

No. 03-20-00498-CV

IN THE COURT OF APPEALS
THIRD JUDICIAL DISTRICT OF TEXAS – AUSTIN

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

Appellant,

v.

**THE ANTI-DEFAMATION LEAGUE AUSTIN, SOUTHWEST AND
TEXOMA REGIONS; COMMON CAUSE TEXAS; AND ROBERT
KNETSCH,**

Appellees.

*On Appeal from the 353rd Judicial District Court, Travis County
Cause No. D-1-GN-20-005550*

**AMICI CURIAE BRIEF OF 17 CITIES, COUNTIES, AND
ELECTIONS ADMINISTRATORS IN SUPPORT OF
PLAINTIFFS-APPELLEES' REQUEST TO LIFT
AUTOMATIC STAY OF DISTRICT COURT ORDER**

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STATEMENT OF INTEREST

Amici are a collection of city and county governments across the United States.¹ These jurisdictions administer and facilitate federal, state, and local elections. Some *amici* run elections operations directly by, among other things, setting up polling locations and counting mail-in or absentee ballots. Others facilitate local elections, are tasked with protecting public safety at polling locations, and engage their communities through registration drives, voter outreach, and other efforts to ensure that residents fulfill their civic duty to vote. Even in a federal election—and national election, such as this year—local governments play a central and indispensable part in the administration of the election. These elections occur and run at the local levels of government.

The 2020 election has proved to be one of the most challenging in recent memory. A global pandemic has required election administrators to alter planning and adjust protocols. To mitigate the health risks associated with contact outside of the home such as voting in person, some *amici* are mailing ballots to all eligible voters, while others are encouraging voters—especially those with health risks or who are living with vulnerable family members—to use mail-in options to cast their ballots. Other jurisdictions have expanded early voting days, have added more early

¹ Pursuant to Texas Rule of Appellate Procedure 11, no party or their counsel has participated in the drafting of this brief. No party or their counsel paid for the preparation of this brief. All costs were assumed by the Public Right Project and Thompson & Horton LLP.

voting locations, including prominent places such as sports arenas, and have provided more hand-delivery locations for voters to turn in their ballots. In many situations, efforts to mitigate public health risks have resulted in expanded access to the ballot and increased opportunities for participation in the franchise.

Beyond the COVID-19 pandemic, local jurisdictions have had to confront an erosion in confidence in the United States Postal Service (“USPS” or “Postal Service”), due to the revelation of compromising changes in policies over the summer. Public statements by Postmaster General Louis DeJoy as well as communications to all 50 states and Washington, D.C. have created considerable concern about the mail system’s ability to handle all ballots in and around the November election. Other federal officials—including and especially President Donald J. Trump—have questioned the accuracy and reliability of voting by mail specifically and the sanctity of the electoral process overall. The President has signaled efforts to contest election results if he were to lose in the Electoral College. These additional challenges have required local officials to continue to refine plans as voter mindsets have moved from in-person voting to mail-in ballots and back to in-person voting. Local jurisdictions also have invested considerable resources in promoting voting options and reinforcing confidence in the voting process.

All *amici* have a vested interest in ensuring that elections are run effectively and fairly, protecting the fundamental rights of their constituents, and fulfilling their

statutory obligations to run and support elections while complying with public health orders and recommendations. *Amici* submit this brief to offer their deep expertise in the administration of the election, particularly in the current public health and political environment, and to strongly support the ability of Texas counties to increase the number of ballot delivery locations to meet the particular needs of their voters.

ARGUMENT

The 2020 election presents some significant challenges for the city and county administrators. Voter turnout for early voting has been high—more than 35 million votes (and counting) have been cast at the time of filing²—and it is expected to remain high through Election Day. There have been numerous reports of potential disruption at election locations by private parties. The USPS tried to change some of its practices, particularly as it relates to election mail, impacting voter confidence in the use of the mail. This is the most litigated election in our nation’s history. And all of this comes in the midst of a devastating global pandemic, which has cost nearly 220,000 American lives and sickened more than 8 million over the past eight-plus months.³

² U.S. Elections Project, 2020 General Election Early Vote Statistics, <https://electproject.github.io/Early-Vote-2020G/index.html> (last visited Oct. 20, 2020).

³ Centers for Disease Control & Prevention, CDC COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days (last visited Oct. 20, 2020).

Administering elections in this time is no easy job. *Amici* do not take lightly their advocacy in wading into another jurisdiction's election administration decision. However, Governor Abbott's October 1, 2020 Proclamation reversing prior permission for multiple ballot delivery locations in each county strains credulity. *Amici* write to share their perspective with the Third Court of Appeals as it considers whether to extend a stay of the 353rd District Court's injunction pending appeal—and effectively remove the option of multiple locations for this election cycle.

