

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

THE ANTI-DEFAMATION LEAGUE	§	
AUSTIN, SOUTHWEST, AND	§	IN THE DISTRICT COURT
TEXOMA REGIONS; COMMON	§	
CAUSE TEXAS; and ROBERT	§	
KNETSCH;	§	TRAVIS COUNTY TEXAS
<i>Plaintiffs,</i>	§	
	§	
v.	§	353RD JUDICIAL DISTRICT
	§	
GREG ABBOTT, in his official	§	
capacity as the Governor of Texas,	§	
<i>Defendant.</i>	§	

**PLAINTIFFS’ VERIFIED ORIGINAL PETITION AND APPLICATION FOR
TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION,
AND PERMANENT INJUNCTION**

Plaintiffs, the Anti-Defamation League Austin, Southwest, and Texoma Regions (“ADL”); Common Cause Texas; and Robert Knetsch (collectively, “Plaintiffs”),¹ by and through their counsel of record, file this Verified Original Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction against Defendant Greg Abbott, in his official capacity as Governor of Texas.²

1. For several months, Texas voters and election officials have prepared to cast and receive ballots based on rules laid out in the Texas Election Code and Governor Abbott’s July 27 Proclamation regarding early and absentee voting. Now, at the eleventh hour, Governor Abbott issued a new Proclamation that, if allowed to stand, dramatically changes the applicable rules,

¹ “Plaintiffs” include the supporters, constituents, and/or members of ADL and Common Cause Texas.

² Notice of this Petition and Application was provided to the Texas Attorney General in advance of filing pursuant to Local Rule 10.4.

namely where ballots-by-mail can be dropped off. This bait-and-switch exceeds the Governor's authority and violates the Texas Constitution – in addition to being inconsistent with principles of efficient election administration and fundamental fairness to all Texas voters.

2. Defendant Governor Greg Abbott's October 1, 2020 Proclamation ("the Proclamation") impermissibly intrudes on local election officials' authority to manage elections and imposes an unconstitutional burden on voters' right to vote. The Proclamation bars local election officials from providing more than one drop-off site for mail-in ballots during the early voting period, regardless of the size or population density of the county. *See Ex. A, Proclamation (Oct. 1, 2020).*

3. It is consistent, however, with a broader effort by the State to make it more difficult for elderly, sick, and disabled Texans to cast ballots by mail. Earlier this year, the State asked the Texas Supreme Court to narrow the circumstances in which sick and disabled voters would be eligible to vote by mail. Several weeks ago, Texas sued the Harris County Clerk for sending ballot applications to voters under the age of 65 in his jurisdiction. The Secretary of State still does not allow Texans to apply for ballot-by-mail online, forcing voters to download the application, print it out, and mail it in. And now the Governor has issued an order decimating a well-ordered system for returning marked ballots in person. Governor Abbott's distaste for an accessible ballot-by-mail system puts him at odds with the Texas Constitution, Texas statutes, and county election authorities. This court should enjoin his Proclamation.

4. At a time when COVID-19 is ravaging the country and the U.S. Postal Service ("USPS") acknowledges the "significant risk" that ballots will not be delivered in time to be counted, ballot drop-off locations provide eligible Texas voters with a means of voting that reduces contacts with others but still ensures the voter's ballot will be received and counted.

5. The Election Code designates local election officials as the officials with the authority to manage and conduct the early voting process, not Defendant. Tex. Elec. Code §§ 32.071, 83.001(c), 83.002. Indeed, *just one day prior to the issuance of the Proclamation*, Defendant conceded in a judicial admission to the Supreme Court of the State of Texas that the Texas Election Code allows local election officials to designate more than one early voting ballot drop-off site in each county. *See Ex. B at 5, Texas SG Submission dated Sept. 30, 2020.*

6. Given the COVID crisis and the recent upheaval at the USPS, many counties had already proceeded with multiple drop-off locations in the primary runoff election based on this authority, and intended to do so in the upcoming general election. For example, Harris County operated 11 drop-off sites receiving ballots-by-mail in advance of the July 2020 primary runoff, and was already operating 12 drop-off sites receiving ballots-by-mail for the November 2020 general election at the time Defendant issued the Proclamation.³ Travis County had also opened four locations to receive ballots on October 1.⁴ Fort Bend County had announced plans to open five drop-off locations.⁵ And after Defendant's Proclamation was released, Dallas County announced that they had had plans to open multiple drop-off locations as well.⁶

7. Plaintiffs and their supporters, constituents, and/or members include Texas residents who are eligible to vote by mail, either because they are over 65 or because they have a

³ <https://www.texastribune.org/2020/10/02/texas-greg-abbott-ballot-drop-lawsuit/>

⁴ *Id.*

⁵ https://www.fbherald.com/news/county-announces-more-ballot-drop-off-locations-but-abbott-later-bans-them/article_32bb3fc3-fd7c-5888-b059-2ab1bfd18b89.html

⁶ Dallas County Judge On Changes To Mail Ballot Drop-Off Locations In Texas: 'This Has President Trump Written All Over It', CBSDFW.com (Oct. 1, 2020), available at: <https://cbsloc.al/3l0ZpMu>.

physical condition that puts them at greater risk for contracting COVID-19. In light of the continuing pandemic, many of these voters planned to vote by mail.

