

**Testimony Submitted *by***  
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*U.S. House of Representatives*

**Select Subcommittee on the Coronavirus Crisis**

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## I. INTRODUCTION

It is a great honor to testify before this body, the Select Subcommittee on the Coronavirus Crisis for the U.S. House of Representatives.<sup>1</sup> For my testimony this morning, I draw heavily from my work as President of the Texas Civil Rights Project (TCRP), and appear on behalf of that organization. I also bring my experience as Chairwoman of the Texas State Advisory Committee to the U.S. Commission on Civil Rights,<sup>2</sup> as an adjunct professor of “Election Law and Policy” at the University of Texas School of Law, and from roughly a dozen years working to advance voting rights and election reform as a civil rights attorney.

I have been asked to update this Subcommittee on the State’s preparation for the November election, focusing on the actions state officials are and are not taking to ensure that no Texas voter has to choose between their safety and their right to vote. Unfortunately, as detailed below, State officials are failing to fulfill their obligation to Texas voters. Their actions and inactions are undermining the fair and free functioning of our Texas democracy, with particularly dire potential consequences for Black and Latinx communities.

As detailed below, Texas has aggressively fought any expansion of voting, despite guidance from the Centers for Disease Control and Prevention (CDC) to provide “a wide variety of voting options”<sup>3</sup> in addition to in-person voting and the bipartisan adoption of expanded voting by mail in the vast majority of other states. On top of that, in a brazen abuse of state power, our Attorney General has repeatedly threatened to prosecute voters and civil society organizations for running afoul of confusing vote-by-mail rules, chilling voting by mail by voters with disabilities who are in fact eligible to do so. Any voter who nonetheless does vote by mail faces myriad additional threats, including a decentralized and overwhelmed vote-by-mail system prone to administrative errors and discriminatory laws that allow their ballot to be trashed by local, partisan actors who can deem their signature invalid.

To be sure, Texas has been more proactive in making in-person voting safe and accessible, most notably by adding an additional week of early voting. But the State’s hands-off approach to ensuring sufficient polling places and poll workers will produce, at best, a patchwork of voter access across Texas, determined by the resources and resolve of (already exhausted) local election officials.

Tragically, history and current data confirms that voters of Texas will not be evenly affected by the State’s choices. Instead, Black and Latinx Texans, and particularly women of color, will suffer a heavier burden, as they have time and again.

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<sup>1</sup> We are Texas lawyers for Texas communities, serving the rising movement for equality and justice in our state. Our Voting Rights Program tackles the systemic issues that suppress democratic participation in Texas—from voter registration to the moment when an individual casts their ballot. Learn more at <https://www.texascivilrightsproject.org>. I am deeply grateful for the work of TCRP’s entire team, particularly given the heightened importance of our voting rights efforts in this presidential election year. Special thanks to attorney Zachary Dolling for his characteristically thorough and thoughtful assistance with preparing this testimony.

<sup>2</sup> Our committee conducted a study of voting rights in Texas in 2018, including an all-day public hearing in Houston in March 2018. Our findings were published in a report entitled *Voting Rights in Texas*, available at <https://www.usccr.gov/pubs/2018/07-23-TX-Voting-Rights.pdf>.

<sup>3</sup> Considerations for Election Polling Locations and Voters, Centers for Disease Control, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

Texas has the power to mitigate these problems—indeed, pages 15-19, below, provide a roadmap of commonsense steps the State can take, many of which have been recommended to the state by TCRP and other advocacy groups already. The question is whether Texas has the will.

## II. TEXAS IS NOT PREPARED TO HOLD A FAIR AND SAFE ELECTION THIS NOVEMBER

### A. Texas Continues to Fight Any Expansion of Voting by Mail

As of late August, voters in 44 states and the District of Columbia—representing 83% of the American electorate—will be able to vote by mail in the November 2020 election.<sup>4</sup> Many of these jurisdictions have expanded access to vote by mail due to concerns over the coronavirus, either by permitting voters to cite concerns over the virus to qualify for a mail-in ballot or by automatically mailing every registered voter the required materials.<sup>5</sup> This accelerated pace of expansion was sparked by the coronavirus pandemic, but it follows a growing bipartisan trend.<sup>6</sup> Approximately 25% of all voters cast their ballots by mail in 2018.<sup>7</sup> Those states permitting all voters to utilize mail-in voting during the November 2020 election are governed by an almost even split of Republican and Democratic governors.<sup>8</sup> An April 2020 study from Stanford, based on vote-by-mail data spanning two decades, recently “confirm[ed] important conventional wisdom among election experts: vote-by-mail offers voters considerable convenience, increases turnout rates modestly, but has no discernible effect on party vote share or the partisan share of the electorate.”<sup>9</sup> And numerous empirical studies have demonstrated that the risk of mail-in ballot fraud is infinitesimally small.<sup>10</sup>

Despite this, State officials—led by Texas Governor Greg Abbott and Attorney General Ken Paxton—have fought every commonsense opportunity to expand voting by mail for the more than 16.2 million registered voters of Texas during the COVID-19 pandemic. They have demanded an overly exclusionary interpretation of existing law, fighting in court to limit who qualifies as sufficiently “disabled” to be at-risk from the deadly virus. Paxton has engaged in a campaign of intimidation,

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<sup>4</sup> Kate Rabinowitz and Brittany Renee Mayes, *At least 83% of American Voters can cast ballots by mail in in the fall*, THE WASHINGTON POST, (Aug. 20, 2020), <https://www.washingtonpost.com/graphics/2020/politics/vote-by-mail-states/>.

<sup>5</sup> *Id.*

<sup>6</sup> Historically, the widespread use of mail-in voting enjoys bipartisan support from voters, party leaders and election officials. Dominique Erney and Wendy R. Weiser, *Bipartisan Support for Expanded Mail Voting for 2020 Elections*, THE BRENNAN CENTER FOR JUSTICE, (April 15, 2020), <https://www.brennancenter.org/our-work/research-reports/bipartisan-support-expanded-mail-voting-2020-elections>.

<sup>7</sup> United States Election Assistance Commission, *Election Administration and Voting Survey* (2018), [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/2018\\_EAVS\\_Report.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf).

<sup>8</sup> Edward Perez, Open Source Election Technology Institute, *The Bipartisan Truth About By-Mail Voting*, (May 27, 2020), available at [https://trustthevote.org/wp-content/uploads/2020/05/27May20\\_BipartisanTruthAboutByMailVoting\\_v3.pdf](https://trustthevote.org/wp-content/uploads/2020/05/27May20_BipartisanTruthAboutByMailVoting_v3.pdf).

<sup>9</sup> Daniel M. Thompson, Jesse Yoder, Jennifer Wu and Andrew B. Hall, Stanford Institute for Economic Policy Research, *The Neutral Partisan Effects of Vote-by-Mail: Evidence from County-Level Rollouts*, (April 2020), available at <https://siepr.stanford.edu/sites/default/files/publications/20-015.pdf>.

<sup>10</sup> See Wendy R. Weiser and Harold Ekeh, *The False Narrative of Vote-by-Mail Fraud*, THE BRENNAN CENTER FOR JUSTICE, (April 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud>; see also Elaine Karmack and Christine Stenglein, *Low rates of fraud in vote-by-mail states show the benefits outweigh the risks*, THE BROOKINGS INSTITUTION, (June 2, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risks/>.

threatening *criminal prosecution* of local leaders, community organizers and civic engagement groups who encourage others to vote by mail. The Texas Supreme Court proclaimed a “don’t ask, don’t tell” framework that is confusing to voters and has predictably sparked further legal action between state and local officials. In fact, just last week, the Texas Secretary of State (who answers to Governor Abbott) sued Harris County (home to Houston) officials when they took the Texas Supreme Court at its word and mailed vote-by-mail applications to all registered voters with instructions modeled from that decision. On top of all of this, Abbott and other officials have steadfastly ignored warnings from the U.S. Postal Service about its inability to deliver ballots in accordance with existing Texas law.

