

A banner featuring a wooden gavel resting on a wooden surface, with the Texas state flag in the background. The text is centered over the image.

# Texas Supreme Court Update

## *Opinions Issued October 27, 2020*

By Stephen Gibson  
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**Mandamus:** *If there is no probable right of recovery, the court can dissolve a temporary injunction without first addressing whether a party has standing to sue for relief.*

**Scope of Delegated Discretion:** *When the Legislature grants the right to amend or rescind actions taken under delegated authority, narrowing the rights or privileges extended by the exercise of that power is within the scope of the delegatee's authority.*

**Equal Protection:** *The burden of limiting expanded ballot return opportunities on voting rights of large county v. small county residents was not sufficiently significant to require strict scrutiny. The imposition was merely incidental and was permissible under the Texas equal protection guarantee so long as it reasonably advanced a legitimate government interest.*

**Equal Protection:** *Disparate impacts do not violate the equal protection guarantee unless the impact was an intended, not merely incidental, consequence of the classification.*

Under the Election Code, a voter who wishes to make an in-person delivery of a marked early voting ballot may only do so at “the early voting clerk’s office ... while the polls are open on election day.” The “early voting clerk’s office” includes main *and satellite* clerk’s offices. In response to the pandemic, Gov. Abbott exercised his emergency powers in July to enlarge the time for early voting and in-person ballot return. In October, the Governor modified his July order to limit permissible return locations to a single early voting office location designated by the early voting clerk. In [\*Abbott, et al. v. Anti-Defamation League of Austin, et al.\*](#) the Supreme Court of Texas upheld by *per curiam* opinion the restrictions the October order imposed on the July emergency decree against claims it (1) exceeded emergency powers delegated by statute to the Governor, (2) violated the equal rights guarantee of [Texas Constitution Article I, section 3](#), or disparately burdened the rights of voters who reside in large counties.

Procedurally, the case was presented to the court as a review of an order in which the court of appeals temporarily enjoined enforcement of the October order. Although standing sets a jurisdictional threshold, the court bypassed a standing determination and ruled that the injunction could not be upheld because there was no probable right of recovery under any of the plaintiffs’ three attacks on the October order.

The argument that the October order exceeded the powers delegated under the emergency authority the Legislature delegated to the Governor in [Government Code section 418.016\(a\)](#) was dismissed because it cut both ways. The statute authorizing the July proclamation also allowed the amendment or rescission of such orders. If the July order’s expansion of existing voting opportunities was within the Governor’s authority, then the October order reducing that expansion was likewise valid so long as it did restrict the opportunity to vote provided under the Election Code. “Nothing in [section 418.016] suggests any limitation on the Governor’s ability to consider valid policy goals, such as encouraging economic recovery, preserving constitutional rights, or promoting ballot integrity.” Translation: as

long as the Governor does not restrict voting rights as they exist absent an emergency, restricting an emergency liberalization of those rights is within the discretion conferred by section 418.016.

The equal protection claim fared no better. The opinion began its analysis with the test to be applied. If the restriction on voting rights was “severe,” the action could not be permitted unless it was narrowly tailored to meet a compelling governmental interest. If, however, the burden on voting rights was permissible if it reasonably advanced a legitimate interest. The opinion reasoned the restrictions of the October order was not a severe burden on voting rights because voters had numerous alternatives to in-person early ballot returns. Even if voters insisted on an early in-person return of the ballot, the inconvenience to residents of large counties from limiting the “early voting office” to a single location was merely incidental because the class of voters affected was narrow and the impediment was not sufficiently different from the other usual “*de minimus*” inconveniences of voting under the Election Code procedures applicable but for the Governor’s invocation of emergency powers.

The opinion addressed the disparate impact as a complaint about the difference in the effect of the October order on residents of large counties and smaller counties. It ruled this difference did “not raise concerns of discriminatory classification unless the measure was adopted *because of*, and not merely in spite of, its disparate impact on the affected class.” (Emphasis added). The opinion did not address – and presumably the parties did not question – whether the validity of the October restriction on the prior order could be considered an abuse of the Governor’s discretion if its impact effected a partisan advantage or disadvantage. Accordingly, the court upheld the Governor’s October order limiting to one location per county where early ballots could be returned regardless of the size of the county.

*Per curiam* opinions are customarily unanimous. This one, however, prompted two concurring opinions to give additional explanations for the outcome in this case without taking issue with its legal reasoning. Justice Blacklock [concurred](#) to emphasize that the remedy for concerns about the restrictions on times and places for returning ballots that do not infringe on state or federally guaranteed voting rights rests with the political branches, not the courts. Justice Guzman, joined by Justice Lehrmann, [concurred](#) separately “to highlight the many options voters have for accessing the ballot box this year, which may otherwise get lost in the cross-fire of advocacy and may be obscured by the weight of the legal analysis the parties’ arguments necessitate.”