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, *Defendant*.	§	

PLAINTIFFS' RESPONSE TO DEFENDANT'S PLEA TO THE JURISDICTION AND REPLY IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTIVE RELIEF

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Plaintiffs The Anti-Defamation League Austin, Southwest, and Texoma Regions; Common Cause Texas; and Robert Knetsch (collectively, "Plaintiffs")[1] respectfully submit their response to Defendant's Plea to the Jurisdiction and their Reply in support of the Application for Temporary Injunctive Relief.

SUMMARY OF THE ARGUMENT

Defendant misconstrues Plaintiffs' application as a broad attack on Defendant's authority to suspend statutes during a disaster. But Plaintiffs' Application merely seeks to ensure that when Defendant exercises such authority, he does so within the proper boundaries of the law and in a manner that is rationally tailored to the disaster. His October 1, 2020 Proclamation (the "Proclamation") limiting each county to one ballot return location during the early voting period fails on both counts. The Court should issue a temporary injunction to restore the status quo and enjoin enforcement of the Proclamation with respect to its limitation on ballot return locations in the early voting period.

First, the Proclamation impermissibly intrudes on local election officials' statutory authority to manage and conduct elections, which includes making determinations as to the number of "early voting clerk's office[s]" that can accept ballots, consistent with Defendant's July 27, 2020 Proclamation. *See* Def.'s Appx. 019 (the October 1 Proclamation, page 3) ("I further suspend Section 86.006(a-1) of the Texas Election Code . . . this suspension applies only when (1) the voter delivers the marked mail ballot at a ***single*** early voting clerk's office location"). This authority is so well-established that the Texas Solicitor General conceded in a judicial admission to the Supreme Court of the State of Texas that the Texas Election Code

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

allows local election officials to designate more than one early voting ballot drop-off site in each county. *See* Pls.' Pet. Ex. B at 5 (Texas Solicitor General's Submission, *In re Hotze*, No. 20-0739, dated Sept. 30, 2020).

Second, the Proclamation bears no rational relationship to the declared disaster. Defendant issued the Proclamation under the Disaster Act, but Defendant argues the Proclamation furthers the State's interests in ballot security and statewide uniformity in election administration—two interests that have no relevance to the reigning public health crisis. And despite Defendant's invocation of his authority to "control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area" under Texas Government Code § 418.018(c), the Proclamation will result in *increased* occupancy in each ballot return location—the exact opposite of what public health experts and government officials recommend during the COVID-19 pandemic. Indeed, Defendant's response brief is noticeably thin on the governor's authority under Texas Government Code § 418.018(c)—Defendant only mentions the provision once in passing—because reducing voters' ingress and egress to and from polling places by congregating them in a single ballot return location exacerbates current public health crisis. Defendant's action has no "real or substantial relation to the public health crisis." *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020).

Third, the Proclamation unconstitutionally burdens Plaintiffs' right to vote. Plaintiffs include and represent voters at heightened risk of adverse health incomes from COVID-19, and so must contend with greater occupancy and crowd congestion at polling places when returning their ballots. This risk is particularly heightened due to Defendant's exemption of polling places from the statewide mask mandate. The Proclamation has further injured voters by unnecessarily introducing voter confusion shortly before the election—a harm that the Texas Supreme Court

recently recognized in *In re Hotze*. *See In re Hotze*, No. 20-0739, 2020 WL 5919726, at *3 (Tex. Oct. 7, 2020) ("Moreover, the election is already underway. . . To disrupt the long-planned election procedures as relators would have us do would threaten voter confusion."). These burdens clearly outweigh Defendant's claimed interests in the Proclamation, given that Defendant's interests bear no relevance to the pandemic—a conclusion all the more apparent due to Defendant's admission that "multiple ballot return centers can be open on Election Day." *See* Ex. A, *Texas LULAC v. Abbott*, 20-CV-1015, Dkt. 38, Order at ECF 42 (Oct. 9, 2020) ("*Texas LULAC* Order"). For these reasons, a federal court recently granted injunctive relief to plaintiffs alleging equal protection and disparate impact claims under the U.S. Constitution. *Id.*[2]

In recognition of these defects with the Proclamation, Defendant devotes the large majority of its response papers to urge the Court to dismiss the Application on standing and immunity grounds. Defendant's position effectively boils down to this: even though he is the actor who issued the Proclamation, and the actor who can rescind the Proclamation, he is not the right party to be enjoined here. Defendant's position is particularly egregious in light of Plaintiffs' claim that he acted *ultra vires* when issuing the Proclamation. Taking Defendant's argument to its logical conclusion, one could never sue him for *ultra vires* conduct because he is not the party responsible for its enforcement, even though he is the only party that can amend or rescind it. The Court should reject Defendant's shell game.

The Court should deny the Defendant's plea to the jurisdiction and enjoin the Proclamation with respect to its limit on ballot return locations.

[2] Plaintiffs' case is not mooted by the injunction in *Texas LULAC* because Plaintiffs have asserted different claims, and the parties have not exhausted appeals in that case. The Fifth Circuit issued a stay of the order on October 10, 2020.

ARGUMENT

I. The Court Should Reject Defendant's Plea To The Jurisdiction

When deciding a plea to the jurisdiction, the court "determine[s] if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). The court construes the pleadings "liberally in favor of the plaintiffs and look[s] to the pleaders' intent." *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004) (citing *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993)). "If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend" *Id.*

Thus, to prevail on a plea to the jurisdiction, the defendant must demonstrate that, "even if all the allegations in the plaintiff's pleadings are true, there is an incurable jurisdictional defect apparent from the face of the pleadings, rendering it impossible for the plaintiff's petition to confer jurisdiction on the trial court." *City of San Angelo v. Smith*, 69 S.W.3d 303, 305 (Tex. App. 2002) (pet. denied). Defendant has not met this high threshold.

A. Plaintiffs Have 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). A plaintiff must therefore be "personally aggrieved" by the defendant's action. *Id.* "[O]nly one plaintiff with standing is required." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 6 (Tex. 2011). And the Texas Supreme Court has said that "[i]t 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." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 10 (Tex. 2011).

