

No. 19-1389

IN THE
Supreme Court of the United States

TEXAS DEMOCRATIC PARTY, ET AL.,
Petitioners,

v.

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.,
Respondents.

**On Petition for a Writ of Certiorari before
Judgment to the United States Court of Appeals
for the Fifth Circuit**

**BRIEF OF *AMICI CURIAE* CHRIS HOLLINS,
HARRIS COUNTY CLERK, FORT BEND
COUNTY, DANA DEBEAUVOIR, TRAVIS
COUNTY CLERK, AND CAMERON COUNTY
AND ITS ELECTION ADMINISTRATOR, REMI
GARZA, IN SUPPORT OF PETITIONERS**

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**IDENTITY AND INTERESTS
OF *AMICI CURIAE*¹**

Chris Hollins, Harris County Clerk; Fort Bend County; Dana DeBeauvoir, Travis County Clerk; and Cameron County and its Elections Administrator, Remi Garza, are all individuals and governmental entities with responsibilities for administering elections in Texas (the “Elections Administrators” or “the Counties”).² They believe that unless access to vote by mail is increased significantly, providing a safe election will be impossible because of the expected high volume of voters this presidential year. The Elections Administrators submit this *amici* brief to advise this Court on the mechanics of election administration, particularly vote by mail (“VBM”) procedures and safeguards, and lessons learned from the July 14 primary runoff.

Chris Hollins, the interim County Clerk of Harris County, Texas, has the duty to administer elections in the state’s largest county with 2.4 million registered voters and a highly diverse electorate.

¹ Pursuant to Rule 37, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief’s preparation. All parties received timely notice of and provided written consent to this brief’s filing.

² Depending on local options, the chief election officer in a county is either the elected County Clerk or a quasi-independent Elections Administrator. *See* Tex. Elec. Code §§ 31.031-.049, 31.091, 83.002, 83.032. This brief refers to these officials as either “election administrators” or “election clerks.”

Recently, COVID-19 cases have surged in Harris County and the rest of Texas. Even with its immense and world-renowned medical centers, Harris County hospitals are overwhelmed as the pandemic rages throughout the greater metropolitan area.

Fort Bend County, Texas, is the second-largest county by population in the Houston-metropolitan region, the tenth largest in Texas, and one of the most diverse and fastest-growing counties in the country. The County's population has nearly tripled since 2000 while the ratio of its Anglo population has decreased to 31%, the remainder is almost evenly divided among Latinos, African-Americans, and East and South Asians.

Fort Bend County has not always been at the forefront of voting rights. In 2009, the United States sued the County, principally asserting Voting Rights Act violations, and the County entered into a consent decree agreeing to federal monitoring, increased training, and electoral reporting to the Department of Justice. *See United States v. Fort Bend Cnty.*, No. 4:09-cv-01058 (S.D. Tex. Apr. 9, 2009). Fort Bend County, therefore, joins with *amici* to advocate for the widest and easiest participation of its electorate possible under the law.

Dana DeBeauvoir, the Travis County, has overseen elections for more than 35 years in the fifth largest Texas county which has a high percentage of registered voters and expects a high voter turnout in November of more than 500,000 votes.

Smaller than the other *amici*, Cameron County is the thirteenth largest county in Texas in terms of population and the fifteenth largest county in terms

of registered voters with just over 200,000. Remi Garza is its elections administrator. The southernmost county in Texas and bordering Mexico, Cameron County does not have the resources of an urban or suburban county either for elections or managing a public health crisis.

The Election Administrators' brief reflects the prospective of the state's largest urban county, a rapidly growing and diversifying suburban county, a county clerk with decades of elections administration experience, and a border county with little margin of error for public health crises all with the desire and ability to accommodate increased vote by mail.

SUMMARY OF THE ARGUMENT

The Elections Administrators face impossible circumstances from the COVID-19 pandemic and the legal bind in which the State of Texas, the Secretary of State, and the Texas Supreme Court have placed them. Without this Court enforcing the Twenty-Sixth Amendment's plain terms to allow any qualified voter to vote by mail without regard to age, the Elections Administrators will be unable to conduct the November election without endangering the lives and health of voters and election workers. While the legal issue before the Court is simple — the Twenty-Sixth Amendment's guarantee that the right to vote will not be denied or abridged on account of age — the implications of a failure to enforce that right are complex and severe. The Elections Administrators explain those implications — heightened by the Attorney General's stance — given the intricacies of conducting elections in Texas

and the substantial protections against potential voter fraud that already exist in Texas law.

Dramatically increasing the ratio of VBM voters is crucial to spreading out voter congregation during in-person voting so that social distancing and other safety measures may be effectively implemented to protect those voters who wish to vote in person. The plain language of the Twenty-Sixth Amendment provides that opportunity. *See* U.S. Const. amend. XXVI. The Elections Administrators agree that the Twenty-Sixth Amendment's prohibition on age-based voting restrictions require that all qualified voters be afforded the opportunity to vote by mail under the same conditions imposed on those 65 years of age or older. *See* Tex. Elec. Code § 82.003.

The Elections Administrators additionally urge this Court to promptly grant the petition to facilitate the administrative ease of the election, obviate controversies concerning vague penal statutes, and protect counties from potential lawsuits. The Fifth Circuit declined to grant the Petitioners' motion to expedite in full and assigned the related case to a merits panel sitting the week August 31 leaving the submission date up to the panel and little time for the inevitable appeal to this Court before the November election. A definitive answer by September would provide the Elections Administrators the time needed to prepare for the election. Consequently, this Court should promptly request a response and grant certiorari setting an expedited schedule for decision.

