No. 20-___

In the Supreme Court of Texas

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

Relators.

On Petition for Writ of Mandamus
to the Third Court of Appeals, Austin

PETITION FOR WRIT OF MANDAMUS

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Respondent:
The Honorable Third Court of Appeals, Austin

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"App." refers to this petition's appendix. "MR" refers to the mandamus record.

Statement of the Case

Nature and Course of the Underlying Proceeding

On July 27, 2020, Governor Abbott suspended two provisions of the Election Code to extend early voting by six days and to allow eligible voters to hand deliver mail-in ballots to the early-voting clerk on any day prior to and including on Election Day (rather than limiting such delivery to Election Day, as required by the Election Code). MR.0012-15. The Governor later issued a Proclamation on October 1 which amended and replaced the July 27 Proclamation, clarifying one suspension with certain conditions in response to reports that counties were applying it in a way that might undermine the integrity of and confidence in the election. MR.0016-20. Plaintiffs sued, asserting that the Governor exceeded his authority under the Texas Constitution and the Texas Disaster Act. MR.0084-111. The trial court granted a temporary injunction against one of the conditions that was part of a lawful suspension of the temporal restriction in Section 86.006(a-1). App. B. Relators immediately appealed, superseding the injunction. MR.0481-86. The Plaintiffs sought reinstatement of the injunction under Rule 29.3 on the grounds that they would suffer irreparable harm if Relators were permitted to supersede the injunction. MR.0490-521.

Respondent: The Honorable Third Court of Appeals, Austin

Respondent's Challenged Action: This afternoon, the court of appeals affirmed the trial court's temporary injunction, then immediately issued the mandate to allow the temporary injunction to go into effect without expressly ruling on Plaintiffs' Rule 29.3 Motion. App. A.

Statement of Jurisdiction

The Court has jurisdiction under Texas Government Code section 22.002(a).

Issues Presented

The Texas Legislature has guaranteed the right of state appellants to supersede trial-court orders and judgments pending appeal. *See* Tex. Civ. Prac. & Rem. Code § 6.001(a)-(b); Tex. Gov't Code § 22.004(i). As the real parties in interest do not dispute, Texas's Governor and Secretary of State ("State Officials") exercised that right by filing a notice of interlocutory appeal after the trial court denied their plea to the jurisdiction but before it issued its preliminary injunction. But the court of appeals effectively denied the State Officials' their right to supersedeas by immediately issuing the mandate (without providing any reasoning for doing so) to allow the temporary injunction to go into effect.

The issue presented is whether the court of appeals' order effectively reinstating the trial court's temporary injunction, which denies the State Officials their statutory right to supersedeas for the duration of the underlying appeal, including review by this Court, is an abuse of discretion for which the State Officials have no adequate remedy by appeal.

To the Honorable Supreme Court of Texas:

The Texas Legislature has guaranteed state appellants the right to supersede a trial court's order or judgment pending appeal except under limited circumstances not present here. This case is a good example why: Governor Abbott used the powers granted to him by the Legislature in the Texas Disaster Act to expand the ways in which eligible voters can return their mail-in ballots in the upcoming election. Before the Governor's actions, a voter could cast a mail-in ballot in one of two ways: (1) mail it in; or (2) hand deliver it "in person to the early voting clerk's office only while the polls are open *on election day*." Tex. Elec. Code § 86.006(1)-(2), (a-1) (emphasis added). Now, after the Governor's October 1 Proclamation, voters can *also* cast their ballots by hand-delivering them to a single designated early-voting clerk's office location, at which poll watchers must be allowed, *at any time before election day*. Nevertheless, Plaintiffs filed this suit to enjoin the Governor's October 1 Proclamation, which clarified the suspension in his July 27 Proclamation to create a uniform, statewide rule for ballot-delivery locations throughout this expanded hand-delivery period—which would not exist without the Proclamations. The trial court entered an order stating that it would effectively rewrite the terms of the Governor's suspension to allow county clerks to establish as many ballot-delivery locations as they please in this expanded period. The State Officials immediately filed an accelerated interlocutory appeal, superseding any coercive impact of that order.

