

No. 20-50407

In the United States Court of Appeals for the Fifth Circuit

TEXAS DEMOCRATIC PARTY, GILBERT HINOJOSA, CHAIR OF THE
TEXAS DEMOCRATIC PARTY, JOSEPH DANIEL CASCINO, SHANDA
MARIE SANSING, AND BRENDA LI GARCIA,

Plaintiffs-Appellees

v.

GREG ABBOTT, GOVERNOR OF TEXAS, RUTH HUGHS, TEXAS SEC-
RETARY OF STATE, KEN PAXTON, ATTORNEY GENERAL OF TEXAS,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

**EMERGENCY MOTION FOR STAY PENDING APPEAL
AND TEMPORARY ADMINISTRATIVE STAY**

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CERTIFICATE OF INTERESTED PERSONS

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Defendants-Appellants.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellants, as govern-
mental parties, need not furnish a certificate of interested persons.

/s/ Kyle D. Hawkins

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Defendants-Appellants

INTRODUCTION AND NATURE OF EMERGENCY

Yesterday evening, the district court below issued a preliminary injunction preventing Texas officials from enforcing critical anti-fraud provisions of the Texas Election Code mere weeks before an election and days before mail-in ballots are distributed to eligible voters. Exhibit A. The provisions at issue, Texas Election Code sections 82.001-004, provide exceptions to Texas’s general requirement that all voters vote in person. Sections 82.001-004 allow voting by mail for voters physically absent from their county, or suffering from a “disability”—that is, “a sickness or physical condition”—or over 65, or incarcerated. The Texas Legislature believes mail-in balloting should be limited because in-person voting is the surest way to prevent voter fraud and guarantee that every voter is who he claims to be.

The district court below has now overridden that policy choice. Announcing that “the entire world is . . . fearfully disabled” due to its lack of immunity to the ongoing global pandemic, the district court declared that Texas’s decision to limit voting-by-mail to only a small subset of voters violates the First, Fourteenth, and Twenty-Sixth Amendments. It ordered: “Any eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances.” *Id.* at 9. And it enjoined the Texas Governor, Attorney General, and Secretary of State “from issuing any guidance, pronouncements, threats of criminal prosecution or orders, or otherwise taking any actions inconsistent with this Order.” *Id.* at 9-10.

The district court manifestly erred. Indeed, later today, the Texas Supreme Court will hear oral argument on the proper interpretation of section 82.002. Exhibit

B. With the State’s highest court on the verge of deciding a question of state law, the district court had a clear duty to abstain from weighing in—yet it went ahead anyway because “[ab]stention would take considerable time.” Ex. A at 73. The district court also lacks jurisdiction, because the plaintiffs present political questions against the wrong defendants that are in any event barred by sovereign immunity. And they cannot succeed on the merits, since no provision of the Constitution allows a federal court to order a State to let everyone vote by mail.

This Court should enter a stay pending appeal, and it should immediately enter a temporary administrative stay while it considers this application. Over the past two months, this Court has entered multiple stays pending appeal and temporary administrative stays of “patently wrong,” *In re Abbott*, 954 F.3d 772, 795 (5th Cir. 2020), district court orders like this one. *See id.*; *see also In re Abbott*, 800 F. App’x 293, 296 (5th Cir. 2020); *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020). It should do the same here.

Appellants have brought this motion directly to this Court under Federal Rule of Appellate Procedure 8(a)(2) because it is impracticable to seek relief before the district court. Election officials will begin distributing mail-in ballots next week; time is of the essence

BACKGROUND

I. Texas Law Requires In-Person Voting Except in Narrow Circumstances.

Most Texas voters vote in person. They may apply to vote by mail in only one of four instances—they: (1) anticipate being absent from their county of residence;

(2) have a disability that prevents them from appearing at the polling place; (3) are 65 or older; or (4) are confined in jail. Tex. Elec. Code §§ 82.001-.004. These rules are primarily enforced at the county level by early-voting clerks. *Id.* §§ 83.005, 86.001(a).

The Appellants are Texas Governor Gregg Abbott, Attorney General Ken Paxton, and Secretary of State Ruth Hughs. Neither Governor Abbott nor Secretary of State Hughs enforce the above provisions. *See id.* Attorney General Paxton carries broad authority to prosecute voter fraud. Tex. Elec. Code § 273.021.

II. Appellants’ Are Working Diligently to Ensure the Safety of In-Person Voting.

On March 13, 2020, Governor Abbott declared a state of disaster in all of Texas’s 254 counties. Tex. Gov. Proclamation (Mar. 13, 2020 11:20 a.m.). Almost immediately, he began adopting measures to protect the uniformity and integrity of elections. These actions include, for example, postponing a May 26, 2020 primary runoff to July 14, 2020. Tex. Gov. Proclamation (Mar. 20, 2020 6:35 p.m.).

Most recently, on May 12, the Governor issued a proclamation expanding early voting for the July 14 election. *See* Exhibit C. The proclamation doubled the time period allowed for “early voting by personal appearance,” *id.* at 3, “to ensure that elections proceed efficiently and safely when Texans go to the polls to cast a vote in person during early voting or on election day,” *id.* at 2 (providing election officials with sufficient time to “implement appropriate social distancing and safe hygiene practices”).

The Secretary of State has also issued several advisories. For example, she quickly alerted election officials to the Governor’s May 11 proclamation. Exhibit D. The advisory explained that, in very short order, the Secretary of State would provide “detailed recommendations for protecting the health and safety of voters and election workers at the polls” and work closely with election officials “to ensure that our elections are conducted with the utmost safety and security.” *Id.* The Secretary had intended to send that guidance this morning, but now will delay her actions due to the uncertainty caused by the district court’s injunction. Election officials may distribute mail-in ballots next week. *See* Tex. Elec. Code § 86.004(b)

III. Several Groups Sue in State Court to Compel Election Officials to Expand Voting by Mail.

In late March, several organizations and voters (including Appellees) filed a lawsuit against the Travis County Clerk, one of the local officials charged with enforcing the law, aimed at expanding voting by mail to all Texans. *See* Exhibit E. They asked the court to declare that “any eligible voter, regardless of age and physical condition,” may vote by mail “if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease.” *Id.* at 10. The clerk did not oppose the plaintiffs’ request for a temporary injunction. The trial court obliged, prohibiting Appellants from “taking actions that during all elections affected by the COVID-19 pandemic, that would prohibit individuals from submitting mail ballots based on the disability category.” Exhibit F at 5.

The State—which had intervened to protect the integrity of Texas law—immediately filed a notice of interlocutory appeal. Exhibit G. Under the Texas Rules of

Appellate Procedure, the trial court's temporary injunction was superseded and stayed upon the State's appeal. Tex. R. App. P. 29.1(b); *In re State Bd. for Educator Certification*, 452 S.W.3d 802, 805 (Tex. 2014). Appellees, however, continued to act as if the state-court injunction was in effect.

In response to the "public confusion" caused by the Travis County lawsuit, the Attorney General provided guidance to county election officials on May 1, 2020. Exhibit H. "Based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code," he explained. *Id.* at 1. And he further explained that the then-stayed state-court injunction "does not change or suspend these requirements." *Id.* at 2-3; *see also* Exhibit I.

In response, Appellees filed a motion to enforce the state-court injunction in Texas' Fourteenth Court of Appeals. That court confirmed that the injunction had been superseded but issued its own injunction to allow the trial-court order to go into effect. Exhibit J at 2-3. The Texas Supreme Court, however, quickly stayed that order. Exhibit B. The Fourteenth Court appeal remains pending and is scheduled to be submitted for decision by June 12.

Meanwhile, confusion continued to spread across the State. On May 13, the State petitioned the Texas Supreme Court for a writ of mandamus to compel five county clerks to abide by the language of the Election Code. Exhibit K. The Supreme Court is hearing argument today. Exhibit B.

IV. Appellees Bring This Duplicative Litigation in Federal Court.

Hedging against an unfavorable outcome in state court, Appellees—the Texas Democratic Party, its chair, and three individuals—filed this action on April 7. They argue that the State’s articulation of the plain text of the Election Code (1) violates the Twenty-Sixth Amendment as-applied, (2) discriminates on the basis of age and race in violation of the Equal Protection Clause as-applied, (3) violates the First Amendment, and (4) is void for vagueness. Exhibit L. And they accuse the Texas Attorney General of voter intimidation. *Id.* at 19. But they seek relief indistinguishable from what Appellees sought—and preliminarily obtained—in state trial court. *Compare id.* at 20-21, *with* Exhibit F.

Following a hearing on May 15, the district court issued a 74-page opinion and order that provides essentially the same relief that is currently being requested in state court. *Compare* Exhibit A at 9-10, *with* Exhibit F at 4-6. In particular, it orders that “[a]ny eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances.” Exhibit A at 9. Appellants are further enjoined from “issuing any guidance, pronouncements, threats of criminal prosecution or orders, or otherwise taking any actions inconsistent with this Order.” *Id.* 10.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

A R G U M E N T

Appellants are entitled to a stay because: (1) they are likely to succeed on the merits; (2) they will suffer irreparable harm in the absence of a stay; (3) Appellees will not be substantially harmed by a stay; and (4) the public interest favors a stay. *See Nken v. Holder*, 556 U.S. 418, 426 (2009).

I. Appellants Are Likely to Succeed on Appeal.

Appellants are likely to succeed on appeal for at least three reasons: (1) the trial court should have abstained from ruling on the temporary injunction; (2) the court lacked jurisdiction; and (3) Appellees failed to meet their burden of proof to be entitled to such extraordinary relief.

A. The trial court should have abstained in light of the state-court proceedings.

Though Appellees brought federal claims, they cannot be resolved without answering the question the Texas Supreme Court is considering *today*: whether fear of contracting disease constitutes a “disability” under the Texas Election Code. As this Court has explained, there are “two prerequisites” for abstention under *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941): “(1) there must be an unsettled issue of state law; and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised.” *Palmer v. Jackson*, 617 F.2d 424, 428 (5th Cir. 1980). Both are met here.

First, there is no doubt that Appellees have manufactured widespread confusion about eligibility to vote by mail. Indeed, the Texas Supreme Court has set that very

issue for oral argument on the strength of the State’s mandamus petition alone, without first requesting merits briefing.

And the Texas Supreme Court’s ruling would undoubtedly put Appellees’ claims “in a different posture,” if not moot them entirely. *Id.* If the Appellees’ view prevails, all Texas voters could be eligible to vote by mail. In turn, Appellees’ as-applied constitutional claims here, which are based on the alleged disparities between voters who can vote by mail and voters who cannot in the unique context of COVID-19, will be moot.

In the trial court, Appellees argued that abstention is inappropriate because this is a voting-rights case. But “traditional abstention principles apply to civil rights cases.” *Romero v. Coldwell*, 455 F.2d 1163, 1167 (5th Cir. 1972) (abstaining in a one-man, one-vote case). And this Court has frequently abstained in cases involving challenges to election laws. *See, e.g., Justice v. Hosemann*, 771 F.3d 285, 301 n.14 (5th Cir. 2014); *Moore v. Hosemann*, 591 F.3d 741, 745-46 (5th Cir. 2009); *see also Harris v. Samuels*, 440 F.2d 748, 752-53 (5th Cir. 1971).

Although Appellees asserted—and the district court apparently agreed—that the state-court proceedings are not moving quickly enough, Appellees are the masters of their litigation decisions. In state court, counsel for Appellees expressly disclaimed any argument that section 82.002(a) is unconstitutional on any of the theories they pursue here, though the court was competent to decide them. Exhibit M at 37. That is, Appellees chose to split their claims. The district court should not have rewarded that behavior by entering a temporary injunction, rather than applying

longstanding abstention doctrines—let alone affirmatively rule on the meaning of section 82.002 of the Texas Election Code. Exhibit A at 8.

B. The court lacked jurisdiction.

1. Political question doctrine

Appellants will likely show that this case should have been dismissed because it presents a political question into which “the judicial department has no business entertaining [a] claim of unlawfulness.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (citation omitted). Just last week, the Northern District of Georgia dismissed a similar case. *Coalition for Good Governance v. Raffensperger*, 2020 WL 2509092, at *1, *3 (N.D. Ga. May 14, 2020) (citing *Rucho* and *Jacobson v. Fla. Sec’y of State*, No. 19-14552, 2020 WL 2049076, at *18 (11th Cir. Apr. 29, 2020) (William Pryor, J., concurring)). The district court should have done the same here, where Appellees essentially ask the federal courts to determine whether the State’s efforts to combat COVID-19 in the context of elections have been adequate.

2. Sovereign immunity

Appellants are also likely to show that the preliminary injunction is barred by sovereign immunity. “[T]he principle of state-sovereign immunity generally precludes actions against state officers in their official capacities, subject to an established exception: the *Ex parte Young* doctrine.” *McCarthy ex rel. Travis v. Hawkins*, 381 F.3d 407, 412 (5th Cir. 2004) (citation omitted). *Ex parte Young* applies only when the defendant enforces the challenged statute in violation of federal law. The “general duty to see that the laws of the state are implemented” held by a statewide official (such as the Governor, Attorney General, or Secretary of State) is

insufficient. *See Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quotation marks omitted). Instead, the named defendant must have “the particular duty to enforce the statute in question *and* a demonstrated willingness to exercise that duty.” *Id.* (emphasis added). As this Court has recently emphasized, even when a government official “*has* the authority to enforce” a challenged statute, a plaintiff still must show the official “is likely to do [so] here.” *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019).

As an initial matter, a federal court lacks jurisdiction to order compliance with state law as the district court purported to do (Exhibit A at 8). *Valentine*, 956 F.3d at 802 (applying *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984)).

Moreover, no Appellant has the “requisite connection” to the enjoined conduct to bring him or her within *Ex parte Young*’s ambit. The order states, among other things, that “[a]ny eligible Texas voter who seeks to vote by mail” may “cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances.” Exhibit A at 9. It also requires the Secretary of State to use “power granted her under state law to ensure uniformity of election administration throughout the state . . . to ensure th[e] Order has statewide, uniform effect.” *Id.* at 10. But the Secretary of State lacks authority to enforce the Order in the manner contemplated, and no Appellant enforces the mail-in ballot rules. Appellants are thus likely to show that the claim is barred by immunity.

The district court comes also purported to enjoin Appellants from prosecuting or threatening to prosecute individuals who apply to vote by mail based on COVID-19. *Id.* Unlike the Governor or Secretary of State, the Attorney General has

concurrent jurisdiction with local prosecutors to prosecute election fraud. But Appellees did not offer any evidence that he has either brought criminal enforcement proceedings for potential violations of the Election Code relating to COVID-19 or threatened to bring such criminal proceedings. At most, Appellees have demonstrated that he has stated that there are criminal consequences for encouraging individuals who are not eligible to vote by mail. Ex G at 2. That is just a correct statement of Texas law, Tex. Elec. Code §§ 84.0041, 276.013, not a threat of enforcement sufficient to invoke *Ex parte Young*. See *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014).

3. Standing

For several reasons, Appellants are also likely to show that Appellees lack standing to sue Appellants. Most prominently, their claims at the preliminary-injunction stage were based entirely on their desire to vote by mail.¹ Acceptance or rejection of an application to vote by mail falls to local, rather than state, officials. See Tex. Elec. Code §§ 83.005, 86.001(a). Thus, Appellees' asserted injuries are not "fairly traceable to the challenged action of the defendant." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks and alterations omitted). And the impact of the statutory scheme on a plaintiff is insufficient for standing purposes; the named defendants must enforce that scheme as to the plaintiff. *Paxton*, 943 F.3d at 1002. Thus, Appellees' purported injuries are not redressable.

¹ Appellees have expressly stated that they did not seek preliminary relief on their race-based claims. Exhibit N at 17-18.

C. Appellees failed to show a likelihood of success on the merits of their claims.

1. Twenty-Sixth Amendment or equal-protection claims

Appellants are also likely to show that Appellees failed to demonstrate a likelihood of success on the merits of the claim that Appellants have violated the Fourteenth and Twenty-Sixth Amendments by allowing individuals 65 and over to vote by mail without extending that ability to those under 65. The Supreme Court examines rules about the ability to vote by mail under rational-basis review. *McDonald v. Bd. of Elec. Comm'rs of Chi.*, 394 U.S. 802, 807-08 (1969) (distinguishing between right to vote and right to vote by mail). It currently evaluates Fourteenth Amendment challenges to state election laws under the “*Anderson-Burdick*” framework. *See Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The only circuit court to have ever considered the issue has also suggested that, when the right to *vote* is implicated, it would apply the same test to Twenty Sixth Amendment claims. *Cf. Walgren v. Bd. of Selectmen of Town of Amherst*, 519 F.2d 1364, 1366-67 (1st Cir. 1975). Under either test, the State is likely to prevail on appeal.

a. It is rational to distinguish between those aged 65 and over and those under 65 for purposes of voting by mail is rational. Even outside the context of COVID-19, individuals aged 65 and over (as a group) face unique challenges in attending the polls. For example, many live in nursing homes and have limited mobility.² The State’s decision to allow older Texans to vote by mail without extending that ability

² *See* Long Term Care, Texas Health and Human Services, <https://hhs.texas.gov/services/aging/long-term-care>.

to everyone is a rational way to facilitate exercise of the franchise for Texans who are more likely to face everyday barriers to movement, outings, and activity than younger people. And even if it were not, the district court did not explain why the proper remedy, in light of Texas's presumption in favor of in-person voting, was to extend mail-in voting to those under 65, rather than requiring all to vote in person. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698-99 & nn.22-23 (2017)

b. If the stricter *Anderson-Burdick* standard applies, the result does not change. Under *Anderson-Burdick*, courts “must weigh ‘the character and magnitude of the asserted injury to the rights protected by the [Constitution] that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). State rules that impose a “severe” burden on constitutional rights must be “narrowly drawn to advance a state interest of compelling importance.” *Id.* “Lesser burdens, however, trigger less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quotations and citations omitted).

Section 82.003 in no way hampers Appellees’ fundamental right to vote. Rather, it provides an alternative avenue to cast a ballot for members of a community more likely to face special challenges. Therefore, Section 83.003 places no burden upon Appellees’ ability to vote.

Instead, Appellees argue that because under-65 voters might contract COVID-19 while voting in person, they will face an unconstitutional burden on their exercise of the franchise if they cannot vote by mail. But the record demonstrates that policy-makers are taking appropriate steps to ensure that voters can safely vote at the polls. For example, a Collin County election official has testified that he has taken numerous steps to protect voters in his jurisdiction. Exhibit O ¶ 4. Even without additional guidance from the Secretary of State—now put on hold by the injunction—other counties intend to introduce similar protective measures. *Id.* ¶ 6. The district court barely referenced the significant evidence the State offered, instead relying on its own research and data that even Appellees had not submitted. *E.g.*, Exhibit A at 8 (citing data about an increase in COVID-19 the day *after* the preliminary injunction hearing). Appellants will likely be able to show that the district court’s ruling is unsupported in light of the State’s precautions.

The State’s interest in the integrity of elections far outweighs the Appellees’ interest. Indeed, the Supreme Court has stated that “[t]here is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters,” and that the need to ensure “orderly administration and accurate record-keeping provides a sufficient justification for carefully identifying all voters participating in the election process.” *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196 (2008). “While the most effective method of preventing election fraud may well be debatable,” the Court has said that “the propriety of doing so is perfectly clear.” *Id.* Moreover, “public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic

process.” *Id.* at 197. Commanding election officials to hastily cobble together a universal vote-by-mail system in time for this year’s elections without care and planning risks widespread chaos. Such an outcome will neither ensure the integrity of the election nor engender public confidence in the outcome. *Cf. Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) (per curiam).

For similar reasons, Appellees’ age-based equal-protection claims fail. The district court’s jumbled analysis itself requires a stay pending further review. The opinion indicates that it may have concluded that section 82.002 violates strict scrutiny because it found “no rational basis” for distinctions between voters over 65 and under 65. Ex. A at 7. But these are, of course, different levels of review.³ To the extent that the district court applied strict scrutiny, this was legal error because the Supreme Court has squarely held that age classification is subject to rational-basis review under the Fourteenth Amendment. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-84 (2000). And, for the reasons discussed above, Appellants are likely to show on appeal that section 82.003 satisfies rational basis review.

