 1 Proclamation as a power grab, all while the election was already underway and with only one day's notice. Pet.App.A at 20. Voters, however, are the collateral damage and the Texas Constitution does not allow that. 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,³ and offering this option will be particularly critical at a time when COVID-19 still presents a threat. Texas is already seeing unprecedented levels of voter turnout during the early voting period,⁴ and with Election Day drawing near, more voters will seek to return their ballots in person to avoid problems with USPS delivery.⁵

In the absence of an injunction, state officials may very well conclude that they can take almost any action to limit voters' access to the ballot under the Disaster Act as long as they do so close Election Day so as to escape judicial review. 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.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

³ Resp.App.A at 5.

⁴ The Travis County Clerk noted that she had received 15,999 mail-in ballots by hand delivery at just one location between October 2 and October 23. Resp.App.A at 4.

⁵ Resp.App.A at 4.

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 as well. As the Court 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.A at 21. To do as Petitioners suggest would not redress the injury to Respondents from the October 1 Proclamation.

PRAYER

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
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

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), I hereby certify that this brief contains 4,466 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

5808074.2.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

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

Tab

TAB A

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

DAVID A. ESCAMILLA
COUNTY ATTORNEY

DAN HAMRE
FIRST ASSISTANT

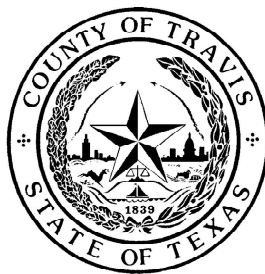
SHERINE E. THOMAS†
EXECUTIVE ASSISTANT

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

ANTHONY J. NELSON

LAURIE R. EISERLOH*

PATRICK M. KELLY

AMY S. YBARRA

PATRICK T. POPE

CYNTHIA W. VEIDT

*BOARD CERTIFIED-LABOR & EMPLOYMENT
LAW AND PERSONAL INJURY TRIAL LAW-
TEXAS BOARD OF LEGAL SPECIALIZATION

ACCEPTED
03-20-00498-CV
47471812
THIRD COURT OF APPEALS
AUSTIN, TEXAS
10/23/2020 12:04 PM
JEFFREY D. KYLE
CLERK

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 deliver 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: (1) 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@traviscountytexas.gov

LESLIE W. DIPPEL
State Bar No. 00796472
leslie.dippel@traviscountytexas.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

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Sara Boltin on behalf of Leslie Dippel
Bar No. 00796472
sara.boltin@traviscountytx.gov
Envelope ID: 47471812
Status as of 10/23/2020 12:09 PM CST

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

Automated Certificate of eService

This automated certificate of service was created by the eFiling system.
The filer served this document via email generated by the eFiling system
on the date and to the persons listed below:

Lindsey Cohan
Bar No. 24083903
lindsey.cohan@dechert.com
Envelope ID: 47543180
Status as of 10/27/2020 7:37 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Lindsey Cohan	24083903	lindsey.cohan@dechert.com	10/26/2020 11:42:44 PM	SENT
Kyle Hawkins		kyle.hawkins@oag.texas.gov	10/26/2020 11:42:44 PM	SENT
Myrna Perez	24041676	myrnaperez@aya.yale.edu	10/26/2020 11:42:44 PM	SENT
Maria Williamson		maria.williamson@oag.texas.gov	10/26/2020 11:42:44 PM	SENT
Cecilia Hertel		cecilia.hertel@oag.texas.gov	10/26/2020 11:42:44 PM	SENT
Anne LSchievelbein		anne.schievelbein@oag.texas.gov	10/26/2020 11:42:44 PM	SENT
Kristy Alonzo		kalonzo@thompsonhorton.com	10/26/2020 11:42:44 PM	SENT
Wolfgang PHirczy de Mino, PhD		wphdmphd@gmail.com	10/26/2020 11:42:44 PM	SENT
Lanora Pettit		lanora.pettit@oag.texas.gov	10/26/2020 11:42:44 PM	SENT
Beau Carter		Beau.Carter@oag.texas.gov	10/26/2020 11:42:44 PM	SENT