The court of appeals affirmed the trial court's order and immediately issued its mandate, which effectively denies State Officials their right to supersede the injunction until the interlocutory appeal is finally resolved by this Court. That court's

attempt to short-circuit this process not only was wrong, it will irreparably harm the State Officials' efforts to maintain uniformity in the general election that is already underway. This Court should act quickly to protect the State Officials' statutory right to supersedeas and the State's sovereign right to enforce its election laws.

Statement of Facts

The COVID-19 pandemic represents a "public health crisis of unprecedented magnitude." *In re Abbott*, 954 F.3d 772, 786 (5th Cir. 2020). On March 13, 2020, Governor Abbott exercised his authority under the Texas Disaster Act to declare that COVID-19 "poses an imminent threat of disaster" in all Texas counties. MR.0001. During such a disaster, the Legislature has expressly authorized the Governor to suspend the provisions of regulatory statutes prescribing the procedure for conduct of state business and the orders and rules of state agencies if they would "in any way prevent, hinder, or delay necessary action in coping with [the] disaster." Tex. Gov't Code § 418.016(a). The Legislature has also granted the Governor the power to "control . . . the movement of persons and occupancy of premises" during such a disaster. Tex. Gov't Code § 418.018(c).

The Governor has exercised these authorities on several occasions to protect Texans statewide, including when they go to the polls. The Governor authorized postponement of elections scheduled for May until July 14. MR.0004-06. He also expanded the early-voting period for all July 14 elections so "election officials can implement appropriate social distancing and safe hygiene practices." MR.0008. The Governor then issued the July 27 Proclamation, which not only increased the number of days of in-person early voting for the November 3 elections—adding a week to the

two-week period set by the Election Code—but also greatly expanded the ability for eligible mail-in ballot voters to hand-deliver their ballots. *See* MR.0012-15.

Before the July 27 Proclamation, an eligible voter could cast a mail-in ballot in one of two ways: (1) mail it in; or (2) hand-deliver it "in person to the early voting clerk's office only while the polls are open *on election day*." Tex. Elec. Code § 86.006(a)(1)-(2), (a-1) (emphasis added). Voters choosing the latter option must present a valid form of identification along with the marked ballot. *Id.* § 86.006(a-1). The July 27 Proclamation changed nothing about a voter's ability to put a mail-in ballot in the mail or how to hand-deliver it on Election Day, but it expanded options for eligible voters by allowing hand-delivery of mail-in ballots *at any point prior to Election Day*.[1] MR.0014. Absent that Proclamation, local election officials would have had no authority to accept hand-delivered ballots at *any* location before Election Day. *See State v. Hollins*, No. 20-0729, 2020 WL 5919729, at *4 (Tex. Oct. 7, 2020) (discussing limits of authority delegated to early-voting clerks under section 32.071 of the Election Code).

While almost all counties have only one location at which mail-in ballots may be hand-delivered—and until this year, *no* county has used more than one location for hand-delivery of mail-in ballots on Election Day—a handful of counties, including

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

Harris, Travis, and Fort Bend, recently announced plans to open multiple mail-in ballot delivery locations at satellite offices or annexes. Harris County did so for "[t]he first time" before the July 14 primary runoff. MR.0011. Travis and Fort Bend Counties proposed to follow suit during the general election.[2] But it soon became clear that these counties were not following State law, including regarding the proper designation of annex locations and the provision of adequate election security, such as the opportunity for poll watchers to observe hand-deliveries of balots, at these annexes. Additionally, Fort Bend County's intended annex locations did not meet the Election Code's definition for an early-voting clerk's office, raising a question about whether ballots delivered to those locations could legally be counted and creating a risk of a potential election contest. MR.409-11. These types of inconsistencies impede the uniform conduct of the election and introduce a risk to ballot integrity, such as by increasing the possibility of ballot harvesting. *See* Tex. Elec. Code § 33.051; *see also Tex. League of United Latin Am. Citizens v. Hughs*, 20-50867, 2020 WL 6023310, at *6-7 (5th Cir. Oct. 12, 2020) (*LULAC*) (discussing importance of State's interest in preserving uniformity and integrity of election).