ARGUMENT**I. THE PRIMARY RUNOFF DEMONSTRATED VOTERS’ INTENSE INTEREST IN BOTH VOTING AND VOTING BY MAIL THIS ELECTION YEAR AS TURNOUT AND VOTE-BY-MAIL (“VBM”) APPLICATIONS INCREASED TO HISTORIC LEVELS.**

The recent intense surge of COVID-19 cases in Texas raises the stakes of this Court’s decision for the Elections Administrators and Texas voters. In the last few weeks, Texas has catapulted to the stage of refrigerated morgues parked outside its hospitals as New York City suffered earlier.³ Hospitals across Texas are nearing or at capacity.⁴ The primary runoff results indicate a strong voter interest both in voting and in voting by mail.

Early voting turnout was extraordinarily high for the primary runoff as was the volume of VBM voters compared to in-person voters. Typically, Texas primary runoff elections attract 5% voter turnout, but

³ Jenny Deam and Zach Depart, *‘Code blue’: Texas COVID deaths higher than publicly reported – and spiking*, HOUSTON CHRON., July 11, 2020, <https://www.houstonchronicle.com/news/investigations/article/As-COVID-19-continues-to-slam-Houston-the-death-15400462.php>.

⁴ Lauren Caruba, *‘We’re all fearful of what could happen’: COVID deaths rise in San Antonio as hospitals are pushed to capacity*, SAN ANTONIO EXPRESS-NEWS, July 12, 2020, <https://www.expressnews.com/news/local/article/We-re-all-fearful-of-what-could-happen-15402124.php>; Sarah R. Champagne, *Ten out of 12 hospitals in Texas’ Rio Grande Valley are now full*, TEX. TRIB., July 4, 2020, <https://www.texastribune.org/2020/07/04/texas-coronavirus-rio-grande-valley-hospitals/>.

the July election produced nearly 10% turnout statewide with more than 17% in high engagement counties such as Fort Bend and Travis. For November, the Elections Administrators expect higher than usual turnout, even for a presidential year, and need to safely accommodate six to seven times more voters than in July. For Harris County, that translates to 1.5 to 1.75 million voters up from the 224,305 in July.

VBM applications have likewise increased dramatically. Fort Bend County's application requests increased 59% from the primary to the primary runoff. Harris County's increased 109%. This jump is more remarkable because those who requested an "annual" mail-in ballot, an option available under Texas law for age and "disability" voters but not other categories such as absentee voters, *see* Tex. Elec. Code § 86.0015, are automatically included in the primary runoff and general election mail ballots. Thus, the dramatic increases are entirely additional VBM voters. The total requesting mail-in ballots in the primary runoff exceeded or neared the volume typical for presidential year general elections.

The Harris County Clerk mailed VBM applications to every registered voter 65 or older to increase the VBM ratio and protect the health of older Texans who are more susceptible to COVID-19's more dangerous symptoms.⁵ This outreach paid off

⁵ Taylor Goldenstein, *Texas primary runoffs: Fiery Democratic race for U.S. Senate fuels record turnout*, HOUSTON CHRON., July 13, 2020, <https://www.houstonchronicle.com/politics/texas/>

and appears to have greatly increased the ratio of VBM voters. For the top fifteen counties in terms of registered voters an average of 28.9 percent of Democratic primary voters and 25.6 percent of Republican primary voters voted by mail.⁶ Harris County had the second highest ratios at 40.7 percent and 58.8 percent respectively. With this higher use of vote by mail — even with the high turnout overall — the Counties were able to largely avoid lines during in-person early voting and long lines on Election Day and thus ensure adequate social distancing.

November will be a different scenario given the much higher anticipated voter turnout and larger proportion of younger voters who cannot vote by mail without an excuse. The Counties also urge this Court's intervention because of the Texas Attorney General's aggressiveness in reminding voters and Election Administrators of his powers of felony prosecutions in election matters.⁷

article/Texas-primary-runoffs-Fiery-Democratic-race-for-15405013.php.

⁶ See Tex. Sec. of State, *Primary Runoff Election, Cumulative Totals, Through Close of Business July 10*, <https://earlyvoting.texas-election.com/Elections/getElectionDetails.do>.

⁷ See e.g., *AG Paxton Warns County Officials to Avoid Misleading the Public on Vote by Mail Laws*, June 14, 2020, <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-warns-county-officials-avoid-misleading-public-vote-mail-laws>; *AG Paxton Advises County Officials to Avoid Misleading the Public on Vote by Mail Laws*, May 1, 2020, <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-advises-county-officials-avoid-misleading-public-vote-mail-laws>.

II. THE ELECTIONS ADMINISTRATORS ARE PREPARED TO HANDLE THE INCREASED VBM VOLUME NECESSARY TO PROVIDE SAFE IN-PERSON VOTING IN NOVEMBER.

The Texas VBM statutes contain a myriad of protections against fraud that are completely unaffected by citizens under 65 voting by mail. While the Secretary of State (“SOS”), the Attorney General, and a recent Texas Supreme Court decision have this election headed toward trouble, the Elections Administrators prefer and are prepared to muster resources for a safe November election should this Court enforce voting rights to enable all ages of eligible voters to vote by mail.

A. The Texas VBM system provides multiple methods to identify and expose fraud.

For all practical purposes, Texas elections are administrated by Counties. From registration to counting, the Counties implement the Texas Election Code subject to the SOS’s guidance. *See* Tex. Elec. Code §§ 31.003, 31.004. Early voting — whether by personal appearance or by mail — is conducted under the aegis of the “early voting clerk.” Tex. Elec. Code § 83.001(a). The “early voting clerk” is a county official. *See* Tex. Elec. Code §§ 31.091(a), 83.002. The early voting clerk reviews VBM applications,⁸ Tex. Elec. Code § 86.001, sends the approved

⁸ The SOS Application for Ballot by Mail form is attached in the Appendix. App. 1a. While a voter may use any form that includes certain required data, most emulate this form. *See* Tex. Elec. Code §§ 84.001, 84.002.

applicants their ballots, Tex. Elec. Code § 86.004, and processes the ballots' return, Tex. Elec. Code § 86.011.