Here, Defendant challenges Plaintiffs' standing for lack of a concrete, particularized injury and lack of redressability. Defendant's challenge fails.

1. Plaintiffs Are Personally Aggrieved By The Proclamation's Closing of Additional Ballot Return Locations

Contrary to Defendant's brief, which misleadingly characterizes Plaintiffs' standing as deriving only from their status as a voter, Plaintiffs have alleged concrete, particularized injury. Defendant seems to argue that because the Proclamation affects all voters in Texas, Plaintiffs cannot allege a distinct personal injury not shared with the broader public. Def.'s Resp. at 12. But the Proclamation does not affect all Texas voters equally, and Plaintiffs have alleged that they face distinct burdens as a result of Defendant's limit on ballot return locations. Indeed, the Texas Supreme Court has previously found that voters asserting equal protection claims as a result of illegal executive action have standing. *See Andrade*, 345 S.W.3d 1, 8 (Tex. 2011) ("The voters assert a denial of equal protection—a claim voters often have standing to bring.").

Defendant's argument as to particularized injury glosses over the fact that we are mired in a global pandemic, and the risks from COVID-19 do not fall equally among the population. Plaintiffs' injury is thus far from speculative and hypothetical: Plaintiffs include and represent voters who face heightened risks from COVID-19, and for whom social distancing is critical when voting. Plaintiff Knetsch's age puts him at greater risk for adverse health outcomes from COVID-19. Plaintiffs ADL and Common Cause similarly represent members, supporters, and constituents who face heightened risks from COVID-19.[3]

[3] ADL and Common Cause are also discussed in the subsequent section.

Prior to the Proclamation, county officials determined the appropriate number of ballot return sites per county and made arrangements to ensure that returning a ballot in this manner provides a secure and efficient means of voting.[4] Thus, voters who are eligible to vote by mail can complete their ballots at home and need only wait on line to show identification when returning their ballot at the return location. But because the Proclamation limits each county to just one ballot return site, it is inevitable that long lines will form and congestion will occur, especially in a high turnout election. The Proclamation therefore transforms what was a relatively secure and efficient means of voting into a considerably less efficient (but still secure) method of voting where voters must now face considerably more people to return their ballots. Many of these issues regarding voter turnout, congestion, and the public health crisis also arose in a recent case concerning straight ticket voting case, and the federal district court there found that plaintiffs had adequately alleged an impending injury sufficient for standing. *Texas All. for Retired Americans v. Hughs*, No. 5:20-CV-128, 2020 WL 5747088, at *7 (S.D. Tex. Sept. 25, 2020), *rev'd on other grounds*, --- F.3d ----2020 WL 5816887 (5th Cir. Sept. 30, 2020).

Defendant argues that "the concern that long lines may exist for the entire month of October is just the type of speculation that is not sufficient for standing." Def.'s Resp. at 14. However, this is not simply about "long lines" and the time it takes to cast one's ballot. Plaintiffs' 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.

[4] *See* Ex. B, Declaration of Harris County Clerk Chris Hollins, Case No. 20-CV-1006, Dkt. 8-1 at ¶¶ 26-32 ("Hollins Declaration") (detailing the ballot security measures in place to document chain-of-custody and prevent any tampering once mail-in ballots are returned in person).

Plaintiffs' particularized injury thus distinguishes them from the plaintiff in *Brown v. Todd*, whom the Texas Supreme Court found to lack standing. *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001). In *Brown*, the Texas Supreme Court found that the plaintiff, a city council member, had not alleged any injury aside from the mayor's act outside of his authority. *Id.* Nor was the council member suing on the council's behalf or joined by other council members in the suit. *Id.* In contrast, here Plaintiffs include and represent individuals who are adversely affected by the Proclamation because of the distinct burdens the Proclamation imposes on their right to vote.

Finally, Defendant argues that Plaintiffs have other options to vote and that their fears about the USPS are too speculative. Def.'s Resp. at 13. But Plaintiffs need not demonstrate that it is impossible for them to vote as a result of the Proclamation. *See Texas LULAC* Order at 44 (finding plaintiffs alleged irreparable injury despite State's assertion that voters had alternative means of voting because "the existence of alternative means of exercising one's fundamental rights 'does not eliminate or render harmless the potential continuing constitutional violation of a fundamental right.'" (quoting *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981)).

Plaintiffs need only show that they are personally aggrieved by the Proclamation, and they have done so by alleging particular, concrete burdens resulting from the closure of additional ballot return locations.

2. Organizations Have Standing Through Their Members and In Their Own Right

Defendant objects to the standing of ADL and Common Cause Texas, *see* Def.'s Resp. at 19, but both organizations have standing to represent their members, supporters, and constituents

who are adversely affected by the Proclamation. The Proclamation also adversely affects each organization, and so they have standing in their own right.

"An association has standing to sue on behalf of its members when '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993) (adopting the federal test for associational standing).

Contrary to Defendant's brief, at this early stage of the litigation, evidence of specific members of an organization are not required. *See Hancock Cnty. Bd. of Supervisors v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012) ("We are aware of no precedent holding that an association must set forth the name of a particular member in its complaint in order to survive a Rule 12(b)(1) motion to dismiss based on lack of associational standing.").

Defendant argues without basis that organizational standing is a controversial doctrine that has not been broadly applied even in federal courts. Def.'s Resp. at 21. This may reflect Defendant's opinion, but it is not the law. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017) ("organization can establish standing in its own name if it 'meets the same standing test that applies to individuals'"). In *OCA-Greater Houston*, the Fifth Circuit found that an organization established injury-in-fact where the "Texas statutes at issue 'perceptibly impaired' [the organization's] ability to 'get out the vote' among its members." *Id.* at 610.[5] The organization, whose mission was voter outreach and education, had to devote greater

[5] *OCA-Greater Houston* was decided following summary judgment, so the Fifth Circuit's findings as to organizational standing were based on "undisputed summary-judgment evidence." *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017).

organizational resources due to the state's illegal interpretation of the law; because it had to spend "extra time and money" educating its members about the state's interpretation, it reached fewer voters.[6] *Id*. This was sufficient for standing.[7]

Both ADL and Common Cause Texas have alleged that the Proclamation's limitation on ballot return locations will impair their ability to "get out the vote" among their members, supporters, and constituents. Like the organization in *OCA-Greater Houston*, both ADL and Common Cause Texas are engaged in voter education and mobilization efforts due to their organizational missions. Compl. ¶¶ 16, 19-20. Because the Proclamation thwarts activities that are core to ADL and Common Cause Texas' mission, they have sufficiently alleged organizational standing.