To address these disparate and potentially dangerous practices, the Governor issued his October 1 Proclamation to amend and replace the July 27 Proclamation. The October 1 Proclamation clarified that his suspension of Election Code section 86.006(a-1) to allow more time for hand-delivery of mail-in ballots applies only when

[2] Plaintiffs have suggested that Dallas County also had plans to open multiple locations, but "Judge Clay Jenkins said in a statement that Dallas County won't be affected." MR.0021.

an eligible absentee voter is, prior to Election Day, hand-delivering a mail-in ballot (1) at a county's single designated delivery location, which (2) can be monitored by poll watchers. MR.0019-20. The October 1 Proclamation adds substantially more time for eligible voters to hand-deliver mail-in ballots leading up to Election Day, and does not address or affect what the Election Code allows on Election Day itself or the ability of any eligible absentee voter to simply place the ballot in the mail.

Despite this unprecedented expansion of early voting, Plaintiffs sued the State Officials to temporarily enjoin the enforcement of the Governor's October 1 Proclamation. MR.0110-11. The trial court issued a signed letter ruling on October 15, indicating that a further, more formal injunction would follow. MR.0479-80. The trial court also denied the State Officials' jurisdictional pleas without explanation. MR.0480.

Recognizing that the trial court's temporary injunction would inject confusion into the *already ongoing* early-voting process, the State Officials immediately filed a notice of appeal before the trial court entered its formal order. MR.481-86. Doing so stayed the trial-court proceedings, Tex. Civ. Prac. & Rem. Code § 51.014(b), and superseded any coercive effect of the temporary injunction, *id.* § 6.001(b); Tex. R. App. P. 24.2(a)(3), 29.1(b). The trial court followed up with the foreshadowed injunction later in the afternoon on October 15. MR.487-89.

On October 19, Plaintiffs asked the court of appeals to reinstate the injunction under Texas Rule of Appellate Procedure 29.3 or, in the alternative, to set the appeal on a highly expedited briefing schedule. MR.0490-521. In response, the court of appeals ordered on October 19 that the case be fully briefed by October 23, MR.0522.

On October 23, the court of appeals affirmed the trial court's temporary injunction, then immediately issued its mandate to allow the temporary injunction to go into effect before a petition for review could be filed in this Court. App. A.

Summary of the Argument

When and how state appellants may supersede a trial court's order or judgment pending appeal is "a policy question peculiarly within the legislative sphere." *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 782 (Tex. 1964) (orig. proceeding). The Texas Legislature has chosen to allow state appellants to supersede trial-court orders and judgments. *See* Tex. Civ. Prac. & Rem. Code § 6.001(a)-(b). And the Legislature recently reaffirmed that right and provided that *no* rule of procedure gives the lower courts discretion to deny supersedeas to a state appellant except under limited circumstances not present here. Tex. Gov't Code § 22.004(i). This supersedeas right is also reflected in this Court's recent amendment to Rule 24. *See* Tex. R. App. P. 24.2(a)(3). The State Officials exercised that right when they filed their notices of appeal. MR.0481-86.

The court of appeals abused its discretion by immediately issuing its mandate, which effectively precludes the State Officials from exercising their right to supersedeas pending final disposition of the appeal. And doing so failed to give due regard to the rights of the State and the people its officials serve. Because the State Officials have no adequate remedy at law, this Court should grant mandamus relief, order the mandamus recalled, and stay the court of appeals' judgment at least until its review of the underlying appeal is complete.

Standard of Review

To obtain mandamus relief, a relator must show that the respondent abused its discretion, and no adequate appellate remedy exists. *See In re Turner*, 591 S.W.3d 121, 124 (Tex. 2019) (orig. proceeding). A court abuses its discretion if it "fails to correctly analyze or apply the law." *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (orig. proceeding) (per curiam). Because this original proceeding turns exclusively on the interpretation of statutes and court rules, it is subject to de novo review. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127, 132 (Tex. 2019); *In re City of Dickinson*, 568 S.W.3d 642, 64-46 (Tex. 2019) (orig. proceeding).