Amici write to emphasize two points. First, local election officials deserve deference when making choices to enhance access and protect the voting rights of their residents. Election officials in Fort Bend, Galveston, Harris, and Travis Counties understand the needs of their communities, and chose to designate additional sites for mail-in ballot delivery locations. In these counties, the presence of additional sites enables more voters to drop their ballots with election officials, rather than in the mail. These efforts to increase access to ballot delivery locations is consistent with work done in many of the *amici* jurisdictions, especially given ongoing concerns among voters about the delivery of mail-in ballots by the USPS as well as the spread of COVID-19. Governor Abbott's curtailment of existing locations is an outlier in this election cycle.

Second, while uniformity and voter fraud protection are important to the administration of a free and fair election, Governor Abbott's October 1 Proclamation

does not advance either of those goals. In actuality, the burdens of the restriction far outweigh any benefits (if there are any). The presence of multiple hand-delivery locations in heavily populated counties promotes uniformity across the state, given the wide disparities in size, overall population, population density, and access to transportation (both public and personal). With respect to voter fraud, *amici* write to clearly underscore their informed perspective that the presence of multiple ballot delivery locations does not create actual or perceived voter fraud. Many more locations than suggested in Texas have been administered in several other jurisdictions across the country during this election cycle. Moreover, the system in Texas is far more rigorous than in most other states. Voters utilizing these hand-delivery locations—a group already limited to those eligible for mail-in ballots (most of whom are vulnerable because of age, disability, or health)—are required to show up in person, must provide valid identification, and may be subject to the scrutiny of poll watchers. Such procedures offer far more protection than placing a ballot in the corner mailbox, an option that some mail-in voters may be forced to utilize instead of the method they trust and would prefer—a hand delivery location.

I. DEFERENCE IS DUE TO THE DISCRETION OF LOCAL JURISDICTIONS ABOUT MEANS OF PROVIDING BALLOT ACCESS TO THEIR RESIDENTS

A. Texas Law Provides Counties with Significant Discretion in Election Administration

The administration of elections in the United States is “highly decentralized,”⁴ and for good reason. As the closest, most accessible, and most accountable government to constituents, cities and counties are the best situated to understand the voting needs of their constituents and the most likely to be able to meet those needs head-on. Indeed, Texas itself has recognized as much as state laws grant deference and discretion to the expertise of local officials. *See, e.g.*, Tex. Elec. Code §§ 32.071, 83.001(c), 83.002. Governor Abbott’s decision to restrict counties to a single ballot delivery location in each county runs counter to these long-held principles and is inconsistent with the flexibility granted to the counties to ensure their residents are provided access.

While states typically have primary responsibility for setting the wide parameters within which elections should be administered, “the day-to-day implementation of election administration policy is still mostly handled by localities.”⁵ While the exact parameters vary from state to state, these primary duties of the local jurisdiction can include adding eligible voters to voter rolls; designing and printing ballots; recruiting and training poll workers; selecting and preparing polling places; storing and transporting voting equipment; and counting, canvassing,

⁴ Karen Shanton, *The State and Local Role in Election Administration: Duties and Structures*, Cong. Research Serv. (March 4, 2019), <https://fas.org/sgp/crs/misc/R45549.pdf> (last visited Oct. 20, 2020).

⁵ *Id.*

and reporting election results.⁶ In Texas, these duties may also include providing for more than one early voting mail-in ballot delivery location.

The Texas Legislature has granted a wide berth to local elections officials. Each county’s early voting clerk “shall conduct” the early voting in each election. Tex. Elec. Code. § 83.001(a); *see also id.* § 83.002. This authority with respect to early voting is the same as that pertaining to regular voting of a presiding election judge, who is “in charge of and responsible for the management and conduct of the election at the polling place.” *Id.* § 83.001(c); *see also id.* § 32.071. The Legislature has also granted voters the ability to “deliver a marked ballot in person to the early voting clerk’s office . . . on election day.” *Id.* § 86.006(a-1). And importantly, the legislature has clarified that generally, “the singular includes the plural and the plural includes the singular.” Tex. Gov’t Code § 311.012(b). In other words, there may be more than one early voting clerk’s office.

The Governor’s proclamation upsets the deference granted to local officials to implement these policies. Multiple ballot delivery locations had been used earlier in the year during the primaries.⁷ It was only after Fort Bend, Galveston, Harris, and

⁶ *Id.*; *see also* U.S. Government Accountability Office, *Elections: Observations on Voting Equipment Use and Replacement*, April 2018, p. 9, at <https://www.gao.gov/assets/700/692024.pdf>.

⁷ Erica Ponder, *Voters Can Drop Off Their Voting by Mail Ballots at These 11 Locations Across Harris County on Election Day*, Click2Houston (July 14, 2020), <https://www.click2houston.com/news/local/2020/07/14/voters-can-drop-off-their-vote-by-mail-ballots-at-these-11-locations-across-harris-county-on-election-day/>.