3. Plaintiffs Have Sued The Correct Party

Defendant's claim that Plaintiffs cannot establish standing because the Governor does not have responsibility for enforcement of the Proclamation is incorrect. Defendant's argument that the party charged with enforcement must be sued is based on inapposite cases where the plaintiff's injury was the enforcement/threat of enforcement for non-compliance with the challenged law. *See* Def.'s Resp. at 14-15.[8] In other words, the legal precedent cited by

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[6] Defendant cites *Texas Department of Family and Protective Services v. Grassroots Leadership* for the proposition that Texas has rejected organizational standing based on "advocacy expenditure." That case, however, involved an organization that had no members and so the appellate court found that advocacy expenditure, divorced from any legally protected interest, could not suffice to establish a particularized injury. *Texas Dep't of Family & Protective Servs. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 WL 6187433, at *4 (Tex. App. Nov. 28, 2018).

[7] Defendant argues that Texas courts do not recognize organizational standing as separate from representative standing, but Texas' standing doctrine follows federal practice. *See, e.g., Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993).

[8] For instance, Defendant cites *In re Abbott*, 601 S.W.3d 802 (Tex. 2020), a case involving a challenge by county judges to a directive limiting the availability of bail for certain offenders. *Id*. at 805. The injury alleged was the threat of criminal prosecution if the judges did not comply with the directive. *Id.* at 812. The Texas Supreme Court held that because defendants in that case did not have or otherwise had disclaimed enforcement authority, there was no "credible threat of prosecution," and thus plaintiffs did not have a legally cognizable injury. *Id*.; *see also City of El Paso v. Tom Brown Ministries*, 505

Defendant requires suing the party responsible for enforcement *because* the plaintiff's injury in those cases was premised on enforcement (or, at the very least, on the threat of enforcement); only the enforcing party would cause plaintiff's injury and only injunctive relief directed at the enforcing party could remedy plaintiff's injury. Here, Plaintiffs have been harmed by *the Proclamation itself*, rather than by the threat of enforcement for non-compliance with the Proclamation. Accordingly, Plaintiffs' *ultra vires* claim is properly asserted against Defendant because he is the officer who issued the Proclamation.

A government officer acts *ultra vires* when he "acts[s] without legal authority." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). The proper party to an *ultra vires* suit, therefore, is not the State, but "the state actor[]" who exceeded his authority. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009). As made clear in Plaintiffs' Petition, and further herein, Defendant exceeded his authority when he issued the Proclamation because he does not have authority to manage and conduct the early voting process, and his emergency powers extend only to alleviating the effects of a disaster—not exacerbating them. Thus, Defendant is the proper party to this lawsuit.

Once an ultra vires claim is established, a court may award "prospective injunctive [relief] against government actors ***who violate*** statutory or constitutional provisions." *Heinrich*, 284 S.W.3d at 369 (emphasis added). Because Defendant is the only official alleged in this lawsuit to have exceeded his authority, he is therefore the only party to whom the injunction can be directed. The remedial injunctive relief to which Plaintiffs are entitled does not require that

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S.W.3d 124 (Tex. App.—El Paso 2016, no pet.) (finding that plaintiff could not "establish an injury" based on a "credible threat of prosecution" because there was no "credible threat that the named defendant could bring the enforcement action against him). Defendant similarly relies on cases where the court found no credible threat of prosecution to claim that Plaintiffs lack standing to bring claims for declaratory judgment relief. *See Garcia v. City of Wills*, 593 S.W.3d 201, 206-07 (Tex. 2019). For all of the same reasons, Defendant's arguments are without merit.

the Court necessarily enjoin enforcement of the Proclamation, but should be directed at requiring Defendant to come into "compliance with [his] duties going forward." *PermiaCare v. L.R.H.*, 600 S.W.3d 431, 442 (Tex. App.—El Paso 2020, no pet.). Indeed, by their nature "*ultra vires* suits do not attempt to exert control over the State; instead they attempt to 'reassert the control of the State over one of its agents,' or in other words, they are intended to bring such agents into compliance with the law." *Id*. (quoting *Heinrich,* 284 S.W.3d at 272).

Despite the State's claim to the contrary, the officer charged with enforcement of the Proclamation is not the proper party to an *ultra vires* lawsuit unless the enforcement is itself *ultra vires*. *Hall v. McRaven,* 508 S.W.3d 232, 240 (Tex. 2017) ("[A]n *ultra vires* claim . . . must be confined to conduct pursuant to [the officer's] authority."). And this makes sense: if another government actor had "nothing to do with [Defendant's] *ultra vires* actions" in issuing the Proclamation, that actor cannot be held liable for Defendant's conduct. *Id*. Rather, it is the effect of the *ultra vires* Proclamation—the burden placed on the right to vote—that caused Plaintiffs' injury. Plaintiffs' injury therefore, is traceable to Defendant's conduct.[9]

Defendant's position would ultimately preclude any attempts to hold Defendant liable for the Proclamation he issued, and its attendant ultra vires conduct. With regard to the former, Defendant's attempt to limit standing to plaintiffs alleging injury from enforcement actions would preclude voters and organizations from challenging the Proclamation. Because the Plaintiffs exert no control over voting procedures, they have no opportunity for non-compliance