Argument

I. The Legislature Has Validly Guaranteed the Right of State Appellants to Supersede Trial-Court Judgments and Orders.

The Legislature has made the policy decision that a state appellant's notice of appeal supersedes a trial court's order. Any doubt about that was removed by the recent addition to the Government Code and the corresponding amendment to the Texas Rules of Appellate Procedure. This Court should ensure that lower courts comply with that legislative directive, particularly in a case like this where an order interferes with the rules of an election to *create* dis-uniformity across Texas's 254 counties *after* early voting has been underway for more than a week and is scheduled to conclude in only seven days.

A. A state appellant's notice of appeal automatically supersedes an adverse order or judgment.

As this Court has recognized, section 6.001 of the Texas Civil and Practice Remedies Code gives state appellants a right to supersede without bond. *In re State Bd. for Educator Certification*, 452 S.W.3d 802, 804 (Tex. 2014) (orig. proceeding) ("In effect, the State's notice of appeal *automatically* suspends enforcement of a judgment."); *accord In re State*, 602 S.W.3d 549, 552 (Tex. 2020) (orig. proceeding). The Legislature has also expressly recognized that section 6.001 grants a "*right* . . . to supersede a judgment or order on appeal." Tex. Gov't Code § 22.004(i) (emphasis added). The State Officials exercised that right when they filed an immediate notice of appeal.

B. The Legislature recently clarified that no rule of procedure gives a court discretion to deny supersedeas to a state appellant except under limited circumstances not present here.

When it comes to judgments that are "for something other than money or an interest in property," Rule 24 generally allows the trial court to "decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court." Tex. R. App. P. 24.2(a)(3). Although this Court at one point granted trial courts discretion to apply that rule in cases involving the State, *see State Bd. for Educator Certification*, 452 S.W.3d at 809, subsequent legislation confirms that procedural rules may not trump the State's substantive right to supersede adverse judgments.

The Legislature's response to *State Board for Educator Certification* confirms as much. It directed this Court to "adopt rules to provide that *the right* of an appellant

under [section 6.001] to supersede a judgment *or order* on appeal is not subject to being counter-superseded under [Rule 24.2(a)(3)] *or any other rule*." Tex. Gov't Code § 22.004(i) (emphases added). This Court responded to that legislative directive by amending Rule 24.2 to provide:

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

Tex. Supreme Ct., Order Adopting Amendments to Texas Rule of Appellate Procedure 24.2, Misc. Docket No. 18-9061, 43 Tex. Reg. 2633 (Tex. Apr. 12, 2018) (emphasis added); Tex. R. App. P. 24.2(a)(3) (effective May 1, 2018).

This Court's holding in *State Board for Educator Certification* has thus been abrogated by statute. Any rule that purports to limit a state appellant's right to supersede a trial court's judgment or order would directly contravene the Legislature's command. And the amendment to Rule 24.2(a)(3) negates any discretion trial courts may have formerly had to deny a state appellant's right to supersede a trial-court judgment or order. The one exception crafted by the Legislature—a matter arising from a contested case in an administrative enforcement action—does not apply here. *Tex. Educ. Agency v. Houston Indep. Sch. Dist.*, No. 03-20-00025-CV, 2020 WL 1966314, at *3 (Tex. App.—Austin Apr. 24, 2020, mand. pending).

There is nothing surprising or unusual about statutory restraints on a court's authority to review executive action; this Court has recognized "[f]or well over 150 years" that the Legislature can "limit judicial review of executive actions." *Morath v. Sterling City ISD*, 499 S.W.3d 407, 412 (Tex. 2016) (plurality op.) (citing *Keenan*

v. Perry, 24 Tex. 253, 261 (1859)). For instance, the Texas Constitution expressly guarantees the Legislature's authority to vest exclusive jurisdiction in administrative agencies, effectively precluding judicial review of agency decisions. Tex. Const. art. V, § 8 (noting that "other law" may confer exclusive jurisdiction on an "administrative body"). While "[j]udicial review of claimed violations of constitutional rights and infringement of vested property rights cannot be foreclosed," "in other instances the Legislature may make an executive's actions final." *Morath*, 499 S.W.3d at 412-13 (plurality op.).

Just as the Legislature can insulate executive actions from judicial review altogether, it can also provide that, when a trial court enjoins executive action, the state appellant may supersede that injunction pending appeal. Tex. Gov't Code § 22.004(i). And this Court properly implemented that legislative decision by amending Rule 24.2(a)(3).