Travis Counties chose, in their discretion, to have multiple mail ballot delivery locations at voting clerk’s offices for the November election that Governor Abbott sought to limit the number of drop-off locations to one per county. His proclamation supplants local governments’ judgments as to the voting needs of their respective communities with his own and does so with a purported justification that lacks basis.⁸

B. The Decision of County Clerks in Texas to Add Hand Delivery Locations Is Consistent with the Considered Judgment of Other Local Election Officials

The Legislature’s reasoned choice to grant discretion to local officials in administering elections is backed by the extensive efforts these and other local jurisdictions have taken to support their electorates. Local governments around the country have worked hard to cultivate relationships with their communities and implement voting policies that are responsive to their needs. From voter turnout campaigns to registration drives, local governments are at the forefront of our nation’s democracy. Their efforts should be amplified—not hindered—by the state

⁸ As many as forty states and Washington, D.C. offer mail-in ballot drop-off sites for the November election. *See, e.g.*, Healthy Elections Project, *Ballot Drop-Off Options in All 50 States*, Lawfare Blog (Oct. 14, 2020), <https://www.lawfareblog.com/ballot-drop-options-all-50-states>. Only two—Iowa and Ohio—forbid counties from having more than one site. *See* Appx. A to Brief of Amici Curiae District of Columbia, et al., *Texas League of United Latin American Citizens v. Hughes*, No. 20-50867 (5th Cir. Oct. 12, 2020), <https://oag.dc.gov/sites/default/files/2020-10/TX-LULAC-v-Hughs-Amicus.pdf>.

government. While states often “play the primary decisionmaking role in election administration,” they often do so by “delegat[ing] or defer[ring] responsibility for decisions about the administration of elections to other state or local officials and to voters.”⁹ For example, eleven states *permit* jurisdictions to replace precinct polling places with vote centers or have authorized vote center pilot projects in select jurisdictions. Vote centers, which allow voters from any part of a jurisdiction to cast a ballot in any location, have been shown to increase turnout, particularly among infrequent voters.¹⁰

There are also numerous specific examples, not limited to this election cycle, of local governments taking into consideration the election needs of their constituents. For example, Dallas, Los Angeles, and Lynchburg, Virginia have all made public transportation free on Election Day and/or early voting days, with the goal of encouraging voter turnout and satisfying demand to vote early.¹¹ Boston has made voter registration easier when people are renewing parking permits and library cards.¹² The Registrar of Voters for Santa Clara County, California, is partnering

⁹ Shanton, *supra* n.4.

¹⁰ Katy Owens Hubler, *Improving Voter Turnout*, NCSL (October 2014), <https://www.ncsl.org/research/elections-and-campaigns/improving-voter-turnout.aspx>.

¹¹ Katy Blakey, *North Texas Election Officials Prepare for Record Voter Turnout*, NBCDFW (Oct. 12, 2020), <https://www.nbcdfw.com/news/politics/texas-politics/north-texas-election-officials-prepare-for-record-voter-turnout/2459458/>.

¹² Brooks Rainwater & Olivia Snarski, *Voting in Local Elections Matters. This Is What Cities Can Do*, Citylab (Nov. 4, 2019), <https://www.bloomberg.com/news/articles/2019-11-04/how-cities-can-invigorate-local-politics>.

with the San José Sharks—a National Hockey League franchise—to make the SAP Center, an arena in San José, a drive-through ballot delivery location for the November election.¹³ Many other cities are working with professional franchises to use outdoor stadiums and indoor arenas as socially distanced early voting centers.¹⁴ Placer County, California, has implemented a program allowing high school students to serve as poll workers.¹⁵ And with the circumstances of this election in mind, some Texas counties will track polling place wait times on their websites.¹⁶ In short, local governments utilize their deep understanding of their communities’ needs and their expertise as to how best to meet them in the implementation of election administration plans.

The Texas counties’ decisions to provide for more than one ballot delivery location each, pursuant to Texas law, is in lockstep with these other efforts to meet voters’ needs. Additionally, they mirror the efforts of other states and counties around the country to make it easier for their constituents to vote specifically through

¹³ San Jose Sharks, *SAP Center to Serve as a Ballot Drop Box Location for 2020 Election*, NHL (Sept. 22, 2020), <https://www.nhl.com/sharks/news/sap-center-to-serve-as-a-ballot-drop-box-location-for-2020-election/c-319133630>.

¹⁴ Emma Steinberg, *These Stadiums Are Serving as Polling Sites for the 2020 General Election*, *Sports Illustrated* (Oct. 5, 2020), <https://www.si.com/sports-illustrated/2020/10/05/sports-stadiums-arenas-polling-centers-election-list>.

¹⁵ *Community Outreach*, Placer County Elections Office, <https://www.placerelections.com/community-outreach/> (last visited Oct. 20, 2020).