The State is well aware—and its own data reflects—that Black and Latinx Texans will bear the brunt of its actions.<sup>11</sup> These communities make up the overwhelming percentage of Texans who have been diagnosed with or died from COVID-19, and Texans of color are far less able to access healthcare than their White counterparts.<sup>12</sup> Recent polls reflect public perception of this disparity: 63% of Black and 65% of Latinx Americans see in person voting “risky” compared to just 45% of White Americans.<sup>13</sup> Furthermore, women are significantly more likely than men to have taken on additional caregiving duties during the pandemic,<sup>14</sup> so it is no surprise that 57% of woman see leaving the house to vote as “risky” compared to 47% of men.<sup>15</sup>

Nevertheless, as chronicled in greater detail below, the State is fighting tooth and nail to limit our ability to safely vote remotely, even as the coronavirus has already infected more than 630,000 Texans

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<sup>11</sup> See, e.g., Texas Department of State Health Services COVID-19 Dashboard, Case Demographics, <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83>.

<sup>12</sup> See, e.g., *id.*; Emma Platoff and Carla Astudillo, *Across Texas and the nation, the novel coronavirus is deadlier for people of color*, THE TEXAS TRIBUNE, (July 30, 2020), <https://www.texastribune.org/2020/07/30/texas-coronavirus-deaths/>; Health Equity Considerations and Racial and Ethnic Minority Groups, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>; Lena H. Sun, *CDC: Covid-19 death toll is twice as high among people of color under age 65 as for white Americans*, THE WASHINGTON POST, (July 10, 2020), <https://www.washingtonpost.com/health/2020/07/10/cdc-covid-19-death-toll-is-twice-high-among-people-color-under-age-65-white-americans/>; Soo Rin Kim, Matthew Vann, Laura Bronner, and Grace Manthey, *Which Cities Have The Biggest Racial Gaps in COVID-19 Testing Access?*, FIVETHIRTYEIGHT.COM, (July 22, 2020), <https://fivethirtyeight.com/features/white-neighborhoods-have-more-access-to-covid-19-testing-sites/>; James Barragan, *Texas to begin study of COVID-19 effects on black, Latino populations. Analysis due in fall*, THE DALLAS MORNING NEWS, (June 5, 2020), <https://www.dallasnews.com/news/2020/06/05/texas-to-begin-study-of-covid-19-effects-on-black-latino-populations-analysis-due-in-fall/>.

<sup>13</sup> Margaret Talev, *Axios-Ipsos poll: Fear of Voting*, AXIOS.COM, (Aug. 4, 2020), <https://www.axios.com/axios-ipsos-poll-democrats-fear-voting-cd1325d4-2347-4b2d-a41a-18ff447c0a32.html>

<sup>14</sup> See, e.g., Diana Boesch and Katie Hamm, Center for American Progress, *Valuing Women’s Caregiving During and After the Coronavirus Crisis*, (June 4, 2020), available at <https://cdn.americanprogress.org/content/uploads/2020/06/03111448/WomenCaregiving-brief.pdf>; Kathy Caprino, *How The Pandemic Is Negatively Impacting Women More Than Men, And What Has To Change*, FORBES.COM, (July 13, 2020), <https://www.forbes.com/sites/kathycaprino/2020/07/13/how-the-pandemic-is-negatively-impacting-women-more-than-men-and-what-has-to-change/>; Liza Hamel and Alina Salganicoff, *Is There a Widening Gender Gap in Coronavirus Stress*, KAISER FAMILY FOUNDATION, (April 6, 2020), <https://www.kff.org/policy-watch/is-there-widening-gender-gap-in-coronavirus-stress/>; Women, Caregiving, and COVID-19, Centers for Disease Control and Prevention, <https://www.cdc.gov/women/caregivers-covid-19/index.html>.

<sup>15</sup> Margaret Talev, *Axios-Ipsos poll: Fear of Voting*, AXIOS.COM, (Aug. 4, 2020), <https://www.axios.com/axios-ipsos-poll-democrats-fear-voting-cd1325d4-2347-4b2d-a41a-18ff447c0a32.html>

in total through close person-to-person contact. The consequences are sure to be devastating—both on the right to vote and on Texans’ health—and to disproportionately impact communities of color and women of color in particular.

**i. The State’s Legal Battles to Limit Voting by Mail**

There has been extensive litigation in Texas around expanding voting by mail in recent months. As discussed in greater detail below, the State was first sued in Texas district court, where it lost. The State appealed this decision but then sidestepped the appeals process by bringing an original proceeding in the Texas Supreme Court. At the same time, the State was sued in federal district court, where it again lost. The United States Court of Appeals for the Fifth Circuit stayed the federal district court’s ruling, after which the Texas Supreme Court issued its opinion. As of today’s date, the only judgment remaining in force is that of the Texas Supreme Court while a subsequent decision of the Fifth Circuit remains pending.

**a. State Trial Court Litigation**

Immediately after the onset of the pandemic in early March, TCRP and other civil rights groups sent a letter<sup>16</sup> to the State with a simple argument: a lack of immunity to the coronavirus is a “disability” as defined in the Texas Election Code, *i.e.*, “a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter’s health.”<sup>17</sup> Because the Code permits any qualified voter with a “disability” to vote by mail, all non-immune voters should therefore be able to vote by mail.<sup>18</sup> It was a commonsense interpretation of existing law that, if accepted by the State, would have opened up the option to vote by mail to tens of millions of eligible Texas voters.

The State was silent. Then, on these same grounds, the Texas Democratic Party and several voters sued the Travis County Clerk and the Texas Secretary of State in Texas state court. More voters and organizational plaintiffs, represented by the TCRP and other advocacy groups, quickly intervened, as did the State of Texas.

The court heard evidence on April 15 and issued a written temporary injunction on April 17, holding that a lack of immunity to the virus “meet[s] the plain language definition of disability” because it is “reasonable to conclude that voting in person while the virus . . . is still in general circulation presents a likelihood of injuring [the voter’s] health.”<sup>19</sup> The State immediately appealed, staying the

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<sup>16</sup> Letter to Texas Secretary of State Ruth Hughs, (March 17, 2020), *available at* [https://texascivilrightsproject.org/wp-content/uploads/2020/03/Letter-to-SOS-re -Coronavirus.pdf](https://texascivilrightsproject.org/wp-content/uploads/2020/03/Letter-to-SOS-re-Coronavirus.pdf).

<sup>17</sup> Tex. Elec. Code § 82.002.

<sup>18</sup> The Election Code limits voting by mail to those who (1) are 65 or older at the time of the election; (2) expect to be out of their county of residence on election day; (3) are confined in jail but otherwise eligible to vote; or (4) have a disability. *Id.* at §§ 82.001–004.

<sup>19</sup> *Tex. Democratic Party v. Debeauvoir*, No. D-1-GN-20-001610 (201st Dist. Ct., Travis County, Tex. Apr. 17, 2020), *available at* [https://countyclerk.traviscountytexas.gov/images/pdfs/OrderonApplicationForTemporary InjunctionsAndPleaToTheJurisdiction.pdf](https://countyclerk.traviscountytexas.gov/images/pdfs/OrderonApplicationForTemporaryInjunctionsAndPleaToTheJurisdiction.pdf).

