

No. 20-0846

IN THE
SUPREME COURT OF TEXAS

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

Petitioners,

v.

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

Respondents.

On Petition for Review
from the Third Court of Appeals, Austin

**AMICI CURIAE BRIEF OF 17 CITIES, COUNTIES, AND
ELECTIONS ADMINISTRATORS IN SUPPORT OF
RESPONDENTS' REQUEST TO DENY PETITION FOR REVIEW**

Jessica N. Witte
THOMPSON & HORTON LLP
8300 N. MoPac Expressway, Suite 220
Austin, TX 78759
T: 512.615.2352
F: 512.597.1681
jwitte@thompsonhorton.com

Jonathan B. Miller, Legal Director
LiJia Gong, Counsel
Victoria Stilwell, Staff Attorney
PUBLIC RIGHTS PROJECT
4096 Piedmont Avenue #149
Oakland, CA 94611

T: 646.831.6113
jon@publicrightsproject.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

ARGUMENT 2

 I. DEFERENCE IS DUE TO THE DISCRETION OF LOCAL
 JURISDICTIONS ABOUT MEANS OF PROVIDING BALLOT
 ACCESS TO THEIR RESIDENTS 4

 A. Texas Law Provides Counties with Significant Discretion in
 Election Administration 4

 B. The Decision of County Clerks in Texas to Add Hand-Delivery
 Locations Is Consistent with the Considered Judgment of Other
 Local Election Officials 7

 II. THE STATE’S ASSERTED INTERESTS ARE FAR
 OUTWEIGHED BY THE BURDEN ON PLAINTIFFS
 AND THE PUBLIC 10

 A. The Limitation on Ballot Delivery Locations Does Not
 Advance the State’s Articulated Interests 11

 B. The Burdens Placed on the Right to Vote by the Governor’s
 Order Are Substantial, Especially for Vulnerable Populations 16

CONCLUSION 20

ADDITIONAL COUNSEL 21

CERTIFICATION OF WORD COUNT 23

CERTIFICATION OF SERVICE 24

TABLE OF AUTHORITIES

CASES

Anderson v. Celebrezze,
460 U.S. 780 (1983)..... 10, 16

Donald J. Trump for President, Inc. v. Boockvar,
2020 WL 5997680 (W.D. Pa. Oct. 10, 2020)..... 10, 12

State v. Hodges,
92 S.W.3d 489 (Tex. 2002)10

Washington v. Trump,
2020 WL 5568557 (W.D. Wash. Sept. 17, 2020)16

STATUTES & REGULATIONS

52 U.S.C. § 10307.....14

Cal. Elec. Code § 30258

Cal. Code Regs. §§ 20132-36.8

Colo. R.S. § 1-7.5-1079

8 Colo. Code Regs. § 1505-1:7.....9

Tex. Elec. Code § 32.071.....5, 6

Tex. Elec. Code § 63.0101.....13

Tex. Elec. Code § 86.006(a-1).....6, 13

Tex. Elec. Code § 86.006(a)(3).....14

Tex. Elec. Code § 86.006(h)14

Tex. Elec. Code § 87.0222(a)13

Tex. Elec. Code § 87.024.....13

Tex. Gov’t Code § 311.012(b).....6

OTHER AUTHORITIES

Absentee Ballot Drop-off Sites, City of Milwaukee Elec. Comm’n,
<https://city.milwaukee.gov/election/Voter-Info/Absentee-Ballot-Drop-Off-Sites>15

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

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>.....17

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>.....15

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>.....6

Centers for Disease Control & Prevention, CDC COVID Data Tracker,
https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days.3

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.....18

David Litt, *Ohio’s Quarter-Mile Early-Voting Lines? That’s What Voter Suppression Looks Like*, Guardian (Oct. 15, 2020),12

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>16

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>.....16

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>.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/>.....6

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>.....12

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>.....6

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>.....4, 5

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>.....17

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/>.....9

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>.....9

Melissa Santos, *Security and Ballot Drop Boxes: How It Works in WA*, *CrossCut* (Aug. 26, 2020).....15