8. Because of recent, unprecedented delays in mail delivery by USPS, Plaintiffs prefer to return their ballots to a local drop-off location to ensure that their vote is counted rather than risk that a mailed-in ballot will not reach the clerk prior to the deadline to be counted. Until Defendant issued the Proclamation, many of these voters could choose the early voting drop-off location most convenient to them – whether because it is closest to their place of residence, easily accessible by public transportation, or some other factor.

9. By limiting each county to just one early voting drop-off location, Defendant's Proclamation substantially and unconstitutionally burdens Plaintiffs' right to vote. The Proclamation forces voters eligible to vote by mail to choose between risking their health by voting in-person so that they have more assurance that their ballots will count, or protecting their health by attempting to vote by mail and risking the real possibility that their ballots will not count because of USPS delays. Defendant's action further burdens Plaintiffs who would be precluded from returning their ballots to the early voting drop-off location because they would have to travel a significant distance and spend a substantial amount of time getting to their county's only location. Finally, the Proclamation burdens Plaintiffs who would be precluded altogether from early voting because they do not have access to a car and live too far from the early voting drop-off location; they do not have access to public transportation; or they have access to public transportation but that mode of transportation is not a practical and/or a safe means during a pandemic.

10. The Proclamation unlawfully favors voters in counties smaller in population over those counties larger in population, in violation of equal protection of the law. While the

Proclamation substantially burdens all Texans, that burden is greater for those who live in more populated counties because only one early voting drop-off location is available for hundreds of thousands of registered voters in the county eligible to vote by mail. And because the Texas Election Code requires a voter returning a marked ballot in person to present identification, voters who reside in more populous counties will encounter long lines and wait times at the single drop-off location. The Proclamation thereby eliminates one of the primary advantages of returning a ballot in person during the early voting period during the ongoing pandemic. For these reasons, Defendant's Proclamation substantially and unconstitutionally burdens and threatens the right of Plaintiffs to vote.

11. Plaintiffs seek immediate injunctive and declaratory relief before the November 3, 2020 general election and ask this Court to enjoin enforcement of the Proclamation to the extent that it prohibits local election officials from operating multiple early voting drop-off locations in their counties.

DISCOVERY CONTROL PLAN

12. Discovery is intended to be conducted under Level 3 of Rule 190.4 of the Texas Rules of Civil Procedure.

JURISDICTION / VENUE

13. The Court has jurisdiction over this matter of election law under Texas Election Code § 273.081 and other laws. Plaintiffs do not seek damages and therefore make no statement under Texas Rule of Civil Procedure 47. Plaintiffs seek injunctive relief which, in this context, is within the jurisdiction of this Court.

14. Venue is proper in Travis County under sections 15.002(a)(1) of the Texas Civil Practices and Remedies Code.

PARTIES

15. **Plaintiffs Anti-Defamation League Austin, Southwest, and Texoma Region** are the regional offices of the Anti-Defamation League in Texas. ADL's mission, consistent with national Anti-Defamation League's overall mandate, is to protect the civil rights of all persons, eliminate vestiges of discrimination, racism, and antisemitism within communities in Texas, and to fight hatred in all its forms.

16. Accordingly, a critical part of ADL's mission includes voter mobilization and education activities. Among other things, ADL is encouraging college-age students to be pollworkers and poll monitors, providing approximately 700 schools with information about the voting process, holding webinars on the voting process, and engaging in outreach to and education of its constituents about Texas's vote-by-mail process and ensuring voters have a plan about how to cast their ballots. If the Governor's Proclamation is permitted to stand, it will distract from ADL's voter mobilization and education activities and force ADL to move resources from those planned activities to assist and educate voters in casting ballots at the single drop-off location in their county.

17. ADL has approximately 23,000 constituents or supporters who are Texas residents, a substantial number of whom are registered to vote in Texas and eligible to vote by mail, either because of their age or because of a physical condition that puts them at greater risk for contracting COVID-19. ADL also has approximately 250 regional board members throughout Texas, a substantial number of whom are registered to vote in Texas and eligible to vote by mail, either because of their age or because of a physical condition that puts them at greater risk for contracting COVID-19.

18. **Plaintiff Common Cause Texas** is a chapter of Common Cause, a non-partisan citizen lobby organized as a not-for-profit corporation under the laws of the District of

Columbia, and devoted to electoral reform, ethics in government and to the protection and preservation of the rights of all citizens to vote in national, state and local elections, including the education of voters about voting rights and procedures.

19. Since its founding, Common Cause Texas has been dedicated to the promotion and protection of the democratic process, including the right of all citizens to vote in fair, open, and honest elections. Common Cause Texas conducts significant non-partisan voter-protection, advocacy, education, and outreach activities to ensure that voters are registered and have their ballots counted as cast. At this point in the election cycle, Common Cause Texas's three full-time staff and five paid fellows are primarily focused on the organization's election protection program, including recruiting and training poll monitors and assisting voters. In addition, Common Cause Texas is engaging in a digital advertising campaign to educate voters. If Defendant's Proclamation is permitted to stand, it will thwart Common Cause Texas's voter advocacy, education, and outreach activities and force Common Cause Texas to move resources from those planned activities to assist voters in casting ballots at the single drop-off location in their county.