¹⁶ Blakey, *supra* n.11.

this mechanism. Heading into 2020, some thirteen states regularly offered hand delivery locations in their elections—a number that has expanded to approximately thirty-eight states plus Washington, D.C. during the pandemic.¹⁷ Often states, such as Texas, defer to counties’ expertise as to how many additional ballot deposit locations are needed. In California, the state has provided for the availability of hand delivery locations, and county election officials determine the location and number based on population, voter convenience, proximity to public transportation, security, and funding.¹⁸

In Colorado, Hawaii, Oregon, and Washington, which conduct elections entirely by mail, the states have provided frameworks to guide counties’ decisions as to the number or location of hand delivery locations, but have left the ultimate determination up to localities.¹⁹ Colorado, which has been a universal vote-by-mail state since 2013, requires county election officials to offer *at least* one ballot delivery location for every 30,000 registered voters in the county.²⁰ In Harris County, that

¹⁷ Nathaniel Rakich, *More States Are Using Ballot Drop Boxes. Why Are They So Controversial?*, FiveThirtyEight (Oct. 5, 2020), <https://fivethirtyeight.com/features/more-states-are-using-ballot-drop-boxes-why-are-they-so-controversial>.

¹⁸ Cal. Elec. Code §§ 3025; Cal. Code Regs. §§ 20132-36.

¹⁹ National Conference of State Legislatures, *VOPP: Table 9: Ballot Drop Box Definitions, Design Features, Location and Number*, NCSL (Aug. 18, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-9-ballot-drop-box-definitions-design-features-location-and-number.aspx>; Lisa Lerer, *Washington: Where Everyone Votes By Mail*, New York Times (April 22, 2020), <https://www.nytimes.com/2020/04/15/us/politics/washington-where-everyone-votes-by-mail.html>.

²⁰ Colo. R.S. § 1-7.5-107; 8 Colo. Code Regs. § 1505-1:7.

would mean approximately 80 ballot delivery locations. While Hawaii requires ballot delivery locations to be “securely maintained,” county election officials can determine the number and location.²¹ In Chicago, the Board of Election Commissioners has implemented secured drop boxes at all 51 early voting locations, plus an additional twenty-five public libraries. The locations are staffed by Board of Election Commissioners personnel, and ballots are collected at least once per day.

Again, the reason underpinning this deference is simple: different jurisdictions have different voting needs, dependent on their populations. Some jurisdictions in Texas served fewer than 100 eligible registered voters in the 2016 election; others served millions.²² Some jurisdictions are rural, whereas others are dense. Some jurisdictions are diverse in population, with a range of ethnicities, ages, and socioeconomic statuses. Others are not. For this very reason—the variation in size, density, and make-up of population—a federal district court in Pennsylvania upheld the granting of discretion to counties to choose where to locate and how many ballot delivery locations to utilize. *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 5997680, at *62 (W.D. Pa. Oct. 10, 2020). Thus, Texas’s decision to vest discretion in local officials makes sense. No one would suggest that all counties are required to have the same number of polling places on Election Day or early voting

²¹ Haw. R.S. § 11-1, § 11-109, § 11-110.

²² Shanton, *supra* n.4.

sites.²³ A one-delivery-location-fits-all solution imposed by the Governor at the eleventh hour is not appropriate either.

II. THE STATE’S ASSERTED INTERESTS ARE FAR OUTWEIGHED BY THE BURDEN ON PLAINTIFFS AND THE PUBLIC

When evaluating a rule that impacts voter participation under *Anderson v. Celebrezze*, 460 U.S. 780 (1983),²⁴ a court must evaluate “the precise interests put forward by the State as justifications for the burden imposed by its rule,” while considering “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments.” *Id.* at 789, 780. A court must consider the extent to which the State’s interests “make it necessary to burden the plaintiff’s rights.” *Id.* at 780; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Here, the State’s articulated interests in uniform election administration and protection against voter fraud are valid ones, but they are not advanced by the Governor’s October 1 Proclamation restricting mail-in ballot drop-off locations. The burdens imposed by

²³ For example, Uvalde County—Texas’s 100th-largest county by population—has 14 Election Day polling locations as well as one early voting site. *See* Uvalde County, Voting Locations, https://uvaldecounty.com/images/county_tax_assessor/voting_locations.pdf. Whereas Travis County—Texas’s 5th-largest county by population—has approximately 37 early voting sites alone. *See* Travis County, Early Voting Locations, https://countyclerk.traviscountytexas.gov/images/pdfs/polling_locations/11.03.20/Early_Voting_Flyer.pdf.

²⁴ 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 U.S. Supreme Court in *Anderson*. *See, e.g., 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*.”).

the State’s limitation on in-person ballot locations are substantial in light of the ongoing COVID-19 pandemic and current skepticism of the Postal Service’s ability to deliver mail in a timely manner, and they far outweigh the State’s asserted interests.

A. The Limitation on Ballot Delivery Locations Does Not Advance the State’s Articulated Interests

The State has articulated an interest in “establishing uniformity in the manner in which counties administer the election.” (Defs. Plea to Jurisdiction & Resp. to Pl. Appl. for Temp. Inj. Relief at 30.) *Amici* cities and counties are responsible for administering elections across the country and agree that uniformity is a key component to effective and efficient election administration; crucially, effective election administration should aim to ensure that *voters* across the state have *uniform* access to the ballot.

