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Chairman J. Bruce Bugg, Jr.
Katelyn Dwyer, Commissioner Analyst
Texas Transportation Commission
125 E. 11th Street
Austin, Texas 78701
Via email to Katelyn.Dwyer@txdot.gov

Commissioner Alvin New
Emily Clisby, Commissioner Analyst
125 E. 11th Street
Austin, Texas 78701
Via email to Emily.Clisby@txdot.gov

Commissioner Laura Ryan
Noah Oaks, Commissioner Analyst
125 E. 11th Street
Austin, Texas 78701
Via email to Noah.Oaks@txdot.gov

Commissioner Robert C. Vaughn
Julie Jerome, Commissioner Analyst
125 E. 11th Street
Austin, Texas 78701
Via email to Julie.Jerome@txdot.gov

August 19, 2021

Dear Chairman Bugg, Commissioner New, Commissioner Ryan, and Commissioner Vaughn:

The undersigned organizations, which have members with disabilities and work in and with communities in which persons with disabilities live, request that the Texas Transportation Commission (TTC) immediately institute procedures for remote public comment for its August 31, 2021 Commission meeting and all TTC meetings thereafter until the state community transmission rate has declined to low or moderate levels, and the decline in community

transmission rate has continued for at least 4 weeks.¹

Specifically, we are requesting a reasonable accommodation and/or reasonable modification under Title II of the Americans with Disabilities Act² of the Commission's rules, policies, and practices to allow equal access to persons with disabilities, persons regarded as having a disability,³ and persons associated with a person with a disability, to attend TTC meetings and provide public comment by telephone, videoconference, or in writing to be read into the record.

On August 5, 2021, Austin Public Health raised Travis County's COVID-19 risk-based guidelines to Stage 5, the highest level. This decision was based on changes in key indicators since July 4, 2021 including: a 600% increase in the 7-day moving average of hospital admissions; a 570% increase in COVID-19 patients in local ICU beds; an increase in COVID-19 patients on ventilators from 8 to 100; and that the 7-day moving average for new cases increased more than 10 times.⁴ At Stage 5, unvaccinated, partially vaccinated, and high-risk individuals should avoid all activities unless essential, particularly indoor and outdoor gatherings, even with precautions like masks. High-risk individuals include people over 65 and those with underlying health conditions, even if vaccinated. As of August 19, 2021, the Capital Area Trauma Service Area of 11 counties and 2.3 million people had only 2 staffed ICU beds available.⁵

This high level of risk is a result of the prevalence of the Delta variant of COVID-19, which is significantly more contagious than the original COVID-19 virus, carries a higher viral load which increases the severity of the disease, and can be transmitted by vaccinated people.⁶ As of August 18, 2021, the 7-day average of new confirmed cases in the state of Texas was 13,457,

¹ https://covid.cdc.gov/covid-data-tracker/#cases_community

² 42 U.S.C. §12131(2)

³ 42 U.S.C. §12102

⁴ City of Austin, COVID-19 News Update: Austin, Travis County Return to Stage 5, August 5, 2021. Available at: <https://www.austintexas.gov/news/austin-travis-county-returns-stage-5>

⁵ Marisa Charpentier and Jerry Quijano, "Austin Area Down to Two Available ICU Beds", KUT 90.5, August 10, 2021. Available at:

<https://www.kut.org/covid-19/2021-08-10/austin-area-down-to-two-available-icu-beds-as-covid-19-cases-continue-to-surge>

⁶ See, e.g.: Sanjay Mishra, "Why is Delta more infectious and deadly? New research holds answers." National Geographic, August 6, 2021. Available at:

<https://www.nationalgeographic.com/science/article/why-is-delta-more-infectious-and-deadly-new-research-holds-answers>;

Kimball A, Hatfield KM, Arons M, et al. Asymptomatic and Presymptomatic SARS-CoV-2 Infections in Residents of a Long-Term Care Skilled Nursing Facility — King County, Washington, March 2020. *MMWR Morb Mortal Wkly Rep* 2020;69:377–381. DOI: <http://dx.doi.org/10.15585/mmwr.mm6913e1>; Riemersma et al.

Vaccinated and unvaccinated individuals have similar viral loads in communities with a high prevalence of the SARS-CoV-2 Delta variant. Pre-print. Available at

<https://www.medrxiv.org/content/10.1101/2021.07.31.21261387v1>;

the 7-day average of fatalities was 100, and 12,402 Texans were hospitalized with COVID-19.⁷ As an example of the heightened risk of the Delta variant, Governor Greg Abbott, who is fully vaccinated and received a vaccine booster currently unavailable to other Texans, was recently diagnosed with COVID-19 after attending indoor gatherings where attendees were unmasked.⁸ The state has asked the federal government for 5 mortuary trailers to handle the anticipated spike in COVID-19 deaths, and hospitals and emergency services are already strained.