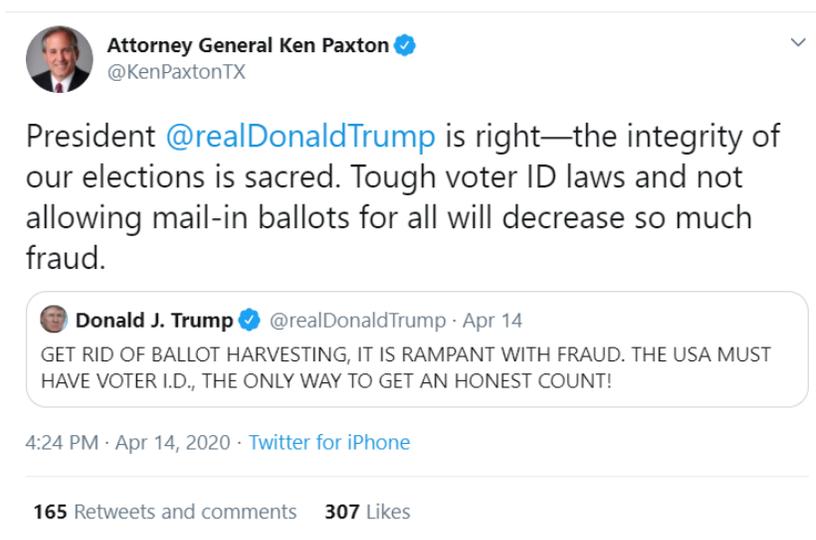
injunction. On May 14, the Texas Fourteenth Court of Appeals granted an emergency motion to reinstate the injunction pending final resolution of the appeal.<sup>20</sup>

Rather than wait for regular resolution of the appeal, Texas sidestepped the process by bringing an original proceeding seeking a contrary holding in the Texas Supreme Court. The Texas Supreme Court obliged, and issued its decision, explained below, on May 20.

### b. *Paxton's Campaign of Intimidation*

While this dispute played out in the state courts, Paxton engaged in a jaw-dropping campaign to undermine the district court's decision by intimidating voters and grassroots organizations.

On April 14, one day prior to the district court's bench ruling, Paxton sent a letter to the Chair of the Texas House Elections Committee stating that any third party who advised voters to apply for a mail-in ballot on the basis of "fear" of the coronavirus would be subject to criminal sanctions.<sup>21</sup> That same day he took to Twitter to denounce the specter of voter fraud if vote by mail were expanded:



Then, on April 15, immediately after the Texas district court's bench ruling, he issued a press release stating the court had "unlawful[ly]" expanded vote by mail and "undermine[d] the security and integrity of our elections," thereby "facilitat[ing] fraud."<sup>22</sup> Paxton misleadingly claimed that the district

<sup>20</sup> *State v. Tex. Democratic Party*, --- S.W. 3d ----, 2020 WL 3022949, at \*1 (Tex. App.—Houston [14th Dist.] May 14, 2020, no pet.).

<sup>21</sup> Letter from Ryan M. Vassar, Deputy Att'y Gen. for Legal Counsel, Att'y Gen. of Tex., to Stephanie Klick, Chair, Comm. on Elections, Tex. House of Representatives (Apr. 14, 2020), available at <https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/4.14.20%20Letter%20to%20Rep.%20Klick.pdf>.

<sup>22</sup> Texas Attorney General Press Release, *AG Paxton: Voting by Mail Because of Disability Must be Reserved for Texans Suffering from Actual Illness or Mental Problems*, (April 15, 2020), available at <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-voting-mail-because-disability-must-be-reserved-texans-suffering-actual-illness-or-medical>.

court had ruled that fear of the coronavirus constituted a disability, rather than a lack of immunity.<sup>23</sup> Finally, on May 1, he issued a statewide letter to all Texas’s county judges and county election officials. He again misstated the district court’s ruling and warned that advising voters to apply to vote by mail due to fear of the coronavirus constituted criminal election fraud.<sup>24</sup>

To be clear: Paxton’s letters and tweets lack the force of law. Particularly as the courts were quickly acting to address the underlying legal dispute, Paxton’s acts served no discernable legitimate purpose—instead, they were naked attempts to use the power of the State of Texas to intimidate Texans from voting. Indeed, as explained below, his threats of criminal prosecution were so blatantly egregious that a federal district court later ruled he had likely violated the First Amendment as well as the Voting Rights Act of 1965.

### *c. Federal Court Litigation*

While the state litigation was pending, the Texas Democratic Party and voters filed suit in federal court in San Antonio challenging Texas’s mail-in ballot scheme as unconstitutional and naming Paxton, among others, as a defendant.<sup>25</sup> After the Texas district court issued its temporary injunction, but before the Texas Supreme Court had weighed in, the plaintiffs moved for a preliminary injunction. They sought much the same relief as in state court and additionally requested the court enjoin the defendants from threatening voters and others with criminal prosecution.

The federal district court issued the preliminary injunction on May 19. It found that Texas’s mail-in ballot statute, as applied during the pandemic, likely violates: (1) the Twenty-Sixth Amendment by allowing voters 65 and over the safe option of voting by mail but not those younger; (2) the Equal Protection clause, because it places an unjustified burden on the right to vote; and (3) the Due Process clause, because it is impermissibly vague.<sup>26</sup> As part of the latter finding, the court pointed to Paxton’s threats to prosecute voters and election officials “who seek to comply with a state court order” as additional evidence of a “lack of guidelines.”<sup>27</sup> The court also held that Paxton had likely violated the First Amendment because his threats suppressed political speech, including the right to vote, as well as the Voting Rights Act of 1965, because his actions amounted to voter intimidation.<sup>28</sup>

The State immediately appealed to the United States Court of Appeals for the Fifth Circuit, which quickly stayed any changes to the vote-by-mail law.<sup>29</sup> Appellate proceedings are ongoing and oral argument was heard on August 31, 2020,<sup>30</sup> but a lift of the stay after full briefing seems unlikely.

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<sup>23</sup> *Id.*

<sup>24</sup> Ken Paxton, Att’y Gen. of Tex., Opinion Letter on Ballot by Mail Based on Disability to County Judges and County Election Officials, (May 1, 2020), available at [https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Mail-in%20Ballot%20Guidance%20Letter\\_05012020.pdf](https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Mail-in%20Ballot%20Guidance%20Letter_05012020.pdf).

<sup>25</sup> *Texas Democratic Party et al. v. Abbott et al.*, 5:20-cv-00438-FB, Doc. 1, Complaint (W.D. Tex. 2020).

<sup>26</sup> *Tex. Democratic Party v. Abbott*, --- F. Supp. 3d ----, 2020 WL 2541971, at \*26–28, 29–30, 31–32 (W.D. Tex. May 19, 2020).

<sup>27</sup> *Id.* at \*30.

<sup>28</sup> *Id.* at \*28–29.

<sup>29</sup> See *Hinojosa v. Abbott*, 2020 WL 2616080 (5th Cir. May 20, 2020) (per curiam); *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. June 4, 2020).

<sup>30</sup> See generally *Tex. Democratic Party v. Abbott*, No. 20-50407 (5th Cir. May 19, 2020).

#### d. *Texas Supreme Court Decision*

The Texas Supreme Court issued its opinion on May 20, focusing on whether lack of immunity to the coronavirus constitutes a “physical condition” posing a “likelihood of injury” to the voter’s health, both of which are required for it to qualify as a “disability” under the Texas Election Code. Seven of the nine justices held that a lack of immunity alone never constitutes a “physical condition” under the first prong of the definition.<sup>31</sup> Two justices disagreed, but nevertheless determined that the requirement of a “likelihood” of injury necessitates a voter-by-voter analysis that precludes broadly allowing *all* eligible voters lacking immunity to qualify to vote by mail solely on that basis.<sup>32</sup>

In the end, what all nine justices agreed upon was that Texas had “placed in the hands of the voter the determination of whether in-person voting will cause a likelihood of injury due to a physical condition,”<sup>33</sup> based on the voter’s own assessment of the totality of their circumstances, and that local election officials have no duty to inquire into *why* any voter has requested a mail-in ballot on the basis of a disability.<sup>34</sup> The Court otherwise provided little guidance on what other factors a voter may or should take into consideration in carrying out this self-assessment, such as whether serious underlying conditions or comorbidities that increase the risk posed by the coronavirus would provide a lawful basis, in combination with a lack of immunity, for voting by mail.