Requiring the same number of ballot delivery locations across counties in Texas, without any consideration of the population and geography of each county, undermines uniform access to the ballot. *See, e.g., Boockvar*, 2020 WL 5997680 at *49. Texas comprises 254 counties, and there is great variation among the counties in terms of total population, population density, and geographic size. For example, Harris County has 2.38 million registered voters—more than the 200 least populous counties in Texas *combined*. In moderate traffic, it can take up to an hour to drive

one-way from the suburban neighborhoods of the county to the one ballot delivery location in downtown Houston.²⁵ During heavy traffic, that time can easily double, and many trips are exceedingly difficult via public transportation. Voters in populous Ohio counties have already endured such challenges during early voting.²⁶ Relying on public transportation, a round trip to the one ballot delivery location in Cincinnati can take an hour and a half; a trip to the one ballot delivery in Columbus similarly may take up to two and a half hours.²⁷ These distances are high barriers to casting ballots.²⁸ In contrast, Pennsylvania has deferred to local governments’ discretion in the placement and number of ballot delivery locations per county considering the “many variations in population, geography, local political culture, crime rates, and resources.” *Boockvar*, 2020 WL 5997680, at *49.

Texas laws regulating voting in general—and the laws regulating the use of ballot drop boxes specifically—already guarantee uniform access to the ballot and election administration. In all Texas counties, the requirements for requesting a

²⁵ Eurum Salam, *Texas Shutdown of Mail-in Ballot Drop-off Sites Hits Diverse Cities Hardest*, Guardian (Oct. 3, 2020), <https://www.theguardian.com/us-news/2020/oct/03/texas-mail-in-ballot-drop-off-sites>.

²⁶ David Litt, *Ohio’s Quarter-Mile Early-Voting Lines? That’s What Voter Suppression Looks Like*, Guardian (Oct. 15, 2020), <https://www.theguardian.com/commentisfree/2020/oct/15/ohio-us-election-voter-suppression>.

²⁷ Amicus Brief of the City of Columbus, et al. ISO Pls. Mot. for Prelim. Inj., at *11-*12, *Ohio Democratic Party v. Frank DeRose*, No. 20 CV 5634 (Ohio Ct. of Comm. Pleas Sept. 3, 2020).

²⁸ See, e.g., William McGuire, Benjamin Gonzalez, Katherine Bird, Benjamin Corbett & Loren Collingwood, *Does Distance Matter? Evaluating the Impact of Drop Boxes on Voter Turnout*, 101 Soc. Sci. Q. (2001), <https://doi.org/10.1111/ssqu.12853> (finding that a decrease of one mile to the nearest drop box increased the probability of voting by 0.64 percent).

ballot by mail and dropping off the ballot at an early voting clerk's office are the same. The county clerk must receive a request for a mail ballot by October 23 from any registered voter. Tex. Elec. Code §§ 84.001, 84.007(c), (d). The application must be sent via mail and include a physical signature. *Id.* § 84.007(b), (b-1). If the application is accepted, the county clerk must mail back an official ballot the latter of thirty days before election day or seven days after receiving the application. *Id.* § 86.004(a). After filling out the ballot, the voter must then place the ballot in the ballot envelope, seal the ballot envelope in the official carrier envelope, and provide a signature. *Id.* § 86.005(c).

The State contends that “there is no set standard on what precautions the county should take to ensure that the [ballot] delivery process is both accessible and resistant to fraud.” (Defs. Resp. at 30.) This statement, however, is belied by the detailed, uniform requirements that counties must implement for ballot hand-delivery locations under Texas law. For example, a voter who delivers a marked ballot in person must present an acceptable form of identification described by Section 63.0101. Tex. Elec. Code § 86.006(a-1). Section 63.0101 requires either photo identification or identification using a birth certificate, a voter's registration certificate, or certain documents showing the name and address of the voter. *Id.* § 63.0101.

Additionally, the rigid *uniformity by county* for which the State argues with respect to the number of ballot delivery locations is undermined by Texas election regulations that aim at *uniformity for residents* which take into account population variation. Texas law governing the process for counting early voting ballots, for example, acknowledges that larger counties may require more time to tabulate votes. In counties with a population greater than 100,000 residents, the county clerk may deliver mail ballots to the board on the ninth day before the end of early voting rather than at the end of the early voting period to allow for such additional time for vote tabulation. Tex. Elec. Code §§ 87.0222(a), 87.024. Similarly, the early voting board in counties with more than 100,000 residents may also begin processing early voting ballots at the end of the early voting period as compared to when the polls open on election day. *Id.* § 87.0241(b).