20. Common Cause Texas is one of the nation's leading grassroots, democracy-focused organizations and has over 1.2 million members nationwide and chapters in 30 states. Common Cause Texas has approximately 36,000 members and supporters across the state of Texas, a substantial number of whom are registered to vote in Texas and eligible to vote by mail, either because of their age or because of a physical condition that puts them at greater risk for contracting COVID-19.

21. **Plaintiff Robert Knetsch** is a registered voter who resides in Harris County. He is 70 years old. His age renders him particularly vulnerable if he contracts COVID-19.

22. **Defendant Greg Abbott** is the Governor of Texas and, pursuant to Article IV, Section I of the Texas Constitution, is the chief executive officer of the State of Texas. He is sued in his official capacity.

FACTUAL ALLEGATIONS

Voting By Mail in Texas & County Clerks' Authority to Establish Drop-Off Locations

23. Under Texas law, a voter is eligible to vote by mail if he or she meets any of the following requirements: (1) the voter is 65 or older; (2) the voter has a sickness or physical condition that prevents the voter from appearing at the polls; (3) the voter will be outside his or her county of residence for all of the Early Voting period and on Election Day; or (4) the voter is in jail, but otherwise eligible to vote. Tex. Elec. Code § 82.001-004.

24. Earlier this year, the Texas Supreme Court ruled that “a voter can take into consideration aspects of his health and his health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail because of disability.” *In re State*, 602 S.W.3d 549, 560 (Tex. 2020). Thus, while a lack of immunity to COVID-19 “is not itself a ‘physical condition’ that renders a voter eligible to vote by mail,” a voter with a physical condition that puts himself or herself at greater risk of contracting COVID-19 may vote by mail. *Id.*

25. The Texas Election Code provides that eligible voters may deliver their marked ballots “in person to the early voting clerk’s office . . . on election day.” Tex. Elec. Code § 86.006(a-1).

26. The Texas Election Code designates local election officials, as the officials “in charge of and responsible for the management of the election.” *Id.* § 32.071. That authority extends to early voting. *Id.* §§ 83.001(c), 83.002.

27. As Defendant Abbott previously conceded, the Texas Election Code allows the local election official to set up more than one “early voting clerk’s office.” On September 30,

2020, the Attorney General advised the Texas Supreme Court in an official filing responding to a question from the Supreme Court as follows: “The Court asks whether, ‘in light of the Governor’s July 27, 2020 proclamation, . . . allowing a voter to deliver a marked mail ballot in person to any of [the] eleven annexes in Harris County violates Texas Election Code section 86.00[6](a-1).’ The Government Code generally provides that the singular includes the plural. See Tex. Gov’t Code § 311.012(b). Nothing in section 86.006(a-1) overcomes that presumption or otherwise indicates that ‘office,’ as used in section 86.006(a-1), does not include its plural, ‘offices.’ *Accordingly, the Secretary of State has advised local officials that the Legislature has permitted ballots to be returned to any early-voting clerk office.*” **Ex. B at 5**, Texas SG Submission dated Sept. 30, 2020 (emphasis added).

Harris County Operated Multiple Drop-Off Sites For July Primary Runoff

28. The authority of local election officials to establish multiple ballot drop-off locations is confirmed by the fact that the Harris County Clerk did, in fact, provide multiple drop-off locations in the July primary runoff.

29. In advance of the July primary runoff, Harris County operated 11 locations at which voters could drop off their mail-in ballots.

30. The state did not make any objection to Harris County’s provision of these additional drop-off sites.

Defendant’s July 27, 2020 Proclamation

31. Shortly after the July primary runoff election, on July 27, 2020, Defendant Abbott issued an executive order extending the early voting period in light of the COVID-19 pandemic. Specifically, to “ensure that elections proceed efficiently and safely when Texans go to the polls”

this election cycle, Defendant Abbott extended in-person early voting to begin on October 13, 2020 instead of October 19, 2020.⁷

32. In the same order, Defendant Abbott suspended the restriction in Texas Election Code 86.006 that only allows in-person delivery of ballots on Election Day: “I further suspend Section 86.006(a-1) of the Texas Election Code, for any election ordered or authorized to occur on November 3, 2020, to the extent necessary to allow a voter to deliver a marked mail ballot in person to the early voting clerk’s office prior to and including on election day.”⁸

33. In so doing, Defendant Abbott specifically found that “Sections 85.001(a) and 86.006(a-1) of the Texas Election Code [the in-person delivery restriction] would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster[.]”⁹

County Clerks’ Establishment of Multiple Drop-Off Locations
for the Return of Ballots

34. In accordance with Defendant Abbott’s order and to ensure safe and accessible voting for all Texans, counties began preparations to run multiple early voting drop-off locations, particularly in counties that are both geographically large and populous. County election officials were designing plans to ensure that voters will have reasonable access to those locations and that drop-off locations will not be overcrowded, which would pose a serious health risk for voters. By definition, voters dropping off their ballots-by-mail are older, sick, or have disabilities that prevent them from voting in person, and thus at particularly high risk of COVID-19.