Every VBM application and ballot undergoes a rigorous process before acceptance. Before receiving a ballot, an applicant must provide their name and address, then sign under penalty of perjury as a qualified and eligible voter. *See* Tex. Elec. Code § 84.001; SOS Application for Ballot by Mail form [SOS VBM Form], App. 1a. A “qualified” voter is at least 18 years old, a citizen, and registered to vote. Tex. Elec. Code § 11.002. An “eligible” voter is a qualified voter who satisfies the requirements, such as residency, for a particular election. Tex. Elec. Code § 11.001. To provide a ballot the early voting clerk must:

- (1) confirm or correct the applicant's voter registration number or county election precinct of residence on the application, Tex. Elec. Code § 86.001(d);
- (2) note on the list of registered voters that a mail-in ballot was provided, *id.* § 86.001(g);
- (3) send the ballot to a verified address in an official carrier envelope that contains the voter's name and date of election, *id.* §§ 86.002, 86.003; and
- (4) only accept the ballot's return from the official carrier envelope (except when the voter returns it in person with identification or it is contained in another official carrier envelope of a person registered to vote at the same address), *id.* § 86.006(a), (a-1), (b) & (c).

Once a voter submits a mail-in ballot, the Early Voting Ballot Board (“EVBB”) goes to work. *See* Tex. Elec. Code § 87.001. This bi-partisan committee of citizens process the ballots by making sure:

- the carrier envelope has been properly executed;
- the voter’s signature on the carrier envelope matches that on the VBM application;
- the voter’s VBM application states a legal ground for vote by mail;
- the voter is in fact registered to vote; and
- the ballot was mailed to the proper address, among other tasks.

Tex. Elec. Code § 87.041(b). Only when the EVBB has determined a ballot meets these requirements will it accept it for counting. Tex. Elec. Code § 87.041(a), (c). Then ballots are separated from the envelopes and prepared for counting.⁹ To ensure voters do not vote twice a “poll book” is kept electronically where election workers note when a ballot has been issued to a voter whether by mail or in person. Tex. Elec. Code §§ 63.003, 86.001(g), 87.122(a). If a voter who received a mail-in ballot then wishes to vote in person, the voter must surrender that ballot which is documented. Tex. Elec. Code § 84.032(c). This rigorous statutory scheme ensures that any anomaly — whether fraud or mistake — is easy to identify.

⁹ Tex. Elec. Code § 87.042; *see also* Tex. Sec. of State, *Processing and Counting Early Voting by Mail Ballots*, Elec. Adv. No. 2020-20, July 2, 2020, <https://www.sos.state.tx.us/elections/laws/-advisory2020-20.shtml> [SOS Elec. Adv. No. 2020-20].

These processes are among the many provisions in Texas law designed to protect voting integrity. Neither the district court’s injunction, the Petitioners, nor the Elections Administrators challenge any of them. “Ballot integrity is undoubtedly a worthy goal.” *Veasey v. Abbott*, 830 F.3d 216, 238 (5th Cir. 2016) (en banc).

The Election Code’s criminal enforcement provisions are likewise numerous. The Attorney General’s “voter fraud” prosecution toolbox is more than full.¹⁰ The preliminary injunction affects none of them. While the State maintains that it will be harmed if more voters are allowed to vote by mail, the State never explains why voters over 65 years old do not pose a less dire threat than voters under 65.

While the State claims its policy goal is to minimize “voter fraud,” it fails to explain why more

¹⁰ See Tex. Elec. Code § 273.021 (grants the Attorney General the power to prosecute any criminal offense under the Election Code); see also Tex. Elec. Code §§ 61.008 (unlawfully influencing voter); 64.012 (illegal voting such as voting when not eligible, voting more than once, impersonating another voter, marking ballot without permission of voter); 64.036 (unlawfully assisting voter); 276.012 (unlawfully engaging in organized election fraud); 276.013 (election fraud including intentionally misleading statements on voter forms). The Attorney General also has VBM-specific tools. See Tex. Elec. Code §§ 86.010 (unlawfully assisting voter voting by mail), 84.0041 (*knowingly* providing false information on an application for ballot by mail); 86.0051 (depositing mail ballot in the mail for another voter); 86.0052 (compensating another for depositing mail ballots in the mail on behalf of another person); 86.0105 (compensating another for assisting voter voting by mail); 276.010 (unlawfully buying and selling ballot materials).

Texans voting by mail constitutes “illegal” voting or “fraud.” Under Texas law a vote is only fraudulent or illegal if cast by a voter who is unqualified, not eligible to vote in that election, votes more than once, or who votes for or coerces another. Tex. Elec. Code § 64.012(a). The Elections Code explains what constitutes an “illegal vote” — one “that is not legally countable.” See Tex. Elec. Code §§ 221.001, 221.003(b). Thus, because a voter may not be “eligible” to vote by mail does not make the voter ineligible to vote at all. Likewise, in election contests a vote is not “illegal” unless a person voted in an election in which they were not eligible. Tex. Elec. Code § 221.003. In other words, the *manner* in which the person voted cannot make the vote “illegal” for contest-purposes. Nevertheless, the Attorney General has repeatedly and publicly exclaimed an expansive view of “fraud” unsupported by the Code but for which he expresses a readiness to prosecute voters and those who advise them.¹¹

B. The State’s guidance for conducting in-person voting safely is inadequate.

Texas’ COVID-19 policy has been one of the weakest in the country making the recent surge of cases and deaths not surprising. The State has also aggressively intervened in local efforts to institute more stringent precautions.¹² The Governor’s recent

¹¹ See note 7, *supra*.