2. Vagueness

Equally without basis is the district court’s conclusion that Appellees will likely succeed on their void-for-vagueness claim. As this Court has explained, the “void-for-vagueness doctrine has been primarily employed to strike down criminal

³ Compounding this error, Appellees expressly deferred their facial challenges to section 82.003 of the Texas Election Code to “a final trial on the merits,” Exhibit P at 14 n.8, yet the district court appears to have found the statute facially unconstitutional, *see* Exhibit A at 10.

laws”; in civil contexts, “the statute must be ‘so vague and indefinite as really to be no rule at all.’” *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 217 (5th Cir.2000) (quotation marks omitted). This court has emphasized that a “statute is not unconstitutionally vague merely because a company or an individual can raise uncertainty about its application to the facts of their case.” *Ford Motor Co. v. Tex. Dep’t of Transp.*, 264 F.3d 493, 509 (5th Cir. 2001); *see also Stansberry v. Holmes*, 613 F.2d 1285, 1289 (5th Cir. 1980). But Appellants have never claimed that Section 82.002(a)’s definition of “disability” is “vague and indefinite,” and the district court did not so find.

Instead, the district court announced without citation or further explanation that “a more stringent vagueness test applies here as the statute infringes upon basic First Amendment freedoms and voters are threatened with prosecution.” Exhibit A at 62. As discussed above, this case does *not* implicate the fundamental right to vote. And the Attorney General’s letter that formed the basis of this claim did not threaten to prosecute anyone.

Moreover, Appellees’ “as-applied” void-for-vagueness claim will be resolved as a matter of course when the Texas Supreme Court rules on the meaning of the statute.

3. Voter intimidation.

Resolution of the state litigation is also necessary to determine Appellees’ voter-intimidation claims. With essentially no analysis, the trial court accepted wholesale the Appellees’ theory that that the Attorney General conspired *with members of his own staff* to intimidate voters. Exhibit A at 64-65 (citing 42 U.S.C.

§ 1985(3)). But his behavior was not voter intimidation. It was a correct statement of law. Moreover, the very case upon which the district court relied demonstrates why Appellees have no claim because—among other reasons— “[i]t is a long-standing rule in this circuit that a ‘corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.’” *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994).

4. First Amendment

Finally, the trial court found that Appellees were likely to demonstrate that the Attorney General threatened their free-speech rights. Ex. A at 59-61. This claim fails for at least two reasons.

First, the First Amendment does not protect Appellees’ asserted right to encourage otherwise healthy individuals to vote by mail if doing so promotes or incites illegal activity. *E.g.*, *United States v. Williams*, 553 U.S. 285, 298 (2008). Under Texas law, it is a crime for voters to submit knowingly false applications to vote by mail, or for third parties to encourage voters to do so. *See* Tex. Elec. Code §§ 84.0041, 276.013. As such, unless the Texas Supreme Court agrees with Appellees’ reading of section 82.002, Appellees’ First Amendment rights are not implicated by the Attorney General’s letter.

Second, the relief the court ordered—an injunction prohibiting Appellants from “issuing any guidance, pronouncements, threats of criminal prosecution or orders,” Ex. A at 10—threatens *Appellants’* rights to comment on matters of public

concern.⁴ The freedom of speech safeguards the right of individuals to “speak as they think on matters vital to them.” *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). The Supreme Court has provided the same robust and strenuous protection to elected officials’ speech as to citizens’ speech in general. *E.g.*, *Bond v. Floyd*, 385 U.S. 116, 133-35 (1966). General Paxton exercised that right when he spoke on an issue of public concern at a time when there was no effective court order preventing him from doing so. Tex. R. App. P. 29.1(b).

II. Appellants Will Be Irreparably Harmed Absent a Stay.

The district court’s preliminary injunction threatens irreparable injury by injecting substantial confusion into the Texas voting process mere days before ballots are distributed and weeks before runoff elections. Moreover, the injunction inflicts an “institutional injury” from the “inversion of . . . federalism principles.” *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016). Federalism principles recognize that “any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (alterations omitted) (Roberts, C.J. in chambers). And that right is not protected for the sake of the Appellants as state officials. Instead, the “ultimate purpose” of the structural provisions of the Constitution and of guarding state sovereignty, “is to protect the liberty and security of the governed.” *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991).

⁴ Appellees’ voter-intimidation claim was limited to the Attorney General; the district court’s order was not.

Those concerns are particularly important here. “It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’” *Burdick*, 504 U.S. at 433. And it is one of the most fundamental obligations of the State to enact clear and uniform laws for voting to ensure “fair and honest” elections, to bring “order, rather than chaos, [to] the democratic process[],” and ultimately to allow the vote to be fully realized. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

III. The Remaining Factors Favor a Stay.

A. A stay merely maintains the status quo and will not harm Appellees.

A stay pending appeal will not threaten Appellees with irreparable harm because it maintains the status quo, and Appellees have alleged only a speculative threat of harm from the absence of a preliminary injunction. A preliminary injunction requires a showing of “irreparable harm” that is *likely*, not merely possible. *See, e.g., Winter v. NRDC*, 555 U.S. 7, 22 (2008). And the threatened harm must be “imminent.” *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975). Appellees have not shown that existing measures to protect voters are so deficient that the absence of additional federal-court-ordered measures threatens them with imminent harm. Moreover, in light of the impending rule by the Supreme Court of Texas, the injunction may be rendered moot in a matter of days.

B. The public interest strongly favors a stay.

“Because the State is the appealing party, its interest and harm merge with that of the public.” *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). For the reasons set out in Part I.C.1, *supra*, the public interest strongly favors a stay.

IV. The Court Should Enter an Immediate Temporary Administrative Stay While It Considers this Motion.

For the reasons set out above, Appellants are entitled to a stay pending appeal, and they ask the Court to enter one forthwith. In the alternative, Appellants ask the Court to enter an immediate administrative stay today while the Court considers this filing. Such administrative stays are routine. *E.g., In re Abbott*, 800 F. App'x 293, 296 (5th Cir. 2020); *M.D. ex rel. Stukenberg v. Abbott*, No. 18-40057, ECF 12 (5th Cir. Jan. 19, 2018).

CONCLUSION

The Court should immediately enter a temporary administrative stay while it considers this motion, then stay the district court's injunction pending appeal.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On May 21, 2020, this document was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins

KYLE D. HAWKINS

CERTIFICATE OF COMPLIANCE

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5180 words, excluding the parts of the motion exempted by rule; and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Kyle D. Hawkins

KYLE D. HAWKINS

EXHIBIT LIST

- A. Order Regarding Plaintiffs' Motion for Preliminary Injunction (W.D. Tex.)
- B. Orders on Case Granted (20-0394 and 20-0401) (Tex.)
- C. Tex. Gov. Proclamation (May 11, 2020)
- D. MASS EMAIL (CC/EA/VR - 910) - Proclamation regarding early voting for July 14, 2020 Elections (May 11, 2020)
- E. Plaintiffs' Original Petition and Application for Temporary Injunction, Permanent Injunction and Declaratory Judgment (Tex. Dist. Ct. - Travis County)
- F. Order on Application for Temporary Injunctions and Plea to the Jurisdiction (Tex. Dist. Ct. - Travis County)
- G. Notice of Appeal (Tex. Dist. Ct. - Travis County)
- H. Letter from Ken Paxton, Attorney General of Texas, to County Judges and County Election Officials (May 1, 2020)
- I. Letter from Ken Paxton, Attorney General of Texas, to Hon. Stephanie Klick (Apr. 14, 2020)
- J. Order (Tex. App.—Houston [14th Dist.])
- K. Petition for Writ of Mandamus (Tex.)
- L. Plaintiffs' First Amended Complaint (W.D. Tex.)
- M. Transcript of April 15, 2020 Hearing (Tex. Dist. Ct. - Travis County)
- N. Transcript of May 15, 2020 Hearing (W.D. Tex.)
- O. Declaration of Bruce Sherbet
- P. Plaintiffs' Motion for Preliminary Injunction (W.D. Tex.)

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

MAY 19 2020

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DEPUTY

TEXAS DEMOCRATIC PARTY,)
GILBERTO HINOJOSA, Chair of the)
Texas Democratic Party, JOSEPH DANIEL)
CASCINO, SHANDA MARIE SANSING,)
and BRENDA LI GARCIA,)

Plaintiffs,)

V.)

CIVIL ACTION NO. SA-20-CA-438-FB

GREG ABBOTT, Governor of Texas,)
KEN PAXTON, Texas Attorney General,)
RUTH HUGHS, Texas Secretary of)
State, DANA DEBEAUVOIR, Travis)
County Clerk, and JACQUELYN F.)
CALLANEN, Bexar County Elections)
Administrator,)

Defendants.)

ORDER REGARDING PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness

THE DECLARATION OF INDEPENDENCE para.2 (U.S. 1776).

Two hundred forty-four years on, Americans now seek Life without fear of pandemic, Liberty to choose their leaders in an environment free of disease and the pursuit of Happiness without undue restrictions.

We the People of the United States, in Order to form a more perfect Union

U.S. CONST. pmbl.

Of the 3,929,214 original Americans, “We the People” as the new sovereign with the power to prevent a new despot belonged in the hands of only 235,753 white males who owned property.¹

Over time the franchise grew to include all white males,² African-American men,³ and women.⁴ Without that evolving expansion, “We the People” are mere words on 200 year old parchment.

There are some among us who would, if they could, nullify those aspirational ideas to return to the not so halcyon and not so thrilling days of yesteryear of the Divine Right of Kings,⁵ trading our birthright as a sovereign people for a modern mess of governing pottage in the hands of a few and forfeiting the vision of America as a shining city upon a hill.⁶

PROCEDURAL BACKGROUND

Now before the Court is plaintiffs’ assertion that current public health circumstances require an expansion of how votes are cast to prevent the spread of COVID-19. Plaintiffs would have the Court interpret “disability” to include lack of immunity from COVID-19 and fear of infection at polling places. Plaintiffs seek a preliminary injunction to enlarge the use of voting by mail in lieu of close quarters in-person voting.

Texas law allows voting by mail for absentees (those who will be away from home for all of early voting and on election day), voters age sixty-five or older, and those with a “disability” which prevents them from voting in person. Tex. Elec. Code §§ 81.001-.004.

On April 17, 2020, a Travis County state court judge determined that any Texas voter without established immunity to COVID-19 meets the plain language definition of disability in the Texas Election Code, and thus, is eligible to apply for a mail in ballot in the upcoming July 2020 run off

elections. Attorney General Paxton has appealed the ruling. He also threatened election administrators and voters with criminal prosecution if they followed the state court order.

Plaintiffs filed this federal suit on April 7, 2020. They allege the failure to allow voters under the age of sixty-five to vote by mail during the pandemic violates their federal constitutional rights. On April 29, 2020, plaintiffs filed a motion for preliminary injunction seeking to enjoin defendants from denying mail-in ballots to otherwise eligible voters under the age of sixty-five and to enjoin defendants from threatening to initiate criminal prosecutions to those seeking or providing mail-in ballots.

On May 13, 2020, the state defendants filed a petition for writ of mandamus with the Texas Supreme Court seek a determination that election administrators have a duty to reject applications for mail in ballots which claim disability under the Texas Election Code based solely on the generalized risk of contracting a virus. The state court order has been stayed pending further proceedings in the state appellate courts, and no ruling has issued either on the appeal or the petition for writ of mandamus.

Plaintiffs' motion for preliminary injunction is ripe for review by this Court. The state defendants filed a response in opposition to the motion, Bexar County Elections Administrator Jacquelyn F. Callanen filed a response, plaintiffs filed a reply, and amici curiae briefs were filed by several organizations.

In order to secure a preliminary injunction, plaintiffs must establish the following four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury if the injunction is denied

outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest. *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). Plaintiffs contend they have met their burden of proof because defendants' interpretation of the disability provision allowing vote by mail—which would exclude those who seek to avoid possible exposure to the coronavirus from the disability authorization—subjects voters under the age of sixty-five to unconstitutional burdens not levied on voters age sixty-five or older.

The state defendants respond that the resolution of the state court litigation will invariably alter this closely-related federal proceeding. They therefore argue that the abstention doctrine applies and this Court should decline to hear plaintiffs' claims at this juncture. The state defendants further contend that plaintiffs lack standing and have not met their burden to show they are entitled to a preliminary injunction.

Plaintiffs reply that they have standing to bring suit and that abstention is not warranted because resolution by the state courts will not render this case moot or materially alter the constitutional questions presented. Plaintiffs also reurge their arguments that they have met their burden to show substantial likelihood of success on the merits of their claims under the First, Fourteenth and Twenty-Sixth Amendments of the United States Constitution; irreparable injury to plaintiffs outweighs the threatened harm to defendants if the injunction is denied; and granting the injunction will not disserve the public interest. For a more expansive view of the parties' positions, please see Appendix B.

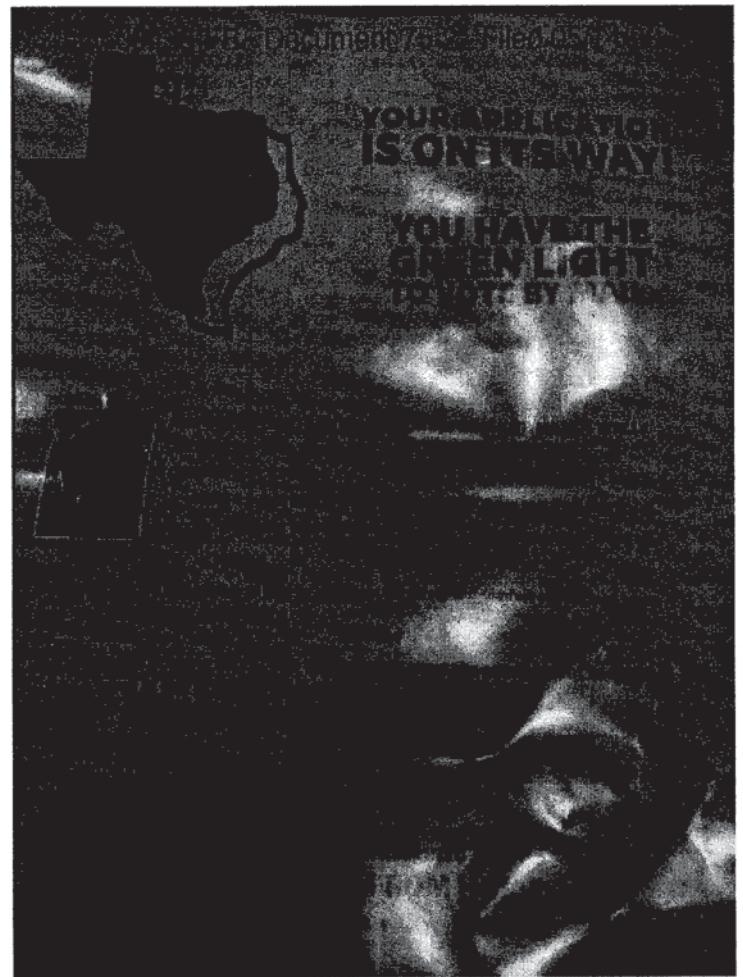
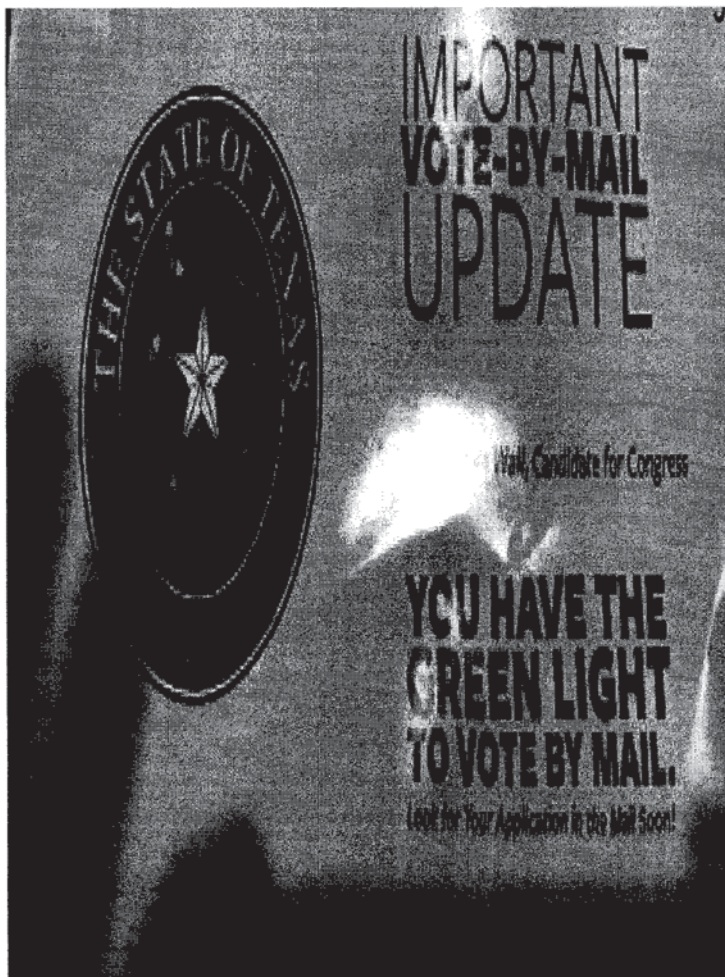
DISCUSSION

For those who have recently awakened from a Rip Van Winkle sleep, the entire world is mostly without immunity and fearfully disabled. Moreover, Governor Abbott, the State of Texas, and the federal government have issued guidance concerning prevention of the spread of the virus which speaks in terms of social distancing.⁷ Plaintiffs say in-person voting makes social distancing difficult if not impossible.

In order to implement in-person voting, poll workers, many of whom are in an at-risk category, are also exposed to the COVID-19 virus.⁸ The Court has concerns for the health safety of those individuals as well.


Other states have recognized the dangers of in-person voting and have implemented vote by mail procedures,⁹ a process recently used by the President of the United States.¹⁰

The confusion concerning vote by mail eligibility is exemplified in plaintiffs' Exhibit 35, campaign material for a Republican candidate endorsed by Attorney General Paxton, who urges voters to use mail ballots based on COVID-19 concerns authorized by Secretary of State guidance, but subsequently advises that a voter must have the virus based on Attorney General Paxton's advice letter dated April 14, 2020. *See* docket no. 10, Exhibit 2 (explaining Attorney General Paxton's conclusion that based on the plain language of the relevant statutory text "fear of contracting COVID-19 does not constitute a disability under the Texas Election Code for purposes of receiving a ballot by mail."). Confusion also reigns because plaintiffs have not received requested guidance nor can the Court find any guidance from the Secretary of State. The lack of clarity is evidenced in Exhibit 35:




+1 (844) 505-3072 >

Hi this is Alex w/Kathaleen Wall for Congress. Due to Covid19, the campaign is mailing you absentee ballot applications, so you will have the option to safely vote! If you haven't received your app or need help, contact the campaign or find more info at kathaleenwall.com. Have you filled out & mailed back your app yet?

 Kathaleen Wall

Either today or tomorrow you will receive from my campaign a notice of update on how to VOTE BY MAIL during this Coronavirus outbreak in consultation with Texas Attorney General, who has endorsed my run for Congressional District 22, we've gotten clarification that you have to have the vote in order to qualify. Therefore if you meet that criteria and would like to have a ballot by mail sent to you, don't hesitate to contact my campaign or your local county elections admin. See More

 **KEN PAXTON**
ATTORNEY GENERAL of TEXAS

AG Paxton: Voting by Mail Based on Disability Reserved for Texans With Actual Illness or Medical Problem Rendering ...

Equally vague and confusing are Attorney General Paxton's prior opinions. *Compare* Op. Tex. Att'y Gen No. KP-0009 (2015) (determining that no special definition of "disability" is required to use mail in ballot) *and contrast* Op. Tex. Att'y Gen. No. KP-0149 (2017) (determining that sexual deviant under age sixty-five meets definition of disabled under Texas Election Code §§ 82.001-.004) *with* Attorney General Paxton's advice letter of April 14, 2020 (determining that fear of contracting COVID-19 does not meet the definition of "disability" to use mail in ballot). Such contradictory opinions are at best duplicitous and at worst hypocritical.

Defendants raise the specter of widespread voter fraud if mail ballots are employed but cite little or no evidence of such in states already doing so. Texas truth is to the contrary. Between 2005 to 2018, there were 73 prosecutions out of millions of votes cast.¹¹ The Court finds the Grim Reaper's scepter of pandemic disease and death is far more serious than an unsupported fear of voter fraud in this *sui generis* experience. Indeed, if vote by mail fraud is real, logic dictates that all voting should be in person. Nor do defendants explain, and the Court cannot divine, why older voters should be valued more than our fellow citizens of younger age. U.S. CONST. amend. XIV § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); Tex. Elec. Code § 82.003 ("A qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day.").

In a previous case, the evidence has shown that there is no widespread voter fraud.¹² The Court has great confidence in the ability of election administrators and law enforcement to prevent or prosecute, with evidence and probable cause, the infinitesimal events of voter fraud, none of which are likely to affect election outcomes.