The Texas Supreme Court’s ruling is, for now, the confusing final word. This means Texans must judge for themselves whether they are eligible to vote by mail during the pandemic, balancing that a lack of immunity to coronavirus can be one criteria but not the sole criteria. Voters should be able to seek comfort in the Texas Supreme Court’s admonishment that county election officials are expected to take voters at their word. But Paxton’s threats of criminal prosecution still loom. As election law expert Professor Richard Hasen summarized, the Texas Supreme Court’s ruling has made “a Lone Star-size mess of the state’s law on [mail] balloting” and its “don’t ask don’t tell policy is a recipe for disaster” that “leave[s] open the possibility for Paxton to frighten possibly qualifying voters into not voting, or to go after those who do.”<sup>35</sup>

#### ii. **Now, the State is Seeking to Stymie Local Election Officials**

Caught in the middle are local election officials who have been forced to navigate the confusing legal guidance while preparing for the predictable surge in voting by mail. After seeing a 100% increase in the number of applications for mail-in ballots between March and July, election officials in Harris County (home to Houston) sent applications to every registered voter over the age of 65 prior to the July runoff.<sup>36</sup> More recently, Hidalgo County (home to McAllen) and Bexar County

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<sup>31</sup> *In re State*, 602 S.W.3d 549, 549–561 (Tex. 2020) (Hecht, C.J., joined by Justices Green, Guzman, Lehrmann, Devine, Blacklock, and Busby).

<sup>32</sup> *Id.* at 563–67 (Boyd, J., concurring), 567–73 (Bland, J., concurring).

<sup>33</sup> *Id.* at 561; *see id.* at 562–63 (Guzman, J., concurring) (distilling the court’s ultimate ruling).

<sup>34</sup> In a rare rebuke, Justice Bland singled out Texas’s voter fraud concerns, noting that “the possibility of fraud does not allow for the disenfranchisement of eligible voters who complete an application of a mail-in ballot according to the Election Code.” *In re State*, 602 S.W.3d at 572 (Bland, J. concurring).

<sup>35</sup> Richard Hasen, *Texas Voters Face Malicious Prosecutions After COVID-19 Absentee Ballot Ruling*, SLATE.COM (May 27, 2020), <https://slate.com/news-and-politics/2020/05/texas-supreme-court-voters-covid-19-absentee-ballot.html>.

<sup>36</sup> Alexa Ura, *Texas’ most populous county sending mail-in ballot applications to millions of registered voters*, THE TEXAS TRIBUNE, (Aug. 25, 2020), <https://www.texastribune.org/2020/08/25/texas-vote-by-mail-harris/>.

(home to San Antonio) have similarly decided to send applications to registered voters who are 65 and older prior to the November election.<sup>37</sup> Travis County (home to Austin) is considering the same.<sup>38</sup>

On August 25, 2020, Harris County announced that it intends to send applications for mail-in ballots for the November election to all 2.4 million-plus of its registered voters, with instructions on eligibility drawn from the Texas Supreme Court’s decision.<sup>39</sup> Two days later, Keith Ingram, Director of Elections for Texas Secretary of State Ruth Hughs, sent the county a letter demanding the county “immediately halt” this plan because it would supposedly lead to voter fraud.<sup>40</sup> He threatened that the Secretary would take “appropriate steps” under the Election Code—which allows the Secretary to “seek enforcement of [her] order[s]” through a lawsuit filed by the Attorney General—if the county refused to comply.<sup>41</sup> The county replied by stating that it would include detailed guidance on who qualifies to vote by mail along with its mailing, and that it believed “[p]roviding more information and resources to voters is a good thing, not a bad thing.”<sup>42</sup>

On August 31, Paxton sued Harris County officials on behalf of the State, supported by a declaration from Keith Ingram, in local state court.<sup>43</sup> The State seeks an injunction preventing the Harris County Clerk from sending every registered voter a vote-by-mail application because doing so would allegedly be in excess of his legal authority.<sup>44</sup> That same day, the Harris County Republican Party, joined by a Republican nominee for Harris County district court and an individual voter, *also* sued Harris County, this time in an original proceeding at the Texas Supreme Court.<sup>45</sup> They seek the same: an order prohibiting Harris County from sending applications to all registered voters.<sup>46</sup>

The State’s aggressive litigation tactics once again proved successful. On September 1, Harris County Clerk Chris Hollins decided to put the county’s broader plan on hold until resolution of the State’s case, but to continue sending applications to voters 65 and over.<sup>47</sup> This voluntary decision became compulsory the next day when the Texas Supreme Court granted the emergency motion before it and ordered Hollins “to refrain from sending applications to vote by mail to registered voters under the age of 65 who have not requested them until five days after a temporary injunction ruling

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Alexa Ura, *Texas tells Harris County to halt plan to send all voters applications for mail-in ballots*, THE TEXAS TRIBUNE, (Aug. 28, 2020), <https://www.texastribune.org/2020/08/28/mail-in-ballots-texas-harris-county/>; Letter from Keith Ingram, Director of Elections for the Texas Secretary of State’s Office to Chris Hollins, Harris County Clerk, (Aug. 27, 2020), available at [https://static.texastribune.org/media/files/9078f160593df832d2704969c73628c5/SOSLetter\\_HarrisCountyVBM.pdf](https://static.texastribune.org/media/files/9078f160593df832d2704969c73628c5/SOSLetter_HarrisCountyVBM.pdf).

<sup>41</sup> *Id.* (citing Tex. Elec. Code § 31.005).

<sup>42</sup> Alexa Ura, *Texas tells Harris County to halt plan to send all voters applications for mail-in ballots*, THE TEXAS TRIBUNE, (Aug. 28, 2020), <https://www.texastribune.org/2020/08/28/mail-in-ballots-texas-harris-county/>.

<sup>43</sup> *State of Texas v. Hollins*, No. 2020-52383 (61st Dist. Ct., Harris County, Tex. Aug. 31, 2020).

<sup>44</sup> *See id.*, Original Petition for Writ of Mandamus.

<sup>45</sup> *In re Steven Hotze, M.D., Harris County Republican Party, and Sharon Hemphill*, No. 20-0671 (Tex. Aug. 31, 2020), docket available at <http://search.txcourts.gov/Case.aspx?cn=20-0671&coa=cossup>.

<sup>46</sup> *Id.*

<sup>47</sup> Schaefer Edwards, *Harris County Clerk Holds Off On Mail-In Ballot Application Plan, For Now*, HOUSTON PRESS, (Sept. 1, 2020), <https://www.houstonpress.com/news/harris-county-clerk-reverses-on-mail-in-ballot-applications-11492468>.

in [the other case.]”<sup>48</sup> This mess prompted even private business leaders to weigh in; Charles Butt, the C.E.O. of H.E.B—a beloved grocery retailer and Texas’s largest private employer—sent a letter to the Court that same day stating that “[i]t’s always been my impression that the more people who vote, the stronger our democracy will be” and commenting that the Court’s decision appeared to put its “non-partisan reputation . . . in jeopardy.”<sup>49</sup>

The Secretary of State’s actions here stand in stark contrast to her repeated claims in federal court that the Texas Election Code does not grant her office the authority to force local election authorities to do *anything*.<sup>50</sup> Her actions against Harris County also further call to question her failure to provide oversight of other aspects of voting, including her failure to ensure a sufficient number of polling places in each county.