[9] Several of the cases cited by Defendant are irrelevant because the plaintiffs did not challenge any conduct *by the defendant*, and the court therefore unremarkably concluded that the plaintiff could not maintain an action against the defendant. *See Tex. Democratic Party v. Abbott*, 961 F.3d. 389 (5th Cir. 2020) (in challenge to existing, legislatively-enacted election law, plaintiffs could not maintain an action against defendant where he did not implement or enforce the law at issue); *OHBA Corp. v. City of Carrollton*, 203 S.W.3d 1, 3 (Tex. App.—Dallas 2006) (finding that there was "no live controversy" where the plaintiff did not "challenge the validity or constitutionality" of any city ordinance). Again, here, Plaintiffs injuries are the direct result of Defendant's issuance of the Proclamation.

under the Proclamation and therefore cannot allege a credible threat of prosecution. That result is not only untenable, it is not the law: the Texas Supreme Court has previously rejected any such "blanket rule that would ensure no voter ever has standing to challenge a voting system." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 8 (Tex. 2011).[10] Likewise, Defendant's claim that he is not a proper party to an *ultra vires* suit challenging his legal authority to issue an executive order would mean that he could *never* be liable for *ultra vires* conduct because he does not enforce his executive orders. Such a result would effectively place the Governor above the law.

B. Defendant Is Not Immune from Suit

1. Plaintiffs Have Alleged An Ultra Vires Claim, And So Plaintiffs' Suit Is Not Barred By Sovereign Immunity

Defendant is not immune from suit because Plaintiffs have adequately alleged an *ultra vires* claim. "'[A]n action to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit against the State that sovereign immunity bars.'" *City of El Paso v. Heinrich*, 284 S.W.3d 366, 368 (Tex. 2009) (finding sovereign immunity "does not preclude prospective injunctive remedies in official-capacity suits against government actors who violate statutory or constitutional provisions.").

To fall within the ultra vires exception, "a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Turner v. Robinson*, 534

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

S.W.3d 115, 126 (Tex. App. 2017). Plaintiffs' Petition clearly alleges, and Plaintiffs will establish, that Defendant exceeded his authority when limiting ballot return locations.

Plaintiffs do not challenge the Governor's ability to act to safeguard the health and welfare of Texas citizens during a crisis pursuant to the Texas Disaster Act. Rather, Plaintiffs' challenge is to the portion of the October 1, 2020 Proclamation that seizes authority that, up and until September 30, 2020, Defendant conceded belonged to local election officials. The Proclamation "suspends" Texas Election Code § 86.006 and limits each county to one "early voting clerk's office." Def.'s Appx. 019. The authority to determine the number of early voting clerk's offices (and thus, ballot return sites), however, is statutorily prescribed to the local election official designated as the early voting clerk, who has the authority to manage and conduct the election. *See* TEX. ELEC. CODE §§ 83.002; 83.001(c); 32.071.[11]

Nor can Defendant's action be justified by his claimed interest in ballot security or his reliance on the Disaster Act, since these interests have nothing to do with a limitation on ballot return locations.[12]

The Proclamation claims authority to limit the number of ballot return locations because Defendant "may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area." TEX. GOV'T CODE § 418.018(c).[13] But Defendant cannot invoke such powers under the Disaster Act in a way that leads to *more*

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[11] Defendant claims an "independent power to limit the occupancy of early voting sites while allowing all voters the chance to cast their votes," but omits any citation or reference to the source of this authority. This is because the early voting clerks are the officials with authority to manage polling locations, including ballot return sites.

[12] Professor Vladeck notes that Texas' Disaster Act is derived from the Model Emergency Health Powers Act (MEHPA). Ex. F, Expert Report of Stephen Vladeck, ¶ 14 ("Vladeck Report"). The MEHPA requires a relationship between the underlying emergency and the suspension. *Id.*

[13] Professor Vladeck also notes this provision is also derived from the MEHPA. Vladeck Report ¶ 19.

congestion and *greater* crowds during a public health crisis where social distancing is of utmost importance. And as discussed further in Section B.2, Defendant's action cannot be justified by an interest in ballot security, because ballot security is unrelated to any disaster, and in any event, ballot security is not enhanced by limiting where an eligible voter can return a mail-in ballot. Returning a mail-in ballot in-person is safeguarded by a number of measures.[14]

Defendant's action has no "real or substantial relation to the public health crisis." *See In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020). Defendant's reliance on ballot security and Tex. Gov't Code § 418.018(c) is merely a pretext. *Texas LULAC* Order at 14.

2. The Proclamation Fails The *Anderson-Burdick* Balancing Test and Rational Basis Review

Defendant further argues that the Proclamation does not violate the right to vote, and therefore it must be immune from suit. But the fact that a voter can vote by alternate means does not cure the burdens that the Proclamation imposes on Plaintiffs' ability to vote by using a ballot return location. In fact, courts around the country have held state-imposed burdens on the right to vote unconstitutional even when they only affected one option for voting, like absentee ballots. *See, e.g.*, *Thomas v. Andino*, 2020 WL 2617329, at *20 (D.S.C. May 25, 2020) (witness requirements for absentee ballot significantly burdened the plaintiffs' right to vote). This is particularly so during the current public health crisis. *See, e.g.*, *LWV of Va. v. Bd. of Elections*, 2020 WL 2158249, at *1, *8 (W.D. Va. May 5, 2020) ("In ordinary times, Virginia's witness signature requirement may not be a significant burden on the right to vote," but "these are not

[14] Professor Vladeck expresses concern about the implications of the Governor's Act. Vladeck Report ¶ 21 ("[A] reading of the Disaster Act in which the Governor may act against persons and property during a disaster to whatever extent his actions are not forbidden by the state or federal constitutions would be, in my view, an unprecedented and implausible reading of the parallel language in the MEHPA that no other state has adopted – and a potentially limitless one, at that.").

ordinary times."); *Garbett v. Herbert*, 2020 WL 2064101, at *12 (D. Utah Apr. 29, 2020) ("On balance, considering the current pandemic and the totality of the State's emergency measures to combat it, Utah's ballot access framework as applied this year imposed a severe burden…."); *Frederick v. Lawson*, 2020 WL 4882696, at *16 (S.D. Ind. Aug. 20, 2020) (state's rejection of absentee ballots for signature-matching without notice and opportunity to cure placed significant burden on the right to vote, especially during a pandemic); *Harding v. Edwards*, 2020 WL 5543769, at *4, *18 (M.D. La. Sept. 16, 2020) (ordering state to expand who can vote absentee and early voting period during COVID-19 pandemic).