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/>18

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>.....8

National Conference of State Legislatures, *VOPP: Table 9: Ballot Drop Box Definitions, Design Features, Location and Number*, NCSL (Aug. 18, 2020).....9

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/>19

October 1, 2020 Voter Registration Statistics, Wisc. Elec. Comm’n.15

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.....14

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>.15

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>.....7

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>.18

Travis County, Early Voting Locations, https://countyclerk.traviscountytexas.gov/images/pdfs/polling_locations/11.03.20/Early_Voting_Flyer.pdf	10
U.S. Elections Project, 2020 General Election Early Vote Statistics, https://electproject.github.io/Early-Vote-2020G/index.html	2
U.S. Government Accountability Office, <i>Elections: Observations on Voting Equipment Use and Replacement</i> , April 2018, p. 9, at https://www.gao.gov/assets/700/692024.pdf	7
Uvalde County, Voting Locations, https://uvaldecounty.com/images/county_tax_assessor/voting_locations.pdf	10
Viebeck, <i>Miniscule Number of Potentially Fraudulent Ballots in States with Universal Mail Voting Undercuts Trump Claims About Election Risks</i> , Wash. Post (June 8, 2020).	15
Voter registration statistics by county, Penn. Dep’t of State (Oct. 19, 2020), https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Pages/VotingElectionStatistics.aspx	14
<i>Where Do I Return My Ballot or Vote in Person?</i> , Commonwealth of Pa., https://www.votespa.com/Voting-in-PA/pages/drop-box.aspx	14
William McGuire, Benjamin Gonzalez, Katherine Bird, Benjamin Corbett & Loren Collingwood, <i>Does Distance Matter? Evaluating the Impact of Drop Boxes on Voter Turnout</i> ”, 101 Soc. Sci. Q. (2001), https://doi.org/10.1111/ssqu.12853	12

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 and other efforts to ensure that residents fulfill their civic duty to vote.

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 voting locations; and have provided more hand-delivery locations for voters to turn in ballots. In many situations, efforts to mitigate public health risks have resulted in

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 Rights Project and Thompson & Horton LLP.

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. 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. These additional challenges have required local officials 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.

ARGUMENT

The 2020 election presents some significant challenges for the city and county administrators. Already this is the most litigated election in our nation’s history. Voter turnout for early voting has been high—more than 64 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

² U.S. Elections Project, 2020 General Election Early Vote Statistics, <https://electproject.github.io/Early-Vote-2020G/index.html> (last visited Oct. 26, 2020).

election locations by private parties. The USPS tried to change some of its practices, particularly as it relates to election mail, reducing voter confidence in the use of the mail. All of this comes amid a devastating global pandemic, which has cost more than 224,000 American lives and sickened more than 8 million since January.³

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. 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 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

³ Centers for Disease Control & Prevention, CDC COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days (last visited Oct. 26, 2020).

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. Moreover, the system in Texas is far more rigorous than in most other states. 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 use.

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

A. Texas Law Gives Counties 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

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. 26, 2020).

§§ 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 have adequate access to ballot delivery locations.

“[T]he 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, and reporting election results.⁶

In Texas these duties may also include providing for more than one early voting mail-in ballot delivery location, as 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*

⁵ *Id.*

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>.

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 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 and does so with a purported justification that lacks basis.⁸

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/>.

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—prohibit 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-Hughes-Amicus.pdf>.

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.

There are numerous examples, not limited to this election cycle, of local governments taking into consideration the election needs of their constituents. The Registrar of Voters for Santa Clara County, California, is partnering 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.⁹ Many other cities are working with professional franchises to use outdoor stadiums and indoor arenas as socially distanced early voting centers.¹⁰ And with the

⁹ 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>.

¹⁰ 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>.

circumstances of this election in mind, some Texas counties will track polling place wait times on their websites.¹¹ In short, local governments use their deep understanding of their communities' needs and their expertise as to how best to meet them in the implementation of election administration plans.

Additionally, the Texas counties' decisions mirror the efforts of other states and counties around the country to make it easier for their constituents to vote specifically through 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.¹² 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.¹³

In Colorado, Hawaii, Oregon, and Washington, which conduct elections entirely by mail, the states have provided frameworks to guide counties' decisions

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 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>.