¹² See e.g., Sami Sparber, *Gov. Greg Abbott says Harris County can’t impose fine over face mask order*, HOUSTON CHRON., Apr. 27, 2020, <https://www.texastribune.org/2020/04/27/harris-face-masks-fine-texas-coronavirus/>.

tepid face mask order exempted voters, voter assistants, poll watchers, and election workers from the requirement to wear face masks in indoor commercial and public spaces or outdoor spaces where social distancing is not possible.¹³

While the SOS issued multiple advisories for running an election during the pandemic,¹⁴ they offer an unsettling amount of prohibitions on safety measures compared to mandatory safety measures for in-person voting. According to the SOS, election workers cannot:

- Ask voters about their health history or whether they have been exhibiting symptoms including, presumably, whether they have been exposed to COVID recently, or check their temperature, Tex. Sec. of State, *Voting in Person During COVID-19*, Elec. Adv. No. 2020-19, June 18, 2020, at 6, 12 [SOS Elec. Adv. No. 2020-19];

¹³ Gov. Greg Abbott, Exec. Order GA-29, July 2, 2020, at 2, <https://open.texas.gov/uploads/files/organization/opentexas/EO-GA-29-use-of-face-coverings-during-COVID-19-IMAGE-07-02-2020.pdf>.

¹⁴ SOS Elec. Adv. No. 2020-20; Tex. Sec. of State, *Voting in Person During COVID-19*, Elec. Adv. No. 2020-19, June 18, 2020, <https://www.sos.state.tx.us/elections/laws/advisory2020-19.shtml>; Tex. Sec. of State, *Health Protocols for Voters*, May 26, 2020, <https://www.sos.state.tx.us/elections/forms/health-protocols-for-voters.pdf>; Tex. Sec. of State, *COVID-19 (Coronavirus) Voting and Election Procedures*, Elec. Adv. No. 2020-14, Apr. 6, 2020, <https://www.sos.state.tx.us/elections/laws/advisory2020-14.shtml>.

- Refuse a voter, voting assistant, or poll watcher who refuses to wear a mask or honor social-distancing measures, *id.* at 6-7, 10, 11, 12; and
- Refuse a voter or poll watcher who is *actively displaying* known-COVID symptoms, *id.* at 7, 10.

When faced with a voter who actively displays COVID symptoms during in-person voting, the SOS advises local election authorities to:

- Offer a disposable mask and/or gloves and ask the voter to wear the mask in consideration of the health and safety of other voters and election workers;
- Remind the symptomatic voter of the option to vote “curbside,” *see* Tex. Elec. Code §§ 64.009, 85.034; or
- Give the symptomatic voter priority in voting as they would a disabled voter, *see* Tex. Elec. Code § 63.0015.

SOS Elec. Adv. No. 2020-19 at 7. The SOS does not explain what the election worker who assists the COVID-contagious curbside voter should do aside from hope their personal protective equipment works adequately.

These concerns are not hypothetical. During the primary runoff at least two dozen of the Counties’ election workers tested positive for, exhibited symptoms of, or were exposed to COVID-19 and were sent home. The more voters whom the State requires to vote in person, the more likely a polling place could become a vector for contagion. Further, the SOS criteria makes no allowance for workers with known

COVID-19 exposure, contrary to CDC recommendations that anyone with known exposure should self-quarantine for fourteen days.¹⁵

C. The Texas Supreme Court’s recent decision defining “disability” makes matters worse for voters and Elections Administrators.

A “qualified voter” is “eligible to vote by mail” if the voter is “disabled.” Tex. Elec. Code § 82.002(a). “Disability” is a misnomer used both in the statute and the SOS VBM Form, as the definition is broader than the word’s common meaning: “A qualified voter is eligible for early voting by mail if the voter has 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.” *Id.*

Within a few weeks of the pandemic arriving in Texas, the Petitioners filed a state court declaratory judgment action seeking application of the “disability” definition to the pandemic context including whether a lack of immunity to COVID-19 was a “physical condition” such that voting in person posed a “likelihood” of “injuring the voter’s health.” The resulting Texas Supreme Court decision only complicated matters. *See generally, In re State*, No. 20-0394, 2020 WL 2759629 (Tex. May 27, 2020). The

¹⁵ CDC, *When You Can be Around Others After You Had or Likely Had COVID-19*, updated May 26, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html>.

court held that while a voter may decide whether they qualify for “disability” and “take into consideration aspects of [their] health and [] health history that are physical conditions in deciding whether, under the circumstances, to apply to vote by mail” a mere lack of immunity is not enough. *Id.* at *10. The court also held that election clerks may not look beyond a voter’s representations on an application as the Legislature has “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” *but* this is “subject to a correct understanding of the statutory definition of ‘disability.’” *Id.* at *10, 11. Moreover, the Court found “likelihood” to mean a probability, and that contacting COVID-19 was “highly improbable” for the general population. *Id.* at *10 (apparently confusing ease of contagion with likelihood of symptom severity). Notably, the SOS VBM Form contains no explanation of the “disability” ground at all leaving voters without guidance as to qualifications. *See App. 1a.*

The Texas Supreme Court’s opinion did not help clarify the law in a changing pandemic environment and created more ambiguity for voters and those who advise them like the Elections Administrators. For example, would a diabetic who is not actively ill and whose condition is under control still have to vote in person? The Texas Supreme Court’s opinion leaves voters who guess wrong subject to criminal penalties. In addition, the opinion does nothing for those voters who are exposed to COVID-19 and know they should quarantine to protect the health of others and to help stem the spread of the pandemic.