### iii. Texas’s Inaction Despite Warnings from the U.S. Postal Service

On July 30, 2020, the United States Postal Service warned the Texas Secretary of State that Texas’s “deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service’s delivery standards,” which “creates a risk that [mail-in] ballots requested near the deadline under state law will not be returned by mail-in time to be counted.”<sup>51</sup>

Governor Abbott has previously claimed and exercised emergency power during the pandemic to alter or suspend certain deadlines and requirements under the Election Code.<sup>52</sup> On August 24, 2020, 48 civil rights organizations, including TCRP, wrote to Abbott explaining several actions he could take to alter or suspend vote by mail-related deadlines and requirements under the Election Code and mitigate the risk identified by the Postal Service.<sup>53</sup> The organizations took no stance on whether this

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<sup>48</sup> *In re Steven Hotze, M.D., Harris County Republican Party, and Sharon Hemphill*, No. 20-0671 (Tex. Aug. 31, 2020), Miscellaneous Order of September 2, available at <https://www.txcourts.gov/supreme/orders-opinions/2020/september/september-2-2020/>.

<sup>49</sup> Abigail Rosenthal, *H-E-B- CEO backs Harris County Clerk’s plan for mail-in ballots in letter to Texas Supreme Court*, HOUSTON CHRONICLE, (Sept. 3, 2020), <https://www.houstonchronicle.com/business/article/H-E-B-Charles-Butt-backs-Harris-County-clerk-s-15540627.php>.

<sup>50</sup> Texas Secretary of State’s Motion for Summary Judgment, *Richardson et al. v. Texas Secretary of State et al.*, 5-19-cv-00963, Doc. 70 at 11–13 (W.D. Tex. 2019) (“[T]he Secretary cannot compel local election elections to review mail-in-ballot applications in any particular way” and can at most issue non-binding “advice”); Texas Secretary of State’s Response to Plaintiffs’ Motion for Summary Judgment, *Flores et al. v. Hughs et al.*, 7-18-cv-113, Doc. 96 at 2–3 (S.D. Tex. 2018) (The Texas Election Code “does not provide [the Secretary] the power to coerce local officials” and “the Secretary is empowered to provide advice and guidance to election officials, but the Secretary cannot force compliance.”).

<sup>51</sup> Letter from Thomas Marshall to Secretary of State Ruth Hughs, (July 30, 2020), available at <https://drive.google.com/file/d/1UGSxc9XcMv8oaCn1-9UZL86bA4-xi5iA/view>.

<sup>52</sup> See Proclamation of Governor Greg Abbott, (Mar. 20, 2020), available at [https://gov.texas.gov/uploads/files/press/PROCLAMATION\\_COVID-19\\_May\\_26\\_Primary\\_Runoff\\_Election\\_03-20-2020.pdf](https://gov.texas.gov/uploads/files/press/PROCLAMATION_COVID-19_May_26_Primary_Runoff_Election_03-20-2020.pdf);

Proclamation of Governor Greg Abbott, (May 11, 2020), available at <https://gov.texas.gov/news/post/governor-abbott-issues-proclamation-regarding-july-4th-early-voting-for-special-runoff-elections>;

Proclamation of Governor Greg Abbott, (July 27, 2020), available at <https://gov.texas.gov/news/post/governor-abbott-issues-proclamation-extending-early-voting-period-for-november-3rd-election>.

<sup>53</sup> Letter to Governor Abbott, (August 24, 2020), available at <https://txcivilrights.org/wp-content/uploads/2020/08/Letter-to-Governor-re-Post-Office-Issues.pdf>. This included suggestions to (1) require county election officials to accept mail-in ballots up to seven days after Election Day, so long as postmarked by 7 p.m. on that day or delivered via a type of mail not subject to postmarking; (2) eliminate the requirement

or any previous exercise of emergency powers was lawful. Instead, they noted that such action would be consistent with the Governor’s previous conduct and would alleviate the concerns identified by the Postal Service.<sup>54</sup> Abbott has yet to take any action in response.

#### iv. **Flaws in the Texas Election Code’s Implementation of Vote by Mail**

Making matters worse, the State’s most recent efforts to limit safe voting opportunities rest on top of already problematic law. Under the Texas Election Code, local election officials are permitted to reject a voter’s mail-in ballot based on their subjective, untrained determination that the voter’s signatures do not match, and to withhold notice of that rejection until after the election. The Code also draws an arbitrary distinction between “regular” mail-in ballot and “emergency” ballot voters, so that an individual’s ability to submit an absentee ballot may depend entirely on when they are diagnosed with coronavirus (or any other debilitating illness)—even if that occurs substantially prior to the election. TCRP is challenging these unlawful statutes in court, but may not be able to achieve a victory in time to help Texas voters this fall. Of course, even with record evidence of the ways these discriminatory laws suppress voting, the State continues to defend them.

##### a. *The Signature Matching Process*

The Texas Election Code generally requires a panel of volunteers from the community, called the Early Voting Ballot Board (“EVBB”), to determine whether to accept or reject a mail-in ballot.<sup>55</sup> In practice, EVBBs are often composed of party activists. The EVBB must compare the signature on a voter’s application to vote by mail with the signature on the carrier envelope containing the ballot.<sup>56</sup> If the EVBB determines these signatures do not match, it may reject the ballot.<sup>57</sup> It is not required to inform the voter that their ballot has been rejected until 10 days *after* the election, at which point the voter has no recourse.<sup>58</sup>

Expecting layperson panels of volunteers to make this signature determination is obviously flawed on its face; worse, these volunteers regularly have strong ideological views about the “right” election results. Errors are guaranteed and voters who have complied with every requirement of the Election Code will nonetheless be disenfranchised. Moreover, national studies show that people of color are more likely to have their ballots rejected, raising significant race equity concerns.<sup>59</sup>

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that mail-in ballot applications submitted electronically be followed by a hard copy via mail; (3) allow voters to deliver a marked mail ballot in person to secure, county-controlled boxes located at early voting sites and/or early voting clerk offices, consistent with how ballots are deposited in the mail under all other circumstances.

<sup>54</sup> *Id.*

<sup>55</sup> Tex. Elec. Code § 87.001 *et seq.*

<sup>56</sup> *Id.* at § 87.041(b)(2).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at § 87.043.

<sup>59</sup> See Jane C. Timm, *A white person and a Black person vote by mail in the same state. Whose ballot is more likely to be rejected?*, NBC NEWS, (Aug. 9, 2020), <https://www.nbcnews.com/politics/2020-election/white-person-black-person-vote-mail-same-state-whose-ballot-n1234126>; see also Daniel A. Smith, American Civil Liberties Union of Florida, *Vote-By-Mail Ballots Cast in Florida*, (Sept. 19, 2018), available at [https://www.aclufl.org/sites/default/files/aclufl\\_-\\_vote\\_by\\_mail\\_-\\_report.pdf](https://www.aclufl.org/sites/default/files/aclufl_-_vote_by_mail_-_report.pdf) (review of 2012 and 2016 general election data in Florida shows that younger and racial and ethnic minority voters are significantly more likely than older and white voters to have their mail-in ballots rejected, including for alleged signature mismatches); Anna Bariner,

Similar signature matching statutes have been struck down by federal courts in New Hampshire, Illinois, Florida, Georgia, and North Dakota.<sup>60</sup>

Two Texas voters whose ballots were incorrectly rejected and several community organizations, represented by TCRP, sued last year to challenge the signature comparison process.<sup>61</sup> The federal district court is expected to issue a final judgment soon. Unfortunately, in recent court filings, the State has already signaled its intention to immediately try to block any pro-voter ruling from going into effect prior to November.

### **b. *Emergency Ballot Discrepancies***

Under Texas law the deadline to apply for a mail-in ballot under the “disability” qualification is 11 days prior to Election Day.<sup>62</sup> If a voter becomes disabled after this deadline they must apply for a so-called “emergency absentee” ballot.<sup>63</sup> This requires them to submit a doctor’s certification confirming their illness.<sup>64</sup> In contrast, regular mail-in ballot voters are not required to “prove” their illness or disability.