II. The Court of Appeals Abused Its Discretion in Immediately Issuing Its Mandate Before State Officials Could Exhaust Their Appeal.

The State Officials superseded the trial court's injunction when they filed their notice of appeal, deferring enforcement of the order pending resolution of that appeal. But the court of appeals has created the potential for mass confusion and effectively denied the State's right to supersedeas by immediately issuing its mandate so that the trial court's injunction can take effect more than halfway through the early-voting period. It abused its discretion by doing so.

A. The State Officials' notice of appeal superseded the trial court's order.

Rule 29 recognizes that perfecting an appeal from an interlocutory order suspends the order if the appellant is entitled to supersede the order without security by filing a notice of appeal. Tex. R. App. P. 29.1(b). The State Officials are entitled to supersede a trial-court order without security. *See* Tex. Civ. Prac. & Rem. Code § 6.001(b)(1). So when the State Officials filed their notice of appeal, they automatically superseded the temporary injunction. *See In re State*, 602 S.W.3d at 552.

B. Procedural rules do not allow appellate courts to abrogate substantive statutory rights.

As discussed above in Part I, the Legislature has made the policy decision that state appellants have the right to supersede trial-court orders and judgment pending appeal. That right is enshrined in section 6.001 of the Civil Practice and Remedies Code and section 22.004(i) of the Government Code. The court of appeals' action ignores that right by ordering the temporary injunction—which it recognizes has not been in force—to go into effect immediately while the State Officials' interlocutory appeal is still pending.

The supersedeas right applies "pending appeal." Tex. R. App. P. 24. The injunction cannot be enforced "until *all appeals* relating to the judgment [have been] exhausted and a mandate enforcing the injunction [is] issued." *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999). And no mandate should be issued until ten days *after* the time expires to seek review in this Court. Tex. R. App. P. 18.1(a)(1).

The court of appeals disregarded Rule 18.1's plain language by immediately issuing the mandate. Under Rule 18.1, a court of appeals may issue its mandate only

"[t]en days after the time has expired for filing a motion to extend time to file a petition for review," *id.* R. 18.1(a)(1), which is (at the earliest) 60 days from now, *id.* R. 53.7(a), (f). A court of appeals may only issue the mandate earlier: (1) if the parties so agree (they have not); and (2) "for good cause *on the motion of a party*." *Id.* R. 18.1(c) (emphasis added). No such motion was filed in the court of appeals, so the court of appeals had no authority to immediately issue the mandate. Doing so was a clear abuse of discretion, as it had no authority to issue its mandate until after the State Officials had a chance to seek review in this Court. *In re Dawson*, 550 S.W.3d at 628.

In issuing its mandate immediately, the court of appeals relied on Texas Rules of Appellate Procedure 2 and 18.6. App. A at 22 n.2. Rule 2 allows a court to "suspend a rule's operation in a particular case" for "good cause." Rule 18.6 authorizes a court to "issue the mandate with its judgment" in an accelerated appeal. But the Legislature has commanded that *no* rule may allow a court to grant counter-supersedeas against the State. Tex. Gov't Code § 22.004(i). Yet that was the effect of the court of appeals' action. Indeed, the court of appeals purported not only to overcome the State Officials' right to supersedeas during the pendency of the interlocutory appeal, but to cut that appeal short, before the Court could even consider it. That was a double abuse of discretion.

In a zero-sum situation like this, it is not possible to preserve all rights alleged by the parties. That is why, as this Court has recognized, supersedeas poses a policy question about whose rights will receive preference pending appeal. *See Ammex*, 381 S.W.2d at 482. And by guaranteeing state appellants the right to supersede trial-

court orders, the Legislature has definitively instructed courts to give precedence to the sovereign's rights. This Court should honor that policy decision and refuse to allow the court of appeals to circumvent the Legislature's will.