The Proclamation clearly violates Plaintiffs' voting rights, whether under *Anderson-Burdick* or rational basis review. Under the *Anderson-Burdick* balancing test, the court considers "the character and magnitude of the asserted injury to Plaintiffs' right to vote against 'the precise interests put forward by the State as justification 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). Defendant minimizes the burden to Plaintiffs while ignoring the fact that its claimed interests bear no rational relationship to the Proclamation's limit on ballot return locations.

Here, when discussing the Proclamation's effect on voters, Defendant tellingly omits the current public health crisis. Def.'s Resp. at 27-29. But the Court should not ignore the fact that the upcoming election is taking pace amidst a global pandemic. As a result, as already discussed above, Plaintiffs face unique risks to their health under the Proclamation. Plaintiffs originally sought to cast their ballots at ballot return locations because, as residents of populous counties, the presence of multiple ballot return locations ensured an efficient, secure, and safe means of voting. The Proclamation, however, resulted in the closure of those additional ballot return

locations—meaning that Plaintiffs will now face heightened health risks if they vote in person or use the single ballot return location (if they can access it all), or face the risk that USPS does not deliver their mail-in ballot in time.

Defendant invokes concerns about election fraud and uniformity across the state, but never establishes a cause for concern and, regardless, those concerns do not justify the burden on Plaintiffs' right to vote. Expert testimony shows 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." Ex. E, Expert Report of Edgardo Cortés ("Cortés Report"), ¶ 13. The Texas Election Code already contains safeguards to protect against voter fraud because it requires voters returning ballots to a ballot return location to provide identification. TEXAS ELECTION CODE § 86.006(a-1); *see also* Cortés Report ¶¶ 12-13 (identifying security protocols including storage in secure, sealed containers, maintenance of chain of custody documentation identifying those who safeguard and transport ballots, and voter identification procedures). Voters must also sign a roster when delivering their ballots. *See, e.g.*, Hollins Declaration ¶ 32 ("Ironically, voters returning mail-in ballots in person is more secure than returning by mail because (1) there is no danger of tampering or loss of the ballot in transit and (2) voters who return ballots in person must sign a roster and present voter ID."). And while Defendant argues that the limit established in the Proclamation "enables election personnel to focus their resources and attention on a single location," Def.'s Resp. at 30, that argument sidesteps the fact that, under Texas Election Code § 86.006(a-1), local election personnel are the proper parties to determine whether voters would be better served by multiple ballot return locations, not Defendant.

Defendant similarly claims that uniformity in interpreting Texas Election Code § 86.006(a-1) is important, but neglects to mention that, prior to the Proclamation, there *was* a statewide understanding of that provision—an understanding set forth by the Secretary of State in August 2020 and reaffirmed by Defendant in a judicial admission on September 30, 2020. Pls.' Pet. Ex. B at 5. That understanding was that, under Texas code, local election officials had the authority to operate more than one "early voting clerk's office" to receive ballots. This is underscored by the fact that Defendant has not prohibited local election officials from operating ballot return locations at multiple polling places *on Election Day*.

Finally, by invoking the interests of election fraud and uniformity, but not mentioning the pandemic, Defendant concedes that the Proclamation's limit on ballot return locations has nothing to do with any disaster, nor would it address the reigning public health crisis—even though the Proclamation was issued pursuant to Defendant's disaster authority. *See* Def.'s Appx. 018-019 ("it has become apparent that for the November 3, 2020 elections, strict compliance with the statutory requirements in Sections 85.001(a) and 86.006(a-1) of the Texas Election Code would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster . . . I further suspend Section 86.006(a-1) of the Texas Election Code . . ."). For this reason alone, the Proclamation cannot even pass rational basis review.

These inconsistencies expose Defendant's Proclamation for what it is: a power grab from local election officials. Voters, however, are the collateral damage and the Texas Constitution does not allow that. The Court should therefore find that Defendant's claimed interests do not justify the burden on Plaintiffs' voting rights, and further that it cannot withstand rational basis review. The Proclamation impermissibly burdens Plaintiffs' right to vote and arbitrarily disenfranchises them.

II. The Court Should Grant Plaintiffs Temporary Injunctive Relief

A. Plaintiffs have already proven each element of a temporary injunction.

A temporary injunction may be granted when the applicant has proffered some evidence establishing (1) a cause of action, (2) a probable right to the relief sought, and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); *see also id.* at 211 ("The trial court does not abuse its discretion if some evidence reasonably supports the trial court's decision."); *Mattox v. Jackson*, 336 S.W.3d 759, 762 (Tex. App.—Houston [1st Dist.] 2011, no pet.). In addition, the balance of the equities—including consideration of the public interest—must weigh in favor of granting the injunction. *Int'l Paper Co. v. Harris Cty.*, 445 S.W.3d 379, 396 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

It is uncontroverted that Plaintiffs have established causes of action against Defendant. And as discussed above, Plaintiffs have already proven their right to the relief sought and that they will suffer irreparable injury from the Proclamation. But it is the balance of the equities that truly establishes how essential a temporary injunction here is. The evidence is clear: the Proclamation is not just unrelated to Defendant's proffered interests of ensuring secure and orderly elections, it is adverse to them. On the other hand, allowing counties to open up multiple ballot return locations protects public health, equal access to the ballot box, and a free and fair election in Texas.

B. Defendant's July 27 Proclamation provides the basis for the "status quo" that a temporary injunction is necessary to restore.