⁷ July 27, 2020 Proclamation, https://gov.texas.gov/uploads/files/press/PROC_COVID-19_Nov_3_general_election_IMAGE_07-27-2020.pdf

⁸ *Id.*

⁹ *Id.*

35. Harris County covers a large area of approximately 1700 square miles.¹⁰ As of January 2020, approximately 2.3 million people were registered to vote in Harris County.¹¹

36. In August 2020, the Harris County Clerk announced that there would be multiple locations in operation for ballot drop-offs “beginning whenever [voters] receive their ballots and continuing through Election Day, November 3, at 7:00 PM.”¹² Eleven of these locations were the same drop-off sites that Harris County successfully administered during the July 2020 primary runoff elections, with no objection by the State, with an additional ballot drop-off location at the NRG Arena in Houston.¹³

37. Travis County covers an area of approximately 1,000 square miles¹⁴ and has more than 813,000 registered voters.¹⁵ Prior to the Proclamation, Travis County had opened four locations to receive ballots on October 1.¹⁶

¹⁰ U.S. Census Bureau, QuickFacts – Harris County, Texas, <https://www.census.gov/quickfacts/fact/table/harriscountytexas/PST045219>

¹¹ <https://www.sos.state.tx.us/elections/historical/jan2020.shtml>

¹² Statement: Harris County Clerk Chris Hollins on Expected USPS Delivery Delays in November (Aug. 14, 2020), available at: <https://bit.ly/2GqFAPD>. (“Voters concerned with mail delays will be able to drop off their marked ballot in-person at any of the County’s eleven offices and annexes”).

¹³ Despart, Zach, Gov. Abbott Forces Harris County To Close 11 Mail Ballot Drop-Off Sites, Leaving Just One, Houston Chronicle (Oct. 1, 2020), available at: <https://bit.ly/2St1PqZ>

¹⁴ U.S. Census Bureau, QuickFacts – Travis County, Texas, <https://www.census.gov/quickfacts/fact/table/traviscountytexas/PST045219>

¹⁵ <https://www.sos.state.tx.us/elections/historical/jan2020.shtml>

¹⁶ Despart, Zach, Gov. Abbott Forces Harris County To Close 11 Mail Ballot Drop-Off Sites, Leaving Just One, Houston Chronicle (Oct. 1, 2020), available at: <https://bit.ly/2St1PqZ>

38. Just minutes before Defendant issued his executive order, Fort Bend County Judge KP George announced plans to open five ballot drop-off locations across the county.¹⁷ Fort Bend covers an area of approximately 861 square miles.¹⁸ Approximately 445,757 people are registered to vote in Fort Bend, and of those, 86,055 are over the age of 65.¹⁹

39. And after Defendant's Proclamation was released, Dallas County Judge Clay Davis stated that Dallas County had planned to announce multiple ballot drop-off locations.²⁰ Dallas County covers approximately 871 square miles.²¹ Approximately 1,271,254 people are registered to vote in Dallas, and of those, 250,858 are over the age of 65.²²

Projected Increased Use of Voting By Mail

40. Due to the ongoing COVID-19 pandemic, elections officials in Texas are projecting a marked increase in the use of voting by mail compared to prior elections.

41. The Harris County Clerk's Office, for instance, has reportedly received approximately 208,000 ballot-by-mail requests for the November 3, 2020 General Election as of

¹⁷ Modrich, Stefan. Smart Financial Centre to be Used as Polling Place, Fort Bend Star (Oct. 1, 2020), available at: <https://bit.ly/33q1onG>

¹⁸ U.S. Census Bureau, QuickFacts – Fort Bend County, Texas, <https://www.census.gov/quickfacts/fact/table/fortbendcountytexas/PST045219>

¹⁹ Figures include inactive voters and are pulled from L2 Political's VoterMapping Tool, a proprietary database.

²⁰ Dallas County Judge On Changes To Mail Ballot Drop-Off Locations In Texas: 'This Has President Trump Written All Over It', CBSDFW.com (Oct. 1, 2020), available at: <https://cbsloc.al/3l0ZpMu>.

²¹ U.S. Census Bureau, QuickFacts – Dallas County, Texas, <https://www.census.gov/quickfacts/fact/table/dallascountytexas/PST045219>

²² Figures include inactive voters and are pulled from L2 Political's VoterMapping Tool, a proprietary database.

August 23, 2020—an increase from the approximately 111,000 requests received in 2018 and 115,000 requests received in 2016.²³

42. In Travis County—where just 27,000 absentee ballots were cast in the 2016 presidential election—71,000 voters had requested mail-in ballots as of October 2, 2020.²⁴ Elections officials expect up to 200,000 mail-in ballots to be cast.²⁵

43. And as of September 3, McLennan County had seen a 162% increase in mail-in ballot requests since the 2016 presidential election.²⁶

44. The increase in ballot-by-mail requests is also being seen in Texas's less populous counties.

45. Taylor County, for example, has already received a record-breaking number of vote-by-mail applications, processing almost 4,900 applications by September 25 and continuing to process 50-70 requests per day.²⁷ In 2016, by contrast, the county received only 3,579 requests, and just 2,977 requests in 2012.²⁸

²³ Despart, Zach, *Harris County Launches Mail Ballot Tracking System to Ensure Residents Their Vote Has Counted*, Houston Chronicle (Sept. 30, 2020), available at: <https://bit.ly/3nh7q1U>.