Voters are already indicating that COVID-19 is a reason they are seeking to vote by mail. The images below are from VBM applications the Harris County Clerk received where voters applying for a mail-in ballot under the “disability” category indicated COVID factored into their decision:

REASON YOU ARE APPLYING FOR AN EARLY BALLOT: <input type="checkbox"/> 65 years or over <input checked="" type="checkbox"/> DISABILITY covid <input type="checkbox"/> Out of the county on Election Day <input type="checkbox"/> In jail but otherwise eligible

5 Reason for Voting by Mail: <input type="checkbox"/> 65 years of age or older. (Complete Box #6a) <input checked="" type="checkbox"/> Disability. (Complete Box #6a) <input type="checkbox"/> Expected absence from the county. (Complete Box #6b and Box #8) You will receive a ballot for the upcoming election only <input type="checkbox"/> Confinement in jail. (Complete Box #6b) You will receive a ballot for the upcoming election only	<input checked="" type="checkbox"/> = COVID-19
--	--

One voter attached a post-it note to his application begging the question many voters share:

Due to COVID-19, I would like to be able to vote by mail for May & Nov elections. If possible. Thank you.

Voters often ask elections administrators for guidance but they are also subject to criminal liability should the Attorney General not like even well-intended answers. These notations are unclear whether they mean the voters have COVID-19, think they have COVID-19 but cannot get a test, are at high risk for severe COVID-19 symptoms because of underlying conditions, have been exposed to COVID-19 and are self-quarantining, or simply do not want to be exposed to COVID-19. Yet, the Texas Supreme Court leaves voters under 65 vulnerable to an investigation by the Attorney General for “fraud” and criminal prosecution.

D. Increased vote-by-mail will not be disruptive, but a failure to do so will be a threat to public health and safety.

The Elections Administrators have deployed many methods to handle increased VBM ratio including hiring extra workers and purchasing high-speed scanners. While mail-in ballots require more resources to accept and process than in-person votes, with adequate planning and shifting resources the Elections Administrators can easily accommodate the shifts in voter behavior that are already occurring.

The EVBBs have a minimum size set by statute but are not limited in how large they may be. *See* Tex. Elec. Code § 87.002. The Counties can and many have prepared for a VBM increase by expanding their EVBBs. In fact, Cameron and Travis Counties have already doubled their size. Harris and Fort Bend Counties plan significant expansion for November as well.

During the primary runoff, Harris County experimented with accepting in-person delivery of mail-in ballots at eleven locations where formally designated and trained election clerks could check IDs, keep sign-in sheets as with in-person voting, and keep the ballots separate and secure.¹⁶ When voters return mail-in ballots in person they must present ID as they do during in-person voting. Tex. Elec. Code §§ 63.0101, 86.006(a-1).

The last day to apply for a ballot by mail for the general election is October 23, and the Elections Administrators will begin to mail out ballots to eligible voters on September 19.¹⁷ Any reluctance by this Court to step in to resolve this straight-forward constitutional issue of age discrimination creates a *Purcell* problem the Counties wish to avoid. See *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006) (per curiam) (“As an election draws closer, that risk will increase.”). Petitioners have been seeking legal resolution since April. Action by this Court need not be at the last minute by waiting for the Fifth Circuit’s September or later resolution.

¹⁶ See Tex. Elec. Code §§ 1.007, 63.010(a-1), 83.032, 86.006(a-1), (e); Tex. Sec. of State, *New Laws and Procedures for ABBMs due to passage of HB 1927*, Elec. Adv. No. 2015-10, Sept. 15, 2015; *Harris County Clerk Chris Hollins Announces Vote by Mail Drop-Off Locations*, July 13, 2020, https://www.harrisvotes.com/PressReleases/Vote%20By%20Mail%20Drop-off_en-US.pdf.

¹⁷ See Tex. Sec. of State, *November 3, 2020, Election Law Calendar*, Elec. Adv. No. 2020-17, <https://www.sos.state.tx.us/elections/laws/advisory2020-17.shtml>.

Holding the November election without allowing eligible voters under 65 to vote by mail creates multiple problems. First, crowds, lines, and the resulting increased risk of COVID-19 exposure. Crowd and line length will be exacerbated as the repeal of the time-saving straight-ticket voting method goes into effect this November. *See* Act of May 20, 2017, 85th Leg., R.S., ch. 404, 2017 Tex. Gen. Laws 1081. The effect will be most acutely felt in Harris County with its enormous ballot length of more than eighty races.

Recruiting an adequate number of election workers is an increasing challenge as COVID-19 surges. Some jurisdictions had to close polling sites during the primary runoff due to worker shortages prompted by avoiding COVID-19 exposure and concerns about potential confrontations with voters who refuse to wear a mask.¹⁸ Other poll workers left their posts when some of their fellow workers refused to wear masks.¹⁹ Similarly, securing an adequate number of polling places has been a challenge. Typically, grocery stores, schools, and nursing homes

¹⁸ Jackie Wang, *Election Day Voting Locations Reduced by 8 After Workers Bow Out*, RIVARD REPORT, July 11, 2020, <https://therivardreport.com/election-day-locations-shrink-by-8-voting-sites-after-workers-bow-out/>; Anna M. Tinsley, *Two Election Day polling sites in Tarrant will be closed; workers worried about COVID*, FORT WORTH STAR-TELEGRAM, July 10, 2020, <https://www.star-telegram.com/news/coronavirus/article-244145002.html>.