As Defendant rightly states in his brief, the purpose of a temporary injunction is to preserve the status quo of the subject matter of the suit pending a trial on the merits. *Butnaru*, 84 S.W.3d at 204. And he is correct in noting that the COVID-19 pandemic has thrown much of daily life into flux. But he argues in his brief that Plaintiffs are not entitled to a temporary

injunction because there *is* no status quo in a pandemic. Def.'s Resp. at 36. This is an extraordinary statement. Just as he cannot negate Plaintiffs' standing by promulgating an Executive Order devoid of enforcement power, Defendant cannot negate Plaintiffs' entitlement to injunctive relief by negating the existence of some shared reality, even if it is in the context of a global pandemic.

The simple truth is that there was an accepted status quo before the October 1 Proclamation. The status quo allowed counties to operate multiple ballot return locations. This status quo was restated in the July 27 Proclamation, Def.'s Appx. 011, in the Solicitor General's representations to the Texas Supreme Court, Pls.' Pet. Ex. B at 5, and in the Secretary of State's emails to early voting clerks, *id.* at 37. And this status quo was in effect *during* the pandemic, as clearly shown by the fact that Harris County offered multiple ballot return locations during Texas's July primary election without objection from any state official.

This argument—that since there is no status quo in a pandemic, there can be no injunctive relief—must be called out for what it is: an attempt to rig the system so that some voters are less likely to vote. It is not an attempt to justify his Proclamation based on law, it is an attempt to justify his Proclamation by denying reality.

C. The balance of equities strongly favors a temporary injunction.

1. The Proclamation threatens public health and safety.

By forcing more people to visit a single location—during a time when COVID-19 infection rates are plateauing, not improving[15]—the Proclamation significantly hinders the ability of voters and poll workers to protect themselves from COVID-19. Voters who previously were

[15] Ex. H, Expert Report of Dr. Krutika Kuppalli, ¶¶ 13, 15 ("Kuppalli Report"); New Coronavirus Cases, Hospitalizations Plateau after Falling from Record Highs in July, TEXAS TRIBUNE (Apr. 14, 2020, last updated Oct. 7, 2020), available at: https://bit.ly/2IakXbn

able to drop off their ballots at one of multiple return locations will now be forced to travel to just one return location.

Voters will face long lines with minimal opportunity to social-distance. They will also have to use public restrooms while they are away from home. They will be in close proximity to other voters, poll watchers, and elections administrators, who are all exempted from a mask-wearing mandate issued by Governor Abbott in July.[16] This could be sufficient to set off a chain of COVID-19 infections resulting from exposures in and around ballot return locations. *See* Kuppalli Report ¶¶ 19, 22-24, 26. This is particularly true since voters who are eligible to vote by mail are precisely those voters at high risk for adverse health incomes from COVID-19—individuals over 65 and/or with disabilities—and who should be taking as many precautions as possible to avoid crowded places. Some of these voters, who had initially planned to drop off their absentee ballots at ballot return locations near them, have chosen to vote in person instead. *See, e.g.*, Ex. D, Declaration of Robert Knetsch ("Knetsch Declaration") ¶¶ 9-10.

Defendant argues that voters who planned to drop off their absentee ballots but now feel unsafe doing so still have other available options to cast their vote: they can drop their ballots in the mail, or they can vote in person. But voters know that widespread issues with the U.S. Postal Service mean that if they cast their ballot by mail, their votes may not be received in time to be counted. Knetsch Declaration ¶ 6; Cortés Report ¶¶ 9-10. And while polling places where they can vote in person may be geographically closer to them, visiting these polling places present the same problems as dropping off a ballot at a single, crowded ballot return location. Thus, these

[16] Executive Order GA-29 (July 2, 2020), available at: https://bit.ly/2SCF0B5 ("Every person in Texas shall wear a face covering over the nose and mouth when inside a commercial entity or other building or space open to the public . . . provided, however, that this face-covering requirement does not apply to the following: . . . any person who is voting, assisting a voter, serving as a poll watcher, or actively administering an election.")

additional options are not safer, more secure, or more efficient alternatives to additional ballot return locations: they present their own risks, either from COVID-19 or facing the prospect that their ballots may not be received in time to be counter.

The Governor himself seems to understand these risks. In issuing the July 27 Proclamation, he stated that "it is necessary that election officials implement health protocols to conduct elections safely and to protect election workers and voters," and that "strict compliance with the statutory requirements . . . of the Texas Election Code would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster." Def.'s Appx. 011. When multiple counties opened or planned to open multiple ballot return locations in response to this Proclamation, he did not object. He did not communicate *any* ballot integrity concerns about county clerks opening multiple absentee ballot return locations, despite knowing of counties' intention to do so since shortly after the July 27 Proclamation was issued, and despite knowing that for the July 14, 2020 primary election, at least some county clerks had made multiple ballot return locations available on Election Day. Hollins Declaration ¶ 9 ("We had no security or other logistical issues related to in-person ballot drop-off on July 14—the use of multiple drop-off locations was a success and a needed service for Harris County voters. Neither the Governor's Office nor the SOS complained to me about using our annex offices for this purpose.")

2. The Proclamation Imposes Discriminatory Burdens on Voters.

The burdens of the Proclamation do not fall evenly on all voters. Instead, the Proclamation mandates disparate burdens based on where voters live and has predictable disparate impacts on minority communities.

First, the Proclamation discriminates against people living in Texas's most populous counties by disregarding the extreme variation in demand for access to the drop-off sites among

counties. Texas has 254 counties, most with substantially fewer voters and precincts than Texas's top 10 most populous counties, which include Harris, Travis, and Fort Bend.[17] For example, as of March 2020—the most recently available data—Loving County had 113 registered voters and 4 precincts, Armstrong County 1,443 registered voters and 9 precincts, Coke County 2,299 registered voters and 4 precincts, and Upton County 2,151 registered voters and 6 precincts. *Id.* In contrast, Harris County had over 2.38 million registered voters—more than the number of registered voters in the 200 least-populated counties *combined*—and 1,012 precincts. *Id.* Travis had nearly 823,000 registered voters and 247 precincts. *Id.* Fort Bend had over 456,000 registered voters and 159 precincts. *Id.* By limiting voters to a single drop-off site regardless of the county's population, the Proclamation imposes a discriminatory burden on the populous counties' voters. This includes substantially increasing congestion and wait-time for submitting ballots, requiring voters in populous counties to endure significant traffic delays to reach the single drop-off site, requiring longer public transportation commutes to the single site, and increased COVID exposure for those seeking to return absentee ballots (by law, limited to those over 65 and with disabilities).