²⁴ Lindell, Chuck, and Nicole Cobler. *Abbott Orders Counties to Close Multiple Ballot Drop-Off Sites*, Austin American-Statesman (Oct. 2, 2020), available at: <https://bit.ly/3jlFIyt>.

²⁵ Devenyns, Jessi. *Travis County Plans for Drive-Thru Voting Drop-Off for Mail-In Ballots*, Austin Monitor (Aug. 26, 2020), available at: <https://bit.ly/3nfLDrl>.

²⁶ Ellenberger, Paige. *Central Texas Counties are Seeing a Surge in Mail-In Ballot Requests*. KXXV.com (Sept. 3, 2020), available at: <https://bit.ly/2Sm7fnA>.

²⁷ Bethel, Brian, *Taylor County Elections Office Seeing Record Mail Ballot Requests*, Abilene Reporter-News (Sept. 25, 2020), available at: <https://bit.ly/30uAfxN>.

²⁸ *Id.*

46. The virus that causes COVID-19 is highly contagious and spreads through a variety of ways, including the respiratory droplets that an infected person produces when they cough, sneeze, or talk; or through contact between individuals. The virus enters the body through the nose, mouth, or eyes, and then attaches to a protein, which then enters the cell and replicates. Each infected cell can release millions of copies of the virus before the cell breaks down and dies. An infected person who coughs and sneezes can leave respiratory droplets on surfaces where it can remain in an infectious state for several hours to days without a human host.

47. The risks of severe illness, complications, and death due to COVID-19 increase with age. In addition to age, several other underlying health factors increase the risks associated with COVID-19. People who have underlying health conditions (such as heart disease, diabetes, and lung disease) have weakened immune systems, have cancer, and who are pregnant are considered populations at an increased risk for severe illness from COVID-19.²⁹

48. For these reasons, the Centers for Disease Control and Prevention (“CDC”) urges Americans to adhere to social distancing measures (for example, staying home as often as possible, maintaining at least six feet of physical distance from other people when outside the home, and wearing face masks) to minimize person-to-person contact and reduce the spread of COVID-19. The CDC emphasizes that these measures are crucial for reducing an individual’s risk of becoming infected with the disease and for preventing the transmission of the disease throughout the population. Moreover, it is especially critical for elderly individuals and

²⁹ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>

members of other high-risk populations to continue to adhere to these social distancing measures for the sake of their own health.

49. In June, Texas election officials issued guidance to the County Clerks directing them to permit in-person voters to vote at polling places without a face covering. The guidance, in pertinent part, states that “[t]here is no authority under Texas law to require voters to wear face coverings when presenting to vote,” and that “voters cannot be required to wear a face mask.” Texas Election Advisory 2020-19 (June 18, 2020).

Delays in USPS Mail Delivery

50. At the same time as elections officials are projecting—and seeing—a massive increase in the number of voters choosing to vote by mail, the COVID-19 pandemic and internal policy changes within the USPS have led to delays in mail delivery that risks ballot-by-mail applications and completed ballots not being delivered to boards of elections on time.

51. Due to projected delays, the USPS recommends that voters submitting their absentee ballot applications by mail should do so at least 15 days before Election Day.³⁰ Texas law allows voters to request applications to vote by mail as late as 11 days before Election Day—four days after the recommended USPS cutoff. Tex. Elec. Code Ann. § 84.007.

52. During Texas’s 2020 primary election, the general counsel for USPS wrote to Texas Secretary of State Ruth Hughs that, “[u]nder our reading of Texas’ election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service’s delivery standards,” and “[a]s a result, to the extent that the mail is used to transmit ballots to and from voters, there is a *significant risk* that, at least in certain circumstances, ballots may be

³⁰ See Lee, Michelle Ye Hee, and Jacob Bogage, *Postal Service Backlog Sparks Worries That Ballot Delivery Could Be Delayed In November*, Washington Post (July 30, 2020), available at: <https://wapo.st/34IV0lu>.

requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted.”³¹

53. It was reported that during Texas’s 2020 primary election, 2,482 absentee ballots were rejected because they arrived too late to be counted.³² More than 2,000 of these rejected ballots were in Harris County.³³

54. Compounding this is the fact that mail sorting machines have been decommissioned and removed from USPS facilities across Texas. In August, the President of the National Association of Letter Carriers Branch 181 in Austin reported that four sorting machines and one Automated Flat Sorting Machine were taken out of service in Branch 181 territory, which covers Austin, Burnet, Fredericksburg, Bastrop, Lockhart, Georgetown and Round Rock.³⁴ The same month, representatives of the American Postal Workers Union Local 195 in San Antonio reported that four of the 32 large sorting machines had been removed from the city’s Perrin Beitel Road distribution center.³⁵ In Houston, postal workers reported that about 15 sorting machines were removed from the Aldine Bender postal sorting center. And while

³¹ Letter from Thomas J. Marshall, General Counsel, USPS, to Ruth Hughs, Texas Secretary of State (July 30, 2020), available at: <https://cbsloc.al/3laiYIC> (emphasis added).