Attorney General Paxton has publicly expressed a willingness to pursue criminal charges against these election administrators and law enforcement officials. The state defendants point out that, in 2019, this Court dismissed a claim against Attorney General Paxton based on statements that he made in a press release, noting that the plaintiffs there could not sustain a claim based on “an alleged intimidating press release.” *Texas League of United Latin Am. Citizens v. Whitley*, Case No. 5:19-CA-00074-FB, docket no. 131 (W.D. Tex. Mar. 27, 2019) (Biery, J.). The Court finds that threatening legal voters and election administrators with criminal prosecution is not the same as issuing a political press release directed at alleged illegal voters. *See* docket no. 10, Exhibit 2 (Attorney General Paxton’s advisory letter threatening voting administrators with criminal prosecution if they “advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19” and threatening voters with criminal prosecution if they cause a ballot to be obtained under “false pretense” of “disability” based fear of COVID-19); *see also Whitley*, docket no. 61-3.

The Twenty-Sixth Amendment of the United States Constitution provides:

The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

The Texas Election Code allows citizens over sixty-five without a disability to vote by mail.¹³ Thus, the Texas vote by mail statute provides for the health safety of mail ballots for those 65 years of age and older but not those 64 years, 364 days and younger. The Court finds no rational basis for such distinction and concludes the statute also violates the clear text of the Twenty-Sixth Amendment under a strict scrutiny analysis.¹⁴

The Texas Election Code defines “disability” as a “physical condition that prevents the voter from appearing at the polling place on election day without a likelihood . . . of injuring the voter’s

health.¹⁵ Disability is also defined as “a physical or mental condition that limits a person’s movements, senses, or activities.”¹⁶ Clearly, fear and anxiety currently gripping the United States has limited citizens’ physical movements, affected their mental senses and constricted activities, socially and economically. A new study shows COVID-19’s psychological toll: distress among Americans has tripled during the pandemic compared to 2018. *Jean M. Twenge and Thomas E. Joiner, Mental Distress Among U.S. Adults During the COVID-19 Pandemic* (May 15, 2020) (downloaded from <https://mfr.osf.io/render?url=https://osf.io/download/5eb43025a2.pfd> (last visited May 18, 2020)).¹⁷ The evidence also shows voters are right to be fearful and anxious about the risk of transmission to their physical condition. Texas saw the largest single-day jump in coronavirus cases since the pandemic began this past Saturday.¹⁸ The Court finds such fear and anxiety is inextricably intertwined with voters’ physical health. Such apprehension will limit citizens’ rights to cast their votes in person.¹⁹ The Court also finds that lack of immunity from COVID-19 is indeed a physical condition.

One’s right to vote should not be elusively based on the whims of nature. Citizens should have the option to choose voting by letter carrier versus voting with disease carriers. “We the People” get just about the government and political leaders we deserve, but deserve to have a safe and unfettered vote to say what we get.²⁰ The governed merit more than a Tillichian leap of faith in leaders elected by a small minority of the population as it was in 1789.²¹

For want of a nail the shoe was lost.
For want of a shoe the horse was lost.
For want of a horse the rider was lost.
For want of a rider the message was lost.
For want of a message the battle was lost.
For want of a battle the kingdom was lost.
And all for the want of a horseshoe nail.²²

For want of a vote, our democracy and the Republic would be lost and government of the people, by the people and for the people shall perish from the earth.

Accordingly, for the reasons stated herein, the findings made herein, the additional background in Appendix B and the Findings of Fact and Conclusions of Law in Appendix C, all attached hereto and made a part hereof, the preliminary injunction is GRANTED as follows:

Though Republican voters are not parties to this case, the Court finds it would discriminate against Republicans not to afford them the same health safety precautions of voting by mail. Accordingly, the Court *sua sponte* concludes this Order shall extend to allow Republican voters to vote by mail as well should they claim disability because of lack of immunity from or fear of contracting COVID-19.

Based on the state defendants' assertion of the abstention doctrine and lack of standing, plaintiffs' response thereto and for the reasons stated in the expanded findings in Appendix C, the Court concludes the abstention doctrine is not applicable and plaintiffs have standing to bring this suit.

The Court finds plaintiffs have met their burden to show a likelihood of success on the merits, a substantial threat of irreparable injury if the injunction is not issued, the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and that granting the injunction will not disserve the public interest.

IT IS ORDERED that during the pendency of pandemic circumstances:

(1) Any eligible Texas voter who seeks to vote by mail in order to avoid transmission of COVID-19 can apply for, receive, and cast an absentee ballot in upcoming elections during the pendency of pandemic circumstances;

(2) Defendants Dana Debeauvoir and Jacquelyn Callanen and all their respective officers, agents, servants, employees, attorneys, and persons acting in concert of participation with them may not deny a mail in ballot to any Texas voter solely on the basis that the voter does not otherwise meet the eligibility criteria outlined in Texas Election Code §§ 82.001–82.004;

(3) Defendants Dana Debeauvoir and Jacquelyn Callanen their agents, servants, employees, representatives, and all person or entities of any type whatsoever acting in concert with them or acting on their behalf are enjoined from refusing to accept and tabulate any mail ballots received from voters solely on the basis that the voter does not otherwise meet the eligibility criteria outlined in Texas Election Code §§ 82.001–82.004;

(4) Defendant Secretary of State Hughs is ordered pursuant to the power granted her under state law to ensure uniformity of election administration throughout the state, to use her lawful means to ensure this Order has statewide, uniform effect;

(5) All defendants and all their respective officers, agents, servants, employees, attorneys, and persons acting in concert of participation are enjoined from issuing any guidance, pronouncements, threats of criminal prosecution or orders, or otherwise taking any actions inconsistent with this Order. This Order does not prevent defendants and their agents and employees from prosecuting cases of voter fraud where evidence and probable cause exist;

(6) Each of the defendants, acting through the appropriate state or local agency, shall publish a copy of this Court's Order on the appropriate agency website and that the state defendants shall circulate a copy of this Court's Order to the election official(s) in every Texas County; and

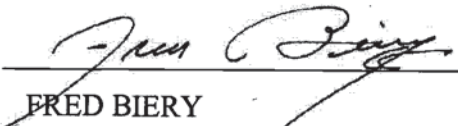
(7) No cash bond shall be required of plaintiffs.

IT IS FURTHER ORDERED that this Order shall remain in full force and effect until a Judgment is issued in this matter or until such time as the pandemic circumstances giving rise to this Order subside.

IT IS FINALLY ORDERED that defendants may petition this Court, upon giving notice and opportunity to be heard to plaintiffs, that the Order should be dissolved for any reason, including that the state courts have resolved issues of a matter of state law that render this injunction unnecessary or because the pandemic circumstances giving rise to it have subsided.

It is so ORDERED.

SIGNED this 19th day of May, 2020.



FRED BIERY
UNITED STATES DISTRICT JUDGE

APPENDIX A

Endnotes

1. At the time of the first presidential election in 1789, there were 3,929,214 million Americans. https://www.census.gov/history/through_the_decades/fast_facts/1790_fastfacts.html (last visited April 13, 2020). Only white, male property owners— 6% of the population—were eligible to vote. https://www.archives.gov/exhibits/charters/charters_of_freedom_13.html (last visited April 13, 2020).

2. The 1828 presidential election was the first in which non-property-holding white males could vote in the vast majority of states. North Carolina was the last state to end the practice in 1856. Stanley Engerman & Kenneth Sokoloff, *The Evolution of Suffrage Institutions in the New World* 16, 35 (February 2005), <http://www.economics.yale.edu.org/UploadedPDF/sokoloff-050406.pdf> (last visited April 13, 2020).

3. U.S. CONST. amend. XV. Though in practice their votes were suppressed by poll taxes, violence and intimidation. <https://www.history.com/topics/early-20th-century-us/jim-crow-laws> (last visited April 14, 2020); see also 42 U.S.C. § 1973 (The Voting Rights Act of 1965); 42 U.S.C. § 2000d, et seq. (The Civil Rights Act of 1964).

4. U.S. CONST. amend. XIX.

5. “The Divine Right of Kings” is the doctrine that kings have absolute power because they were placed on their thrones by God and therefore rebellion against the monarch is always a sin. <https://www.oxfordreference.com/view/101093.oi/authority.20110810104754564> (last visited April 27, 2020).

6. On January 11, 1989, President Ronald Reagan referred to America as a “shining city” upon a hill during his farewell speech to the nation:

I've spoken of the shining city all my political life, but I don't know if I ever quite communicated what I saw when I said it. But in my mind it was a tall, proud city built on rocks stronger than oceans, wind-swept, God-blessed, and teeming with people of all kinds living in harmony and peace; a city with free ports that hummed with commerce and creativity. And if there had to be city walls, the walls had doors and the doors were open to anyone with the will and the heart to get here. That's how I saw it, and see it still.

<https://www.reaganlibrary.archives.gov> (last visited May 10, 2020). “A city upon a hill” is a phrase derived from Jesus’s Sermon on the Mount:

You are the light of the world. A city set on a hill cannot be hidden. Nor do people light a lamp and put it under a basket, but on a stand, and it gives light to all in the

house. In the same way, let your light shine before others, so that they may see your good works and give glory to your Father who is in heaven.

Matthew 5:14-16. This scripture was cited at the end of Puritan John Winthrop's lecture, "A Model of Christian Clarity," delivered on March 21, 1630, at Holyrood Church in Southampton, England, before the first group of Massachusetts Bay colonists embarked on the ship Arbella to settle Boston. He said:

For we must consider that we shall be as a city upon a hill. The eyes of all people are upon us. So that if we shall deal falsely with our God in this work we have undertaken, and so cause Him to withdraw His present help from us, we shall be made a story and a by-word through the world.

JOHN WINTHROP, *THE JOURNAL OF JOHN WINTHROP 1630-1649* 1 n.1 (Harvard University Press 1996) (1630).

7. <https://gov.texas.gov/news/post/governor-abbott-issues-executive-order-to-expand-openings-of-certain-businesses-and-activities.gov> (last visited May 10, 2020);
<https://dshs.texas.gov/coronavirus/default.aspx> (last visited May 10, 2020);
<https://cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited May 10, 2020); <https://whitehouse.gov/openingamerica.gov> (last visited May 10, 2020).

8. <https://www.pewresearch.org> (explaining that "[a]mid COVID-19 risk to seniors, a majority of poll workers are . . . age 61 or older") (last visited May 5, 2020).

9. All active voters in Georgia were mailed absentee ballot request forms after the Republican governor and Democratic Party agreed to move the run off elections due to COVID-19. <https://www.ajc/news/state-regional-govt-politics/georgia-mail-absentee-ballot-requests.html> (last visited April 27, 2020). Currently, registered voters automatically receive a ballot by mail in five states: Oregon, Washington, Utah, Colorado and Hawaii. Seven states have switched to allow all voters to vote by mail with extended deadlines during the pandemic: Alaska, Wyoming, Ohio, Kansas, Delaware, Hawaii and Rhode Island. Other states, such as Florida and Arizona, are encouraging voting by mail. In Pennsylvania, the governor entered an order allowing voters concerned about the coronavirus to request an absentee ballot. Three other states have expanded the option to vote by mail due to COVID-19: Indiana, New Jersey and Maryland. <https://nytimes.com/article/2020-campaign-primary-calendar-coronavirus.html> (last visited May 10, 2020).

10. <https://www.sun-sentinel.com/news/politics/fl-ne-donald-trump-palm-beach-county-voter.html> (last visited May 11, 2020).

11. Robert Brischetto, Ph.D., a former executive director of the San Antonio-based Southwest Voter Research Institute, who was writing for the San Antonio Express News, found that over a

thirteen year period from 2005 to 2018, there were 73 persons identified as adjudicated in election fraud cases in Texas. He noted:

Almost half of the cases involved the improper use of absentee ballots, where voter fraud occurs most often. The rules for handling, transporting and mailing absentee ballots are very specific and very elaborate in Texas. While there were a couple of cases of forging and filling out absentee ballots for others, most were violations involving possessing, collecting, transporting and assisting in the submission of absentee ballots. Many of those violations might have been avoided with more training of election officers and education of voters on the handling and mailing of absentee ballots.

Robert Brischetto, *Texas' Desperate Search for Fraudulent Voters*, SAN ANTONIO EXPRESS NEWS, Mar. 19, 2019, <https://www.mysanantonio.com/opinion/commentary/article/Texas-desperate-search-for-fraudulent-voters-13674630.php> (last visited Apr. 27, 2020).

12. From *Texas League of United Latin Am. Citizens v. Whitley*:

The evidence has shown in a hearing before this Court that there is no widespread voter fraud. **The challenge is how to ferret the infinitesimal needles out of the haystack of 15 million Texas voters.** The Secretary of State through his dedicated employees, beginning in February 2018, made a good faith effort to transition from a passive process of finding ineligible voters through the jury selection system in each county to a proactive process using tens of thousands of Department of Public Safety driver license records matched with voter registration records. Notwithstanding good intentions, the road to a solution was inherently paved with flawed results, meaning perfectly legal naturalized Americans were burdened with what the Court finds to be ham-handed and threatening correspondence from the state which did not politely ask for information but rather exemplifies the power of government to strike fear and anxiety and to intimidate the least powerful among us.

Civil Action No. SA-19-CA-74-FB, (docket no. 61 at page 1) (bold emphasis added).

13. Tex. Elec. Code §§ 81.001-.004.

14. The rational basis standard is implemented pursuant to *Anderson v. Celebrezze*, 420 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Alternatively, defendants' interpretation of the statute does not meet the heightened standard set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), or the strict scrutiny standard set forth in *Lynch v. Donnelly*, 465 U.S. 668, 687 n.13 (1984), as applied in *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978), *aff'd sub nom.*, *Symm v. United States*, 439 U.S. 1105 (1979).

15. Tex. Elec. Code § 81.002(a).

16. <https://www.oxforddictionary.com/us/definition/disability.com> (last visited May 11, 2020).

17. This new study suggests that the COVID-19 pandemic will substantially change daily life in ways which will have a negative impact on mental health. Researchers at San Diego State University and Florida State University compared a nationally representative online sample of 2,032 American adults in late April 2020, to 19,330 American adults who participated in the April 2018 National Health Interview Survey, to measure mental distress. Although the study has not yet undergone peer review and formal publication, its preliminary data showed that American adults in April 2020 were 8 times more likely to fit criteria for serious mental illness (27.7% v. 3.4%) and 3 times more likely to fit criteria for moderate or serious mental illness (70.4% v. 22.0%) compared to the 2018 sample.

18. Texas reported 1,801 new coronavirus cases on Saturday, May 16, 2020, <https://www.dshs.texas.gov> (dashboard) (last visited May 16, 2020), reportedly marking the States' largest single-day jump since the start of the COVID-19 pandemic. <https://www.houstonchronicle.com/news/article/massive-jump-in-COVID-19-cases.html> (last visited May 18, 2020).

19. See American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* (5th ed. 2013) (explaining that mental health disorder is condition which affects thinking, feeling, behavior, or mood and which deeply impacts daily functioning).

20. *Dutmer v. City of San Antonio*, 937 F. Supp. 587, 589, 595 (W.D. Tex. 1996) (Biery, J.) ("If history judges the [San Antonio] term limits movement an idea whose time should not have come, the evolutionary experiment called democracy includes the right to make mistakes and, ultimately, delivers just about the kind of government voters deserve. . . . Those who believe the [term limits] Ordinance a malignancy on the body politic may have to await the appearance of symptoms to attempt persuasion of a majority to perform corrective surgery at the ballot box.").

21. PAUL TILlich, *DYNAMICS OF FAITH* (Harper Collins Publishers Inc. 1957).

22. Benjamin Franklin included a version of this proverb in *Poor Richard's Almanac* when the American colonies were at odds with the English Parliament. Benjamin Franklin, *Poor Richard's Almanac* 275 (1758) (G.P. Putman's Sons eds. 1889). During World War II, this verse was framed and hung on the wall of the Anglo-American Supply Headquarters in London. <https://www.citidel.edu.com> (last visited May 1, 2020).

APPENDIX B
OVERVIEW

The Texas Election Code §§ 82.001-.004 restricts access to voting by mail through explicit age-based eligibility criteria. Voters age sixty-five and older can vote by mail without an excuse while voters under the age of sixty-five can do so only if they fit within very limited exceptions. Plaintiffs allege in this lawsuit that the age restriction is unconstitutional and that the State cannot justify with an adequate basis its decision to grant voters age sixty-five and older additional voting rights than those under age sixty-five.

However, in the motion for preliminary injunction, plaintiffs seek only preliminary relief on their as-applied challenge. Plaintiffs argue they are entitled to a preliminary injunction because the vote by mail provisions, as interpreted by Texas Attorney General Paxton, violate the Twenty-Sixth Amendment in the circumstances of the pandemic now facing the state and the country. Plaintiffs assert that, during the pandemic, Attorney General Paxton's strict interpretation of the disability exemption for vote by mail to exclude those who wish to avoid possible exposure to the coronavirus subjects voters under the age of sixty-five to unconstitutional burdens not levied on voters age sixty-five or older.

Meanwhile, plaintiffs contend the State gives voters no benchmark of which pre-existing medical conditions allow them to vote with the disability exception and no standard exists for how election officials would enforce the line the State wishes to draw. Plaintiffs assert that the failure of the State to provide a safe vote by mail option for voters under age sixty-five under these pandemic circumstances—while providing that safe option widely to those sixty-five and older—abridges the right to vote on account of age and violates the Twenty-Sixth Amendment and

the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs also contend that Attorney General Paxton violated their rights to free speech. In response to a state court order finding that state law permits every eligible voter to vote by mail amid the COVID-19 pandemic, Attorney General Paxton publicly stated that third parties who advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19 could subject those third parties to criminal sanctions. Plaintiffs assert that Attorney General Paxton's letter is presently harming their right to vote, and indeed threatens political speech with criminal prosecution, in violation of the First Amendment. Plaintiffs further argue that Attorney General Paxton's conduct violates their right to be free from voter intimidation as guaranteed by the Voting Rights Act. Finally, plaintiffs seek injunctive relief based on their claim that Attorney General Paxton's interpretation of the Texas Election Code renders the statute unconstitutionally vague because it is not clear which voters qualify to vote by mail under its provisions.

The state defendants respond that plaintiffs have not met their preliminary injunction burden, which is to show a substantial likelihood of success on the merits on each claim, sufficient harm to plaintiffs and undue harm to defendants, and that it serves the public interest to grant the injunction. They submit that it is safe for all voters to vote in person in the midst of this pandemic. The state defendants also argue that abstention is warranted in this case because there are ongoing state court proceedings. They further contend that they are entitled to sovereign immunity and plaintiffs lack standing because the state defendants do not enforce the Texas Election Code.

Plaintiffs reply that they have met their preliminary injunction burden. They further argue that this Court should not abstain because they have cognizable federal constitutional claims which will not be addressed in the state court proceedings and the failure to remedy them would cause

irreparable harm. Plaintiffs further contend the state defendants cannot claim sovereign immunity because of their connections to the enforcement of the Texas Election Code. Finally, plaintiffs maintain they meet the requirements for Article III standing because each has suffered and will continue to suffer legally cognizable injuries because of defendants' actions.

BACKGROUND

Given the current pandemic conditions and their effects on election procedure, on March 27, 2020, some of the plaintiffs in this case filed an original petition and application for temporary injunction in a Texas state court to determine the application of state law. Plaintiffs argued § 82.002 of the Texas Election Code allows voters to elect to cast their ballots by mail under the circumstances of this pandemic. Section 82.002 of the Texas Election Code provides:

Sec. 82.002. DISABILITY. (a) 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.

Tex. Elec. Code § 82.002. Section 82.003 of the Election Code states that "[a] qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day." TEX. ELEC. CODE § 82.003. Plaintiffs contended that participating in social distancing to prevent the spread of COVID-19 is "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." They therefore requested a declaration that Texas Election Code § 82.002 "allows any eligible voter, regardless of age and physical condition, to request, receive and have counted, a mail-in ballot, if they believe they should practice social distancing in order to hinder the known or unknown spread of the virus or disease." Plaintiffs also sought a temporary injunction requesting

that the Texas Secretary of State and the Travis County Clerk “be enjoined to accept and tabulate any mail-in ballots received from voters in an upcoming election who believe that they should practice social distancing in order to hinder the known or unknown spread of a virus or disease.”

Shortly after the state court case was filed, the Texas Democratic Party and three voters brought this federal suit on April 7, 2020. The complaint states that, “[i]n the event the state courts find that vote by mail is permitted for all voters over the age of eighteen who are social distancing,” plaintiffs ask this Court to “ensure compliance with federal law by providing a remedy.” Plaintiffs allege this case should proceed so that the Court can timely determine “the constitutional rights of these plaintiffs and be in a position to do so in the event the state court rulings serve to harm these federal rights and/or the state court proceedings are delayed thus preventing timely state resolution of the state law issue.” Their complaint asserts claims of age, race and language-minority discrimination, as well as violations of the right to free speech under the First Amendment, vagueness in violation of the Fourteenth Amendment, and intimidation in violation of the Voting Rights Act.