Two instances of late-identified disabilities during the July primary run-off cast this differential treatment into stark relief. Linda Harrison was diagnosed with the coronavirus on the cutoff day to apply for a mail-in ballot, and her husband Vernon Webb was diagnosed one week later. Both were ordered by county health officials to strictly quarantine and thus could not vote in person. It was only one day before the election that they learned they needed a doctor’s note to cast an emergency ballot and, given the strain on healthcare workers, had difficulty reaching their providers on short notice. TCRP represented them in an Election Day litigation but was unsuccessful. Ms. Harrison’s doctor got back to her that same evening and she managed to cast her ballot at the last minute, after a TCRP intern hand-delivered it to the clerk’s office four minutes before the deadline. Mr. Webb was not able to vote.<sup>65</sup>

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Michael C. Herron, Daniel A. Smith, Election Law Journal, *Voting by Mail and Ballot Rejection: Lesson from Florida for Elections in the Age of the Coronavirus*, (April 25, 2020), available at [https://electionscience.clas.ufl.edu/files/2020/04/Baringer\\_Herron\\_Smith\\_VBM\\_FL.pdf](https://electionscience.clas.ufl.edu/files/2020/04/Baringer_Herron_Smith_VBM_FL.pdf) (similar conclusion based on data from 2016 and 2018 general elections in Florida); Enrijeta Shino, Mara Suttman-Lea, Daniel A. Smith, Election Law Journal, *Voting by Mail in a VENMO World: Assessing Rejected Absentee Ballots in Georgia*, (May 19, 2020), available at [https://electionscience.clas.ufl.edu/files/2020/05/GA\\_Venmo.pdf](https://electionscience.clas.ufl.edu/files/2020/05/GA_Venmo.pdf) (similar conclusion for 2018 general election in Georgia).

<sup>60</sup> *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017 (N.D. Fla. 2018); *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312 (11th Cir. 2019); *Fla. Democratic Party v. Detzner*, 2016 WL 6090943 (N.D. Fla. Oct. 16, 2016); *Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018); *Saucedo v. Gardner*, 335 F. Supp. 3d 202 (D.N.H. 2018); *Zessar v. Helander*, 2006 WL 642646 (N.D. Ill. March 13, 2006); *Self Advocacy Solutions N.D. v. Jaeger*, --- F. Supp. 3d ---, 2020 WL 2951012 (D. N.D. June 3, 2020).

<sup>61</sup> *Richardson et al. v. Texas Secretary of State et al.*, 5-19-cv-00963 (W.D. Tex. 2019); see also *Flores et al. v. Hughs et al.*, 7-18-cv-113 (S.D. Tex. 2018) (similar challenge to signature matching procedure).

<sup>62</sup> Tex. Elec. Code § 84.007(c).

<sup>63</sup> *Id.* at § 102.001 *et seq.*

<sup>64</sup> *Id.* at § 102.002.

<sup>65</sup> Alexa Ura, *It took a doctor’s note and mad dash to Sonic for this coronavirus sufferer to vote*, THE TEXAS TRIBUNE, (July 14, 2020), <https://www.texastribune.org/2020/07/14/texas-coronavirus-mail-in-ballot/>; Paul Flahive, *It’s Ridiculous’: States Struggle To Accommodate COVID-19 Positive Voters*, NPR.ORG, (AUG. 9, 2020),

In July, an estimated 99,000 Texans were diagnosed with coronavirus between the deadline for a “regular” mail-in ballot and Election Day.<sup>66</sup> Still today, thousands of Americans are contracting the coronavirus on a daily basis and there is no indication that things will significantly improve by November.<sup>67</sup> It is inevitable that some Texas voters will contract the coronavirus (or any other debilitating illness) after the regular mail-in ballot deadline and ultimately be disenfranchised due to this arbitrary, differential treatment.

**v. Texas is not Prepared for the Anticipated Increase in Mail-in Ballots**

Despite the State’s efforts to limit voting by mail, it surged during Texas’s July Primary Runoff. And, just as predictably, Texas’s election infrastructure showed signs of severe strain. TCRP spearheads the Texas Election Protection Coalition, and we received thousands of reports from voters across Texas who experienced difficulties voting. This included a host of administrative and logistical challenges with voting by mail—reports of mail-in ballots being returned to voters because of a problem scanning barcodes on the return envelopes correctly, of voters receiving mail-in ballots with labels misidentifying their reason for qualifying, of voters having trouble accessing emergency ballots after having been infected by the coronavirus, of voters receiving their mail-in ballots too late to return before the election, and of voters flat-out not receiving their mail-in ballots at all.<sup>68</sup>

Given that the number of people voting by mail this November will be substantially higher, the need to bolster Texas’s vote by mail infrastructure to handle what may be a vote-by-mail tsunami is clear. These practical difficulties—in conjunction with the State’s proven hostility to the concept, the Attorney General’s threats of prosecution, the Secretary of State’s litigation against local jurisdictions, and the State’s refusal to take action to accommodate the U.S. Postal Service’s delivery standards—threaten to significantly suppress access to the ballot this November. We fear that historically marginalized voters will bear the brunt of this suppression, particularly Black and Latinx Texans and women.

**B. While Texas Has Expanded the Period of Time for In-Person Voting, State Officials Have Failed to Take Other Critical Steps**

On July 27, Governor Abbott used his emergency powers to take two important steps toward facilitating safe in-person voting this November: adding six days to the early voting period, so that it now spans from Tuesday, October 13 through Friday, October 30, and allowing voters to cast mail-in ballots in person to the early voting clerk’s office prior to and on Election Day. Both are

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<https://www.npr.org/2020/08/09/900317332/it-s-ridiculous-states-struggle-to-accommodate-covid-positive-voters>.

<sup>66</sup> See Cases over Time by County, Texas COVID-19 Data, Texas Department of State Health Services, available at <https://dsbs.texas.gov/coronavirus/additionaldata.aspx> and <https://dsbs.texas.gov/coronavirus/TexasCOVID19DailyCountyCaseCountData.xlsx>. The difference in total coronavirus cases Texas reported on July 2 (the last day to apply for an application to vote by mail, with a total of 175,977 cases) and July 14 (the day of the election, with a total of 275,058 cases) is 99,081 cases.

<sup>67</sup> See COVID-19 Projections, The Institute for Health Metrics and Evaluation, University of Washington, available at <https://covid19.healthdata.org/united-states-of-america>; see also COVID-19 Forecasts: Deaths, Centers for Disease Control and Prevention, available at <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/forecasting-us.html>.

<sup>68</sup> A TCRP report chronicling these issues and making recommendations to Texas election officials is forthcoming and will be provided to this Committee as soon as it is released.

commendable acts and, as noted in this proclamation, will promote “appropriate social distancing and safe hygiene practices.”<sup>69</sup>

At the same time, State officials have failed to take other commonsense steps to ensure that in-person voting in Texas actually comports with CDC recommendations—or with Texas law.<sup>70</sup> The Texas Secretary of State (who answers directly to Texas Governor Greg Abbott) is the chief election official of Texas by law, and has a responsibility to ensure that the voting experience is uniform and that state laws are followed. That’s why her inaction around polling places and poll workers is deeply troubling, particularly when contrasted with her aggressive actions to halt Harris County from broadly mailing vote-by-mail applications.

Critically, the CDC recommends “maintain[ing] or increas[ing] the total number of polling places available to the public on Election Day to improve the ability to social distance.”<sup>71</sup> This directive is vitally important in Texas, given our dubious track record. As of September 2019, Texas had closed at least **750** polling places with impunity,<sup>72</sup> following the Supreme Court’s disastrous 2013 *Shelby County* decision, which eliminated federal oversight of Texas’s election practices.<sup>73</sup> Numerous recent studies, including one released by TCRP earlier this year,<sup>74</sup> have confirmed that Texas counties routinely violate Texas law by providing too few polling places, with disparate impacts felt in communities of color. Indeed, after reviewing several of these studies and conducting its own investigation, *The Guardian* concluded in March 2020 that “the places where the [B]lack and Latinx population is growing by the largest numbers have experienced the vast majority of the state’s poll site closures.”<sup>75</sup> And that was **before** the COVID pandemic added further complications to selecting and confirming polling places.