The State also has asserted an interest in the prevention of election fraud as justification for its restriction on ballot delivery locations. The State, however, only generally describes the existence of election fraud with mail-in ballots without explaining how such fraud is likely to occur with respect to the use of additional ballot delivery locations. Contrary to the State's generalizations, state regulations and county practices exist to specifically reduce the likelihood of election fraud—interests that are *advanced* by expanding the number of ballot delivery locations. Moreover, Texas already has significant restrictions in place to ensure delivery

locations are safe and secure. Voters in Texas are required to present an approved form of identification when delivering their mail-in ballots, and they are not permitted to turn in anyone else's ballot. Tex. Elec. Code §§ 86.006(a)(3), (h).²⁹ Other procedures have been put in place to guard against fraud. In Harris County, all ballot drop-off locations are staffed by two trained employees. *See* Decl. of Christopher G. Hollins, Harris County Clerk, at ¶ 16, ECF No. 8-1, *Tex. League of United Latin Am. Citizens v. Abbott*, No. 1:20-cv-01006 (W.D. Tex. Oct. 3, 2020). Ballots are placed by staff into a locked ballot box with tamper-proof seals that are specially designed to have a slit large enough for a ballot carrier envelope but small enough so that fingers or tools cannot be forced inside the box to tamper with the ballots.³⁰ *Id.* at ¶ 17.

In voting jurisdictions across the country, administered by *amici* cities and counties with the coordination and guidance of their respective state governments, ballot delivery locations are effectively used to expand access to voting without increasing election fraud. For example, the City of Philadelphia uses a combination

²⁹ There are significant penalties under federal law as well. An individual convicted of voter fraud in a federal election is subject to a \$10,000 fine and/or a five-year term of imprisonment. *See* 52 U.S.C. § 10307.

³⁰ Texas's rules regarding in-person and staffed drop boxes go beyond the guidance provided by the United States Election Assistance Commission regarding how states can "provide a secure and convenient means for voters to return their mail ballot." U.S. Election Assistance Comm'n, *Ballot Drop Box* 1 (2020), https://www.eac.gov/sites/default/files/electionofficials/vbm/Ballot_Drop_Box.pdf.

of eighteen drop box and satellite election office locations to receive mail ballots from as many as 1.1 million registered voters.³¹ The Pennsylvania Secretary of State has issued guidance that those locations will use secure, tamper-proof drop boxes, similar to the ones used in Harris County: the boxes are surveilled either by staff or video.³² In Santa Clara County, the Registrar of Voters added twenty-three locked, tamper-proof boxes at locations that had high volume return in the March 2020 primary—for a total of 98 hand delivery locations (plus approximately 100 vote center locations where ballots can be dropped off)—and increased its public messaging to urge greater drop box use among its nearly 1 million registered voters.³³ The City of Milwaukee also operates fifteen drop box locations, and the drop boxes are similarly locked and tamper-proof to benefit its 542,452 registered voters.³⁴ In the State of Washington, King County makes 73 ballot drop boxes

³¹ *Where Do I Return My Ballot or Vote in Person?*, Commonwealth of Pa., <https://www.votespa.com/Voting-in-PA/pages/drop-box.aspx> (last visited Oct. 20, 2020); Voter registration statistics by county, Penn. Dep’t of State (Oct. 19, 2020) (see “Philadelphia” county under “Reg Voters” tab), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Pages/VotingElectionStatistics.aspx>.

³² *Pennsylvania Absentee and Mail-in Ballot Return Guidance*, Pa. Dep’t of State (Aug. 19, 2020), https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_BallotReturn_Guidance_1.0.pdf.

³³ *Report of Registration as of September 4, 2020*, Cal. Secretary of State (Sept. 4, 2020), <https://elections.cdn.sos.ca.gov/ror/60day-gen-2020/county.pdf>.

³⁴ *Absentee Ballot Drop-off Sites*, City of Milwaukee Elec. Comm’n, <https://city.milwaukee.gov/election/Voter-Info/Absentee-Ballot-Drop-Off-Sites> (last visited Oct. 20, 2020); *October 1, 2020 Voter Registration Statistics*, Wisc. Elec. Comm’n. <https://elections.wi.gov/index.php/node/7147>.

available to nearly 1.4 million registered voters.³⁵ In almost ten years of using ballot drop boxes, the State of Washington has never experienced any security incidents involving ballot drop boxes.³⁶ More comprehensive studies similarly have found that fraud associated with ballot delivery sites and boxes—even those that are not staffed as in Texas—is exceedingly rare if almost nonexistent.³⁷ These jurisdictions’ practices also align with the Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency recommendations for tamper-proof ballot drop boxes, drop box monitoring, and larger allocation of drop boxes in more populous areas.³⁸

B. The Burdens Placed on the Right to Vote by the Governor’s Order Are Substantial, Especially for Vulnerable Populations

Under *Anderson*, a court must consider the “character and magnitude” of the burdens placed on the exercise of the right to vote. 460 U.S. at 789. In considering

³⁵ *Ballot Drop Boxes*, King Cty, Wash. (Oct. 16, 2020), <https://www.kingcounty.gov/depts/elections/how-to-vote/ballots/returning-my-ballot/ballot-drop-boxes.aspx>; *Election Summary Report*, King County Canvassing Board (August 2020), <https://www.kingcounty.gov/~media/depts/elections/results/2020/08/election-summary-report.ashx?la=en>.