A hearing was held in the state court case on plaintiffs’ motion for a temporary injunction on April 15, 2020. Medical experts testified that they expect pandemic conditions to persist throughout the summer months and into the fall. Texas law allows voting by mail for absentees (those who will be away from home for all of early voting and on election day), voters age sixty-five or older, and those with a disability that prevents them from voting in person. As noted, plaintiffs argued that social distancing is a “disability” for purposes of voting by mail. The response presented by Assistant Attorneys General in that case was that the courts have no jurisdiction, pandemic conditions might change by July and Governor Abbott might provide direction to protect voters and

the public.

Even as the hearing was concluding, Texas Attorney General Ken Paxton released an advisory letter to the chair of the House Elections Committee, threatening prosecution of any voter who voted by mail without a narrowly defined “physical condition” constituting a “disability.” He threatened “criminal sanctions” as well for any election official advising such a vote. In the letter, Attorney General Paxton gave a non-official, advisory opinion regarding whether or not the risk of transmission of COVID-19 would entitle Texas voters to cast a mail-in ballot. The letter states: “We conclude that, based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Election Code for purposes of receiving a ballot by mail.”

On April 17, 2020, two days after the hearing, Travis County District Judge Tim Sulak ruled that in the context of the COVID-19 pandemic, all Texas voters who are not immune from the virus are eligible to apply for mail ballots under the “disability” provision of state election law. The temporary injunction order, which is imposed through July 27, states that “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 and therefore any voters without established immunity meet the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code section 82.002.”

In response to the state court order, Attorney General Paxton stated:
I am disappointed that the district court ignored the plain text of the Texas Election Code to allow perfectly healthy voters to take advantage of special protections made available to Texans with actual illness or disabilities. This unlawful expansion of mail-in voting will only serve to undermine the security and integrity of our elections and to facilitate fraud. Mail ballots based on disability are specifically reserved for those who are legitimately ill and cannot vote in-person without needing assistance

or jeopardizing their health. Fear of contracting COVID-19 does not amount to a sickness or physical condition as required by state law.

That same day, Texas Attorney General Ken Paxton filed notice a notice of appeal with the Third Court of Appeals. The Third Court of Appeals transferred the case to the Fourteenth Court of Appeals which ruled that the state court injunction shall remain in full force and effect pending the conclusion of the appeal. During this same time period, Attorney General Paxton filed a petition for writ of mandamus asking the Texas Supreme Court to determine that election administrators have “a duty to reject applications for mail-in ballots that claim ‘disability’ under Texas Election Code section 82.002(a) based solely on the generalized risk of contracting a virus.” The appellate case and petition for writ of mandamus remain pending for disposition in the state courts.

On April 29, 2020, plaintiffs filed a motion for a preliminary injunction with this Court seeking to expedite the process, stating that “[t]he Rule of Law has broken down in the State of Texas, and it has become clear that the federal courts will have to ensure basic constitutional protections for the U.S. Citizens within.” Plaintiffs contend that, in the days since the state court ruling, counties around the state have begun to comply; many counties have posted notice on their websites that they are accepting vote by mail applications in compliance with Judge Sulak’s ruling; and city and school district elections going forward in early May are accepting vote by mail applications in compliance with Judge Sulak’s ruling. Plaintiffs argue that “[a]fter waiting well more than a week watching the state election apparatus turn to comply with the state court order and after watching tens of thousands of Texans submit vote by mail applications, defendants appear willing to allow the circumstances where the State’s judicial branch has so far reached one view of the law

while, at least part of, the executive branch of state government threatens prosecution for complying with the Court order.” Therefore, plaintiffs contend:

Texas citizens can no longer have confidence that the executive branch of the State will comply with the Rule of Law. Now, even if the State is never successful in overturning the state court order, the Attorney General has shown he will not comply with orders of his state’s judiciary. Furthermore, Texans will continue to reasonably fear that the executive branch will not comply with state court rulings and/or that they could be subjected to criminal prosecution for attempting to vote by mail. Under these circumstances, the State is no longer functioning to protect the federal rights of U.S. citizens, and even if it were to begin to do so, voters can have no confidence their rights will be preserved. Moreover, the behavior of the executive branch of Texas government threatens to upset the State’s election apparatus which is largely complying with the state court order and where the State is successful in strong arming local officials to defy the state court order, election procedures throughout the State will be administered non-uniformly.

Accordingly, plaintiffs seek an injunction order blocking state officials from denying a mail-in ballot to any Texas voter who applies for a mail-in ballot because of the risk of transmission of COVID-19, and enjoining defendants, including Attorney General Paxton, from issuing threats or seeking criminal prosecution of voters and others advising voters on mail ballot eligibility based on the risk of transmission of COVID-19.

The state defendants respond that the state court temporary injunction order conflicts with the Texas Election Code’s plain text and “threatens to destabilize the State’s carefully crafted framework governing the conduct of elections.” They argue the resolution of the state court litigation will invariably alter this closely related federal proceeding. For this reason, the state defendants contend the *Pullman* abstention doctrine applies and this Court should decline to hear plaintiffs’ claims at this juncture. The state defendants also argue:

Plaintiffs’ motion for preliminary injunction also exhibits fatal jurisdictional and substantive defects. None of the state defendants—Greg Abbott, Governor of Texas, Ken Paxton, Texas Attorney General, or Ruth Hughs, Texas Secretary of

State—enforce the provisions of the Election Code at issue. Sovereign immunity therefore bars plaintiffs’ claims for injunctive relief against those officials on the basis of those provisions. For related reasons, plaintiffs lack standing to sue the state defendants. And on the merits, plaintiffs have not met their burden of showing that current or unknown future circumstances will prevent voters from safely exercising the franchise via in-person voting in July or November of this year. The known science of COVID-19 is constantly evolving, and with it, our understanding of how elected officials can continue to contain the spread of COVID-19 throughout the State—including, as relevant here, at polling places.

Accordingly, the state defendants request that the Court abstain from ruling on plaintiffs’ claims until the conclusion of the pending state court litigation. Alternatively, they argue plaintiffs’ motion for preliminary injunction should be denied because plaintiffs have failed to make the required showing to obtain the extraordinary injunctive relief they request.

VOTING BY MAIL IN TEXAS

Texas law allows voting by mail for registered voters who meet one of the qualifications stated in the Election Code. *See* Tex. Elec. Code § 82.001, *et seq.* A voter is qualified to vote by mail if he or she (1) anticipates being absent from his county of residence on election day; (2) has an illness or other physical condition that disables him or her from appearing at the polling place; (3) is sixty-five or older; or (4) is confined in jail. Tex. Elec. Code §§ 82.001-004. Voters apply to vote by mail with a mail ballot application sent to the early voting clerk. The early voting clerk is responsible for conducting early voting and must “review each application for a ballot to be voted by mail.” Tex. Elec. Code § 86.001(a). An early voting ballot application must include the applicant’s name, the address at which the applicant is registered to vote, and an indication of the grounds for eligibility for voting by mail. Tex. Elec. Code § 84.002. Mail ballot applicants must certify that “the information given in this application is true, and I understand that giving false information in this

application is a crime.” Tex. Elec. Code § 84.011. Section 84.0041 makes it a crime to “knowingly provide false information on an application for ballot by mail.” Tex. Elec. Code § 84.0041.

If the voting clerk determines the applicant is entitled to vote by mail, the voting clerk shall provide the voter a ballot by mail. Tex. Elec. Code § 86.001. If the applicant is not eligible to vote by mail, the voting clerk shall reject the application and give notice to the applicant. *Id.* A rejected applicant is not entitled to vote by mail. *Id.* July 2, 2020, is the deadline for an early voting clerk to receive an application to vote by mail for the upcoming July 14, 2020, Democratic Party run-off election. Tex. Elec. Code § 84.007(c). In their motion for preliminary injunction, plaintiffs state that “[m]ail ballots are expected to start being sent to voters, in response to their request on May 24, 2020,” and that “thousands of vote by mail applications are pouring in now.”

Plaintiffs maintain that in the last month many Texas counties, including some of the most populous, have been following the state district court’s order interpreting state law in a way that allows all eligible voters, regardless of age and without immunity to COVID-19, to vote by mail, and its injunction enforcing that order. They allege many mail ballots have already been submitted under this order.

When voters submit absentee ballots, they are asked to check a box to indicate which eligibility criteria they meet but not asked to provide more detailed reasoning. Plaintiffs maintain the record shows—and defendants have not suggested otherwise—that it would be impossible to disaggregate the absentee ballots that were submitted pursuant to risk of contracting coronavirus during the past several weeks from other qualifying absentee ballots. Meanwhile, plaintiffs have not yet submitted their applications for a mail ballot to participate in the Democratic primary runoff

election because they fear prosecution and they fear the state courts will ultimately determine that if they vote a mail ballot, their vote will not be counted.

The State is taking steps to impose measures that would make in person voting safer during these pandemic elections. Plaintiffs argue that, even with these measures implemented at the local level, the State still has no way to ensure the non-transmission of the virus at crowded in-person polling locations. Recent history has shown that medical professionals in even the most carefully monitored medical environments have fallen ill and died from virus infections. Plaintiffs state that, although the State's efforts toward encouraging increased in-person voting protections are at least a step in the right direction, they also inevitably will slow the election process and limit the rate at which voters can be processed. At the same time, plaintiffs contend the process will be slowed from another direction because fewer election workers will be present.

Plaintiffs point out that the evidence additionally shows that many election workers did not report as scheduled on election day during the March primary elections because of the possibility of contracting the virus. Further, the recent evidence from the Wisconsin election shows that people did in fact contract the virus during in person voting, and this occurred in a state that does not require an excuse to vote by mail. The State responds with some studies that conclude that the rate of virus infection was not meaningfully changed by voting activity in Wisconsin. Presumably, there are a number of factors that drive virus infection rates and determining one cause from others is a challenging task indeed, particularly given our present state of knowledge about coronavirus spread. Regardless of the rate of growth in Wisconsin after the election, defendants do not deny that some individuals have been found to have contracted coronavirus due to their exposure at polling locations.

PRELIMINARY INJUNCTION STANDARD OF REVIEW

In order to secure a preliminary injunction, plaintiffs must establish the following four elements: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). None of these elements, however, is controlling. *Florida Med. Ass'n v. United States Dep't of Health, Educ. & Welfare*, 601 F.2d 199, 203 n.2 (5th Cir. 1979). Rather, this Court must consider the elements jointly, and a strong showing of one element may compensate for a weaker showing of another. *Id.*

THE ARGUMENTS OF THE PARTIES

Plaintiffs contend they have established a substantial likelihood of success on the merits of their as-applied claims relating to: (1) age discrimination in violation of the Twenty-Sixth Amendment and the Equal Protection Clause of the Fourteenth Amendment; (2) vagueness in the Texas Election Code's definition of "disability" in violation of the Due Process Clause of the Fourteenth Amendment; (3) voter intimidation in violation of 52 U.S.C. § 10307(b); and (4) the denial of free speech in violation of the First Amendment of the United States Constitution. Plaintiffs further argue they will suffer irreparable injury if the injunction is not granted, their substantial injury outweighs the threatened harm to defendants, and granting the preliminary injunction will not disserve the public interest. The state defendants disagree plaintiffs have met their burden. The state defendants also contend that plaintiffs lack standing and that the Court should abstain from hearing plaintiffs' arguments because of the pending state court proceedings.

Likelihood of Success on the Merits

Plaintiffs' Age Discrimination Claims Under the Twenty-Sixth and Fourteenth Amendments

The Twenty-Sixth Amendment provides that “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.” U.S. CONST. amend. XXVI, § 1. The Equal Protection Clause of the Fourteenth Amendment “is essentially a mandate that all persons similarly situated must be treated alike.” *Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996) (internal quotation omitted). Plaintiffs argue that § 82.002(a) of the Texas Election Code abridges their right to vote based on their age in violation of the Twenty-Sixth Amendment and discriminates against them based on age in violation of the Fourteenth Amendment. Specifically, plaintiffs argue that when in-person voting becomes physically dangerous, age-based restrictions on mail ballot eligibility become constitutionally unsound. With regard to the applicable standard of review, plaintiffs argue strict scrutiny applies. *Symm v. United States*, 439 U.S. 1105 (1979); *see also United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978). They contend Texas is unable to present a compelling state interest in “imposing arbitrary obstacles on voters on account of age when Texas election law does not clearly demand this result during this pandemic.” If the Court declines to engage in strict scrutiny, plaintiffs argue it should apply the *Arlington Heights* framework which evaluates: (1) the impact of the official action and whether it bears more heavily on one group than another; (2) the historical background of the decision; (3) the specific sequence of events leading up to the decision challenged in the case, including departures from normal procedures in making decisions and substantive departures; and (4) contemporary statements made by the governmental body which created the official action. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

Plaintiffs contend Attorney General Paxton's interpretation of the law related to mail ballot eligibility in Texas is: (1) discriminatory to every voter under the age of sixty-five and untenable given the COVID-19 pandemic, and (2) the official decision by the Attorney General to threaten to enforce that law in the most disenfranchising and severe manner possible, through criminal sanction, is strong evidence of invidious discrimination.

The state defendants respond that § 82.003 does not "deny or abridge" plaintiffs' right to vote and therefore the challenged statute should be evaluated under the elevated *Anderson-Burdick* rational basis standard of review. *See Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 420 U.S. 780 (1983). Under this rational basis review, as long as the distinctions made in the challenged law bear a rational relationship to a legitimate governmental end, the law must be upheld. *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969). The state defendants maintain that the decision to limit voting by mail to older Texans is rational because individuals aged sixty-five and over are more susceptible to COVID-19, and it is related to legitimate governmental interests including the prevention of voter fraud. Accordingly, the state defendants argue that plaintiffs have not shown a likelihood that they will prevail on their Twenty-Sixth and Fourteenth Amendment claims.

Plaintiffs' Claim Under the First Amendment

Plaintiffs argue their right to vote has been violated by Attorney General Paxton's threats of criminal prosecution. Because the speech at issue is fully protected First Amendment activity, and the burden on this speech is heavy, plaintiffs contend the Court should apply the strict scrutiny standard of review. Citing the reasons stated in support of their age discrimination claim, plaintiffs contend they are likely to succeed on their free speech claim.

The state defendants respond that Texas Attorney General Paxton has not threatened plaintiffs' right to free speech. They argue plaintiffs' accusation misapprehends the Attorney General's responsibilities to enforce state statutes and the letter he sent in fulfillment of those responsibilities. The state defendants also argue that "an injunction prohibiting Attorney General Paxton from threatening voters or voter groups with criminal or civil sanction for voting by mail or communicating with or assisting voters in the process of vote by mail" would violate his rights to comment on matters of public concern. The state defendants therefore contend that plaintiffs have not shown a likelihood of success on their First Amendment claim.

Plaintiffs' Void for Vagueness Claim

Plaintiffs note that the Texas Democratic Party and some of the plaintiffs in the instance case maintained in the state court proceeding that state law allows all voters, regardless of age, to vote by mail because they have a "disability" based on the risk of transmission of COVID-19. They also noted that, although the state court agreed with plaintiffs, Attorney General Paxton holds a different interpretation. Plaintiffs argue that these factual conditions result in an environment where the "public cannot reasonably determine what state law allows." They therefore argue that Attorney General Paxton's interpretation renders the Texas Election Code unconstitutionally vague in violation of the Fourteenth Amendment because it is not clear which voters qualify to vote by mail under its provisions. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *see also Johnson v. United States*, 135 S. Ct. 2551, 2556-58 (2015); *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972).

The state defendants respond that plaintiffs' void-for-vagueness claim fails because this doctrine has been primarily applied to strike down criminal laws and Attorney General Paxton's

interpretation of the statute does not render it to be “so vague and indefinite as really to be no rule at all.” *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 217 (5th Cir. 2000). They also contend Attorney General Paxton’s interpretation of the statute does not result in a constitutional violation because he was merely giving his opinion about the statute’s construction. *See Ford Motor Co. v. Texas Dept’ of Transp.*, 264 F.3d 493, 509 (5th Cir. 2001); *Stansberry v. Holmes*, 613 F.2d 1285, 1289 (5th Cir. 1980). The state defendants therefore conclude that plaintiffs have not shown a likelihood of success on the merits of their vagueness argument.

Voter Intimidation

Plaintiffs argue Attorney General Paxton has made the extraordinary choice to upend the rule of law, disturb the state judiciary from fulfilling its mission, and to outwardly intimidate rightful voters and the third parties who assist voters in elections. He stated: “[T]o the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041.” This advisory opinion was made just as a state court ruled that Texas voters are entitled to a mail-in ballot because of the risk of transmission of COVID-19. Hours later, Attorney General Paxton stated that expanding mail ballot eligibility to all Texans “will only serve to undermine the security and integrity of our elections.” Plaintiffs contend that these statements operate to discourage voters from seeking mail-in ballots because of their fear of criminal sanction or victimization by fraud in violation of 52 U.S.C. § 10307.

The state defendants respond that Attorney General Paxton did not intimidate plaintiffs or any other voters. They argue the communication merely states the law regarding the giving of false information in connection with a request for a ballot by mail. Accordingly, the state defendants

maintain that plaintiffs have not shown that their voter intimidation claim is likely to succeed on the merits.

Irreparable Injury and Harm

Plaintiffs argue they are irreparably injured if an injunction is not granted and their harm outweighs any harm to the defendants. They note that voting is a constitutional right for those that are eligible, and contend that the violation of constitutional rights for even a minimal period of time constitutes an irreparable injury which justifies granting their motion for preliminary injunction. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B. Nov. 1981) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). In addition, plaintiffs contend that forcing voters to unnecessarily risk their lives in order to practice their constitutional rights while allowing other voters a preferred status so they do not have to face this same burden, is also irreparable injury. They assert: (1) there is no harm to the State allowing registered, legal voters the right to vote in the safest way possible, (2) the State has no interest in forcing voters to choose between their well being and their votes, and (3) the State has no interest in allowing a situation where “the Attorney General can sow confusion, un-even election administration and threaten criminal prosecution” under these circumstances.

The state defendants respond that injunctive relief at this point in the election cycle is improper. They note that the Supreme Court “has repeatedly emphasized that lower courts should ordinarily not alter the election rules on the eve of an election.” *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020). The state defendants also argue that plaintiffs cannot establish an irreparable injury because “they have not proven that they will be deprived of the safe exercise of the franchise in the State’s upcoming elections.”

Public Interest Considerations

Plaintiffs contend “the public is best served by both preserving the public health of Texans and by fervent and competitive races for public office.” They argue it is the public policy of the State of Texas to construe any constitutional or statutory provision which restricts the right to vote liberally, and there is no justification nor public interest in denying the ballot to eligible voters. Furthermore, plaintiffs argue it is always in the public interest to prevent violations of individuals’ constitutional rights, and to prevent the State from violating the requirements of federal law. Plaintiffs also contend that protecting the right to vote is of particular public importance because it is “preservative of all rights.” *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Accordingly, plaintiffs contend they have met all the requirements for a preliminary injunction.

The state defendants respond that an injunction would undermine the public interest. They argue “the equitable factors of the injunctive relief analysis tilt heavily against the issuance of an injunction, especially the overbearing one Plaintiffs ask the Court to adopt.” The state defendants assert that the State has a weighty interest in the equal, fair, and consistent enforcement of its laws. *Maryland v. King*, 567 U.S. 1301, 1303 (2012). They further maintain that the inability of Texas to enforce its duly enacted laws clearly inflicts irreparable harm on the State. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). The state defendants assert that interest is especially potent in the middle of a global health crisis and that “if citizens lose confidence in the evenhanded application of the State’s election laws in these precarious times, the foundations of our system of representative government will weaken.” Accordingly, they contend plaintiffs’ motion for preliminary injunction should be denied.

Standing to Bring Suit

The state defendants argue plaintiffs are unlikely to prevail on their claims against them under the Fourteenth and Twenty-Sixth Amendments because they do not enforce Texas Election Code § 82.002 or § 82.003, and are immune from suit. For related reasons, the state defendants also argue plaintiffs lack standing to bring their claims against the state defendants.

Plaintiffs respond that the state defendants' immunity argument is meritless. Specifically, plaintiffs maintain that all of the state defendants have a sufficient connection to the enforcement of the Texas Election Code. They contend that in light of the admissions in this case, including threats of criminal prosecution, this argument bears little credibility. Plaintiffs also argue that each meets the requirements for Article III standing because each has suffered and will continue to suffer legally cognizable injuries because of defendants' actions. Accordingly, plaintiffs contend this Court should proceed to hear their motion for preliminary injunction.