¹³ Cal. Elec. Code §§ 3025; Cal. Code Regs. §§ 20132-36.

as to the number or location of hand-delivery locations, but have left the ultimate determination up to localities.¹⁴ 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.¹⁵ 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.

The reason underpinning this deference is simple: different jurisdictions have different voting needs, dependent on their populations. 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 use. *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 5997680, at *62 (W.D. Pa. Oct. 10, 2020).

¹⁴ 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>.

¹⁵ Colo. R.S. § 1-7.5-107; 8 Colo. Code Regs. § 1505-1:7.

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 sites.¹⁶ A one-delivery-location-fits-all solution imposed by the Governor at the eleventh hour is similarly inappropriate.

II. THE STATE’S ASSERTED INTERESTS ARE HEAVILY 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),¹⁷ 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. 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. The burdens imposed by the State’s limitation on in-person ballot locations are substantial in light of the ongoing COVID-19 pandemic and current

¹⁶ 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://uvaldecountry.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.

¹⁷ 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).

skepticism of the USPS’s ability to deliver mail in a timely manner, and they heavily 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. 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 sole ballot delivery location in downtown Houston.¹⁸ During heavy traffic, that time can easily double, and many trips are exceedingly difficult

¹⁸ 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>.

via public transportation. Voters in populous Ohio counties have already endured such challenges during early voting.¹⁹ Relying on public transportation, a round trip to the single ballot delivery location in Cincinnati can take an hour and a half; a trip to the one ballot delivery location in Columbus similarly may take up to two and a half hours.²⁰ These distances are high barriers to casting ballots.²¹ 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.

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

¹⁹ 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>.

²⁰ 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).

²¹ 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).

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 laws that aim at *uniformity for residents* and 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.

The State also has asserted an interest in the prevention of election fraud as justification for its restriction on ballot delivery locations. Contrary to the State's generalizations, state laws 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).²²

In voting jurisdictions across the country, administered by *amici* 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 of eighteen drop box and satellite election office locations to receive mail ballots from as many as 1.1 million registered voters.²³ 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.²⁴ 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

²² 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.

²³ *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. 26, 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>.

²⁴ *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.

use among its nearly 1 million registered voters.²⁵ 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.²⁶ In the State of Washington, King County makes 73 ballot drop boxes available to nearly 1.4 million registered voters.²⁷ In almost ten years of using ballot drop boxes, the State of Washington has never experienced any security incidents involving ballot drop boxes.²⁸ 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.²⁹

²⁵ *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>.

²⁶ *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. 26, 2020); *October 1, 2020 Voter Registration Statistics*, Wisc. Elec. Comm'n. <https://elections.wi.gov/index.php/node/7147>.

²⁷ *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>.

²⁸ 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>.

²⁹ 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.

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 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.³⁰ This distrust has been aggravated by the USPS’s announcement that it may not be able to deliver mail ballots on time based on existing state deadlines to apply for, send out, and receive mail ballots.³¹ As many *amici* are anticipating and experiencing, there

³⁰ *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>.

³¹ 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>.

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.³²

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 or practical option. And these are precisely the populations that under Texas law have the right to vote by mail or by hand delivering their ballot to a ballot delivery location. COVID-19 cases are spiking for a third time this year across the country, and Texas has reported 38,596 new cases in the last seven days.³³ Scientific research has demonstrated a heightened risk of contracting COVID-19 in indoor spaces with poor ventilation.³⁴ Significantly, there has been record turnout for early voting in the most populous

³² 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>.

³³ 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#cases_casesinlast7days (last visited on Oct. 26, 2020).

³⁴ *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>.

Texas counties, meaning long lines and more time spent in close proximity to other people.³⁵

Permitting these voters to drop off their ballots at ballot delivery locations and to avoid crowds would reduce their risk of contracting COVID-19. 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 of 65.³⁶ Consequently, in light of the significant risks posed by COVID-19 and the skepticism about 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 the 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 in taking time off of work.³⁷ Low-income voters also face greater

³⁵ *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.

³⁶ 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/>.

³⁷ 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/>.

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. 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.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Petition for Review be denied.