³⁶ Melissa Santos, *Security and Ballot Drop Boxes: How It Works in WA*, CrossCut (Aug. 26, 2020), <https://crosscut.com/politics/2020/08/security-and-ballot-drop-boxes-how-it-works-wa>.

³⁷ A *Washington Post* analysis of data collected by Colorado, Oregon, and Washington “identified just 372 possible cases of double voting or voting on behalf of deceased people out of about 14.6 million votes cast by mail in the 2016 and 2018 general elections.” Viebeck, *Miniscule Number of Potentially Fraudulent Ballots in States with Universal Mail Voting Undercuts Trump Claims About Election Risks*, Wash. Post (June 8, 2020). The numbers are very low and not specific to drop boxes.

³⁸ *Ballot Drop Box*, *supra* n.30.

an application for a temporary injunction, a court must balance the equities of the parties and “the resulting conveniences and hardships” as well as the interests of the public. *Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 578 (Tex. App.—Austin [3rd Dist.] 2000) (quoting *Surko Enter., Inc. v. Borg–Warner Acceptance Corp.*, 782 S.W.2d 223, 225 (Tex. App.—Houston [1st Dist.] 1989, no writ)). Under both tests, courts are asked to take seriously the restraints caused by the State’s regulation and the impact on the voting public. In light of concerns about the USPS and the ongoing COVID-19 pandemic, as well as the significant population and geographic variation among the counties, the burdens imposed here by the Governor’s October 1 Proclamation, especially on vulnerable voters, are substantial.

Due to a slowdown in mail delivery and changes in USPS policy including reducing overtime and the number of post boxes (many of which have been reversed due to court orders secured by state attorneys general, *see, e.g., Washington v. Trump*, 2020 WL 5568557 (W.D. Wash. Sept. 17, 2020)), American voters have grown more skeptical of using the Postal Service to vote during this Election.³⁹ This distrust has been aggravated by the USPS’s announcement that it may not be able to

³⁹ *Election Officials Worry Postal Changes Could Affect Voting by Mail*, NPR (July 29, 2020), <https://www.npr.org/2020/07/29/896588223/election-officials-worry-postal-changes-could-affect-voting-by-mail>; Corey Williams, *Despite Coronavirus Threat, Black Voters Wary of Voting by Mail*, WUSA9 (August 3, 2020), <https://www.wusa9.com/article/news/nation-world/black-voters-wary-of-voting-by-mail/507-54ac2c37-e5f6-4c7b-aece-08f28ae111c1>; *Ballot Drop Box*, *supra* n.30.

deliver mail ballots on time based on existing state deadlines to apply for, send out, and receive mail ballots.⁴⁰ As many *amici* jurisdictions are anticipating and experiencing, there has been—and will continue to be—a surge in voters who want to use a ballot delivery location this year. Indeed, research shows that lack of trust in the USPS is the strongest indicator of whether a voter would opt to drop off their mail ballot at a delivery location.⁴¹ Recent polls confirm this continued distrust although the USPS has reversed course on some policy changes in response to litigation and public pressure.⁴²

Voters who are eligible to vote by mail but concerned about returning their ballots through the USPS are left with two options—voting in-person or dropping off their ballots at a hand delivery location. For populations that are especially vulnerable to COVID-19, however, like the elderly and those with underlying medical conditions, voting in-person may not be a safe and practical option during this continued pandemic. And these are precisely the populations that under Texas

⁴⁰ Kathy Frakovic, *Voting By Mail: Can the Postal Service Get the Job Done?*, YouGov (August 19, 2020), <https://today.yougov.com/topics/politics/articles-reports/2020/08/19/postal-service-vote-mail>.

⁴¹ Andrew M. Menger & Robert Stein, *Choosing the Less Convenient Way to Vote: An Anomaly in Vote by Mail Elections*, 73 *Political Res. Quarterly* (2020), <https://doi.org/10.1177/1065912919890009>.

⁴² Mike DiCamillo, *Many Californians Are Concerned about the Integrity of This Year's Presidential Election*, Berkeley Institute of Governmental Studies, <https://escholarship.org/uc/item/8mg346c7> (31 percent of Biden supporters and 65 percent of Trump supporters in California and 41 percent of voters overall expressed doubts about on-time mail delivery of ballots).

law have the right to vote by mail or by hand delivering their ballot to a ballot delivery location. COVID-19 cases have begun rising for a third time this year across the country, and the State of Texas has reported 33,401 new cases in the last seven days.⁴³ While the current daily number of new cases in Texas is about half of its peak in July, the number of new cases is rising in Texas just as early voting has begun.⁴⁴ Scientific research has demonstrated a heightened risk of contracting COVID-19 in indoor spaces with poor ventilation.⁴⁵ Significantly, there has been record turnout for early voting in the most populous Texas counties, meaning long lines and more time spent in close proximity to other people.⁴⁶ Anecdotal evidence from Harris County indicates that higher numbers of elderly voters are voting early at great risk to their health.