Abstention

The state defendants contend that, though plaintiffs' current claims sound in federal law, they cannot be resolved without answering the question posed in state court: whether fear of contracting COVID-19 constitutes a "disability" under the Texas Election Code. They contend that question is squarely presented in the state court litigation and will soon be considered by the Texas Supreme Court. In light of uncertainty about a predicate question of state law, the state defendants argue that this Court should abstain under *Railroad Commission of Texas v. Pullman*, 312 U.S. 496 (1941). "The *Pullman* case establishes two prerequisites for *Pullman* abstention: (1) there must be an unsettled issue of state law, and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised." *Palmer v. Jackson*,

617 F.2d 424, 428 (5th Cir. 1980). With regard to the second factor, the state defendants contend resolution by the state court will render this case moot or materially alter the constitutional claims presented.

Plaintiffs respond that “the abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court’s equity powers.” *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). Plaintiffs also argue that abstention in this case is improper because the state law determination will not moot nor present in a different posture the federal constitutional questions raised by plaintiffs. Plaintiffs further contend that, “regardless of whether the challenged provision of Texas Election Code is resolved in Texas state court, and there is no indication that such clarification will come soon,” Texas voters are “waking every day to make the choice to request a mail ballot and have it rejected (and be criminally prosecuted) or wait further and potentially request the ballot too late or do so with an avalanche of others that overloads the electoral system.” Plaintiffs maintain that the orderly administration of the election requires resolution now because: (1) the question of whether the current circumstances violate the United States Constitution remains and must be answered by this Court; (2) the July run-off election is weeks away; and (3) there “is no guarantee that the state court proceedings will have resolved the issue before this election leaving plaintiff’s federal constitutional rights in limbo.” Accordingly, plaintiffs argue this Court should not abstain from ruling on their motion for preliminary injunction.

APPENDIX C

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

I. COVID-19 is an Immediate Danger to all Texans

1. COVID-19 infection is caused by the SARS-CoV-2 virus and is spread by passing through mucous membranes. Ex. 21 at p. 2.

2. Coronavirus is spread through droplet transmission. These droplets are produced through coughing, sneezing, and talking. Ex. 21 at p. 3. Ex. 22 p. 14. Ex. 22 at p. 16-17.

3. The virus can be spread when an infected person transmits these droplets to a surface like a polling machine screen. Ex. 21 at p. 3. Ex. 22 p. 72-73.

4. It is highly likely that COVID-19 will remain a threat to the public both in July and through November. Ex. 6 at p. 3. Even if virus transmission and prevalence do decline over the summer months, it remains likely that they will resurge in the fall and winter. Ex. 28 at p. 7.

5. Reported illnesses have ranged from mild symptoms to severe illness and death. The most common symptoms include fever, dry cough, and shortness of breath. Ex. 21 at p. 2-3. Other identified symptoms include muscle aches, headaches, chest pain, diarrhea, coughing up blood, sputum production, runny nose, nausea, vomiting, sore throat, confusion, loss of senses of taste and smell, and anorexia. Due to the respiratory impacts of the disease, individuals may need to be put on oxygen, and in severe cases, patients may need to be intubated and put on a ventilator. Ex. 28 at p. 3.

6. Anyone can be infected with the novel coronavirus. Ex. 21 at p. 3-4. Ex. 22 at p. 21.

7. Certain groups, such as those over 60 years of age and those with certain underlying

medical conditions, are at higher risk of serious illness and death should they be infected. Ex. 21 at p. 3.

8. People of every age are at risk of serious illness and possible death. Ex. 28 at p. 3.

9. The Latino community is particularly vulnerable to infection, hospitalization, and death resulting from COVID-19, due to a combination of high prevalence of underlying medical conditions and socioeconomic conditions that make contracting the disease more likely. Ex. 28 at p. 4.

10. Any place where people gather and cannot maintain physical distancing, such as a polling place, represents a heightened danger for transmission of COVID-19 disease. Ex. 21 at p. 3. Ex. 22 p. 14.

11. Crowding and exposure to a range of surfaces at the polls make polling places likely transmission sites for the virus. Ex. 21. at p. 2-3. Ex. 22 p. 14.

12. Polling places will likely remain transmission sites for the virus, even if election officials use all reasonable preventive measures. Ex. 22 at p. 72. Ex. 22 at p. 64-70.

13. Requiring voters to remain in close proximity to other voters and election workers for lengthy periods of time, particularly at polling locations with long lines and extended wait times would place them at risk of contracting or spreading COVID-19. Ex. 28 at p. 8.

14. This would be particularly true for those who are at a greater risk of complications and death from COVID-19, including the elderly, immunocompromised, and people with underlying health conditions, including many members of the Latino community. E. 28 at p. 8.

15. However, data to date in Texas demonstrate higher than expected infection rates in younger persons. Ex. 45. Ex. 22 at p. 42-44.

16. Some infected persons do not appear to have any symptoms although they may still be able to infect others. Ex. 21 at p. 3. Ex. 23 at p. 5.

17. Meanwhile, other people with no pre-existing conditions are dying of stroke without ever displaying the typical COVID-19 symptoms. Ex. 28.

18. COVID-19 has become one of the leading causes of death in the United States. Ex. 48 at p. 1-2.

19. As of May 13, 2020, Texas has 41,048 reported cases of COVID-19. Ex. 44 at p.1.

20. As of April 25, 2020, the highest number of reported cases of COVID-19 in Texas are among 50 to 59-year-olds and 40 to 49-year-olds, with 2,568 reported cases and 2,620 reported cases, respectively. Ex. 45 at p. 1.

21. 20 to 29-year-olds represent 2,183 cases, while those aged 65 to 74 make up 1,292 reported cases in Texas. As of May 13, the State has seen 1,133 deaths from the virus. Ex. 44 at p. 1. Ex. 45 at p. 1.

22. Herd Immunity occurs when a high percentage of people in a community become immune to an infectious disease. This can happen through natural infection or through vaccination. In most cases, 80- 95% of the population needs to be immune for herd immunity to take place. Ex. 21 at p. 5.

23. "Herd Immunity" will not reduce the risk of COVID-19 during the 2020 elections. Ex. 21 at p. 6-7.

24. An FDA-approved vaccine will be available for at least 12-18 months. Therefore, a vaccine will not reduce the risk of COVID-19 during the 2020 elections. Ex. 21 at p. 4-5.

II. Voting by Mail Is Safe with No Risk of COVID-19 Transmission

25. There is no evidence the virus can be spread by paper, including mail. Ex. 21 at p. 7.

26. Voting by mail would prevent virus transmission between voters standing in line, signing in, and casting votes, as well as between voters and election workers. Ex. 21 at p. 7. Ex. 22 at p. 72-73. Ex. 22 at p. 183. Ex. 22 at p. 201.

27. Voting by mail would eliminate viral transmission through contamination of environmental surfaces like voting machines. Ex. 21 at p. 7. Ex. 22 p. 72. Ex. 22 at p. 252-253.

28. Due to the pandemic, voting by mail is much safer for the public than voting in person. Ex. 6 at p. 3. Ex. 22 at p. 182. Ex. 22 at p. 192-193. Ex. 22 at p. 234. Ex. 22 at p. 237.

Background of Voting by Mail in Texas

29. Texas law allows voting by mail for registered voters who meet one of the qualifications stated in the Election Code. See Tex. Elec. Code Ch. 82.

30. A voter is qualified to vote by mail if he (1) anticipates being absent from his county of residence on election day; (2) has an illness or other physical condition that disables him from appearing at the polling place; (3) is 65 or older; or (4) is confined in jail. Tex. Elec. Code §§ 82.001-4. Ex. 1 at p. 2. Ex. 22 at p. 214. Ex. 22 at p. 243-244. Ex. 22 at p. 250.

31. Voters apply to vote by mail with a mail ballot application which they send to the early voting clerk. Tex. Elec. Code §§ 84.001.

32. The early voting clerk is responsible for conducting early voting and must “review each application for a ballot to be voted by mail.” Tex. Elec. Code § 86.001(a).

33. An early voting ballot application must include the applicant's name and the address at which the applicant is registered to vote and an indication of the grounds for eligibility for voting

by mail. Tex. Elec. Code § 84.002.

34. The applicant for a mail ballot must certify that “the information given in this application is true, and I understand that giving false information in this application is a crime.” Tex. Elec. Code § 84.011.

35. It is a crime to “knowingly provide false information on an application for ballot by mail.” Tex. Elec. Code § 84.0041.

36. If the clerk determines the applicant is entitled to vote by mail, the clerk shall provide the voter a ballot by mail. Tex. Elec. Code § 86.001.

37. If the voter is not entitled to vote by mail, the clerk shall reject the application and give notice to the applicant. *Id.*

38. A rejected applicant is not entitled to vote by mail. *Id.*

39. July 2 is the deadline for an early voting clerk to receive an application to vote by mail for the upcoming July 14, 2020 Democratic Party Run-Off. See Tex. Elec. Code § 84.007(c). Ex. 13 at p. 11.

40. Mail ballots are expected to start being sent to voters in response to their requests on May 30, 2020. Ex. 13 at p. 9.

41. Thousands of vote-by-mail applications are being sent to early voting clerks across Texas. Ex. 46 at p. 4-5.

Election Officials Need Clarity to Prepare for Imminent Elections

42. Governor Abbott has set both the date of the special election for Senate District 14 in Bastrop and Travis Counties and the Democratic Primary Run-Off election in all 254 Counties on July 14, 2020. Ex. 7 at p. 1. During both the primary and the November General Election state

election law requires all ballot information be complete by 74 days before the election. Ex. 7 at p.

1. During that time, clerks must do all of the following:

- * proof ballot submissions, order races appropriately, merge with many jurisdictions appearing on the ballot;
- * work with ballot companies to lay out for printing multiple ballot styles;
- * program ballot scanners, controllers, and related technology;
- * prepare ballot carriers for vote by mail applications and returned ballots for the use of signature verification committees and ballot boards;
- * hire election workers for polling locations, early voting locations, and central counting;
- * train all workers;
- * determine polling locations for election day and early voting, negotiate contracts with locations;
- * manage payroll issues of dozens to thousands of temporary workers; and,
- * manage delivering and picking up equipment while keeping it secure and free from tampering before, during and after the polling locations open and close. Ex. 7 at p. 1-2.

43. Prior to the commencement of the instant litigation, election administrators sought guidance from the Secretary of State regarding the threat of COVID-19 and the ability of voters to obtain mail-ballots. Ex. 24 at p. 7. The Secretary did not provide such definitive guidance.

44. On April 6, 2020, the Secretary of State issued Election Advisory 2020-14, which left the interpretation of the disability statute up to local election officials. This advisory remains the only guidance from the Secretary of State to election officials pending the resolution of Defendants' appeal of that litigation. It does not provide guidance to election officials if their interpretation is correct or if counties should have a uniform interpretation of the statute. Ex. 1 at p. 2-4.

45. The State of Texas' Fourteenth Court of Appeals has ordered that the appeal in the state court case will be submitted by June 12, 2020, 32 days prior to the primary runoff election date and 20 days prior to the vote-by-mail application deadline for that election. Ex. 38 at p. 2.

46. On May 13, 2020, the State of Texas filed a Petition for Writ of Mandamus in the Texas Supreme Court against only some of the counties in Texas and the Petition seeks to collaterally attack the state district court injunction order while not including Plaintiffs as real parties in interest.

Ex 42. Sequence of Events Since the Outbreak in Texas. On May 15, 2020, the Justices again blocked mail-in voting requests for people worried about contracting COVID-19, overturning the appellate court order from earlier in the week. The Texas Supreme court did not provide an explanation for issuing the stay.

47. On March 13, 2020, Defendant Abbott declared that COVID-19 poses an imminent threat of disaster. Ex. 2 at p. 2 .

48. On March 19, 2020, Dr. John W. Hellerstedt, Commissioner of the Department of State Health Services, declared a state of public health disaster. The disaster declaration provided that people not gather in groups larger than 10 members and limit social contact with others by social distancing or staying six feet apart. Ex. 4 at p. 1.

49. On March 19, 2020, Defendant Abbott closed schools temporarily. He also closed bars and restaurants, food courts, gyms and massage parlors. Ex. 3 at p. 3.

50. On April 27, 2020, Defendant Abbott issued a new order that purports to open the state's business affairs, in "phases." Ex. 43 at p. 1. He has indicated that case testing will be monitored and that if and when cases begin to increase, the opening will be slowed and/or reversed.

51. Dr. Deborah Leah Birx, the Coronavirus Response Coordinator for the White House Coronavirus Task Force, has stated that "social distancing will be with us through the summer to really ensure that we protect one another as we move through these phases." Ex. 47 at p. 12.

52. The Texas Secretary of State only gives guidance to local election administrators about

how the election laws apply. An advisory issued by the Secretary of State's Office instructed counties to begin preparing for larger than normal volumes of vote by mail while also giving guidance to local officials to seek court orders, as appropriate, to adjust election procedures. Ex. 24 at p. 9 .

53. In order to seek clarity of the requirements of state law, some of these Plaintiffs sought declaratory and injunctive relief in Texas district court in *Travis County. Democratic Party v. DeBeauvoir*, et al., No. D-1-GN-20-001610 (201st Dist. Ct., Travis Cty., Tex. filed March 20, 2020).

54. Texas intervened and asserted a Plea to the Jurisdiction based on standing, ripeness, and sovereign immunity. Ex. 33 at p. 2.

55. Texas argued in its Plea to the Jurisdiction that vote by mail administration is a county-level decision. Ex. 33 at p. 3.

56. On April 15, the state court heard the plaintiffs' temporary injunction motion and Texas' plea to the jurisdiction. The state court verbally announced the denial of the plea to the jurisdiction and the granting of the temporary injunction.

57. In response to the oral order, Defendant Paxton made public a letter he had sent to the Chair of the House Committee on Elections of the Texas House of Representatives. Ex. 55 at p. 1-5.

58. In the letter, Defendant Paxton gave a non-official, advisory opinion regarding whether the risk of transmission of COVID-19 would entitle Texas voters to cast a mail-in ballot. He stated: "We conclude that, based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Election Code for purposes of receiving a ballot by mail." Ex. 55 at p. 3.

59. In a statement accompanying the publication of the letter, General Paxton said: "I am

disappointed that the district court ignored the plain text of the Texas Election Code to allow perfectly healthy voters to take advantage of special protections made available to Texans with actual illness or disabilities. This unlawful expansion of mail-in voting will only serve to undermine the security and integrity of our elections and to facilitate fraud. Mail ballots based on disability are specifically reserved for those who are legitimately ill and cannot vote in-person without needing assistance or jeopardizing their health. Fear of contracting COVID-19 does not amount to a sickness or physical condition as required by state law.” Ex. 55 at p. 1. Ex.35.

60. This statement and the actions of the State contributed to the uncertainty that voters and early voting clerks face in administering upcoming elections.

61. The letter also threatened political speech by Texas Democratic Party (“TDP” or “the Party”) and other political actors in the state. Ex. 55 at p. 5.

62. The letter stated: “To the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041.” Ex. 55 at p. 5.

63. The public statements and actions of the Defendant Paxton create a reasonable fear by voters that they will be prosecuted. Ex. 8 at p. 7.

64. On May 1, 2020 after counties were following Judge Sulak’s order, Defendant Paxton issued another Guidance Letter which again purported to threaten Texans with criminal prosecution for following Judge Sulak’s order. Ex. 34.

65. Given the public statements and actions by Defendant Paxton, a voter would reasonably fear that he or she would face criminal sanction if he or she checks the disability box on a mail ballot application because of the need to avoid the potential contraction of the virus. Ex. 8 at p. 7.

66. Given the public statements and action by Defendant Paxton, third party political actors such as TDP have a reasonable fear of criminal sanction for assisting voters to apply for mail in ballots in order to avoid exposure to COVID-19. Ex. 55 at p. 5.

Texas Is a Large, Diverse State Whose Voters Need Protection

67. Texas is a large state, with a diverse pool of voters. As of July 1, 2019, there are 28,995,881 Texans. Ex. 29. People over the age of 65 are 12.6% of the population, or about 3,653,481 people. *Id.* Children below the age of 18 are 25.8% of the population, or 7,480,937 people. *Id.* Texans between age of 18 and 65 are 61.6% of the population, or 17,861,463 people. *Id.* On January 23, 2020, the Secretary of State announced that Texas had set a new state record of registered voters with 16,106,984 registered voters. *Id.*

Plaintiffs

a. Texas Democratic Party

68. The TDP is a political party formed under the Texas Election Code.

69. The TDP is the canvassing authority for many of the imminent run-off elections to be held on July 14, 2020.

70. The election of July 14 is, in part, to determine runoff elections and therefore award the Democratic Party Nominations to those who prevail. Ex. 24 at p. 13 .

71. TDP is the political home to millions of Texas voters and thousands of Texas' elected officials.

72. The TDP expends resources to try to help its eligible voters vote by mail. Ex 7. 24 and 29.

73. TDP is injured by the uncertainty of the laws associated with voting by mail because of the expenditure of financial resources used to help its members vote by mail, and the potential disfranchisement of its members. Ex 7. 24 and 29.

74. TDP is harmed by the state forcing it to award its nominations in an undemocratic process. Ex 7. 24 and 29.

b. Gilberto Hinojosa

75. Gilberto Hinojosa is the elected Chair of the TDP. He is one of the administrators of the upcoming run-off elections for the Texas Democratic Party. Ex. 24 at p. 4. He is the head of the canvassing authority for the July run-off elections and is the leader of the Party by and through his statutory and rule-based powers.

76. Chair Hinojosa is also a registered voter in Texas.

77. Chair Hinojosa is injured by the Defendants, because of the uncertainty of Texas law s regarding qualifications to vote by mail.

c. Joseph Daniel Cascino

78. Joseph Daniel Cascino is a Travis County voter who voted in Democratic primary election on March 3, 2020. Ex. 10 at p. 1 .

79. He intends to vote by mail in the upcoming run-off and general elections. Ex. 10 at p. 1-2.

80. He is not 65 years of age or older. Ex. 10 at p. 1.

81. He intends to be in Travis County during the early vote period and Election Day. Ex. 10 at p. 1 .

82. He has not been deemed physically disabled by any authority. Ex. 10 at p. 1.

83. He wishes to vote by mail because of the risk of transmission by COVID-19 at polling

places. Ex. 10 at p. 2 .

d. Shanda Marie Sansing

84. Shanda Marie Sansing is a Travis County voter who voted in Democratic primary election on March 3, 2020. Ex. 9 at p. 1.

85. She intends to vote by mail in the upcoming run-off and general elections. Ex. 9 at p. 1-2.

86. She is not 65 years of age or older. Ex. 9 at p. 1.

87. She intends to be in Travis County during the early vote period and Election Day. Ex. 9 at p. 1 .

88. She has not been deemed physically disabled by any authority. Ex. 9 at p. 1.

89. She wishes to vote by mail because of the risk of transmission by COVID-19 at polling places. Ex. 9 at p. 2 .

e. Brenda Li Garcia

90. Brenda Li Garcia is a Bexar County voter who has voted in Democratic primary, run-off, and general elections in the past. Ex. 30.

91. She intends to vote by mail in the upcoming run-off and general elections. Ex. 30.

92. She is not 65 years of age or older. Ex. 30.

93. She intends to be in Bexar County during the early vote period and Election Day. Ex. 30.

94. She has not been deemed physically disabled by any authority. Ex. 30.

95. She wishes to vote by mail because of the risk of transmission by COVID-19 at polling places. Ex. 30.

Defendants

a. The Honorable Gregg Abbott

96. The Honorable Gregg Abbott is the Governor of Texas and a defendant in this case.

97. He is the chief executive officer in this State. Tex. Const. Art. IV § 1.

b. The Honorable Ruth Hughs

98. The Honorable Ruth Hughs is the Secretary of State of Texas and its chief election officer. Tex. Elec. Code § 31.001.

99. Secretary Hughes has injured the plaintiffs by creating a lack of clarity and probable lack of uniformity in application of the election laws relating to mail ballot eligibility throughout the State.

c. The Honorable Ken Paxton

100. The Honorable Ken Paxton is the Attorney General of Texas and its chief legal officer. Tex. Const. Art. IV § 22.

101. The Attorney General of Texas may investigate and assist local jurisdictions in prosecuting election-related crimes. Tex. Elec. Code §§ 273.001 (d); 273.002.

102. Recently, General Paxton has issued a letter threatening “third parties [who] advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code.” Ex. 55 at p. 5.

103. General Paxton has created a lack of clarity and probable lack of uniformity in application of the election laws relating to mail ballot eligibility throughout the State. Ex. 35.