For example, Mr. Hollins testified that Harris County contains 14% of all the registered voters in Texas, has a population of 4.7 million people, and currently has 2.4 million registered voters. Hollins Declaration ¶ 4. Harris County is also the fourteenth largest county in Texas based on geography, "stretching [ ] nearly 1,800 square miles." *Id.* The reduction from 12 ballot drop-off sites to a single site substantially increases the burden on voters seeking to return their ballots. "Traveling from the County's northwest corner to the current location of the main election office is more than a 100-mile round trip," Mr. Hollins explained. *Id.* Traffic

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

exacerbates that burden. "As an urban county, Harris County often has extreme traffic congestion—even during the pandemic—and traveling across the county to a central location and back can easily take at least half a day by car and all day by public transportation (if any public transportation is available in the voter's home area)." *Id.* (emphasis added).

If voters are able to get to the single ballot return location, they will then face long lines that will only serve to deter them from casting their ballots. Mr. Hollins explained that "[i]f we are forced to reduce to one location, I anticipate that toward the end of the early voting and especially on Election Day, we will see massive lines to return ballots in person." *Id.* (emphasis added). Experts predict that, even in scenarios in which only 1.7 to 2.5 percent of registered voters attempt to drop off their ballots on election day, the 22 most populous counties in Texas will see lines of more than 1,000 vehicles and waiting times of more than six hours. Ex. G, Declaration of Daniel Chatman ("Chatman Declaration") ¶¶ 77-78. In Harris County, voters attempting to drop off their ballots on Election Day could face a wait time of over *three hundred hours*. Chatman Declaration at 35. Put another way, a voter who arrives at the back of the line would not arrive at the front of the line to drop off their ballot until November 15. Massive lines—of people over 65 and/or with disabilities—during this pandemic are a recipe for disaster.

The problems with the U.S. Postal Service further exacerbate the burden the Governor's Proclamation has imposed. "Particularly because of the widely-publicized problems with the U.S. Postal Service, some voters may have trouble receiving their ballot until close to Election Day, and will thus have to return their ballot in person in order to ensure it is returned on time." *Id.* ¶ 20; Cortés Report ¶ 15 ("If there is a surge in late absentee ballot requests, which is a likely scenario given the experience in presidential primary elections this year, [voters who] request an absentee ballot but will not have sufficient time to mail it back [may] opt to vote in-person on

election day instead."); *see also* Knetsch Declaration ¶ 6 ("Due to reports of widespread issues with the U.S. Postal Service, I planned to return my ballot to an early voting drop-off location so that it would be received in time to be counted for the election.").

This burden will be especially felt by Black and Hispanic voters. Texas's most populous counties, and its geographically largest counties, are both disproportionately Black and Hispanic, while its least populous, and geographically smallest, counties are disproportionately white. Harris is both the most populous Texas county and one of the state's geographically largest, but only 29.54% of its residents are white. Ex. C, Tex. Demographic Center Data. Only 33.62% of Fort Bend County's residents are white. *Id.* By contrast, Texas's geographically smallest and/or least populous counties are disproportionately white. *Id.* For example, 90.71% of Armstrong County residents are white, 83.72% of Sabine County residents are white, 80.18% of Delta County residents are white, 78.21% of Coke County residents are white, and 75.53% of Loving County residents are white. *Id.* In practice, this means that statewide, absentee-eligible Black voters will be twice as likely as white voters to have a round trip to access a ballot return location exceeding 90 minutes, largely because Black voters are far more likely to live in a household without a car available. Chatman Declaration ¶ 54. Hispanic voters, too, will face disproportionate difficulties: they are 24 percent more likely than white voters to experience a travel burden exceeding 90 minutes. *Id.*

Even within the most populous counties, there are racial disparities that yield disparate burdens of the Governor's Proclamation by race. In the top 10 most populous Texas counties—which include Harris, Travis, and Fort Bend—Black voters are consistently far more likely to experience a 90-minute travel burden than white voters. Chatman Declaration ¶ 55. The number

of Hispanic voters who will experience such a travel burden is also, on average, higher than the number of white voters. *Id.*

Thus, the Governor's Proclamation imposes an impossible burden for a number of voters. As Mr. Hollins testified, "voters without reliable transportation will be unable to get to NRG Arena from their homes (which could be more than fifty miles away) in time to have their vote counted." Hollins Declaration ¶ 20; *see also id.* ¶ 23 ("The size of the County, and the location of our Houston headquarters, would make it difficult, if not impossible, for some voters to return their ballots to only that single return location. This will undoubtedly force some voters to decide if they will risk their health by voting in person or if they instead will not vote at all. No Texas voters should have to make that decision."), ¶ 24 ("In my experience, rural voters, and voters without access to transportation have the hardest time traveling significant distances to vote or drop off their ballots."); *see also* Knetsch Declaration ¶ 10 (testifying that NRG Arena in central Houston is a 12.7 mile drive from his house).

3. The Proclamation does not further the Governor's proffered interests.

While "[a] State indisputably has a compelling interest in preserving the integrity of its election process," the assertion of such an interest does not require the Court to rubber stamp the State's actions where they do not actually serve such a purported interest. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989). Rather, the state must "show[] that its regulation . . . is necessary to the integrity of the electoral process." *Id.*

Defendant claims that the Proclamation furthers the State's "strong interest in ensuring orderly and secure elections. Def.'s Resp. at 35. But he makes no showing as to why the Proclamation is necessary to these interests. This is because he cannot. On the contrary, the overwhelming evidence points to the opposite conclusion.

(a) The Proclamation will make election processes less efficient by adding to election officials' administrative burdens and creating voter confusion.

