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Via Email and E-Filing

Mr. Blake Hawthorne, Clerk
Supreme Court of Texas

Re: No. 20-0846, *Abbott v. Anti-Defamation League of Austin, Southwest, and Texoma Regions*

Dear Mr. Hawthorne:

The State Officials file this letter in reply to three points raised in Plaintiffs' overlong response brief, filed this afternoon.*

First, Plaintiffs ask this Court to hold that they were injured based on a federal district court's decision that requiring voters to send in their ballots early can, under certain circumstances, constitute actionable abridgment of the right to vote. Resp. 26-27 (citing *Vote Forward v. DeJoy*, Civ. No. 20-2405 (EGS), 2020 WL 5763869, at *9 (D.D.C. Sept. 28, 2020)). Even assuming *Vote Forward* was correctly decided on the merits, it does not support a finding of standing in this case because it does not demonstrate that any such abridgment was caused by these defendants. *In re Abbott*, 601 S.W.3d 802, 812-13 (Tex. 2020); *In re Hotze*, No. 20-0739, 2020 WL 5919726, at *6 (Tex. Oct. 7, 2020) (Blacklock, J., concurring). As the State Officials previously explained, because neither the Governor nor the Secretary of State enforces the October 1 Proclamation, Plaintiffs cannot demonstrate standing. PFR 8-11.

But *Vote Forward* was not correctly decided on the merits. Its reasoning has been rejected by two different federal courts of appeals. The Fifth Circuit explained at length that the October 1 Proclamation must be seen as "a part of the Governor's

* For a detailed response to the remainder of Plaintiffs' arguments, the State Officials refer the Court to the briefs they filed in the court of appeals. *See* Tex. R. App. P. 55.5.

expansion of opportunities to cast an absentee ballot in Texas well beyond the stricter confines of the Election Code." *Tex. League of United Latin Am. Citizens v. Hughs*, No. 20-50867, 2020 WL 6023310, at *5 (5th Cir. Oct. 12, 2020). Far from creating the type of severe restriction on voting that Plaintiffs and their amici maintain, the Fifth Circuit explained that "one strains to see how it burdens voting at all." *Id.* Three days earlier, the Sixth Circuit came to the same conclusion based on a similar restriction. *A. Philip Randolph Inst. of Ohio v. LaRose*, No. 20-4063, 2020 WL 6013117, at *2 (6th Cir. Oct. 9, 2020) (unpublished) (concluding a similar drop-box restriction on absentee ballots "surely does not impose a 'severe restriction[] on the right to vote'").

Second, Plaintiffs do not defend the court of appeals' holding that the October 1 Proclamation was *ultra vires* because it "changed the law to limit the meaning of 'early voting clerk's office' to only the singular, contrary to the Attorney General's September 30 representation to the Texas Supreme Court." Pet. App. Tab A at 18. Nor could they, because the proclamation did no such thing. Instead, Plaintiffs bury any discussion of that holding between their defense of factual findings that the trial court did not make, *compare* Resp. 39-40, *with* Pet. App. C at 2, and their opinions about whether the Governor's actions were "consistent with and in response to the declared disaster," Resp. at 43. But Plaintiffs' argument is nothing more than a request for the courts to second-guess the Governor's decisions regarding how to address the pandemic. Courts have repeatedly refused to engage in such an inquiry. *E.g.*, *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020) (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905)).

Third, Plaintiffs ignore the remedial consequences of their argument that the October 1 Proclamation is either *ultra vires* or violates equal protection. The status quo ante is the Texas Election Code. The Code controls except to the extent the Governor has suspended it. The Governor has suspended section 86.006(a-1)'s limitation to election day for hand-delivery of mail-in ballots *only* insofar as counties comply with the number-of-locations requirement and allow poll watchers at the designated location. CR.137-40. If a court determines compliance with the number-of-locations requirement is *ultra vires* because the Governor has not validly suspended the Election Code, then the conditions of the suspension are not met—and the Election Code governs. *Cf. Barr v. Am. Ass'n of Political Consultants, Inc.,* 140 S. Ct. 2335, 2352-53 (2020) (plurality op.) (noting that where inequality is created by an exception to the general rule, the appropriate remedy is to sever the

exception, not to rewrite the general rule). If Plaintiffs were correct that the October 1 Proclamation is improper, that would only allow the Court to enforce the Election Code—not to suspend it to a greater extent than permitted by the Governor, who has allowed an unprecedented *expansion* of voting options.

Respectfully submitted.

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Certificate of Service

On October 26, 2020, this letter was served electronically on Lindsay B. Cohan, lead counsel for the Respondents, via Lindsay.Cohan@dechert.com.

/s/ Lanora C. Pettit
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Certificate of Compliance

Microsoft Word reports that this letter brief contains 738 words, excluding exempted text.

/s/ Lanora C. Pettit
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