104. General Paxton's letter also threatens U.S. citizens for exercising their right to vote. Ex. 55 at p. 5. See also, Ex. 34.

d. The Honorable Dana DeBeauvoir

105. The Honorable Dana DeBeauvoir is the Travis County Clerk. Ex. 15 at p. 1.

106. She is the early voting clerk for the upcoming run-off and general elections.

107. Clerk DeBeauvoir has been ordered by a Texas district court to issue voters like the plaintiffs a mail ballot. Ex. 49 at p. 5-6.

e. Ms. Jacquelyn Callanen

108. Ms. Jacquelyn Callanen is the elections administrator for Bexar County.

109. She is the administrator of the run-off and general elections in Bexar County.

110. She is the early voting clerk that will grant or deny mail ballots to applicants in the coming elections.

CONCLUSIONS OF LAW

I. All Plaintiffs Have Standing

1. This Court concludes that Plaintiffs have standing in this case because they all face an imminent risk of harm, the harm they face is fairly traceable to Defendants' conduct, and that harm is redressable by this Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

2. Plaintiff Texas Democratic Party faces an imminent risk of harm as a result of the Defendants' interpretation of the Texas Elec Code. § 82.001-4. and Defendants' refusal to follow the Texas state court order permitting voters to access absentee ballots due to fear of COVID-19. The Texas Democratic Party will be conducting their own run-off elections to determine who the organization chooses as their standard bearer. Ex. 24 at p. 14: 10-24. The Texas Democratic Party

has an interest in ensuring that their election is conducted in a manner that would not disenfranchise voters nor put voters at risk of death and is harmed because under the Attorney General's interpretation of the statute and inability to follow the Texas state court law, the party's ability to run their primary is diminished. Ex. 24 at p. 15. An organization may establish injury-in-fact if the "defendant's conduct significantly and 'perceptibly impaired' the organization's ability to provide its 'activities—with the consequent drain on the organization's resources.'" *NAACP v. City of Kyle*, 626 F.3d. 233, 238 (5th Cir. 2010) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). The Texas Democratic Party's purpose is to promote Democratic candidates and facilitate elections for the party, promote voter participation among its members and the public more broadly (Ex. 29), and the interest the Party seeks to protect through this litigation are therefore germane to its purpose. This harm is plainly traceable to the Defendants who are refusing to follow the state court order and threatening voters who request or use an absentee ballot due to COVID-19 with prosecution. Accordingly, the Texas Democratic Party has standing to sue Defendants. *See Lujan*, 504 U.S. at 560-61.

3. The Texas Democratic Party also has standing to challenge the actions at issue both on behalf of its members and its own behalf. An organization may establish injury-in-fact if the "defendant's conduct significantly and 'perceptibly impaired' the organization's ability to provide its 'activities—with the consequent drain on the organization's resources.'" *NAACP v. City of Kyle*, 626 F.3d. 233, 238 (5th Cir. 2010) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). The Texas Democratic Party's purpose is to promote Democratic candidates and facilitate elections for the party, promote voter participation among its members and the public more broadly (Ex. 29), and the interest the Party seeks to protect through this litigation are therefore germane to its purpose.

4. Plaintiff Gilberto Hinojosa faces an imminent risk of harm as a result of the Defendants interpretation of the Texas Elec Code. § 82.001-4, and Defendant's refusal to follow the Texas state court order permitting voters to use absentee ballots due to the COVID-19 pandemic. Hinojosa is a registered Democrat, is planning to vote in the July 14th, 2020 runoff election, and is the elected Chair of the Texas Democratic Party. Hinojosa is one of the administrators of the Texas Democratic Party run-off elections. Ex. 24 at p. 4. He is the head of the canvassing authority and is the leader of the Party by and through his statutory and rule-based powers. Texas Election Code § 163.003-004. Hinojosa is injured by the Defendants because the uncertainty of Texas law's regarding qualifications to vote by mail and the Attorney General's threat of prosecution of those who access vote by mail ballots, even those permitted through the Texas state court order. Ex. 49 at p. 4-6. Ex. 55 at p. 1-5. Ex. 34 at p. 1-3. The evidence before this Court is that an injunction issued by the Court requiring the Defendants to permit the use absentee ballots under the Texas law due to COVID-19 and enjoin the Attorney General from threatening prosecution of voters who use absentee ballots would redress the harm. Accordingly, Gilberto Hinojosa has standing to sue Defendants. *See Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-61 (1992).

5. Plaintiff Joseph Daniel Cascino faces an imminent risk of harm as a result of the Defendants interpretation of the Texas Elec Code. § 82.001-4, and Defendant's refusal to follow the Texas state court order permitting voters to use absentee ballots due to the COVID-19 pandemic. Cascino is a registered Democrat and Travis County voter who intends to vote by mail in the July 2020 run-off election and general election due to the risk of transmission by COVID-19. Ex. 10 at p. 1-2 . Cascino is not 65 years of age, intends to be in Travis County during the early voting period and Election Day, and has not been deemed physically disabled by any authority. Ex. 10 at p. 1 .

Cascino is injured by Defendants because Defendant's interpretation of the Texas Election Code and refusal to follow the state court order would disenfranchise him. He is further injured by the threat of unjust prosecution by Attorney General Paxton. The evidence before this Court is that an injunction issued by the Court requiring the Defendants to permit the use absentee ballots under the Texas law due to COVID-19 and enjoin the Attorney General from threatening prosecution of voters who use absentee ballots would redress the harm. Accordingly, Joseph Daniel Cascino has standing to sue Defendants. *See Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-61 (1992).

6. Plaintiff Shanda Marie Sansing faces an imminent risk of harm as a result of the Defendants interpretation of the Texas Elec Code. § 82.001-4. and Defendant's refusal to follow the Texas state court order permitting voters to use absentee ballots due to the COVID-19 pandemic. Sansing is a registered voter in Travis County and has voted in Democratic primary, run-off elections, and general elections in the past. Ex. 9 at p. 1. She intends to vote by mail in the upcoming run-off elections and general elections. Ex. 9 at p. 1-2. She is not 65 years of age, intends to be in Travis County during the early vote period and Election Day, and has not been deemed disabled by any authority. Ex. 9 at p. 1. Sansing wishes to vote by mail due to the risk of transmission of COVID-19 at in-person polling places. Ex. 9 at p. 2. She is injured by Defendants because Defendant's interpretation of the Texas Election Code and refusal to follow the state court order would disenfranchise her. She is further injured by the threat of unjust prosecution by Attorney General Paxton. The evidence before this Court is that an injunction issued by the Court requiring the Defendants to permit the use absentee ballots under the Texas law due to COVID-19 and enjoin the Attorney General from threatening prosecution of voters who use absentee ballots would redress the harm. Accordingly, Shanda Marie Sansing has standing to sue Defendants. *See Lujan v.*

Defenders of Wildlife, 504 U.S. 55, 560-61 (1992).

7. Plaintiff Brenda Li Garcia faces an imminent risk of harm as a result of the Defendants interpretation of the Texas Elec Code. § 82.001-4. and Defendant's refusal to follow the Texas state court order permitting voters to use absentee ballots due to the COVID-19 pandemic. Ex. 30. Garcia is a Bexar County voter. *Id.* She has voted in the Democratic primary, run-off elections, and general elections in the past and intends to vote by mail in the upcoming run-off and general elections. *Id.* She is not 65 years of age or older. *Id.* She intends to be in Bexar County during the early voting period and Election Day. *Id.* She wishes to vote by mail because of the risk of transmission and contraction of COVID-19 at in-person polling places. *Id.* She is injured by Defendants because Defendant's interpretation of the Texas Election Code and refusal to follow the state court order would disenfranchise her. She is further injured by the threat of unjust prosecution by Attorney General Paxton. The evidence before this Court demonstrates that counties view the orders of the Attorney General as mandatory, *id.*, and thus, an injunction issued by the Court requiring the Defendants to permit the use absentee ballots under the Texas law due to COVID-19 and enjoin the Attorney General from threatening prosecution of voters who use absentee ballots would redress the harm. Accordingly, Brenda Li Garcia has standing to sue Defendants. *See Lujan v. Defenders of Wildlife*, 504 U.S. 55, 560-61 (1992).

8. The claims asserted in this case do not require individualized proof as to every affected voter and cases that involve injunctive relief such as that sought here do not normally require individual participation. *See Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

9. The Texas Democratic Party has organizational standing to sue on its own behalf because Defendants' illegal acts not permitting voters to access mail ballots under the Texas state court order and under Texas Election Code and Attorney General Paxton's threats to prosecute voters, impair the Texas Democratic Party's ability to engage in its projects by forcing the organization to divert resources to counteract those illegal actions, such as by educating voters on their ability to access absentee ballots. Ex. 7, 24 and 29. Resource diversion is a concrete injury traceable to the Defendants' conduct and redress can be provided by granting this injunction. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). And the Fifth Circuit has affirmed that "an organization may establish injury in fact by showing that it had diverted significant resources to counteract the defendant's conduct; hence, the defendant's conduct significantly and 'perceptibly impaired' the organization's ability to provide its 'activities—with the consequent drain on the organization's resources.'" *NAACP v. City of Kyle, Tex.*, 626 F.3d 233, 238 (5th Cir. 2010) (quoting *Havens Realty Corp.*, 455 U.S. at 379).

10. Further, all individual Plaintiffs have made clear in their declarations that they not only do intend to vote in the upcoming elections, but they intend to do so through absentee ballots and will be disenfranchised due to fear of COVID-19 if unable to access mail ballots or prosecuted for accessing these ballots. Ex. 9 at p. 1-2. Ex. 10 at p. 1-2 and Ex. 30. The evidence before this court satisfies any requirement that "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." *See Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018).

11. Plaintiffs also satisfy the causation requirement of standing. *K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010) (citations omitted) ("Because State Defendants significantly contributed to the Plaintiffs' alleged injuries, Plaintiffs have satisfied the requirement of traceability."). Defendants'

actions would significantly contribute, if not wholly cause, Plaintiffs' alleged injuries, i.e., their inability to exercise their constitutional right to vote.

II. A Preliminary Injunction Should Issue against Defendants while the Case Proceeds

12. This Court concludes that Plaintiffs should be granted a preliminary injunction pursuant to its as-applied claims relating to: (1) the 26th Amendment of the U.S. Constitution; (2) vagueness in violation of the "Due Process" clause of the 5th and 14th Amendments; (3) voter intimidation in violation of 52 U.S.C. § 10307(b); and (4) the First Amendment of the U.S. Constitution.

13. Plaintiffs should be granted a preliminary injunction, because they have satisfied the four requirements for such an injunction to issue: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009).

a. Plaintiffs Are Likely to Succeed on the Merits of their Claims

i. Plaintiffs Are Likely to Succeed on their 26th Amendment Claim

14. The Twenty-Sixth Amendment states, "[t]he right of citizens of the United State, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on the account of age" (U.S. Const. amend. XXIV, § 1), and forbids the abridgement or denial of the right to vote of young voters by singling them out for disparate treatment. *See Ownby v. Dies*, 337 F. Supp. 38, 39 (E.D. Tex. 1971).

15. Courts presented with claims arising under the Twenty-Sixth Amendment must apply strict scrutiny. *See United States v. Texas*, 445 F. Supp. 1245, 126 (S.D. Tex. 1978), *aff'd sub nom.*

Symm v. United States, 439 U.S. 1105 (1979) (determining that a Texas registrar had violated the Twenty-Six Amendment by imposing burdens on students wishing to register to vote and providing that “before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny”); *see also Lynch v. Donnelly*, 465 U.S. 668, 687 n. 13 (1984) (holding that laws, statutes, or practices that are “patently discriminatory on its face” will receive strict scrutiny.); *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018) (finding that the Twenty-Sixth Amendment provides an “added protection to that already offered by the Fourteenth Amendment”). Under strict scrutiny, the burden is on the State to justify that its policy, statute, or decision is narrowly tailored to serve a compelling state interest. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 475 (2006).

16. Texas statute creates two classes of voters, those under the age of 65 who cannot access a mail ballot under this law and those over the age of 65 who can access mail ballots. Texas Election Code § 82.003 states that “a qualified voter is eligible for early voting by mail if the voter is 65 years of age or older on election day.” Those aged 65 and older are permitted to access mail ballots under this law on the account of their age alone, and those younger than 65 face a burden of not being able to access mail ballots on account of their age alone.

17. Plaintiffs complain that younger voters bear a disproportionate burden because the age restrictions of Tex. Elec. Code § 82.003, that Tex. Elec. Code § 82.003 is a government classification based on age and discriminates against voters under the age of 65 based on age, and that Tex. Elec. Code § 82.003 is *prima facie* discriminatory under all circumstances.

18. However, in the Preliminary Injunction proceeding, Plaintiffs only seek relief, as applied during the pandemic.

19. The Court concludes, that during the COVID-19 pandemic, younger voters bear a disproportionate burden because the age restrictions of Tex. Elec. Code § 82.003, that Tex. Elec. Code § 82.003 is a government classification based on age and discriminates against voters under the age of 65 based on age, and that Tex. Elec. Code § 82.003 violates the 26th Amendment, as applied, during the COVID-19 pandemic.

20. COVID-19 has become one of the leading causes of death in the United States. Data to date in Texas demonstrates higher than expected infection rates in younger persons. General Paxton has threatened to prosecute voters under the age of 65 who use mail ballots under the disability exemption as provided by the state court ruling. Ex. 8 at p. 7. Thus, younger voters who are just as at risk to contract COVID-19 are forced to choose between risking their health by voting in-person or facing criminal prosecution by Defendant Paxton.

21. As a result of Defendants' actions, the right of people below the age of 65 to vote is uniquely threatened and burdened solely based on their age. Thus, this Court concludes that Tex. Elec. Code § 82.003 classification of voters by age is discriminatory, as applied, because it erects an obstacle to the franchise for younger voters.

22. Defendants have attempted to meet their burden of showing that their actions here satisfy strict scrutiny, and they failed to do so. They presented no evidence that demonstrates a compelling governmental interest and instead provided confusing and conflicting reasoning behind why the state would bar younger voters from accessing mail ballots during a global, deadly pandemic. The State's interest is particularly attenuated in this case, given that the data show that Texas aged under 65

comprise a majority of the COVID-19 cases reported. Ex. 45 at p. 1.

23. In fact, the State's given reasoning would increase the harm to the public health and safety of not only those Texans who are under the age of 65 and who would be unable to vote by mail, but also the safety of any Texans (even those over 65) who interact with individuals who voted in person because they were unable to vote by mail and who were exposed to the COVID-19 virus.

24. Put simply, there is no compelling interest in imposing arbitrary obstacles on voters on account of their age in these circumstances, and thus Defendants' conduct thus fails to meet strict scrutiny.

25. This Court concludes that Plaintiffs have established that they are likely to succeed on their as applied Twenty-Sixth Amendment claim.

26. Alternatively, even if strict scrutiny does not apply, defendants' conduct is unconstitutional as it intentionally discriminates against voters on the basis of age.

27. Where they have not applied strict scrutiny, federal courts have evaluated claims under the Twenty-Sixth Amendment using the *Arlington Heights* framework. *See e.g. One Wis. Inst., Inc. v. Thomsen*, 198 F.Supp.3d 896, 926 (W.D. Wis. 2016) (finding that the Twenty-Sixth Amendment's text is "patterned on the Fifteenth Amendment . . . suggest[ing] that *Arlington Heights* provides the appropriate framework.").

28. Under the *Arlington Heights* test, the Court infers discriminatory intent through (1) the impact of the official action and whether it bears more heavily on one group than another; (2) the historical background of the decision; (3) the specific sequences of events leading up to the decision challenged in the case, including departures from normal procedures in making decisions and substantive departure; and (4) contemporary statements made by the governmental body who created

the official action. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

29. Defendants' decision to interpret the law in a discriminatory fashion and threaten criminal prosecution against those who advance a different determination is discriminatory particularly to voters under the age of 65. That decision bears more heavily on voters under 65 especially during the COVID-19 pandemic, because if they are unable to access mail ballots, they will be forced to risk their lives, the lives of their loved ones, and the lives of the public at-large in order to vote. The refusal to extend access to mail ballots to younger voters affirmatively disenfranchises thousands of Texas voters simply on the account of age. Voters age 65 and older will not face the same burden on the right to vote because they are able to access mail ballots and vote from the safety of their home, away from potential COVID-19 carriers and spreaders. Voters under the age of 65 bear the burden of this application of the law more heavily than voters aged 65 and older because they will not be able to vote from the safety of their homes. Thus, the impact of the official action bears more heavily on younger voters than another group—older voters.

30. The background of Defendants' decision also leads this Court to conclude there was discriminatory intent. Initially, a district court granted voters in Texas relief to vote absentee due to COVID-19 by a Texas state court judge. Ex. 49, p. 4-6. Despite this state court order, Attorney General Paxton issued an advisory, non-official opinion threatening to prosecute people and groups who complied with the state court ruling. Ex. 55. Defendant Paxton called the state court ruling an "unlawful expansion of mail-in voting." General Paxton further opined that to help or advise a voter to seek a mail-in ballot pursuant to this provision of the Election Code was a crime. Defendant Paxton's decision to threaten criminal sanctions is strong evidence of invidious discrimination.

31. Further, Defendants' actions regarding the state court proceedings are a departure from the legal norm and policy procedure. The Attorney General rarely, if ever, "opine[s] through the formal opinion process on questions ... that are the subject of pending litigation." In a highly unusual manner, Defendant Paxton circumvented the State's judicial process by announcing that he would criminally prosecute voters in defiance of the emerging court order. These significant departures from normalcy were all in service of preventing legal, registered voters from casting ballots without exposing themselves to a deadly virus.

32. Thus, *Arlington Heights* factors have been satisfied as to Defendants' conduct, and Plaintiffs have established that they are likely to succeed on their claim that Tex. Elec. Code § 82.003 impermissibly discriminates on the basis of age, as applied, in violation of the Twenty-Sixth Amendment. The Court also finds there is no rational basis for allowing voters 65 and over to mail-in their ballots while denying eligibility to voters less than 65.

ii. The Plaintiffs Will Succeed on Their Denial of Free Speech Claim

33. This Court concludes that Plaintiffs are likely to prevail to prevail on their denial of free speech claim.

34. Voters enjoy a "Right to Vote" as a form of political speech. Political speech, including the right to vote, is strongly protected as a "core First Amendment activity." *League of Women Voters v. Detzner*, 863 F. Supp.2d at 1158.

35. When determining whether there has been a violation of this right, the Court inquires as to (1) what sort of speech is at issue, and (2) how severe of a burden has been placed upon the speech. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Strict scrutiny is applied if the law "places a severe burden on fully protected speech and associational freedoms." *Lincoln Club v. City of*

Irvine, 292 F.3d 934, 938 (9th Cir. 2002). “[V]oting is of the most fundamental significance under our constitutional structure,” meaning the speech at issue is fully protected First Amendment activity. *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

36. Political speech is at issue here. If not for Defendants’ conduct, Plaintiff TDP (and other campaigns and political groups) would be engaging in communications with voters concerning who is eligible to and how to vote by mail. Defendant Paxton has outwardly threatened to prosecute these communications. Ex. 55 at p. 3. Defendant Paxton has also threatened to criminally prosecute voters who do not meet his construction of the statutory conditions to vote absentee who attempt to vote by mail.

37. Meanwhile, at least one candidate for the Republican Nomination for a seat in Congress has issued mailers encouraging all voters, regardless of Age, to vote by mail and her statements allege that she did so with advice from Defendant Paxton. Ex. 35. There is no evidence this Republican candidate is being criminally investigated or prosecuted or the county where much of the district at issue in the campaign is located, has been targeted by Defendant Paxton’s letters and Texas Supreme Court Petition.

38. These circumstances leave the Democratic Party and its candidates unsure whether only Democrats will be prosecuted.

39. These circumstances, the evidence shows, hinders the free exchange of political speech.

40. The burden on this speech is severe. Under Defendant Paxton’s interpretation of state law, voters face the choice between casting their ballot and paying the price of criminal prosecution. Especially given the visibility of the fallout from the Wisconsin primary election, voters are deeply fearful.

41. Defendants' conduct does not meet strict scrutiny, and thus Plaintiffs have established that they are likely to succeed on their claim that their right to freedom of political speech was denied. Indeed, Defendants' conduct cannot stand under any potential First Amendment standard.

42. Even were the state courts to clarify the disability provision in favor of voters under the age of 65, in a timely fashion, which seems unlikely, the threats of prosecution, now widely disseminated, would not be completely cured.

iii. The Plaintiffs Will Succeed on Their Void for Vagueness Claim

43. This Court concludes that Plaintiffs are likely to succeed on their void for vagueness claim.

44. A statute violates the Fourteenth Amendment on the basis of vagueness if its terms "(1) 'fail to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits' or (2) 'authorize or even encourage arbitrary and discriminatory enforcement.'" *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). When a statute infringes upon basic First Amendment freedoms, "a more stringent vagueness test should apply." *Id.* at 246.