But Texas has taken an “it is what it is” approach, seemingly allowing each county to police itself. For instance, in a June 18, 2020 Election Advisory (No. 2020-19), the Secretary includes a section about polling place siting, but includes no directions whatsoever as to the quantity of polling places.<sup>76</sup> There is no indication that State officials plan to provide any oversight as counties set polling places for the November election, not even to ensure that counties comply with the bare minimum required by current law, let alone to ensure that polling place decisions do not harm communities of color.

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<sup>69</sup> See Proclamation of Governor Greg Abbott, (July 27, 2020), available at <https://gov.texas.gov/news/post/governor-abbott-issues-proclamation-extending-early-voting-period-for-november-3rd-election>. A partisan group has sued the State, seeking to roll back these additional early voting days. As of this date, nothing has happened in that litigation past the filing of the initial complaint. See generally *Hotze et al. v. Hughs*, No. D-1-GN-20-004344 (459th Dist. Ct., Travis County, Tex. Aug. 20, 2020).

<sup>70</sup> Considerations for Election Polling Locations and Voters, Centers for Disease Control, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

<sup>71</sup> *Id.*

<sup>72</sup> The Leadership Conference Education Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* at 26–28, (Sept. 2019), available at <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>.

<sup>73</sup> *Shelby County v. Holder*, 570 U.S. 529 (2013).

<sup>74</sup> Letter to Secretary of State Ruth Hughs regarding Texas counties providing fewer polling places than required by law, (May 13, 2020), <https://texascivilrightsproject.org/wp-content/uploads/2020/05/2020-05-13-SOS-Letter-Polling-Places.pdf>.

<sup>75</sup> Richard Salame, *Texas closes hundreds of polling sites, making it harder for minorities to vote*, THE GUARDIAN, (Mar. 2, 2020), <https://www.theguardian.com/us-news/2020/mar/02/texas-polling-sites-closures-voting>.

<sup>76</sup> Election Advisory No. 2020-19 to County Clerks/Elections Administrators and County Chairs, (June 18, 2020), available at <https://www.sos.state.tx.us/elections/laws/advisory2020-19.shtml>.

Moreover, during the March Primary Election and the July Primary Runoff Election, the Texas Election Protection Coalition received numerous reports of polling places opening late, or not at all, due to poll worker shortages. In March, for instance, several polling places in Travis County (home to Austin) opened late because poll workers decided to stay home at the last minute, citing fears of contracting COVID.<sup>77</sup> Bexar County (home to San Antonio) announced the closure of three polling places just days before the July election, leaving voters little time to receive notice of the change and plan accordingly. So far, several local election officials have publicly raised concerns about poll worker shortages, including officials in Tarrant County (home to Fort Worth) who described poll workers abruptly quitting before the July election when they realized voters would not be required to wear masks at the ballot box.<sup>78</sup>

These are all ominous signs for November, particularly as poll workers are likely to be older Texans who are most at risk from COVID.<sup>79</sup> But the State has taken no active steps to assist counties with poll worker recruitment, instead leaving the process entirely in the hands of local election officials—with civil society organizations like TCRP trying to pick up their slack.

The State has also undermined another key tenant of CDC recommendations—the importance of masks at the polling place. Masks have emerged as one of our best tools to prevent the spread of COVID and are critical to community safety in situations where maintaining six feet of distancing is not feasible. Recognizing this, Governor Abbott issued a statewide mask mandate on July 2. But that mandate, Executive Order No. GA-29, exempts not just voters, **but poll workers and poll watchers**.<sup>80</sup>

To be sure, requiring a voter to wear a mask as a condition for exercising her fundamental right to vote raises constitutional questions which may justify Abbott’s decision.<sup>81</sup> There is no apparent justification, however, for failing to require masks of poll workers—who are performing a paid service—or poll watchers—who are political party activists at the polls with limited rights to oversee the voting process. Instead, Abbott’s decision further drags Texas voters into a Catch-22 between their safety and their right to vote. Because the State has refused to allow most Texans the opportunity to vote by mail, they must vote in person. But to vote in person, they must risk close encounters with

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<sup>77</sup> Ashley Lopez, *Texas Elections Are Going To Be Hard To Staff, So Voting Groups Plan To Recruit Poll Workers*, KUT.ORG, (May 27, 2020), <https://www.kut.org/post/texas-elections-are-going-be-hard-staff-so-voting-groups-plan-recruit-poll-workers>.

<sup>78</sup> Alexa Ura, *Two major Texas counties are trimming polling locations as workers pull out over coronavirus*, THE TEXAS TRIBUNE, (July 9, 2020), <https://www.texastribune.org/2020/07/09/texas-voting-coronavirus/>.

<sup>79</sup> See, e.g., John C. Mortiz, *Texas primary runoffs: Despite COVID-19, poll workers prep for July 14 election*, AUSTIN AMERICAN-STATESMAN, (Jun. 23, 2020), <https://www.statesman.com/news/20200621/texas-primary-runoffs-despite-covid-19-pandemic-poll-workers-prep-for-july-14-election> (87 percent of Texas poll workers are over 60); EAVS Deep Dive, U.S. Election Assistance Commission, available at [https://www.eac.gov/sites/default/files/document\\_library/files/EAVSDeepDive\\_pollworkers\\_pollingplaces\\_nov17.pdf](https://www.eac.gov/sites/default/files/document_library/files/EAVSDeepDive_pollworkers_pollingplaces_nov17.pdf) (24 percent of poll workers were 71 or older and 32 percent were between 61 and 70 during 2016 elections).

<sup>80</sup> Executive Order GA-29 relating to the use of face coverings during the COVID-19 disaster, (July 2, 2020), available at <https://open.texas.gov/uploads/files/organization/opentexas/EO-GA-29-use-of-face-coverings-during-COVID-19-IMAGE-07-02-2020.pdf>.

<sup>81</sup> Provided that masks are freely available to all voters, I believe that a mask mandate *is* constitutional under the *Anderson-Burdick* framework the U.S. Supreme Court has developed. See *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

people not wearing masks—a risk not present while grocery shopping, getting gas, or doing any other essential tasks.

### **III. RECOMMENDATIONS TO PROTECT TEXAS’S DEMOCRACY**

The following commonsense steps can and should be taken immediately. Each is within the scope of power held by the Secretary of State’s office or is consistent with the emergency power already exercised by Governor Abbott during this pandemic, pursuant to Section 418.016 of the Texas Government Code.

#### **A. Secretary of State Recommendations**

- i. The Secretary of State should clarify “disability” standards for voting by mail and publicize those standards through a press release and via other robust public education efforts, including by requiring the standards be posted on each Texas county’s website. TCRP has previously recommended the following clarifying language:

The Texas Supreme Court recently clarified that a voter is the one best situated to determine whether he or she has a “disability” that qualifies them to vote by mail under Texas law during the COVID pandemic.

To qualify under the disability standard, a voter must have a physical condition, “for example a heart condition,” that presents a likelihood they will injure their health if they vote in person. The Court ruled that merely having a lack of immunity to COVID-19 without other underlying physical conditions does not make an individual eligible to vote by mail. But the Court further stated, “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.” Factors to consider could include “the nature of the person’s sickness or physical condition, the person’s health history, the nature and level of the risk that in-person voting would pose in light of the particular sickness or physical condition, the adequacy of safety and sanitation measures implemented at and near the polling place to reduce that risk, and the level of caution the voter exercises.”