Respectfully submitted,

By: /s/ Jessica N. Witte

Jessica N. Witte

State Bar No. 24095026

THOMPSON & HORTON LLP

8300 N. MoPac Expressway, Suite 220

Austin, TX 78759

T: 512.615.2352

F: 512.597.1681

jwitte@thompsonhorton.com

Jonathan B. Miller, Legal Director

LiJia Gong, Counsel

Victoria Stilwell, Staff Attorney

PUBLIC RIGHTS PROJECT

4096 Piedmont Avenue #149

Oakland, CA 94611

*Counsel for Amici Cities, Counties, and
Elections Administrators*

Dated: October 26, 2020

ADDITIONAL COUNSEL

ANNE L. MORGAN
City Attorney
P.O. Box 1546
Austin, TX 78701-1546
*Attorney for the City of
Austin, Texas*

THOMAS A. CARR
City Attorney
P.O. Box 791
1777 Broadway
Boulder, CO 80302
*Attorney for the City of
Boulder, Colorado*

JUAN A. GONZALEZ
Chief Legal Counsel
Cameron County Commissioners
Court – Legal Division
1100 E. Monroe St.
Brownsville, TX 78520
*Counsel for the Elections
Administrator of Cameron County,
Texas*

MARK A. FLESSNER
Corporation Counsel
30 N. LaSalle Street
Suite 800
Chicago, IL 60602
*Attorneys for the City of Chicago,
Illinois*

ANDREW W. GARTH
Interim City Solicitor
801 Plum Street, Room 214
Cincinnati, OH 45202
*Interim City Solicitor for the City of
Cincinnati, Ohio*

ZACH KLEIN
City Attorney
77 North Front Street, 4th Floor
Columbus, OH 43215
*Attorney for the City of Columbus,
Ohio*

JESSICA M. SCHELLER
Chief; Advice, Business & Complex
Litigation Division
Cook County State's Attorney's
Office
500 Richard J. Daley Center
Chicago, IL 60602
Counsel for Cook County, Illinois

BARBARA J. DOSECK
City Attorney
101 W. Third Street
P.O. Box 22
Dayton, OH 45401
*Attorney for the City of
Dayton, Ohio*

COLLYN A. PEDDIE
Sr. Assistant City Attorney
Office of the City Attorney
900 Bagby, 4th Floor
Houston, TX 77002
*Attorney for the City of Houston,
Texas*

MICHAEL HAAS
City Attorney
210 Martin Luther King Jr. Blvd.,
Room 401
Madison, WI 53703
*Attorney for the City of Madison,
Wisconsin*

BRIAN E. WASHINGTON
County Counsel
3501 Civic Center Drive, Suite 275
San Rafael, CA 94903
*Attorney for the County of Marin,
California*

MARGARET C. DAUN
Corporation Counsel
901 N. 9th Street, Room 303
Milwaukee, WI 53233
*Counsel for the County of Milwaukee,
Wisconsin*

TRACY REEVE
City Attorney
1221 SW Fourth Avenue, Room 430
Portland, OR 97204
*Counsel for the City of Portland,
Oregon*

SUSANA ALCALA WOOD
City Attorney
915 I Street, 4th Floor
Sacramento, CA 95814
*Attorney for the City of Sacramento,
California*

JAMES R. WILLIAMS
County Counsel
70 W. Hedding Street,
East Wing, 9th Floor
San Jose, CA 95110
*Attorney for the County
of Santa Clara, California*

PETER S. HOLMES
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
Attorney for the City of Seattle

LYNDSEY M. OLSON
City Attorney
400 City Hall and Courthouse
15 West Kellogg Boulevard
Saint Paul, MN 55102
*Attorney for the City of Saint Paul,
Minnesota*

CERTIFICATION OF WORD COUNT

I certify that this document contains 4,491 words in the portions of the document that are subject to the word limits of Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

Dated: October 26, 2020

/s/ Jessica N. Witte
Jessica N. Witte

CERTIFICATION OF SERVICE

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 26, 2020 to all counsel of record for the case.

Dated: October 26, 2020

/s/ Jessica N. Witte
Jessica N. Witte