45. Criminal enactments are subject to a stricter vagueness standard because "the consequences of imprecision are . . . severe." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–499 (1982). Voters can face criminal prosecution under Tex. Elec. Code § 84.0041, and thus a stricter vagueness standard applies to it. The law must be specific enough to give reasonable and fair notice in order to warn people to avoid conduct with criminal consequences. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). A statute must also establish minimal guidelines to govern enforcement. *Id.* at 574.

46. Tex. Elec. Code § 82.001–4 concerns the right to vote, which is a form of political speech protected under the First Amendment. Thus, a more stringent vagueness test applies here as the statute infringes upon basic First Amendment freedoms and voters are threatened with criminal prosecution.

47. Tex. Elec. Code § 82.001–4 provides that a voter is qualified to vote by mail if he (1) anticipates being absent from his county of residence on election day; (2) has an illness or other physical condition that disables him from appearing at the polling place; (3) is 65 or older; or (4) is confined in jail. Tex. Elec. Code §§ 82.001–4. Tex. Elec. Code § 82.002(a) states “a qualified voter is eligible for early voting by mail if the voter has a sickness or physical condition that prevents the voters from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter’s health.” *Id.* A Texas state court judge has stated that § 82.002(a) definition includes persons who are social distancing because of COVID-19.

48. Defendant Paxton has issued varying and contradictory interpretations of Tex. Elec. Code § 82.001–4. Prior to the pandemic, Defendant Paxton advised that there was no specific definition of disability required to be met in order to qualify to use an absentee ballot. *Op. Tex. Att’y Gen. No. KP- 0009 (2015)*. Defendant Paxton has also previously opined that a court-ruled sexual deviant under the age of 65 meets the definition of “disabled” under this statute. *Op. Tex. Att’y Gen. No. KP- 0149 (2017)*.

49. Defendant Paxton’s recent interpretations of Tex. Elec. Code § 82.001–4 renders the statute vague as it is unclear which voters qualify to vote using a mail ballot under the law. The statute itself does not clearly define the phrase “physical condition that prevents the voters from appearing at the polling place on election day.” Tex. Elec. Code § 82.001–4. The multiple

constructions of Tex. Elec. Code § 82.001–4 by Defendant Paxton and the state court fail to provide people of ordinary intelligence a reasonable opportunity to understand if they are unqualified to access a mail ballot, and authorize and encourage arbitrary and discriminatory enforcement.

50. Every day that goes by, Texans are being subjected to criminal prosecuting threat if they are under age 65 and seek to vote by mail before the July 2 deadline.

51. The statute does not establish minimal guidelines to govern enforcement by Defendants or other state actors. Defendant Paxton has threatened to prosecute elected officials and voters who access mail ballots as provided by the state court because of the COVID-19 pandemic. He issued a letter stating that “[t]o the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041.” Defendant Paxton’s repeated assertions of prosecution of voters and threatening of election officials who seek to comply with a state court order is evidence of a lack of guidelines.

52. Voters have received conflicting instructions on their ability to access mail ballots; one from the Texas judiciary that orders voters who fear COVID-19 to qualify for a mail ballot and instructions from Defendant Paxton which threatens voters who follow the Texas court order with prosecution.

53. Due Process has been violated as the interpretation by Defendant Paxton and the Election Code itself provide no definitive standard of conduct and instead provides Defendants with unfettered freedom to act on nothing but their own preference and beliefs.

54. Tex. Elec. Code § 82.001–4 is unconstitutionally vague in violation of the Fourteenth Amendment Due Process Clause.

55. Plaintiffs have established that they are likely to succeed on their claim that the State's interpretation of the law and the law itself are unconstitutionally vague in violation of the Due Process Clause.

iv. The Plaintiffs Will Succeed on Their Voter Intimidation Claim

56. This Court concludes that Plaintiffs are likely to succeed on their voter intimidation claim.

57. Title 42 U.S.C. § 1985, part of the Civil Rights Act of 1871, “creates a private civil remedy for three prohibited forms of conspiracy to interfere with civil rights under that section.” *Montoya v. FedEx Ground Package Sys., Inc.*, 614 F.3d 145, 149 (5th Cir. 2010).

58. Plaintiff must prove the following elements for a claim under § 1985(3): (1) a conspiracy of two or more persons; (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or property, or deprives her of a right or privilege of a United States citizen. *See Hilliard v. Ferguson*, 30 F.3d 649, 652– 53 (5th Cir. 1994).

59. The right to vote in federal elections is a right of national citizenship protected from conspiratorial interference by the provision of 42 U.S.C. § 1985(3) pertaining to conspiracies to deprive persons of rights or privileges. See 42 U.S.C. § 1985(3) (preventing persons from conspiring to “prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner”); *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958.

60. Voters are legally entitled access to the franchise, and the right to vote is a fundamental right. *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964). This right entitles voters to access to the franchise free from unreasonable obstacles. *See Common Cause Ga. v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); *see also Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014).

61. Defendants have worked in concert with others in threatening criminal prosecution, an act in furtherance of this conspiracy to deprive access to the franchise from legal, rightful voters. This has injured Plaintiffs, and this injury has been caused by state officials acting in concert with others to prevent legal voters from casting a ballot free from fear of risk of transmission of a deadly illness or criminal retribution.

62. Defendant Paxton issued an advisory opinion just as a state court was ruling that Texas voters are entitled to a mail-in ballot because of the risk of transmission of COVID-19. Ex. 55 at p.1. In this advisory opinion, Defendant Paxton wrote: “[T]o the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041.” Ex. 55 at p. 5. He also claimed that expanding mail ballot eligibility to all Texans “will only serve to undermine the security and integrity of our elections.” Defendant Paxton’s statements operate to discourage voters from seeking mail-in ballots because of their fear of criminal sanction or victimization by fraud, and have the intention and the effect of depriving legally eligible voters’ access to the franchise.

63. Plaintiffs are likely to succeed on the merits of their claim that Defendant Paxton’s official actions amount to voter intimidation in violation of Title 42 U.S.C. § 1985(3).

v. The Defendants Violated the Equal Protection Clause of the 14th Amendment

64. The Defendants, who are state actors and/or acting under color or law as administrators of elections, have violated the Equal Protection Clause of the Fourteen Amendment by creating an unconstitutional burden on the fundamental right to vote for those under the age of 65.

65. The Equal Protection Clause “is essentially a mandate that all persons similarly situated must be treated alike.” *Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996). When a “challenged government action classifies or distinguishes between two or more relevant groups,” courts must conduct an equal protection inquiry to determine the validity of the classifications. *Quth v. Strauss*, 11 F.3d 488, 491 (5th Cir. 1993).

66. First, Defendants have unconstitutionally burdened Plaintiffs’ right to vote as set forth under the *Anderson-Burdick* analysis.

67. Because voting is a fundamental right (*Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966)), state election laws or enactments that place a burden on the right to vote are evaluated under the *Anderson-Burdick* analysis. Under that analysis, a court must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by the rule.” *Burdick v. Takushi*, 504 U.S. at 434. If the burden on the right to vote is severe, a court will apply strict scrutiny. The classification created by the state must promote a compelling governmental interest and be narrowly tailored to achieve this interest if it is to survive strict scrutiny. *Plyer v. Doe*, 457 U.S. 202, 216-17 (1982).

68. Under strict scrutiny, Defendants are unable to supply any legitimate or reasonable interest to justify such a restriction. Defendants’ proffered interests in denying millions of Texans

a mail-in ballot amidst a pandemic are that (1) mail-in ballots are a special protection for the aged or disabled and (2) mail ballots enable election fraud. Both reasons, even taken at face-value, fail to outweigh the burden voters will face in exercising their right to vote before the threat of COVID-19 can be realistically be contained. Moreover, Defendants fail to explain why, under their advanced interests, that older voters are so highly valued above those of younger voters that the rampant fraud Defendants claim mail-in voting provides is justified.

69. Further, the statutory interpretation espoused by Defendants is not narrowly tailored enough to serve the proffered interests. Texas Election Code § 82.001, *et seq.*, extends the “special protection” of a vote by mail-in ballot to not just the aged or disabled but also to voters confined in jail, voters who have been civilly committed for sexual violence, and voters who are confined for childbirth.

70. Second, mail-in ballots have built-in protections to ensure their security, including many criminal penalties for their misuse—protections that Defendant Paxton has publicly expressed a willingness to pursue. Tex. Elec. Code § 86.001, *et seq.* “Even under the least searching standard of review we employ for these types of challenges, there cannot be a total disconnect between the State's announced interests and the statute enacted.” *Veasey v. Abbott*, 830 F.3d 216, 262 (5th Cir. 2016) (citing *St. Joseph Abbey v. Castille*, 712 F.3d 215, 225–26 (5th Cir. 2013)).

71. Even if this Court finds that this statute should receive only rational basis review, as is appropriate where the burden is found to be more minimal, Defendants cannot proffer any rational state interest to justify their statutory interpretation. There is no rational state interest in forcing the majority of its voters to visit polls in-person during a novel global pandemic, thus jeopardizing their health (and the health of all those they subsequently interact with). There is certainly no rational

interest in fencing out voters under the age of 65 because it would introduce rampant fraud, while allowing older voters to utilize mail ballots and allowing the alleged rampant fraud therewith. Nor do Defendants have a rational state interest in fencing out from the franchise a sector of the population because of the way they may vote. “‘The exercise of rights so vital to the maintenance of democratic institutions’ . . . cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.” *United States v. Texas*, 445 F. Supp. 1245, 1260 (S.D. Tex. 1978), *aff’d sub nom. Symm v. United States*, 439 U.S. 1105 (1979). Furthermore, the State has no interest in allowing a situation where the Attorney General can sow confusion, uneven election administration and threaten criminal prosecutions on these circumstances.

72. Thus, this Court concludes that Defendants, who are state actors and/or acting under color or law as administrators of elections, have violated the Equal Protection Clause of the Fourteen Amendment by creating an unconstitutional burden on the fundamental right to vote for those under the age of 65.

b. Without Preliminary Relief, Plaintiffs Are Suffering Irreparable Harm

73. This Court concludes Plaintiffs are suffering irreparable harm in the absence of injunctive relief.

74. Voting is a constitutional right for those that are eligible, and the violation of constitutional rights for even a minimal period of time constitutes irreparable injury justifying the grant of a preliminary injunction. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B. Nov. 1981) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *DeLeon v. Perry*, 975 F. Supp. 2d 632, 663 (W.D. Tex. 2014), *aff’d sum nom. DeLeon v. Abbot*, 791 F3d 619 (5th Cir. 2015) (“Federal courts at all levels have recognized that violation of constitutional rights constitutes

irreparable harm as a matter of law.”); see also *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”).

75. In addition, forcing voters to unnecessarily risk their lives in order to practice their constitutional rights while allowing other voters a preferred status so that they do not have to face this same burden, is also irreparable injury.

76. Leaving the elections conditions as they are is itself a harm. TDP and these individual voters are held up, every day by the conflicting state court order and Attorney General’s Paxton’s guidance. If the Plaintiff voters apply for ballots by mail, right now, as they would otherwise be entitled to do, they subject themselves to criminal investigation. If they wait, they may miss the deadline, risk their application or ballot do not travel in the mail timely or otherwise gets held up with a last minute rush of vote by mail applications. Meanwhile, TDP is unable to counsel and advise its members as to who can vote in its primary runoff and how.

c. The Continued Injury if the Injunction is Denied Outweighs Any Harm that Will Result if the Injunction is Granted

77. This Court concludes that any harm to Defendants is outweighed by the continued injury to Plaintiffs if an injunction does not issue.

78. As explained above, the injury Plaintiffs are suffering in the absence of an injunction, is severe.

79. No harm occurs when the State permits all registered, legal voters the right to vote by utilizing the existing, safe method that the State already allows for voters over the age of 65. The Court also concludes that the local election administrators will suffer no undue burden if vote-by-

mail is expanded.

III. Preliminary Relief Will Serve the Public Interest

80. This Court concludes that the injunctive relief that Plaintiffs seek will not disserve the public interest, and, to the contrary, will serve the public interest because it will protect prevent violation of individuals' constitutional rights and will prevent additional cases of a deadly infectious disease that has already taken the lives of over a thousand Texans.

81. It is "always" in the public interest to prevent violations of individuals' constitutional rights, *Deerfield Med. Ctr.*, 661 F.2d at 338-39, and it is in the public interest not to prevent the State from violating the requirements of federal law. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013); *c.f. Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (stating that protecting the right to vote is of particular public importance because it is "preservative of all rights.") (citing *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)).

82. Moreover, it is the public policy of the State of Texas to construe any constitutional or statutory provision which restricts the right to vote liberally: "[a]ll statutes tending to limit the citizen in his exercise of this right should be liberally construed in [the voter's] favor." *Owens v. State ex rel. Jennett*, 64 Tex. 500, 502 (1885). The public policy the State's executive branch attempts to advance in this case does not appear clearly in any state legislative enactment.

83. Thus, an injunction against Defendants will serve the public interest.

IV. Abstention is not Warranted

Abstention here is not warranted because resolution by the State court will not render this case moot nor materially alter the constitutional questions presented. Plaintiffs allege injury of their federal constitutional rights in addition to injuries arising from the ambiguity of state law. A Texas

state court has already interpreted the ambiguity of Texas' election code and many counties are complying. Yet, General Paxton's letter ruling is preventing meaningful political speech, confuses mail ballot applicants and leaves these voters having to risk criminal prosecution if they seek to protect their health by voting by mail. Meanwhile, vote by mail applications are being submitted daily and many counties, cities, and school districts are complying with Judge Sulak's ruling. Under these circumstances, abstaining from exercising federal court jurisdiction is not warranted.

Moreover, "[t]he abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers." *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). In fact, the stay of federal decision is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959) (quoted in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976)). As such, "abstention is the exception rather than the rule" *Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir. 1981).

Pullman abstention must be "narrow and tightly circumscribed" and is "to be exercised only in special or 'exceptional' circumstances." *Duke v. James*, 713 F.2d 1506, 1510 (11th Cir. 1983). Nonetheless, "voting rights cases are particularly inappropriate for abstention," *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000), because in voting rights cases plaintiffs allege "impairment of [their] fundamental civil rights" *Harman v. Forssenius*, 380 U.S. 528, 537 (1965). Abstention is even more inappropriate where the inevitable delay it will cause could preclude resolution of the case before the upcoming elections. *Detzner*, 354 F. Supp. 3d at 1284 (citing *Harman*, 380 U.S. at 537).

In this case, time is of the essence—the runoff election is mere weeks away, and the 2020 general election comes not long after. There is no guarantee that state court proceedings will be completed in time and given the Attorney General’s defiance of the state district court ruling, a final state court ruling would not fully vindicate Plaintiffs’ federal constitutional rights.

Even if Defendants’ reading of Tex. Elec. Code § 82.003 was plausible, it is not the sole, mandatory reading of the text, and the constitutional avoidance canon requires that it be rejected. “[W]hen one interpretation of a law raises serious constitutional problems, courts will construe the law to avoid those problems so long as the reading is not plainly contrary to legislative intent.” *Pine v. City of West Palm Beach*, 762 F.3d 1262, 1270 (11th Cir. 2014). Resolution of the state court matters is neither “dispositive of the case” before this Court nor would its resolution “materially alter the constitutional questions presented” by Plaintiffs’ claims. *Siegel*, 234 F.3d at 1174.

Presuming the Texas Supreme Court upholds the lower court’s reading of Tex. Elec. Code §§ 82.001–4, and even if the Executive branch of the Texas government complies with this reading, this does not properly counsel for abstention. To find otherwise is to depend upon a series of questionable “mights.” See *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1322 (11th Cir. 2017) (relying on *United States v. Stevens*, 559 U.S. 469, 480 (2010), for the proposition that courts should not decline to enforce constitutional rights in reliance on the “benevolence” of enforcing officials). Additionally, even if this series of “mights” come to pass, that would not change the constitutional questions presented in this case. Plaintiffs allege that Texas’ election code is *prima facie* discriminatory in violation of the United States Constitution, which is a matter only this Court can resolve.

Abstention would take considerable time and meanwhile these Plaintiffs' constitutional speech, right to assemble as a political party and to vote, are all harmed. Abstention is inappropriate in this case, for the same reason that it is "particularly inappropriate" in voting cases. *See Siegel*, 234 F.3d at 1174. Constitutional "deprivations may not be justified by some remote administrative benefit to the State." *Harman*, 380 U.S. at 542. Therefore, Plaintiffs' injuries are redressable by this Court and abstention is not appropriate.

Exhibit B



THE SUPREME COURT OF TEXAS

Orders Pronounced May 15, 2020

ORDERS ON CASE GRANTED

THE FOLLOWING PETITION FOR WRIT OF
MANDAMUS IS SET FOR ORAL ARGUMENT:

20-0394 IN RE STATE OF TEXAS

[**Note:** This case has been set for oral argument at 2:30 p.m., May 20, 2020.]

A STAY IS ISSUED IN THE FOLLOWING PETITION FOR WRIT OF
MANDAMUS:

20-0401 IN RE STATE OF TEXAS; from Travis County; 14th Court of Appeals
District; (14-20-00358-CV, ___ SW3d ___, 05-14-20)
relator's emergency motion for temporary relief granted
stay order issued

[**Note:** The petition for writ of mandamus remains pending before this Court.]

Exhibit C

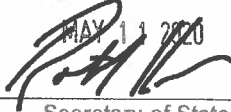


GOVERNOR GREG ABBOTT

May 11, 2020

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
5:30 PM O'CLOCK

The Honorable Ruth R. Hughs
Secretary of State
State Capitol Room 1E.8
Austin, Texas 78701

MAY 11 2020

Secretary of State

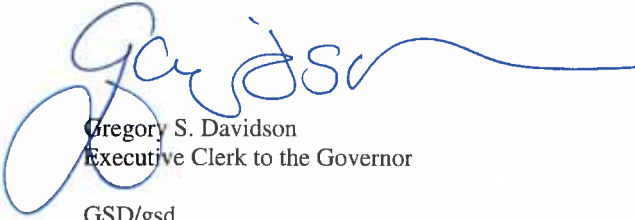
Dear Secretary Hughs:

Pursuant to his powers as Governor of the State of Texas, Greg Abbott has issued the following:

A proclamation concerning early voting for special elections to occur on July 14, 2020.

The original of this proclamation is attached to this letter of transmittal.

Respectfully submitted,


Gregory S. Davidson
Executive Clerk to the Governor

GSD/gsd

Attachment

PROCLAMATION

BY THE

Governor of the State of Texas

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, I, Greg Abbott, Governor of Texas, issued a disaster proclamation on March 13, 2020, certifying under Section 418.014 of the Texas Government Code that the novel coronavirus (COVID-19) poses an imminent threat of disaster for all counties in the State of Texas; and

WHEREAS, on April 12, 2020, I issued a proclamation renewing the disaster declaration for all counties in Texas; and

WHEREAS, the Commissioner of the Texas Department of State Health Services (DSHS), Dr. John Hellerstedt, has determined that COVID-19 represents a public health disaster within the meaning of Chapter 81 of the Texas Health and Safety Code, and renewed that determination on April 17, 2020; and

WHEREAS, I have issued executive orders, proclamations, and suspensions of Texas laws in response to the COVID-19 disaster, aimed at protecting the health and safety of Texans and ensuring an effective response to this disaster; and

WHEREAS, I issued a proclamation on March 16, 2020, ordering a special election on July 14, 2020, to fill the vacancy in Texas State Senate District No. 14; and

WHEREAS, on March 20, 2020, I issued a proclamation postponing the runoff primary election date from May 26, 2020, to July 14, 2020; and

WHEREAS, I also issued a proclamation suspending Sections 41.0052(a) and (b) of the Texas Election Code and Section 49.103 of the Texas Water Code to the extent necessary to allow political subdivisions that would otherwise hold elections on May 2, 2020, to move their general and special elections for 2020 only to the next uniform election date, occurring on November 3, 2020; and

WHEREAS, I subsequently issued proclamations on April 2, April 6, April 8, and May 8, 2020, authorizing certain political subdivisions to call emergency special elections on July 14, 2020; and

WHEREAS, Texas law provides that eligible voters have a right to cast a vote in person; and

WHEREAS, as counties across Texas prepare for the upcoming elections on July 14, 2020, and establish procedures for eligible voters to exercise their right to vote in person, it is necessary that election officials implement health protocols to conduct elections safely and to protect election workers and voters; and

WHEREAS, in order to ensure that elections proceed efficiently and safely when Texans go to the polls to cast a vote in person during early voting or on election day, it is necessary to increase the number of days in which polling locations will be open during the early voting period, such that election officials can implement appropriate social distancing and safe hygiene practices; and

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
5:30 PM O'CLOCK

MAY 11 2020

Governor Greg Abbott
May 11, 2020

Proclamation
Page 2

WHEREAS, Section 85.001(a) of the Texas Election Code provides that the period for early voting by personal appearance begins 17 days before election day; and

WHEREAS, Section 85.001(b) of the Texas Election Code provides that the period for early voting for a runoff primary election begins 10 days before election day; and

WHEREAS, in consultation with the Texas Secretary of State, it has become apparent that strict compliance with the statutory requirements relating to the duration of early voting contained in Sections 85.001(a) and 85.001(b) of the Texas Election Code would prevent, hinder, or delay necessary action in coping with the COVID-19 disaster; and

WHEREAS, pursuant to Section 418.016 of the Texas Government Code, the Governor has 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.