Centers for Disease Control lists individuals with the following physical conditions as being part of “Groups at Higher Risk for Severe Illness” due to COVID-19, although voters must make individualized determinations based on all of their particular factors:

- Asthma
- Chronic kidney disease being treated with dialysis
- Chronic lung disease
- Diabetes
- Hemoglobin Disorders
- Immunocompromised
- Liver disease
- Serious heart conditions

- Severe obesity

The County [Clerk/Election Administrator]’s Office accepts all mail ballot applications that have been properly marked—our office has no legal authority to administratively require voters to substantiate their disability at the time the application is submitted. Voters must determine whether they meet the eligibility guidelines for voting by mail based on their individual circumstances.

- ii. As counties are about to be faced with a significant uptick in voters seeking to vote by mail, the Secretary should also provide best practices to counties on mail-in voting. Best practices should include all counties mailing postage-paid vote-by-mail applications to all voters 65 or older. The Secretary should use her statutory authority to direct any available funds to counties to ensure timely processing of applications and mailing of ballots, including using any available funds (including from the recent stimulus package 8 passed by Congress) to pay for voters’ postage.
- iii. No later than September 18, the Secretary should issue an “Election Advisory” to counties concerning polling place locations and set-up:
  - a. Strongly recommending that the number of polling places do not drop below 2016 levels. Any county planning more than a 2% reduction in polling places compared to 2016 must report that fact to your office by October 5 with justification. Counties should also calibrate the number of polling places to account for population growth in the intervening years.
  - b. Requiring counties to post their planned polling locations for Election Day by October 5.
  - c. Issuing new guidelines around curbside voting so that eligible voters can be processed as they drive up to designated areas without them having to go inside to request curbside voting.
  - d. Emphasizing the requirement that polling places comply with the Americans with Disabilities Act.
- iv. The Secretary should provide detailed guidance for all Early Voting Ballot Board and Signature Verification Committee members on how to verify signatures on mail-in ballots. Recommend a uniform notice and cure process that requires election officials to provide meaningful notice of prior to rejecting a mail-in ballot (by mail as well as by phone and/or email if such information is provided on a voter’s Application for Ballot by Mail or Federal Post Card Application), and a simple verification procedure to prevent the rejection of their mail-in ballot that can be completed by the voter in-person, by mail, over the phone, or through email or fax.
- v. The Secretary should put out a state-wide call for high school and college students to enroll in local Student Poll Worker Programs to supplement an anticipated decline in poll worker availability.

- vi. The Secretary should use her statutory authority to ensure that every county has sufficient funding to buy the Personal Protective Equipment necessary to fulfill the recommendations in the Secretary of State's Health Protocols, including funds to provide: masks to all poll workers, poll watchers and voters; ample hand sanitizer and disinfectant cleaning supplies for all polls; and tape to mark six-foot increments. She should also create and distribute to counties signage about best hygiene practices as envisioned by the Secretary of State's Health Protocols.
- vii. She should also create and distribute to counties updated poll worker trainings so that the workers are ready to conduct elections in accordance with the Secretary of State's Health Protocols.

## **B. Governor Recommendations**

Governor Abbott has repeatedly claimed “the express authority to suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster” in connection with his modification of deadlines and requirements under the Texas Election Code.<sup>82</sup>

On August 24, 48 civil rights organizations, including TCRP, wrote to Abbott explaining several actions he could take, consistent with this claimed authority, to modify vote by mail-related deadlines and requirements under the Election Code and to mitigate the risk identified by the Postal Service. I reiterate those recommendations here by quoting directly from that letter:

- i. Require county election officials to accept mail-in ballots up to seven days after Election Day, as long as they have either been postmarked by 7 p.m. on Election Day or are delivered via a type of mail not subject to postmarking. This would give voters the entire amount of extra time that the Postal Service has indicated voters need to ensure delivery of their ballots, and would be consistent with timelines already established for overseas mail-in ballots and curing of provisional ballots that already require Early Voting Ballot Boards to meet and approve ballots.
- ii. Eliminate the requirement that, for applications for mail-in ballots submitted electronically (such as by fax or email), that the hard copy must also be mailed and received by the early voting clerk no later than the fourth business day thereafter, and mandate that electronic submission of an application for a ballot by mail is sufficient. Electronic submission of an application for a mail-in ballot provides election officials with all the information they need to process the application, without holding voters' applications hostage to this additional, unnecessary step of submitting them in the mail.
- iii. Allow voters to deliver a marked mail ballot in person to secured, county-controlled boxes located at early voting sites or early voting clerk offices, consistent with how ballots are deposited in the mail under all other circumstances. Voters need as many

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<sup>82</sup> See, e.g., *supra* at note 52 (linking to three proclamations Governor Abbott has issued altering or suspending requirements and deadlines under the Texas Election Code).

options as possible to return their ballots that do not rely solely on the mail, given the Postal Service’s recent warning. Although your recent order providing that voters can return their ballots to the early voting clerk’s office is a good first step, the current situation requires an expansion of delivery locations to guarantee that personal delivery is a viable option for all who want it, and enabling delivery to any early voting location would merely be a modest extension of your July 2020 proclamation. Moreover, voters do not currently need to present photo ID to drop their ballot in their personal, unsecured mailbox or in a USPS mailbox. There is no rationale for not similarly allowing voters to deposit their ballots in secured, county-controlled boxes. These boxes can be routinely monitored and controlled if they are located at early voting sites and/or early voting clerk offices. Given the increased number of Texans who will likely take advantage of this, the requirement to go inside and present an ID when submitting a ballot should be waived to cut down on lines and the burden on elections staff, and this would conform to how voters are otherwise allowed to deposit their ballots in the mail. It should also be noted that there are already procedures in place requiring voters who have not previously had their IDs verified to do so if they are voting for the first time by mail, and these procedures would remain in place.<sup>83</sup>

Governor Abbott should additionally utilize this claimed authority to eliminate the arbitrary distinction the Texas Election Code draws between “regular” mail-in ballot voters and “emergency absentee” ballot voters by suspending the Code’s requirement that emergency absentee ballot voters obtain a doctor’s certification “proving” they are disabled. Specifically, he should suspend the requirement under Texas Election Code section 102.002 that:

[a]n application for a late ballot . . . must include or be accompanied by a certificate of a licensed physician or chiropractor or accredited Christian Science practitioner in substantially the following form:

“This is to certify that I know that \_\_\_\_\_ has a sickness or physical condition that will prevent him or her from appearing at the polling place for an election to be held on the \_\_\_\_\_ day of \_\_\_\_\_, [20]\_\_\_\_, without a likelihood of needing personal assistance or of injuring his or her health and that the sickness or physical condition originated on or after \_\_\_\_\_. . . . [placeholder for notarized signature].”<sup>84</sup>

### **C. Attorney General Recommendation**

- i. The Attorney General, like all prosecutors, has considerable discretion in the exercise of his powers. The Attorney General must issue a public announcement making clear that his office does not intend to prosecute voters for making clerical errors or mistakes, nor prosecute civic engagement organizations seeking to educate and mobilize voters, nor assist local jurisdictions in prosecuting such actions. Paxton should apologize for threatening to use the power of the state to intimidate eligible voters, particularly in a way that seems geared at gaining political

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<sup>83</sup> Letter to Governor Abbott, (August 24, 2020), available at <https://txcivilrights.org/wp-content/uploads/2020/08/Letter-to-Governor-re-Post-Office-Issues.pdf>.

<sup>84</sup> Tex. Elec. Code § 102.002.

advantage for himself and his political party, and affirm his commitment to promoting the safety and success of all of the people of Texas.

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In conclusion, State officials are failing to fulfill their obligation to keep Texas voters safe while advancing our right to vote. Their actions (and inactions) are undermining the fair and free functioning of our Texas democracy, with particularly dire potential consequences for communities of color. There is still time for State officials to step up during this critical moment in our history—but time is running short. They must act now.