“When you’re told by the powers that be that you have 12 ICU beds in Dallas County, that means you have 12 ICU beds for the traffic on I-35, 12 ICU beds for the stroke [victim], 12 ICU beds for the five borderline COVID patients we have in the hospital right now. . . . When we say that we may come to be in a situation where we are looking at some impossible decisions about focusing our care and our efforts on those that have the highest likelihood of survival so that we can save as many lives as possible, that equation is not just for COVID patients. That occurs for all patients.”⁹

TTC is not requiring masks or vaccination for those who attend Commission meetings. At last month's meeting, on July 29, 2021, there were well over 100 attendees in one room, and many people were unmasked. People could not avoid being within a few feet of one another. No masks were offered, and no hand sanitizer was readily available. Despite federal, state, and local guidance that recommends social distancing, avoiding indoor gatherings, and staying home as the best way to reduce the threat of COVID-19, the Commission will require Texans to leave home and in some cases to travel, and to spend extensive periods of time indoors with numerous other people, in order to participate in a government process that affects their lives. The requirement that the public appear in person at TTC meetings not only places their health and even lives at risk, but effectively bars specific groups of Texans from participation in the governmental decision-making process in violation of the Texas Open Meetings Act¹⁰ as well as the ADA and Rehabilitation Act.

Populations that are so high-risk that the TTC’s policies regarding in-person public comment effectively deprive them of their opportunity to participate in the policy-making process include the elderly, people with compromised immune systems, and persons with other

⁷ DSHS, COVID-19 Data Dashboard. Available at:

<https://txdshs.maps.arcgis.com/apps/dashboards/ed483ecd702b4298ab01e8b9cafc8b83>

⁸ Dartunorro Clark, “Texas Gov. Greg Abbott tests positive for Covid after banning mask, vaccine mandates”, NBC News, August 17, 2021. Available at:

<https://www.nbcnews.com/politics/politics-news/texas-gov-greg-abbott-tests-positive-covid-n1277021>

⁹ Dr. Mark Casanova, Texas Medical Association COVID-19 Task Force, quoted in, Karen Brooks Harper and Carla Astudillo, “The new Texas COVID-19 surge could be worse than anything the state has seen yet”, Texas Tribune, August 17, 2021. Available at: <https://www.texastribune.org/2021/08/17/texas-covid-19-cases-hospitalizations/>

¹⁰ TEXAS GOVERNMENT CODE, Chapter 551.

pre-existing conditions.¹¹ Many of these people are persons with disabilities, and policies that exclude them are prohibited by the Americans with Disabilities Act (ADA),¹² and the Rehabilitation Act.¹³ Concerns for the health of vulnerable populations would also prevent people associated with people with disabilities, for example persons who work at nursing homes or have immunocompromised family members, from providing in-person public comments. The TTC must change its policies that require in-person public comment in order to reasonably accommodate persons with disabilities as required by the Americans with Disabilities Act and the Rehabilitation Act.

The TTC is not required to hold in-person meetings. The Governor's Office, at the request of the Attorney General, has suspended or modified certain provisions of the Open Meetings Act in order to protect public health and safety and encouraged local governments to do so.

State and local officials can slow the spread of COVID-19 by avoiding meetings that bring many people into congregate settings. OAG has identified provisions that frustrate this public-health goal by requiring that government officials, members of their staff, and members of the public be physically present at a specified meeting location. OAG's request would relax these open-meeting requirements to allow for telephonic or videoconference meetings of governmental bodies, without the need for face-to-face contact during a pandemic.¹⁴

This suspension of open meeting requirements will be in place on August 31, 2021. However, regardless of a public health or other emergency, the Open Meetings Act allows governmental bodies to hold meetings by videoconference and specifically, "[w]ithout regard to whether a member of the governmental body is participating in a meeting from a remote location by videoconference call, a governmental body may allow a member of the public to testify at a meeting from a remote location by videoconference call."¹⁵

¹¹ People of color are also disproportionately exposed to air pollution that increases the prevalence of disabilities and increases the likelihood that COVID-19 will be fatal. Lisa Friedman, "New Research Links Air Pollution to Higher Coronavirus Death Rates", *New York Times*, April 7, 2020. Available: <https://nyti.ms/2UROU3Y>; Razzaghi H, Wang Y, Lu H, et al. Estimated County-Level Prevalence of Selected Underlying Medical Conditions Associated with Increased Risk for Severe COVID-19 Illness — United States, 2018. *MMWR MorbMortal Wkly Rep* 2020;69:945–950. DOI: <http://dx.doi.org/10.15585/mmwr.mm6929a1>.

¹² 42 U.S.C. §12132l "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.;" §12182(a).

¹³ 28 C.F.R. §35.130

¹⁴ Letter from James P. Sullivan, Deputy General Counsel, Office of Governor Greg Abbott to the Office of the Attorney General. Available: <https://www.texasattorneygeneral.gov/sites/default/Siles/Siles/divisions/open-government/COVID-19-OMA-Suspension-Letter.pdf>

¹⁵ TEXAS GOVERNMENT CODE §551.127(k).

We request a response to our request for reasonable accommodation/modification by Tuesday, August 24, 2021. Please direct your response to Madison Sloan at msloan@texasappleseed.org.

Sincerely,

Harrison Humphreys
Transportation Program Manager
Air Alliance Houston

Ines Sigel
Interim Executive Director
LINK Houston

Susan Graham
Founder
Stop TxDOT I-45

David Wheaton
Director of Advocacy
Texas Housers

Greater Houston Coalition for Justice

Madison Sloan, Co-Counsel
Director, Disaster Recovery and Fair Housing
Texas Appleseed

Dennis Grzezinski, Co-Counsel
Law Office of Dennis M. Grzezinski