³² Ura, Alexa. In Texas, USPS Woes and State Deadlines Could Leave Voters Without Enough Time to Return Mail-In Ballots, Texas Tribune (Aug. 20, 2020), available at: <https://bit.ly/30tZTmB>.

³³ *Id.*

³⁴ Marut, Mike. *While Postmaster General Testifies, Austin Union Leader Confirms Sorting Machines Removed From Local USPS Locations*, KVUE.com (Aug. 24, 2020), available at: <https://bit.ly/2SqKGhA>.

³⁵ Flahive, Paul. *Four Mail Sorting Machines Removed From San Antonio Postal Distribution Center*, Texas Public Radio (Aug. 17, 2020), available at: <https://bit.ly/3lpsMIH>.

these sorting machines require two people to operate, because staffing has been reduced, only one employee remained to work the remaining machines at the processing plant.³⁶

The October 1 Proclamation

55. Despite his awareness of the significant risks posed to voters by COVID-19 and the current delays in USPS delivery times, Defendant Abbott issued the Proclamation on October 1, 2020, which purported to limit election officials' authority by prohibiting them from operating more than one early voting drop-off location in each county. Ex. A.

56. The Proclamation provided:

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

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

(2) the early voting clerk allows poll watchers the opportunity to observe any activity conducted at the early voting clerk's office location related to the in-person delivery of a marked mail ballot pursuant to Section 86.006(a-1) and this suspension, including the presentation of an acceptable form of identification described by Section 63.0101 of the Election Code by the voter.

57. According to Defendant Abbott, this measure was necessary to "add ballot security protocols." Defendant claims to have authority to issue the Proclamation to "control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area" under Texas Government Code § 418.018(c).

³⁶ Dellinger, Hannah, and Currie Engel. *'Not Acceptable': Lawmakers Not Satisfied As Changes At U.S. Postal Service Halted*, Houston Chronicle (Aug. 18, 2020), available at: <https://bit.ly/36wE8q0>

58. The Proclamation, however, impermissibly interferes with each county clerk's statutory authority to conduct and manage early voting, including through the operation of more than one "early voting clerk's office" to accept ballots from voters. Tex. Elec. Code §§ 32.071, 83.001(c), 83.002; Tex. Gov't Code § 311.012(b).

59. The Proclamation is thus contrary to each early voting clerk's authority under the Texas Election Code, as established by the Legislature. Indeed, the Secretary of State advised local officials that the Election Code permitted the operation of more than one early voting clerk's office to accept ballots, *see Ex. B at Attachment B, Email dated Aug. 26, 2020*, and the Texas Solicitor General made the same representation to the Texas Supreme Court on September 30, 2020, *see Ex. B at 5, Texas SG Submission dated Sept. 30, 2020*.

60. The Proclamation is an illegal *ultra vires* act that would compound, rather than alleviate, the COVID-19 disaster and interfere with the statutory authority of local election officials. The Proclamation exceeds gubernatorial authority, even in an emergency setting. Defendant is not the election official with authority to manage and conduct the early voting process. Moreover, Defendant's authority to control "ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area" is authority granted to alleviate a disaster. It is not a boundless grant of power that allows Defendant to conduct activity that would exacerbate the crisis, as the Proclamation does.

Harms to Plaintiffs

61. Defendant's Proclamation, which scrambles the rules applicable to early voting at the last minute before the election, harms Plaintiffs and the voters they represent.

62. ADL's supporters and constituents include registered Texas voters who are eligible to vote by mail. But because of USPS delays, a significant number of those voters no

longer feel comfortable sending their ballot back by mail and wish to drop off their ballot at an early voting drop-off location.

63. ADL will also be injured in its own right, because Defendant's Proclamation will cause ADL to expend additional resources to inform voters of the newly changed rules and assist them in making alternative plans to vote or return their mail-in ballots.

64. Common Cause Texas's members include registered Texas voters who are eligible to vote by mail. But because of USPS delays, a significant number of those voters no longer feel comfortable sending their ballot back by mail and wish to drop off their ballot at an early voting drop-off location.

65. Common Cause Texas will also be injured in its own right, because Defendant's Proclamation will cause Common Cause Texas to expend additional resources to inform voters of the newly changed rules and assist them in making alternative plans to vote or return their mail-in ballots.

66. Mr. Knetsch is a registered voter in Harris County who is eligible to vote by mail. Because of his age, he is particularly vulnerable to COVID-19 and so elected to vote by mail. He had planned to return his mail-in ballot to an early voting drop-off location approximately 3.1 miles from his residence, to ensure his ballot would be received in time to be counted. But because the Proclamation now limits Harris County to just one early voting drop-off location, Mr. Knetsch now plans to risk voting in-person at his local polling place, despite the risk to his health, because he is worried about even longer lines and crowd congestion at the single drop-off site that now must serve the entire county. The single drop-off site, NRG Arena, is 12.7 miles from his home.

67. The Proclamation significantly burdens Plaintiffs in urban counties. For example, Harris County – where 20% of the population is Black and 43.7% is Latino – has more than 2.3 million registered voters. By contrast, Rains County – where more than 84% of the population is White³⁷ – has less than 8,000 registered voters.³⁸ And Somervell County – where more than 77% of the population is White³⁹ – has less than 6,500 registered voters.⁴⁰ Yet under the Proclamation these counties would have the exact same number of ballot return locations as Harris County: one.