That is particularly significant here because both this Court and "[t]he United States Supreme Court [have] repeatedly warned against judicial interference in an election that is imminent or ongoing. 'Court changes of election laws close in time to the election are strongly disfavored.'" *In re Hotze*, No. 20-0739, 2020 WL 5919726, at *3 (Tex. Oct. 7, 2020) (citing *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020)); *see also, e.g.*, *Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *2 (U.S. Oct. 5, 2020) (Kavanaugh, J., concurring); *Tex. Alliance for Retired Americans v. Hughs*, No. 20-40643, slip op. at 3-4 (5th Cir. Sept. 30, 2020). It would be perverse in light of that law to use that same exigency to create a judicial exception to the "Legislature's statutory directive . . . that the State's right to supersede a judgment is not subject to counter-supersedeas under Rule 24.2(a)(3) or any other rule." *HISD*, 2020 WL 1966314, at *5.

III. The State Has No Adequate Appellate Remedy.

The court of appeals' premature issuance of the mandate cannot be cured by other means while the State Officials' petition for review is still pending before this Court. Though the State Officials have a statutory right to supersedeas, Plaintiffs and local election officials will presumably be permitted to disregard that right and may act in contravention of the Governor's October 1 Proclamation. Absent immediate relief from this Court, the question of supersedeas will be moot by the time the appeal is resolved, and the State will have been denied an important right guaranteed

by the Legislature—a right it desires to exercise, not on its own behalf, but on behalf of all Texans who have an interest in the integrity of elections. No matter the outcome of the appeal, the denial of that right will be an injustice that cannot be cured by further legal action. And if this Court reverses the court of appeals' judgment, any actions taken in reliance on the trial court's challenged order will be void, resulting in substantial disruption.

IV. This Court Should Act Quickly to Protect the 2020 Elections and the State's Supersedeas Right.

Because of the court of appeals' action, the State is not able to serve one of its most important functions: to safeguard the integrity of Texas elections. *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (the State "indisputably has a compelling interest in preserving the integrity of its election process."). For example, as the Secretary of State's Director of Elections testified, Fort Bend County's intended annex locations do not meet the Election Code's definition for an early-voting clerk's office, raising a question about whether ballots delivered to those locations could legally be counted and creating a risk of a potential election contest. MR.0407-10. The confusion engendered by the trial court's order, which changes the rules for only the final week of early voting, is significant. And additional harms will occur if the Court does not act soon and allow the State to supersede the injunction until the underlying appeal is finally resolved.

State appellants' ability to supersede trial-court injunctions is a question of great significance to the State, the lower courts, and any party involved in litigation with or against the State. This Court should reaffirm that ability against judicial

encroachment by ordering that no procedural rule can abrogate the State's statutory right to supersedeas, and that courts may not disregard the Legislature's policy decisions regarding how supersedeas will operate in Texas.

Prayer

The Court should grant the petition for a writ of mandamus and order the court of appeals to recall its premature mandate.

Respectfully submitted.

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Mandamus Certification

Pursuant to Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this petition and that every factual statement in the petition is supported by competent evidence included in the appendix or record. Pursuant to Rule 52.3(k)(1)(A), I certify that every document contained in the appendix is a true and correct copy.

/s/ Lanora C. Pettit
Lanora C. Pettit

Certificate of Service

On October 23, 2020, this document was served electronically on Lindsey B. Cohan, lead counsel for the Real Parties in Interest, via Linsay.Cohan@dechert.com.

/s/ Lanora C. Pettit
Lanora C. Pettit

Certificate of Compliance

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/s/ Lanora C. Pettit
Lanora C. Pettit

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to the Third Court of Appeals, Austin

APPENDIX

Tab A:
Court of Appeals' Order

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-20-00498-CV

Greg Abbott, in his Official Capacity as the Governor of Texas; and Ruth Hughs, in her Official Capacity as Texas Secretary of State, Appellants

v.

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

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

MEMORANDUM OPINION

PER CURIAM

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

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

BACKGROUND

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

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

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

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

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

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

> I further suspend Section 86.006(a-1) of the Texas Election Code, for any election ordered or authorized to occur on November 3, 2020, to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early voting clerk's office prior to and including on election day; provided, however, that beginning on October 2, 2020, this suspension applies only when:

> (1) the voter delivers the marked mail ballot at a single early voting clerk's office location that is publicly designated by the early voting clerk for the return of marked mail ballots under Section 86.006(a-1) and this suspension . . . .[2]

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

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

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

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

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

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

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

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

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

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

> The—the geographical size of the counties in Texas is pretty substantial. And so, for a voter to reach one of—if there's only a single location, it may be quite extraordinary effort on the part of the voter to figure out a means to get transportation to the site to drop off. In addition to that, if you are funneling voters into one just location for in-person drop-off, because of the way the processes and procedures work, especially with the logging and provision of photo I.D., you could have a situation where you then are creating a line at the singular drop-off location; and so people will have to wait in line in close proximity to others, which, in many cases in this pandemic situation, is a main driver for people that are eligible to vote absentee, so as not to have that level of exposure.