The number of voters in Texas who are vulnerable to serious complications from COVID-19 and who may request a mail ballot on the grounds of disability or

⁴³ See *CDC COVID Data Tracker*, U.S. Ctrs. for Disease Control & Prevention (use “US and State Trends” subtab under “Case Trends” tab), https://covid.cdc.gov/covid-data-tracker/?utm_source=morning_brew#trends_dailytrendscases (last visited on Oct. 20, 2020).

⁴⁴ Impact of Opening and Closing Decisions by State, Johns Hopkins University & Medicine (Oct. 18, 2020), <https://coronavirus.jhu.edu/data/state-timeline/new-confirmed-cases/texas>.

⁴⁵ *Transmission of SARS-CoV-2: Implications for Infection Prevention Precautions*, World Health Organization (July 22, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>.

⁴⁶ *Daily Record of Early Voting*, Harris Cnty. Clerk (Oct. 17, 2020) (documenting 585,963 early voters over 5 days), https://www.harrisvotes.com/Docs/Uploads/EVPA_unofficial.pdf; *November 03, 2020 General and Special Elections Early Voting In Person and By Mail*, Travis Cnty. Clerk (Oct. 17, 2020), https://countyclerk.traviscountytexas.gov/images/pdfs/election_results/2020.11.03/G20_Daily_Totals_Oct_17.pdf.

age is significant. Permitting these voters to drop off their ballots at ballot delivery locations and to avoid crowds would reduce their risk of contracting COVID-19. Approximately 20.7 million people over the age of eighteen in Texas are at high risk of serious illness from COVID-19 due to underlying medical conditions or their age.⁴⁷ Among the elderly, mortality from COVID-19 is very high. Seventy percent of reported COVID-19 deaths in Texas have been among those over the age 65.⁴⁸ Consequently, in light of the significant risks posed by COVID-19 and the skepticism about the USPS's ability to timely deliver ballots, significant numbers of voters, especially those who are particularly vulnerable to COVID-19, will opt to deliver their ballots to a designated ballot delivery location.

In larger and more populous counties, however, the use of a single ballot delivery location poses a substantial burden. Voters may be forced to wait in line to show their identification at the single delivery location or spend significant time traveling long distances and waiting in traffic. Harris and Travis Counties are some of the largest voting jurisdictions in the United States both by population and by

⁴⁷ Wyatt Koma, et al., *How Many Adults Are at Risk of Serious Illness If Infected with Coronavirus? Updated Data*, Kaiser Family Fdn. (Apr. 23, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/how-many-adults-are-at-risk-of-serious-illness-if-infected-with-coronavirus/>.

⁴⁸ Meredith Freed, et al., *What Share of People Who Have Died of COVID-19 Are 65 and Older – and How Does It Vary By State?*, Kaiser Family Fdn. (July 24, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/what-share-of-people-who-have-died-of-covid-19-are-65-and-older-and-how-does-it-vary-by-state/>.

square miles. In contrast, the smallest county by population in Texas has 168 residents.

In these larger counties, the burdens associated with accessing the ballot will fall especially hard on low-income voters. While voters of every income level cite conflicting work schedules as a barrier to voting, low-income voters face greater challenges taking time off of work. They are more likely to fear losing their jobs, loss of wages, and having a supervisor deny their request for work leave.⁴⁹ Low-income voters also face greater difficulty accessing reliable transportation to travel to polling places or ballot delivery locations, as many do not have access to a car in their household and must rely on public transportation, which can significantly lengthen the trip to the delivery location.⁵⁰ As a result, the Governor's unlawful proclamation foreseeably places a substantial burden on the right to vote of low-income, disabled, and elderly residents and does so without advancing any of the State's purported interests.

⁴⁹ Nikki Graf, *Why Workers Don't Always Take Family or Medical Leave When They Need to*, Pew Research Center (April 4, 2017), <https://www.pewresearch.org/fact-tank/2017/04/04/why-workers-dont-always-take-family-or-medical-leave-when-they-need-to/>.

⁵⁰ Robert Paul Hartley, *Unleashing the Power of Poor and Low-income Americans: Changing the Political Landscape*, Poor People's Campaign (August 2020), <https://www.poorpeoplescampaign.org/wp-content/uploads/2020/08/PPC-Voter-Research-Brief-18.pdf>.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the stay of the 353rd District Court's order be lifted.

Respectfully submitted,

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Dated: October 20, 2020

/s/ Jessica N. Witte
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I certify that a true and correct copy of this *Brief of Amici Curiae Cities and Counties* was served electronically through the e-filing system in accordance with the Texas Rules of Appellate Procedure on October 20, 2020 to all counsel of record for the case.

Dated: October 20, 2020

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