68. The Proclamation particularly burdens Plaintiffs who reside in large urban counties such as Harris County, the largest county by population in the state, because travel distances are longer in the county due to its large spatial area and relatively high levels of road congestion. More than a third of all voters eligible to vote by mail in Harris County would expect to have a substantial travel burden to access a ballot drop-off location if only one location per county is allowed.

69. The Proclamation also burdens Plaintiffs who do not have access to a vehicle in their household. This is because public transit and walk times are much longer on average than drive times. While approximately 5% of Texas citizens under the age of 65 without a disability do not have access to a vehicle, the share is substantially higher for citizens aged 65 or more (at

³⁷ U.S. Census Bureau, QuickFacts – Rains County, Texas,
<https://www.census.gov/quickfacts/fact/table/rainscountytexas/PST045219>

³⁸ Texas Sec’y of State Jan. 2020 Voter Registration Figures,
<https://www.sos.state.tx.us/elections/historical/jan2020.shtml>

³⁹ U.S. Census Bureau, QuickFacts – Somervell County, Texas,
<https://www.census.gov/quickfacts/fact/table/lovingcountytexas/PST045219>

⁴⁰ Texas Sec’y of State Jan. 2020 Voter Registration Figures,
<https://www.sos.state.tx.us/elections/historical/jan2020.shtml>

about 9 percent) and particularly for those with a reported disability aged 18 to 64 (at about 14 percent). This means a travel burden is particularly likely for people with disabilities under the age of 65, and for people over the age of 65, i.e., voters eligible to vote by mail and utilize the drop-off locations.

70. The Proclamation also burdens Plaintiffs who reside in less urban parts of the State, who will face lengthy travel times and wait times to return their ballots to the single drop-off location in their county, if they are able to travel there at all due to lack of access to a vehicle or public transportation.

71. Moreover, for voters with a disability that places them at greater risk of contracting COVID-19 and qualifies them to vote by mail, the long lines caused by the wait to show identification with the return of ballots as required by Texas Election Law creates additional unreasonable health risks that defeat the primary benefit of voting by mail and delivering the marked ballot in person.

72. Finally, for voters eligible to vote by mail, estimated queue lengths for ballot drop off on Election Day show that queues will become intolerably long for the largest counties, and effectively drive away voters who cannot afford the cost of wait time to cast their ballot.

COUNT ONE
(Ultra Vires)

73. The preceding and subsequent allegations are incorporated into Count One, as though fully set forth herein.

74. A state officer may not act without legal authority. *See, e.g., City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

75. The Texas Election Code grants authority to the early voting clerk to manage and conduct early voting, including the operation and designation of early voting drop-off locations.

76. By limiting early voting drop-off locations to one site per county, Defendant has acted without authority and has impermissibly interfered with the authority of the early voting clerks across the state of Texas.

77. Defendant's Proclamation also purports to rely on emergency powers that do not save this *ultra vires* act.

78. Section 418.018(c) of the Texas Government Code provides that "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."

79. Defendant invoked this provision to bar counties from offering more than one ballot drop-off location. Counties offering multiple drop-off locations have thus had to reduce their drop-off sites and can only operate one location.

80. However, because social distancing and crowd reduction is of critical importance during the COVID-19 pandemic, Defendant's action makes the remaining ballot drop-off location more dangerous for voters.

81. Voters returning their ballots to a drop-off location must present identification. By being forced into one ballot drop-off location per county, voters therefore will not be able to avoid the long lines and crowd congestion that will necessarily result from Defendant's action.

82. Defendant's purported modification of state law therefore exceeded his legal authority, even under emergency powers, and is *ultra vires*. The Proclamation impermissibly prejudices the right to vote of Plaintiffs.

COUNT TWO
(The Proclamation violates Article 1, Section 3 of the Texas Constitution)

83. The preceding and subsequent allegations are incorporated into Count Two, as though fully set forth herein.

84. The Texas Constitution provides for the equal protection of all laws. Article I, Section 3 of the Texas Constitution provides: “All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.” Tex. Const. art. I, § 3. An individual’s right to vote falls within the ambit of Article I, Section 3 and is coextensive with the U.S. Constitution’s Fourteenth Amendment equal protection clause. Texas courts apply federal standards to determine a violation of Article I, Section 3. *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 846 (Tex. 1990).

85. When resolving a challenge to a provision of Texas election laws under the state constitution, the Texas Supreme Court has adopted the balancing test set forth by the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). *State v. Hodges*, 92 S.W.3d 489, 496 (Tex. 2002) (“The parties agree that the proper test for determining the constitutionality of section 162.015(a)(2) is the balancing test articulated in *Anderson*”).