¹⁹ Alexa Ura, *Runoff elections show Texas not quite ready for November's main event*, TEX. TRIB., July 15, 2020, <https://www.texastribune.org/2020/07/15/texas-primary-runoff-elections-november/>.

serve as polling places. However, many public and private buildings are not large enough for social distancing. Additionally, many public and private entities are already taxed by trying to ensure their own operations are safe and, understanding their own responsibilities to ensure public health, they cannot be stretched further by inviting hundreds or thousands of voters into their spaces.

III. GRANTING REVIEW OBVIATES OTHER PROBLEMS WHERE STATE ACTIONS HAVE FURTHER MUDDIED THE WATER.

Granting certiorari to address the narrow Twenty-Sixth Amendment grounds and adopting the Petitioners' interpretation thereof, obviates controversies concerning vague penal statutes and protects the Counties from suits.

A. Penal statutes enforcing VBM eligibility are unconstitutionally vague.

“[K]nowingly provid[ing] false information on an application” to vote by mail constitutes a criminal offense. Tex. Elec. Code § 84.0041(a)(1). Whether a voter is entitled to apply to vote by mail based on disability is now the voter’s decision because “[t]he elected officials have 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.” *In re State*, 2020 WL 2759629, at *11.

A penal statute must define the criminal offense “with sufficient definiteness that ordinary people can understand what conduct is prohibited’ [and] ‘in a manner that does not encourage arbitrary and discriminatory enforcement.” *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (quoting *Skilling*

v. United States, 561 U.S. 358, 402-03 (2010)). The Texas Supreme Court’s definition of “disability” renders a Section 84.0041(a) prosecution based on the voter’s lack of entitlement to a “disability” ballot void for vagueness. The VBM application simply contains a box for “disability” without *any* further guidance. App. 1a. The Texas Supreme Court decided that the Legislature placed the determination “of whether in-person voting” would likely cause the voter injury “in the hands of the voter.” *In re State*, 2020 WL 2759629, at *11. Any prosecution thereunder violates the Due Process Clause because the court did not articulate a standard such that “ordinary people can understand what conduct is prohibited.” *McDonnell*, 136 S. Ct. at 2373; *see also* Tex. Code Crim. Proc. art. 8.03(b)(2) (mistake-of-law defense). Exacerbating this problem, the Texas Legislature in 2017 increased the offense penalty from a misdemeanor to a felony. Act of Aug. 11, 2017, 85th Leg., 1st C.S., ch. 1, 2017 Tex. Gen. Laws 4493, 4494 (penalty elevated from Class A misdemeanor to state jail felony) (codified Tex. Elec. Code § 84.0041(b)) (“2017 Act”).

The 2017 Act additionally added predicate conduct to the offense of “Fraudulent Use of Application for Ballot by Mail.” *Id.* at 4496 (codified at Tex. Elec. Code § 84.0041(a)(2), (3) & (4)). Specifically, the Act criminalized “intentionally caus[ing] false information to be provided on an application for ballot by mail,” broadening who may be prosecuted under the statute. *Id.* (codified Tex. Elec. Code § 84.0041(a)(2)). In addition to Due Process concerns, *supra*, this *new* prohibition — invoked when election officials or civic organizations

answer voters' VBM questions — “raises special First Amendment concerns.” *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997). Criminal sanctions chill free speech because such “may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.” *Id.* at 872. “Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression.” *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965).

The district attorneys associated with the Counties represented herein have not prosecuted under the 2017 Act nor know of any such prosecution. “[T]he primary duty of all prosecuting attorneys, including any special prosecutors, [is] not to convict, but to see that justice is done.” Tex. Code Crim. Proc. art. 2.01; *see also Berger v. United States*, 295 U.S. 78, 88 (1935) (duty of sovereign party “in a criminal prosecution is not that it shall win a case, but that justice shall be done”).

Accepting petitioners' construction of the Twenty-Sixth Amendment avoids this vagueness problem. It would also avoid, at least in the VBM context, additional due-process problems. The Due Process Clause requires impartial prosecutions based on noticed penal statutes. In Texas, the County and District Attorneys conduct these prosecutions. Tex. Const. art. 5, § 21 (County Attorneys, and District Attorneys as directed by statute, “shall represent the State in all cases in the District and inferior courts in their respective counties.”). The Texas Legislature, however, empowered the Attorney General to “prosecute a criminal offense prescribed by the election laws of this state,” Tex. Elec. Code

§ 273.021(a), and commandeered county and district attorneys for these purposes, Tex. Elec. Code § 273.022. This grant of prosecutorial power to the Attorney General is problematic because the Attorney General's express constitutional mandate is modest and of a civil nature: to represent the State in the Supreme Court of Texas, in any court regarding private corporations, and provide legal advice to the State's executive officers "when requested by them." Tex. Const. art. 4, § 22.

Last, the 1876 Texas Constitution bifurcated the State's judicial power by vesting such into one Supreme Court and one Court of Criminal Appeals. Tex. Const. art. 5, § 1. Yet, the Texas Supreme Court rather than the Court of Criminal Appeals addressed the statute's penal implications. A concurring opinion even stated, "[a] fraudulent application for a mail-in ballot should lead to prosecution against the person perpetrating the fraud." *In re State*, 2020 WL 2759629, at *19 (Bland, J., concurring). In Texas, as in the federal system, advisory opinions are prohibited. *Morrow v. Corbin*, 62 S.W.2d 641, 643-44 (Tex. 1933). "[T]he rule against advisory opinions also recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.'" *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968) (quoting *United States v. Fruehauf*, 365 U.S. 146, 147 (1961)). These problems may be left for another day should this Court grant certiorari and implement

petitioner's common-sense interpretation of the Twenty-Sixth Amendment.

B. Counties face potential liability for the State's constitutional mistakes.

The Respondents assert Eleventh Amendment immunity under *Ex Parte Young*, 209 U.S. 123 (1909), and its progeny. This assertion naturally concerns the Counties to which responsibility could be ascribed for violations of federal law. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978). Though the Counties enjoy robust defenses in § 1983 actions, the burden of defending such suits also motivates this brief's filing.