The State Officials did not offer contradicting evidence.

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

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

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

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

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

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

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

> Plaintiffs' Application for Temporary Injunction is GRANTED, enjoining Defendants, their officers, agents, servants, employees, attorneys, and those inactive concert or participation with them from implementing or enforcing the following paragraph on page 3 of Defendant Abbott's October 1, 2020 Proclamation:
>
> "(1) the voter delivers the marked mail ballot at a single early voting clerk's office location that is publicly designated by the early voting clerk for the return of marked mail ballots under Section 88.006(a-1) and this suspension,"
>
> The limitation to a single drop-off location for mail ballots would likely needlessly and unreasonably increase risks of exposure to COVID-19 infections, and needlessly and unreasonably substantially burden potential voters' constitutionally protected rights to vote, as a consequence of increased travel and delays, among other things.

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

ANALYSIS

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

Plea to the Jurisdiction

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

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

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

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

Standing

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

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

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

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

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

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

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

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

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

Sovereign Immunity

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

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

Temporary Injunction

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

Standard of Review and Applicable Law

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

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

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

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

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

Trial Court's Temporary Injunction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Before Justices Goodwin, Kelly, and Smith

Affirmed

Filed: October 23, 2020

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

Tab B:
Trial Court's Letter Ruling

353RD DISTRICT COURT

TIM SULAK
Judge
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MEGAN JOHNSON
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ERICA SALINAS
Court Clerk
(512) 854-5886

October 15, 2020

VIA E-MAIL

Ms. Lindsey B. Cohan
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Mr. Benjamin L. Dower
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Mr. Erik Snapp
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Mr. Neil Steiner
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Re: Cause No. D-1-GN-20-005550; *The Anti-Defamation League Austin, Southwest, and Texoma Regions, et al v. Greg Abbott, in his official capacity as the Governor of Texas;* in the 353rd Judicial District Court, Travis County, Texas

Dear Counsel:

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

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

"(1) the voter delivers the marked mail ballot at a single early voting clerk's office location that is publicly designated by the early voting clerk for the return of marked mail ballots under Section 88.006(a-1) and this suspension, "

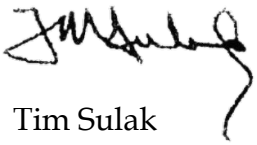
The limitation to a single drop-off location for mail ballots would likely needlessly and unreasonably increase risks of exposure to COVID-19 infections, and needlessly and unreasonably substantially burden potential voters' constitutionally protected rights to vote, as a consequence of increased travel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

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

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

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

Sincerely,



Tim Sulak

TS:ps

Orig: Ms. Velva L. Price, District Clerk

Tab C:
Trial Court's Temporary Injunction Order

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

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

ORDER GRANTING PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTIVE RELIEF

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

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

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

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

3. Plaintiffs' Application for Temporary Injunction is GRANTED, enjoining Defendants, their officers, agents, servants, employees, attorneys, and those inactive concert or participation with them from implementing or enforcing the following paragraph on page 3 of Defendant Abbott's October 1, 2020 Proclamation:

> "(1) the voter delivers the marked mail ballot at a single early voting clerk's office location that is publicly designated by the early voting clerk for the return of marked mail ballots under Section 88.006(a-1) and this suspension,"

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

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

Signed this 15th day of October, 2020.