86. Under *Anderson*, a court must evaluate “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” and “the precise interests put forward by the State as justifications for the burden imposed by its rule,” while considering “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Id.* (quoting the *Anderson* standard as described in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

87. A state’s important regulatory interests are generally sufficient to justify “reasonable, nondiscriminatory restrictions.” *Anderson*, 460 U.S. at 788. But when a burden on the right to vote is severe or discriminatory, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*,

502 U.S. 279, 289 (1992)). This approach also applies to equal protection challenges under the Texas Constitution.

88. Plaintiff's constituents in Texas have a fundamental right to vote under the Texas Constitution. Where the operation of an election law is alleged to cause a deprivation of such a fundamental right, the court "must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment that the plaintiff seeks to vindicate against the precise interest 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." See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

89. Texas's limit on early voting drop-off locations ensures that many disabled and elderly voters – who cannot safely vote in person because of the pandemic – will have to travel long distances and suffer crowded drop-off locations in order to drop off their ballots. And for those who receive their ballots close to Election Day, they will not be able to return those ballots by mail with any confidence they will be counted.

90. Defendant has provided no meaningful justification for the one-per-county limit on drop-off locations. The limit advances no security goals, despite Defendant's unexplained invocation of security in the October 1 order. And though the Proclamation invokes Defendant's power to control the ingress and egress into disaster areas, far from controlling and reducing crowding, the Proclamation actually will result in more crowded conditions in a pandemic where social distancing is critical. The Governor cannot invoke his emergency powers to violate voters' equal protection rights under the Texas Constitution.

91. The limitation on early voting drop-off locations unconstitutionally burdens the fundamental right to vote of Texas voters.

COUNT THREE
**(Arbitrary Disenfranchisement in Violation of Article 1, Section 3
of the Texas Constitution)**

92. The preceding and subsequent allegations are incorporated into Count Two, as though fully set forth herein.

93. “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-05; *see also id.* at 106 (finding that voting procedures that “vary not only from county to county but indeed within a single county” are not “sufficient [to] guarantee[] equal treatment”); *see, e.g., Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”); *see Andrade v. NAACP of Austin*, 345 S.W.3d 1, 12 (Tex. 2011) (citing *Bush v. Gore*).

94. Defendant’s insistence that every county in Texas provide only a single ballot-by-mail drop-off location—regardless of geographical size or population—requires that counties provide voters with disparate access to the franchise. Texas’s 254 counties vary dramatically in both physical size and population. The use of county lines as the delineation for the number of voting resources that may be provided is therefore arbitrary. As a result of the October 1 Proclamation, eligible voters, including constituents of Common Cause Texas and ADL, will face disparate burdens on their right to vote based entirely on which county the voter lives in, or on where they live in a particular county in relationship to the single ballot-by-mail drop-off

location allowed under Defendant's Proclamation. The Governor cannot invoke his emergency powers to violate voters' equal protection rights under the Texas Constitution.

95. The Proclamation's elimination of additional ballot drop-off locations and limit of such drop-off locations to one per county cannot withstand even rational basis review

APPLICATION FOR EMERGENCY TEMPORARY RESTRAINING ORDER

96. A temporary restraining order's purpose is to maintain the status quo pending trial. "The status quo is the last actual, peaceable, non-contested status that preceded the controversy." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004).

97. Plaintiffs are entitled to a temporary restraining order because absent one, the status quo will be destroyed. The Proclamation itself has garnered significant media attention, and unless the Court acts, Plaintiffs and their members, supporters, and constituents who are eligible to vote by mail may decline to timely apply for an application to do so because they will not trust that their ballot will be returned in time to be counted by the USPS and cannot travel to the distant single location within their county to return their ballot in person. These voters will either risk their personal safety to vote in person despite being particularly vulnerable to serious and potentially lethal complications from COVID-19 due to age or disability, or will choose not to vote at all for fear that in person voting creates too great a risk.

APPLICATION FOR TEMPORARY INJUNCTION

98. Plaintiffs are also entitled to temporary injunctive relief for these same reasons. Section 273.081 of the Texas Election Code provides that "[a] person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring."

99. A temporary injunction's purpose is to preserve the status quo of the litigation's subject matter pending a trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

100. Plaintiff must prove three elements to obtain a temporary injunction: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) probable imminent and irreparable injury. *Id.*

101. Plaintiffs state a valid cause of action against Defendant and have a probable right to the relief sought. For the reasons detailed above, there is a substantial likelihood that Plaintiffs will prevail after a trial on the merits because the Proclamation is an unconstitutional ultra vires act exceeding Defendant's authority and an unconstitutional infringement of equal protection and voting rights as protected by Article 1, Section 3 of the Texas Constitution.

102. An injury is irreparable if the injured party cannot be adequately compensated in damages, or if damages cannot be measured by any certain pecuniary standard. *Butnaru*, 84 S.W.3d at 204.

103. If the Proclamation is not enjoined, the resulting burden on voting and loss of opportunity to vote cannot be redressed by damages.

APPLICATION FOR PERMANENT INJUNCTION

104. After full trial on the merits, Plaintiffs asks the Court to enter a permanent injunction granting the relief requested herein.

PRAYER FOR RELIEF

105. Therefore, Plaintiffs respectfully request that this Court:

106. Declare 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;

107. Declare the Proclamation an unconstitutional infringement of equal protection and voting rights as protected by Article 1, Section 3 of the Texas Constitution; and

108. Enter a temporary restraining order and temporary injunction, as well as a permanent injunction, enjoining the enforcement of Defendant's Proclamation forcing the statutory Early Voting Clerks to operate only one drop-off location for vote-by-mail ballots.

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Respectfully submitted,

/s/ Lindsey B. Cohan

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