On October 1, absentee voting in Texas had already begun. Counties had already opened, or announced plans to open, multiple satellite ballot return locations. In fact, it was just that morning that Fort Bend County announced that it would allow voters to return their ballots at any of its annex offices.[18] But just hours later, the Governor's Proclamation dropped. Counties like Fort Bend had to rescind their announcements and reconfigure their ballot return plans entirely, with just a month left before the election.

As Mr. Hollins, the Harris County Clerk, testified, "[t]his last minute change to election procedures is causing voter confusion." Hollins Declaration ¶ 20; *see also id.* ¶ 25 (noting that county election officials, who have many other election-related tasks to accomplish for the already underway election, are being forced to field calls from voters and other interested constituencies about the impact of the Proclamation). This is so, Mr. Hollins explained, because Harris County's "multiple ballot return locations ha[d] been advertised to voters via social media, media interviews, and other methods." *Id.* ¶ 21. The County's Harris Votes website announced the locations, which were set since mid-July, *id.* ¶¶ 14, 21; *see also id.* Ex. F. The shifting rules also create the potential for unfounded challenges to voters; for that reason Mr. Hollins explains that "it is very important that the legality of methods of returning mail-in ballots be very clear." *Id.* ¶ 6 (emphasis in original). Moreover, because the Proclamation was issued with only one day's notice, clerks "are having to change our voter education materials, our website, and our staff training." *Id.* ¶ 25. Thus, the Proclamation harms—and has already harmed—the orderly administration of the election.

[18] https://www.fbherald.com/news/county-announces-more-ballot-drop-off-locations-but-abbott-later-bans-them/article_32bb3fc3-fd7c-5888-b059-2ab1bfd18b89.html

The Fifth Circuit's repeated recent orders indicating that it is too late to change the election rules should weigh heavily in this Court's analysis of the appropriateness of Defendant's action here. *See Tex. Alliance for Retired Americans v. Hughs*, No. 20-40643, 2020 WL 5816887, at *1 (noting that importance of not "alter[ing] the election rules on the eve of an election"); *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. June 4, 2020) (enjoining election changes one month and ten days before the election); *see also RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020) (noting voter confusion caused by last minute changes to election rules); *Purcell*, 549 U.S. at 4 (same). After all, the Governor is not an election official. So it is not at all clear why his interference with election machinery at this late stage of the game should be treated differently than a court order.

(b) The Proclamation undermines election safety.

While Defendant only proffers the prevention of election fraud as an interest when analyzing the Proclamation under the *Anderson-Burdick* test and not as an argument against a temporary injunction, *see* Def.'s Resp. at 29, Texas has produced no evidence of fraud. To the contrary, the Proclamation will undermine election efficiency and security. By ordering a reduction down to one ballot return location per county, it is nearly certain that fewer absentee voters will drop their ballots off in person. *See* Hollins Declaration ¶¶ 22, 32. The use of drop off sites by voters returning mail-in ballots in person "is more secure than returning by mail because (1) there is no danger of tampering or loss of the ballot in transit and (2) voters who return ballots in person must sign a roster and present voter ID." *Id.* ¶ 32.

The Proclamation does not create any additional security measures to the election process. All it does is force early voting clerks to reduce the number of ballot return locations to "a single early voting clerk's office location" per county. Def.'s Appx. 019. In other words, the actual ballot security protocols required before and after the Proclamation are identical, with the

only difference being that now they will only be applied in one location rather than multiple. Such a reduction in voter services does not serve to enhance election security, and may even degrade it instead.

In Harris County, for example—which, before the Governor's Proclamation, had set up the most ballot drop off locations of any county in the State—the election security protocols at each of the 12 sites, including the one that now remains in light of the Governor's Proclamation, were "the same" and "equally secure." Hollins Declaration ¶ 16. The security measures included having two trained staff present at the drop off location at all times that it would be open, and having those staff ensure that each voter signed the roster, provided valid identification, and signed the ballot carrier envelope. *Id.* They also included using a "mail ballot tub" to receive the voted absentee ballots, which is a locked ballot box—sealed by tamper-proof seals— that has "a slit large enough for a ballot carrier envelope but small enough that fingers or tools cannot be forced inside the box to tamper with ballots." *Id.* ¶ 17. And they required the mail ballot tub to be returned to the election administration's headquarters each day for processing by a pair of employees. *Id.*

The level of disruption to election administration that the Proclamation brings is something the State of Texas has decried in state and federal court. *See, e.g.*, Appellant's Emergency Motion for Relief, *Texas v. Hollins*, No. 14-20-00627-CV (Ct. App—Houston, Sept. 11, 2020) at 2, 10 (arguing that a county clerk sending vote-by-mail applications would "sow confusion just weeks ahead of a major national election" and that "State officers will be required to combat the confusion that will inevitably result); Sec'y of State's Reply Brief, *Hughs v. Tex. Democratic Party, et al.*, No. 20-50683) at 12 (noting the need to provide "certainty" to voters and that voters should be entitled to "rely on announced polling locations and trust that early

voting polling places will remain open throughout the early voting period"); Emergency Motion for Stay, *Texas Alliance for Retired Americans v. Hughs*, Case No. 20-40643 (5th Cir. September 28, 2020) (arguing "[t]he 2020 election is already underway.") The irony should not be lost on this court that the State made these arguments (against, it is worth noting, actions designed to *increase* access to voting) and now turns to protect an executive order that *decreases* voting access, has been proven to cause voter confusion, and was made even closer to the election. Texas state officials are not simply trying to have their cake and eat it too: they are trying to have it, eat it, and keep their constituents from accessing it at all.

CONCLUSION

Voters already face a number of challenges this election, due to uncertainty over the USPS' ability to deliver mail-in ballots in time to be counted and a public health crisis that makes congregating in large numbers dangerous to one's health. They should not also have to contend with a Governor who abuses his authority to limit their ability to vote, especially when the stated reasons for doing so are mere pretext. The Court should issue a temporary injunction restoring the status quo and enjoining the Proclamation with respect to its limitation on ballot return locations in the early voting period.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2020, a true and correct copy of the foregoing was sent to all counsel of record in accordance with the provisions of the Texas Rules of Civil Procedure.

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