Honorable Tim Sulak

Automated Certificate of eService

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Envelope ID: 47240046
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Associated Case Party: Anti-Defamation League Austin, Southwest, and Texoma Regions

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

Associated Case Party: Greg Abbott

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

Associated Case Party: Disability Rights Texas

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

Case Contacts

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

TAB D:
TEX. GOV'T CODE § 22.004

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 2. Judicial Branch (Refs & Annos)
Subtitle A. Courts
Chapter 22. Appellate Courts
Subchapter A. Supreme Court

V.T.C.A., Government Code § 22.004

§ 22.004. Rules of Civil Procedure

Effective: September 1, 2020
Currentness

(a) The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.

(b) The supreme court from time to time may promulgate a specific rule or rules of civil procedure, or an amendment or amendments to a specific rule or rules, to be effective at the time the supreme court deems expedient in the interest of a proper administration of justice. The rules and amendments to rules remain in effect unless and until disapproved by the legislature. The clerk of the supreme court shall file with the secretary of state the rules or amendments to rules promulgated by the supreme court under this subsection and shall mail a copy of those rules or amendments to rules to each registered member of the State Bar of Texas not later than the 60th day before the date on which they become effective. On receiving a written request from a member of the legislature, the secretary of state shall provide the member with electronic notifications when the supreme court has promulgated rules or amendments to rules under this section.

(c) So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed. At the time the supreme court files a rule, the court shall file with the secretary of state a list of each article or section of general law or each part of an article or section of general law that is repealed or modified in any way. The list has the same weight and effect as a decision of the court.

(d) The rules of practice and procedure in civil actions shall be published in the official reports of the supreme court. The supreme court may adopt the method it deems expedient for the printing and distribution of the rules.

(e) This section does not affect the repeal of statutes repealed by Chapter 25, page 201, General Laws, Acts of the 46th Legislature, Regular Session, 1939, on September 1, 1941.

(f) The supreme court shall adopt rules governing the electronic filing of documents in civil cases in justice of the peace courts.

(g) The supreme court shall adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. The rules shall provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the motion to dismiss. The rules shall not apply to actions under the Family Code.

(h) The supreme court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions. The rules shall apply to civil actions in district courts, county courts at law, and statutory probate courts in which the amount in controversy, inclusive of all claims for damages of any kind, whether actual or exemplary, a penalty, attorney's fees, expenses, costs, interest, or any other type of damage of any kind, does not exceed $100,000. The rules shall address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions will be expedited in the civil justice system. The supreme court may not adopt rules under this subsection that conflict with other statutory law.

(h-1) In addition to the rules adopted under Subsection (h), the supreme court shall adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000. The rules shall balance the need for lowering discovery costs in these actions against the complexity of and discovery needs in these actions. The supreme court may not adopt rules under this subsection that conflict with other statutory law.

(i) The supreme court shall adopt rules to provide that the right of an appellant under Section 6.001(b)(1), (2), or (3), Civil Practice and Remedies Code, to supersede a judgment or order on appeal is not subject to being counter-superseded under Rule 24.2(a)(3), Texas Rules of Appellate Procedure, or any other rule. Counter-supersedeas shall remain available to parties in a lawsuit concerning a matter that was the basis of a contested case in an administrative enforcement action.

Credits

Acts 1985, 69th Leg., ch. 480, § 1, eff. Sept. 1, 1985. Amended by Acts 1989, 71st Leg., ch. 297, § 1, eff. Aug. 28, 1989; Acts 2001, 77th Leg., ch. 644, § 1, eff. June 13, 2001; Acts 2007, 80th Leg., ch. 63, § 1, eff. May 11, 2007; Acts 2011, 82nd Leg., ch. 203 (H.B. 274), §§ 1.01, 2.01, eff. Sept. 1, 2011; Acts 2011, 82nd Leg., ch. 906 (S.B. 791), § 1, eff. Sept. 1, 2011; Acts 2017, 85th Leg., ch. 868 (H.B. 2776), § 1, eff. Sept. 1, 2017; Acts 2019, 86th Leg., ch. 696 (S.B. 2342), § 1, eff. Sept. 1, 2020.

V. T. C. A., Government Code § 22.004, TX GOVT § 22.004
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

Tab E:
Tex. Elec. Code § 86.006

V.T.C.A., Election Code § 86.006

§ 86.006. Method of Returning Marked Ballot

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

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

(1) mail;

(2) common or contract carrier; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) Section 86.010; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Credits

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

Footnotes

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

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

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