



**Texas House of Representatives Elections Committee  
Written Testimony on Interim Charge #2, September 18, 2020**

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To Chair Klick and members of the Texas House Elections Committee:

Recent major disasters, including several natural disasters as well as the current COVID-19 pandemic, have shined a spotlight on how certain aspects of the Texas Election Code are not workable during disasters, present an undue burden on counties dealing with disasters, and risk disenfranchising voters. In addition to ensuring that counties can operate elections and that voters are not disenfranchised, the Legislature has an interest in designing laws that are flexible and adequate enough to respond to disasters in order to protect constitutional separation of powers principles. Because the current Election Code is not sufficient to meet the demands of a large scale disaster, the Executive Branch has been forced to use its emergency powers repeatedly to waive requirements of the Election Code.<sup>1</sup> Without getting into whether these uses of emergency power extended beyond the Executive's constitutional authority, it would nevertheless avoid these serious issues altogether if the Legislature operated within its own sphere to ensure that Texas voters can exercise their own constitutional rights even during times of disaster.

*Eligibility for Voting by Mail During Declared Disaster*

There are numerous reasons why the Legislature should follow the lead of the majority of states by allowing for no excuse voting by mail. However, even should the Legislature not adopt full no-excuse voting by mail, it should nevertheless adopt an excuse to allow registered voters to vote by mail during declared disasters in the areas that are affected by those disasters. During most types of disasters, a common inherent problem is always that it is difficult for some number of voters to physically access their polling locations.

Disasters—whether weather-related, like hurricanes, flooding, or similar, or sickness-related, like a pandemic—hit our most vulnerable communities the hardest. Physically destructive disasters like a hurricane or flooding make it more difficult to access polling places for those already at a mobility disadvantage, like the elderly, persons with disabilities, or people of lesser financial means. Public

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<sup>1</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>.



transportation may be less available, while needing to deal with living essentials and necessities may monopolize people's money and attention. In the worst case scenario, polling places may themselves be physically destroyed or literally inaccessible.

Similarly, as demonstrated by the ongoing coronavirus crisis, the elderly, people with disabilities, people of lesser financial means, and people of color are at greater risk of injury or death during sickness-related disasters.<sup>2</sup> While the coronavirus may have left polling places physically intact, both voters and poll workers fear exposing themselves to the risk of infection. Poll workers in Texas tend to be older, and are amongst those most at risk from COVID.<sup>3</sup> Thus, during the March Primary Election, several polling places in Travis County opened late because poll workers decided to stay home at the last minute, citing fears of contracting COVID.<sup>4</sup> Officials in Tarrant County described poll workers abruptly quitting before the July election when the workers realized voters would not be required to wear masks at the ballot box.<sup>5</sup> The practical effect is no different from there being no polling place at all.

In these circumstances, when a disaster renders in-person voting a risk to voters' health, more burdensome, or physically impossible, the restrictions on voting by mail should be lifted and any person affected by the disaster should be allowed to vote by mail. Since only 16 states still require any excuse for voting by mail, there are limited examples of emergency-based excuses in state legislation. Indiana provides one such example: "The commission, by unanimous vote of its entire membership, may authorize a person who is otherwise qualified to vote in person to vote by absentee ballot if the

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<sup>2</sup> See, e.g., 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/>; People with Disabilities, Centers for Disease Control, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html>; Naomi Thomas, *Covid-19 has disproportionately impacted those living with developmental disabilities*, CNN, (Aug. 28, 2020), <https://www.cnn.com/2020/08/28/health/covid-19-intellectual-development-disabilities-impact-wellness/index.html>

<sup>3</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>4</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>5</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/>.



commission determines that an emergency prevents the person from voting in person at a polling place.” Burns Ind. Code Ann. § 3-11-4-1(c). To translate this into the Texas election infrastructure, it would make sense to give the governing body ordering an election authority to authorize absentee voting for individuals prevented from voting in person due to a declared disaster.

At the very least, the legislature should add an exception for first responders to be able to vote by mail if they are unable to make it to a polling place because they are dealing with a declared disaster, and waive the application deadlines for such first responders. Responders may be called away from their home counties to respond to a disaster, and may have to work hours that prevent them from going in person to a polling. These disasters are unpredictable, and if one should arrive Alabama provides a model for such legislation:

If the occurrence of a state of emergency as declared in this or any other state, or by the federal government, renders substantial compliance with this article impossible or unreasonable for a group of qualified voters who respond to the emergency, the Secretary of State, pursuant to Section 41-22-5 , may promulgate an emergency rule to allow those qualified voters to vote by absentee ballot. . . .<sup>6</sup>

#### *Postal Service Delays*

In addition to a physical inability to access a polling place, mail delivery is likely to be disrupted and delayed in counties suffering from a disaster. Texas’s existing mail ballot timeline has already been flagged by the post office as being inconsistent with postal delivery standards, potentially leading to uncounted ballots.<sup>7</sup> Given that during a disaster voters may not know of their need for a mail ballot until close to the election, and may not receive the ballot until close to election day due to postal delays, the timeline for counting ballots should be extended during disasters to include ballots that are postmarked by 7 pm on election day and received by the sixth day after the election (inline with military and overseas ballots) rather than the current 5 pm on the day after the election deadline.