The Respondents' immunity assertion necessarily denies that they have "the right and the power to enforce . . . the act in question." *Ex Parte Young*, 209 U.S. at 161. As noted, the Attorney General can prosecute an election-related criminal offense and coerce the elected County and District Attorneys to do his bidding. Tex. Elec. Code §§ 273.021(a), 273.022. State enforcement is the very action typified by *Ex Parte Young*. The Respondents' arguments are not reassuring to the entities that would have to defend any consequent *Monell* actions

* * *

The Twenty-Sixth Amendment's language is clear. Just as the Election Administrators could not force women of color to stand in 100 degree heat to wait to vote while inviting white male voters to cut in line and step into the air conditioning, the State cannot force millennials and the middle aged to vote in person unnecessarily risking COVID-19 exposure, while senior citizens can vote from the safety of their

homes. The partisan rancor concerning mail-in voting has done nothing but disrupt planning for the November election and is a grave disservice to voting rights and public health. Voters need to know they will have access to safe ways to vote in November elections. Election administrators need to know clear rules for conducting elections during the pandemic as soon as possible. Effectively implementing social distancing at in-person locations depends on having more voters vote by mail. Otherwise, there will be simply too many bodies to move through too few spaces in too little time.

CONCLUSION

The petition for writ of certiorari should be promptly granted and set for expedited briefing to allow a decision before the November election.

Respectfully submitted,

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Cameron County and its Elections

Administrator, Remi Garza

July 2020

APPENDIX

APPENDIX

Tex. Sec. of State, Application for Ballot by
Mail (form) (fold out), <https://webservices.sos.state.tx.us/forms/5-15f.pdf> App. 1a

DO NOT REMOVE PERFORATED TABS. Moisten here and fold bottom to top to seal. DO NOT REMOVE PERFORATED TABS. Moisten here and fold bottom to top to seal.

Application for Ballot by Mail		Prescribed by the Office of the Secretary of State of Texas AS-15 12/17	For Official Use Only VUID #, County Election Precinct #, Statement of Residence, etc.
1	Last Name (Please print information)	Suffix (Jr., Sr., III, etc)	First Name
2	Residence Address: See back of this application for instructions.	City _____, TX ZIP Code _____	
3	Mail my ballot to: If mailing address differs from residence address, please complete Box # 7.	City _____	State _____ ZIP Code _____
4	Date of Birth (mm/dd/yyyy) (Optional) <div style="display: flex; justify-content: space-around;"> [][]/[][]/[][][][] </div>	Contact Information (Optional)* Please list phone number and/or email address: * Used in case our office has questions.	
5	Reason for Voting by Mail: <input type="checkbox"/> 65 years of age or older. (Complete Box #6a) <input type="checkbox"/> Disability. (Complete Box #6a) <input type="checkbox"/> Expected absence from the county. (Complete Box #6b and Box #8) You will receive a ballot for the upcoming election <u>only</u> <input type="checkbox"/> Confinement in jail. (Complete Box #6b) You will receive a ballot for the upcoming election <u>only</u>	7 If you are requesting this ballot be mailed to a different address (other than residence), indicate where the ballot will be mailed. See reverse for instructions. <input type="checkbox"/> Mailing Address as listed on my voter registration certificate <input type="checkbox"/> Address of the jail <input type="checkbox"/> Nursing home, assisted living facility, or long term care facility <input type="checkbox"/> Relative; relationship _____ <input type="checkbox"/> Hospital <input type="checkbox"/> Address outside the county (see Box #8) <input type="checkbox"/> Retirement Center	
6a	ONLY Voters 65 Years of Age or Older or Voters with a Disability: If applying for one election, select appropriate box. If applying once for elections in the calendar year, select "Annual Application." <input type="checkbox"/> Annual Application Uniform and Other Elections: <input type="checkbox"/> May Election <input type="checkbox"/> November Election <input type="checkbox"/> Other ____ <input type="checkbox"/> Any Resulting Runoff Primary Elections: You must declare <u>one</u> political party to vote in a primary: <input type="checkbox"/> Democratic Primary <input type="checkbox"/> Republican Primary	8 If you selected "expected absence from the county," see reverse for instructions <div style="display: flex; justify-content: space-around;"> [][]/[][]/[][][][] — [][]/[][]/[][][][] </div> Date you can begin to receive mail at this address Date of return to residence address 9 Voters may submit a completed, signed, and scanned application to the Early Voting Clerk at: _____ (early voting clerk's e-mail address) _____ (early voting clerk's fax) NOTE: If you fax or e-mail this form, please be aware that you must also <u>mail</u> the form to the early voting clerk within four business days. See "Submitting Application" on the back of this form for additional information.	
6b	ONLY Voters Absent from County or Voters Confined in Jail: You may only apply for a ballot by mail for one election, and any resulting runoff. Please select the appropriate box. Uniform and Other Elections: <input type="checkbox"/> May Election <input type="checkbox"/> November Election <input type="checkbox"/> Other ____ <input type="checkbox"/> Any Resulting Runoff Primary Elections: You must declare <u>one</u> political party to vote in a primary: <input type="checkbox"/> Democratic Primary <input type="checkbox"/> Republican Primary	10 "I certify that the information given in this application is true, and I understand that giving false information in this application is a crime." <div style="border: 2px solid black; padding: 10px; display: flex; align-items: center;"> → X <div style="flex-grow: 1;"> _____ Date </div> </div> SIGN HERE If applicant is unable to sign or make a mark in the presence of a witness, the witness shall complete Box #11.	
If someone helped you to complete this form or mails the form for you, then that person must complete the sections below.			
11	See back for Witness and Assistant definitions. If applicant is unable to mark Box #10 and you are acting as a Witness to that fact, please check this box and sign below. <input type="checkbox"/> If you assisted the applicant in completing this application in the applicant's presence or e-mailed/mailed or faxed the application on behalf of the applicant, please check this box as an Assistant and sign below. <input type="checkbox"/> *If you are acting as Witness and Assistant , please check <u>both boxes</u> . Failure to complete this information is a Class A misdemeanor if signature was witnessed or applicant was assisted in completing the application.		
	X _____ Signature of Witness /Assistant _____ Street Address Apt Number (if applicable) _____ State	X _____ Printed Name of Witness/Assistant _____ City _____ ZIP Code	_____ Witness' Relationship to Applicant (Refer to Instructions on back for clarification) <div style="border: 1px solid black; height: 20px; width: 100%;"></div>

DO NOT REMOVE PERFORATED TABS. Moisten tab and fold top to bottom to seal.

FROM: _____

AFFIX FIRST CLASS POSTAGE

AFFIX LABEL HERE OR ADDRESS

TO: EARLY VOTING CLERK



Instructions for Application for Ballot by Mail

Residence Address - Give full address as shown on your voter registration certificate. If you have moved within the county but not yet changed your voter registration address with the voter registrar, indicate your new residence address.

Mail Ballot To - Give full address where you wish to have ballot mailed, if the address is different from your residence address.

Mailing Ballot to a Different Address - Your ballot must be mailed to your home where you live or to your mailing address on your voter registration certificate. There are some exceptions that allow you to have your ballot mailed to a different location as specified below.

Reason for voting by mail	Location to mail ballot
65 or disabled	Nursing home, assisted living/retirement center, relative, hospital
In jail	Address of jail or relative
Absent from county	Address located outside of county

Expected Absence from County - If you chose expected absence from county, you must expect to be absent from the county on election day and during the hours of early voting in person or for the remainder of the early voting period after you submit your application. **Your ballot must be mailed to an address outside the county.** Important: Give date you can begin to receive mail at the address given.

Annual Application - If you are 65 years of age or older, or disabled you may apply to receive all ballots by mail for a calendar year. If you do not select any elections in Box 6a, your application will be considered an Annual Application. If you submit an annual application for a ballot by mail, your application may be forwarded to other entities holding elections where you are a qualified voter. This means that you may receive a ballot for those elections in addition to the ballot(s) you requested with this application.

Submitting Application

1. Sign and date your application - If unable to sign, please go to Witness/Address boxes (11 on reverse) and have a person witness your mark. Witness/Assistant instructions follow below.

2. Deliver to Early Voting Clerk - You may submit your application via these methods:

In Person: Only the applicant may submit their application in person to the Early Voting Clerk until the early voting period begins. However, after the early voting period begins for an election, the applicant may only submit their application via mail, common contract carrier, fax, or e-mail.

By Mail: You may mail your application via the U.S. Postal Service.

By Common Contract Carrier: You may submit via a common or contract carrier which is a bona fide, for profit carrier.

By Fax: You may fax your application to the Early Voting Clerk. Please contact your Early Voting Clerk or the Secretary of State's Office for fax numbers.

By E-Mail: You may e-mail a signed, scanned image of your application to the Early Voting Clerk. Please contact your Early Voting Clerk or the Secretary of State's Office for e-mail addresses.

IF YOU FAX OR E-MAIL YOUR APPLICATION TO THE EARLY VOTING CLERK, YOU MUST ALSO MAIL THE APPLICATION SO THAT THE CLERK RECEIVES IT NO LATER THAN THE FOURTH BUSINESS DAY AFTER THE DAY THE CLERK RECEIVED YOUR FAXED OR EMAILED APPLICATION. If you fax or e-mail your application by the deadline noted below, your application will be considered complete and timely as long as the original is received by the early voting clerk by the fourth business day after it was submitted by fax or e-mail.

Deadline

Your application must be received by the early voting clerk of the local entity conducting the election not later than the 11th day before election day. If the 11th day is a weekend or holiday, the deadline is the first preceding business day. You may submit an application throughout the calendar year, beginning January 1. Please remember that the application must be received not later than the 11th day before the first election in which you seek to vote by mail.

If you submit an Annual Application for Ballot by Mail within 60 days before an election that takes place in the following calendar year, your application will be valid for any election that takes place in the following calendar year, regardless of the fact that your application was submitted prior to the end of the preceding calendar year. This applies to Annual Applications only and not to a regular application for ballot by mail.

Witness/Assistant Section

Witness: If you are unable to sign your name (due to a physical disability or illiteracy), the application may be signed at Box #11 for you by a Witness. You must affix your mark to the application in Box #10 or, if you are unable to make a mark, then the Witness must check the appropriate box in 11 indicating the inability to make a mark. The Witness must state his/her name in printed form and indicate his/her relationship to you or, if unrelated, state that fact. The Witness must sign and provide his or her printed name and residence address. Unless the Witness is a close relative of the voter (parent, grandparent, spouse, child or sibling), it is a Class B misdemeanor for a person to witness more than one application for ballot by mail.

Assistant: If a person (other than a close relative or person registered to vote at the same address) assists you in completing this application in your presence or mails/faxes/e-mails this application on your behalf, then that person must complete Box #11. The Assistant must sign, provide his or her printed name, and his or her residence address. A person commits a Class A misdemeanor if the person provides assistance without providing the information described above unless a close relative or registered at your address.

If you have further questions or need additional assistance, please contact your Early Voting Clerk or The Secretary of State's office at 1-800-252-8683 or www.sos.state.tx.us.