Further, the rules around mail ballot delivery should be altered during disasters to allow individuals more non-mail options for applying for ballots and delivering the ballots themselves. First, the Legislature should 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. Electronic submission of an application for a mail in ballot provides election officials with all the information they need to process the application, including an original handwritten signature, without holding voters’ applications hostage to this additional, unnecessary step of submitting them in the mail. Second, the Legislature should remove the requirement to present photo identification when delivering a mail ballot in person, and allow counties to maintain secure dropboxes on county-controlled facilities. It would be a sensible change for the

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<sup>6</sup> Alabama Elections Code § 17-11-3.

<sup>7</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>.



Legislature to make for all mail ballot voters even in “normal” times, but it would especially be vital during a disaster. 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.

Another option is to allow the entities administering elections to provide for alternative models based on the particular circumstances on the ground. Virginia provides one such model: “The provisions of this section shall apply in the case of an emergency that will not allow sufficient time for the distribution and handling of absentee ballot applications and absentee ballots, in accordance with the procedures of this title, for qualified voters who are unable to vote in person because of the emergency. The Commissioner of Elections shall have the authority to designate alternative methods and procedures to handle such applications and ballots.”<sup>8</sup>

### *Statewide Tracking*

Finally, the state’s vote by mail infrastructure itself should be improved to ensure the integrity of the election. As already discussed, and as common sense dictates, more voters will seek to use mail-in ballots during times of disaster. This strain may be compounded if certain government functions or utilities, like the postal service, are compromised or otherwise unable to function at full capacity. For example, Texas saw a surge in voting by mail during the July runoff as eligible voters sought to avoid exposing themselves to the coronavirus. Unfortunately, Texas’s election infrastructure showed signs of severe strain. The Texas Civil Rights Project, which spearheads the Texas Election Protection Coalition, received reports from across Texas of 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.

It is therefore important to bolster Texas’ vote by mail infrastructure, especially during times of disaster. This could in part be achieved by instituting a statewide ballot tracking system. On top of offering voters a guarantee that their ballot is delivered and counted, this system would be more secure than the current lack of a system because voters could self-police and report irregularities such as their ballot being counted before they have returned it. The Election Code and federal law already require counties to submit information to the Secretary of State to provide online tracking for overseas and military mail ballots.<sup>9</sup> The Secretary of State has the easy capability to provide the same tracking information for all mail ballots, and all that would be necessary is a law that requires counties to submit the same information for all mail ballots to the Secretary of State as they already do for overseas and military ballots. Not only would this increase the security of the process for voters, decreasing the

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<sup>8</sup> Va. Code Ann. § 24.2-713.

<sup>9</sup> Texas Secretary of State FPCA Ballot Tracker, <https://webservices.sos.state.tx.us/FPCA/index.aspx>.



possibility of fraud, but it would also shore up election integrity at the county level by requiring counties to have formalized procedures in place to receive and process ballots in a timely manner.

### *Emergency Late Ballots*

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

In July, in the midst of the ongoing coronavirus disaster, an estimated 99,000 Texans were diagnosed with coronavirus between the deadline for a “regular” mail-in ballot and Election Day.<sup>10</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>11</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. The need for a doctor’s certificate during a time of declared disaster is arcane and has little justification. Medical professionals need to be able to deal with the disaster at hand, rather than worrying about issuing certificates for voters. And many voters may not be able to obtain certificates in time. Just as with regular voting by mail, emergency ballots still require the voter to attest to their condition under penalty of perjury. There has never been a reported case of fraud or attempted fraud related to emergency ballots and the requirements for pickup and delivery already ensure that fraud is exceedingly unlikely.

### *List Maintenance During a Disaster*

During Hurricane Harvey, issues arose around voter list maintenance. In particular, individuals found themselves placed on the suspense list due to undeliverable mail.<sup>12</sup> This produces an extra burden on individuals whose lives are already in disarray. Although placement on the suspense list is curable by a voter, most voters do not understand what the suspense list entails and believe that their registration may be cancelled. This results in confusion, a burden to acquire information on their status and how to cure it, and in some cases may result in voters not attempting to vote because they believe themselves unregistered. The Legislature should provide that voter list maintenance activities dealing with address confirmation must be suspended by the authority declaring a disaster if the disaster results in large scale displacement of individuals from their normal residences.

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<sup>10</sup> See Cases over Time by County, Texas COVID-19 Data, Texas Department of State Health Services, *available at* <https://dshs.texas.gov/coronavirus/additionaldata.aspx> and <https://dshs.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>11</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>12</sup> Miya Shay, *Hurricane Harvey victims shocked to find out voter registration was suspended*, ABC13.COM, (Feb. 1, 2018), <https://abc13.com/hurricane-harvey-texas-politics-voting-election/3019551/>