NOW, THEREFORE, I, GREG ABBOTT, Governor of Texas, under the authority vested in me by the Constitution and laws of the State of Texas, do hereby suspend Sections 85.001(a) and 85.001(b) of the Texas Election Code to the extent necessary to require that, for any election ordered or authorized to occur on July 14, 2020, early voting by personal appearance shall begin on Monday, June 29, 2020, and shall continue through the fourth day before election day, excluding any legal state or federal holidays. I further amend the proclamations issued on April 2, April 6, April 8, and May 8, 2020, authorizing emergency special elections, and the proclamation issued on March 16, 2020, ordering a special election to fill the vacancy in Texas State Senate District No. 14, so as to require that for each of these elections to be held on July 14, 2020, early voting by personal appearance shall begin on Monday, June 29, 2020, in accordance with the above suspension.

The Secretary of State shall take notice of this proclamation and shall transmit a copy of this order immediately to every County Judge of this state and all appropriate writs will be issued and all proper proceedings will be followed to the end that said elections may be held and their results proclaimed in accordance with law.



IN TESTIMONY WHEREOF, I
have hereto signed my name and
have officially caused the Seal of
State to be affixed at my office in
the City of Austin, Texas, this the
11th day of May, 2020.

A handwritten signature in black ink that reads "Greg Abbott".

GREG ABBOTT
Governor of Texas

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
5:30 PM O'CLOCK
MAY 11 2020

Governor Greg Abbott
May 11, 2020

Proclamation
Page 3

ATTESTED BY:



RUTH R. HUGHS
Secretary of State

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
5:30 PM O'CLOCK

MAY 11 2020

Exhibit **D**

From: [Elections Internet](#)
To: [Elections Internet](#)
Subject: MASS EMAIL (CC/EA/VR - 910) - Proclamation regarding early voting for July 14, 2020 Elections
Date: Monday, May 11, 2020 5:57:22 PM
Attachments: [image001.png](#)
Importance: High
Sensitivity: Personal

Dear Election Officials:

Earlier today, Governor Greg Abbott issued a [proclamation](#) suspending certain provisions of the Texas Election Code to expand the early voting period for the July 14, 2020 primary runoff election and other elections occurring on that date. Pursuant to the Governor's proclamation, the early voting period for any election authorized to occur on July 14, 2020 will begin on Monday, June 29, 2020 and last through Friday, July 10, 2020, excluding any legal state or federal holidays. As the proclamation recognizes, this expansion will allow for increased in-person voting opportunities for the July 14, 2020 elections while maintaining appropriate social distancing standards in response to the COVID-19 disaster. We will update the primary runoff calendar and issue a revised copy later this week.

In connection with the Governor's proclamation, we would like to provide additional guidance on several items:

1. **Extended Early Voting Hours:** As a reminder, in addition to the increased number of early voting days pursuant to the Governor's proclamation, the Texas Election Code allows you flexibility to offer voters extended early voting hours. Specifically, you can provide extended hours beyond the minimum number of hours required for weekdays during early voting, as set forth in Section 85.005, in order to allow persons more opportunities to vote after work. You can also provide for more than the minimum of five hours on Sunday in counties over 100,000 in population or those that received a petition for weekend voting, as detailed in Section 85.006.
2. **CARES Act Funding:** The State of Texas has requested approximately \$24.5 million in HAVA emergency funds from the federal government through the Coronavirus Aid, Relief and Economic Security (CARES) Act. With the required 20% cash match, the total amount allotted to Texas through the CARES Act is \$29.4 million. As authorized by Congress, the funds must be used "to prevent, prepare for, and respond to coronavirus, domestically or internationally, for the 2020 Federal election cycle"—including any funds incurred to provide for expanded early voting pursuant to the Governor's proclamation or to pay for extended early voting hours due to the COVID-19 disaster. We intend to sub-grant the CARES Act funding to counties, which can use Chapter 19 funds or county funds to meet the match requirement. We will be receiving the funds and implementing the sub-grant process very soon. To that end, our office will be holding a webinar tomorrow (May 12, 2020) to give you an overview of the CARES Act funding and provide further details on the sub-grant process.
3. **Health and Safety Guidelines for In-Person Voting:** Our office is currently preparing guidance for election officials and voters regarding the proper conduct of in-person voting during the ongoing public health disaster. The guidance, modeled on minimum health protocols recently issued by the Texas Department of State Health Services for individuals and businesses, will contain detailed recommendations for protecting the health and safety of voters and election workers at the polls. We anticipate issuing this guidance by early next week, and we will continue to work closely with you in the coming weeks to ensure that our

**EXHIBIT
B**

elections are conducted with the utmost safety and security.

Please let us know if you have any questions or concerns. As always, thank you for all that you do for Texas elections.

Keith Ingram

Director, Elections Division

Office of the Secretary of State

800-252-VOTE(8683)

www.sos.state.tx.us/elections/index.shtml

For Voter Related Information, please visit:



The information contained in this email is intended to provide advice and assistance in election matters per §31.004 of the Texas Election Code. It is not intended to serve as a legal opinion for any matter. Please review the law yourself, and consult with an attorney when your legal rights are involved.

Exhibit **E**

NO. D-1-GN-20-001610

201ST JUDICIAL DISTRICT

2. Plaintiff Gilberto Hinojosa is Chairman of the Texas Democratic Party and a registered voter in Texas.

3. Joseph Daniel Cascino is a registered voter in Travis County, Texas who is eligible to vote, is a resident of Travis County, Texas, a citizen of the United States and who voted in-person in the March 3, 2020 Texas Democratic Primary Election, desires to vote in the Texas Democratic Party Runoff Election and under the pandemic circumstances would seek to do so by mail-in ballot.

4. Shanda Marie Sansing is a registered voter in Travis County, Texas who is eligible to vote, is a resident of Travis County, Texas, a citizen of the United States and who voted in-person in the March 3, 2020 Texas Democratic Primary Election, desires to vote in the Texas Democratic Party Runoff Election and under the pandemic circumstances would seek to do so by mail-in ballot.

5. Defendant Ruth Hughs is sued in her official capacity as the Texas Secretary of State and may be served with process at 900 Congress, Suite 300 Austin, Travis County, Texas 78701.

6. Defendant Dana DeBeauvoir is sued in her official capacity as the Travis County Clerk and Election Administrator and may be served with process at 5501 Airport Blvd, Austin, Travis County, TX 78751.

Jurisdiction/Venue

7. The Court has jurisdiction over this matter of election law under TEX. ELEC. CODE § 273.081, TEX. CIV. PRAC. & REM. CODE § 37.003 and other laws. Plaintiffs do not seek damages

and therefore make no statement under Texas Rule of Civil Procedure 47. Plaintiffs seek injunctive and declaratory relief which, in this context, is within the jurisdiction of this Court.

8. Venue is proper in Travis County because all or a substantial part of the actions sought to be enjoined will occur in Travis County. *See* TEX. CIV. PRAC. & REM. CODE §§ 15.002(a)(1); 15.014.

Discovery Control Plan

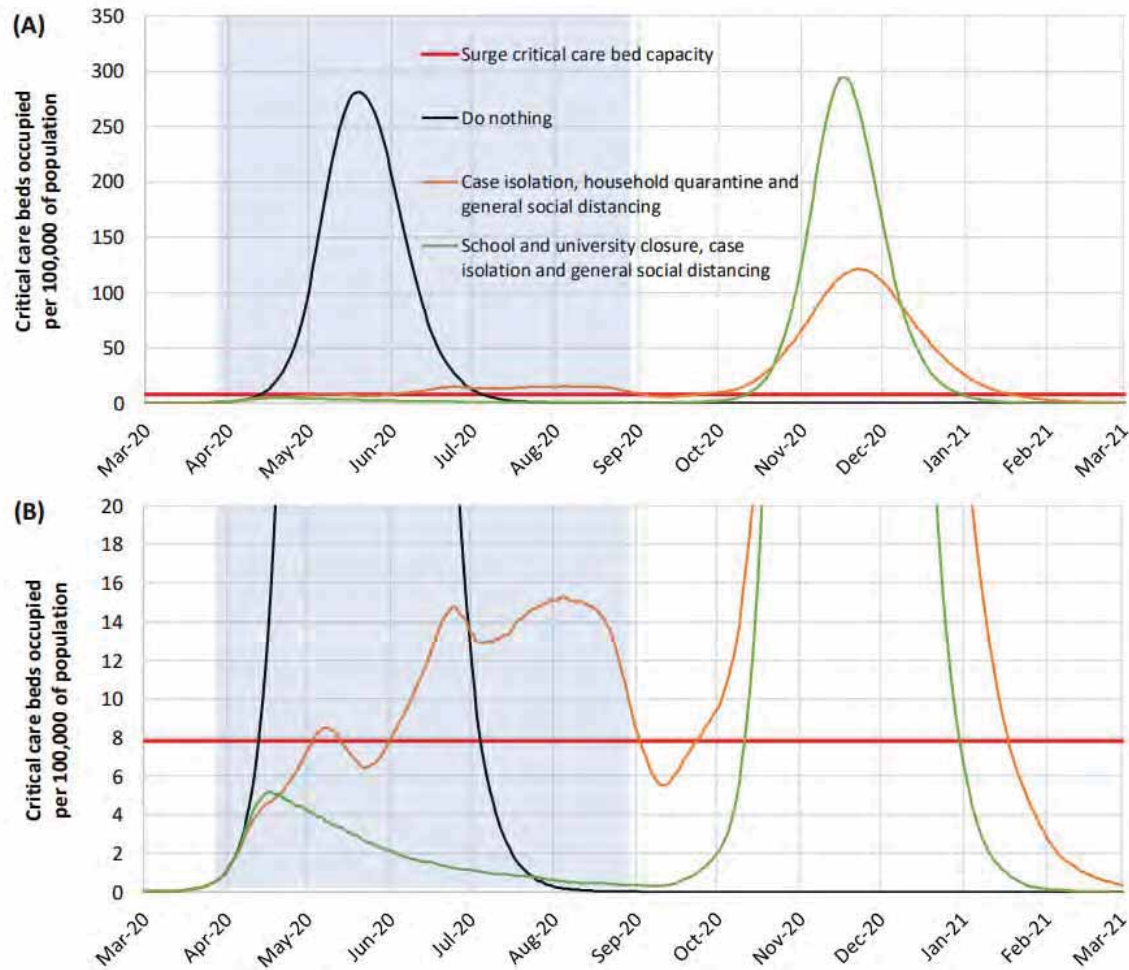
9. Plaintiffs intend to conduct Level 3 discovery under Rule 190.3 of the Texas Rules of Civil Procedure.

Facts/Law

10. The citizens of this state are in the midst of the worst pandemic in modern history. Because of a novel coronavirus, and the disease it causes termed COVID-19, federal, state, county and city officials have ordered various limitations state wide, the central feature of which is to limit contact between persons. Public Health Officials warn that government ordered “social distancing” will probably be in effect for a number of weeks and even after it is lifted, may need to be re-imposed at additional intervals.

11. An influential report from the Imperial College in the United Kingdom¹ that reportedly convinced the President of the United States to view the coronavirus as a public health emergency rather than a “hoax,” sets out some startling facts about the severity and longevity of the crisis facing the public.

¹ <https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf>



12. According to experts, the expected outcome of the various measures ordered by levels of government, if effective, will be to “flatten the curve,” as these diagrams demonstrate. These circumstances, public health experts agree, should extend the coronavirus infection rate over a longer time period allowing the medical community to prepare and handle the onslaught of severe cases.

13. Given these conditions, upcoming elections for federal, state, county, city and other local offices will be vastly impacted. Importantly, voter behavior will change. Historically, most voters in Texas elections vote in person where they have contact with electronic equipment, election personnel, other voters and observers. These very activities are now heavily discouraged

by various government orders and are being discouraged in an enormous public education campaign. Even were this pandemic to cease, certain populations will feel the need and/or be required to continue social distancing. The upcoming party primary runoff elections and the November General Election are certain to be influenced by these conditions.

14. Although the Governor's recent declarations of emergency give him certain powers to manage public health circumstances, Section 28 of Article I of our State Constitution prescribes that: "No power of suspending laws in this State shall be exercised except by the Legislature." Also, the Right of Association granted by the First Amendment to the U.S. Constitution provides that political parties are free to select their party nominees without undue government influence. The Texas Democratic Party, as well as voters and officials in this state, desperately need the courts to declare what the existing law provides so that they can determine their conduct during the primary runoff period and the General Election. An immediate decision interpreting state law is required so that election preparations can continue in compliance therewith.

15. Plaintiffs contend that existing law allows voters to elect to cast their ballots by mail under the circumstances of this pandemic. Tex. Elec. Code § 82.002 provides in full:

Sec. 82.002. DISABILITY. (a) 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.
(b) Expected or likely confinement for childbirth on election day is sufficient cause to entitle a voter to vote under Subsection (a).

Participating in social distancing, to prevent known or unknown spread of what Governor Abbott has described as an "invisible disease"² is a "a sickness or physical condition that prevents the voter

² <https://www.kxan.com/news/coronavirus/live-gov-abbott-to-hold-press-conference-on-states-current-efforts-against-covid-19/>

from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health.”

16. Texas authorities support the conclusion that the mail-in ballots are permitted under these circumstances. According to Texas Attorney General Opinion KP-0009, “The plain language of section 82.002 does not require that a person satisfy any specific definition or standard of “disability” outside of the Election Code in order to qualify to vote by mail.” In that opinion, the Attorney General found that a person who claimed a disability but had not been adjudicated by the Social Security Administration nevertheless qualified for a mail ballot under Section 82.002. In a more recent opinion, the Attorney General opined, “a court would likely conclude that an individual civilly committed pursuant to chapter 841 and residing at the Center is eligible to vote by mail ...” A person who considers herself to be confined at home in order to avoid the spread of disease plainly falls into the persons entitled to vote by mail under this statute and the Court should so declare to prevent uneven application of this provision and in order to give election officials and voters clarity on the matter.

17. The manner and procedure of casting absentee ballots, which includes mail-in ballots, “is mandatory and directed by statutory requirements.” *Tiller v. Martinez*, 974 S.W.2d 769, 775 (Tex. App.-San Antonio 1998, pet. dismiss’d w.o.j.). The Secretary of State has argued that persons who submit mail ballots without authorization to do so are subject to having their ballots voided.

18. Whatever happens from this moment forward with respect to the pandemic, numerous voters, including the two individual Plaintiffs herein, seek to avail themselves of the option of mail-in ballots. Similarly, the Texas Democratic Party needs to know how state law

permits local election officials to handle such ballots cast in the Texas Democratic Party Runoff Primary Election so the TDP can determine how it desires to proceed in selecting nominees who were facing a runoff.

Claims for Relief

1. Declaratory Judgment

19. Plaintiffs pray that the Court enter a declaratory order holding that TEX. ELEC. CODE 82.002 allows any eligible voter, regardless of age and physical condition, to request, receive and have counted, a mail-in ballot, if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease.

2. Application for Temporary Injunction

20. TEX. ELEC. CODE § 273.081 provides, “A person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring.” Plaintiffs have standing under this statute and they request that the Defendants named herein be enjoined to accept and tabulate any mail-in ballots received from voters in an upcoming election who believe that they should practice social distancing in order to hinder the known or unknown spread of a virus or disease. Plaintiffs will experience immediate and irreparable injury unless the Defendants are enjoined. Plaintiffs have no other adequate remedy at law.

3. Request for Permanent Injunction

21. After full trial on the merits, Plaintiffs asks the Court to enter a permanent injunction granting the relief requested herein.

Prayer

22. For the foregoing reasons, Plaintiffs respectfully request that the Court enter judgment against Defendants:

- (a) declaring that TEX. ELEC. CODE 82.002 allows any eligible voter, regardless of age and physical condition, to request, receive and have counted, a mail-in ballot, if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease;
- (b) permanently enjoining Defendants to accept and tabulate any mail-in ballots received from voters in an upcoming election who believe that they should practice social distancing in order to hinder the known or unknown spread of a virus or disease; and,
- (c) awarding the Texas Democratic Party such other and further relief to which it may be justly entitled at law or in equity.

Respectfully submitted,

TEXAS DEMOCRATIC PARTY

By: /s/ Chad W. Dunn

Chad W. Dunn
General Counsel
State Bar No. 24036507
Brazil & Dunn, LLP
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
Telephone: (512) 717-9822
Facsimile: (512) 515-9355
chad@brazilanddunn.com

K. Scott Brazil
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Brazil & Dunn, LLP
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Houston, Texas 77069
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Dicky Grigg
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Martin Golando
The Law Office of Martin Golando, PLLC
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N. Saint Mary's, Ste. 700
San Antonio, Texas 78205
(210) 892-8543
martin.golando@gmail.com

ATTORNEYS FOR PLAINTIFFS

DECLARATION OF TOMMY GLEN MAXEY

I, Tommy Glen Maxey, declare that:

1. My name is Tommy Glen Maxey. I am over the age of eighteen and am competent to make this declaration.

2. I have reviewed the Original Petition filed by TDP and others in this case pertaining to the pandemic and state law vote by mail provisions. The facts stated in the Original Petition, Application for Temporary and Permanent Injunctions and for Declaratory Judgment are true and correct to the best of my personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this the 20th day of March, 2020.


Tommy Glen Maxey

Exhibit **F**

4/17/2020 3:39 PM

Velva L. Price
District Clerk
Travis County
D-1-GN-20-001610
Daniel Smith

No. D-1-GN-20-001610

TEXAS DEMOCRATIC PARTY, et. al

IN THE DISTRICT COURT

Plaintiffs,

and

ZACHARY PRICE, LEAGUE OF
WOMEN VOTERS OF TEXAS,
LEAGUE OF WOMEN VOTERS
AUSTIN AREA, MOVE TEXAS
ACTION FUND, WORKERS DEFENSE
ACTION FUND,

TRAVIS COUNTY, TEXAS

Intervenor-Plaintiffs,

v.

DANA DEBEAUVOIR

Defendant,

and

STATE OF TEXAS

Intervenor.

201st JUDICIAL DISTRICT

Order on Application for Temporary Injunctions and Plea to the Jurisdiction

On April 15, 2020, came on to be heard the Plaintiffs' and Intervenor-Plaintiffs' Applications for Temporary Injunction as well as the State of Texas' Plea to the Jurisdiction. The Court, having considered the applications and pleas along with the supporting and opposing briefing and the applicable law cited therein, evidence presented, arguments of counsel, and the pleadings on file in this case, is of the opinion:

- 1) The State of Texas' Plea to the Jurisdiction should be DENIED; and,
- 2) Plaintiffs' and Intervenor-Plaintiffs' applications for a Temporary Injunction should be GRANTED.

In addition, the Court FINDS:

- 1) Joseph Daniel Cascino and Shanda Marie Sansing are registered voters in Travis County who seek to vote by mail by claiming a disability due to the COVID-19 epidemic;
- 2) The Texas Democratic Party (TDP) is one of the two largest political parties in the United States, with members in Travis County, who are registered voters and are eligible to apply to vote by mail due to COVID-19. The TDP and its chair, Gilberto Hinojosa, are the administrators of the July 14, 2020 run-off election. The interests that the TDP and its Chair seek to protect through this suit are germane to the organization's purpose. TDP and its members are harmed by the lack of clarity in the election law at issue in this case and the probable lack of uniformity in its application throughout the State;
- 3) Intervenor-Plaintiff Zachary Price is a registered voter in Travis County who seeks to vote by mail by claiming a disability due to the COVID-19 pandemic;
- 4) Intervenor-Plaintiffs League of Women Voters of Texas, League of Women Voters Austin Area, and Workers Defense Action Fund are membership organizations with members who are registered voters throughout the State of Texas, including in Travis County, and who are eligible to vote by mail due to COVID-19 but would not otherwise be eligible to vote by mail outside of the COVID-19 pandemic. The interests that these organizations seek to protect through this suit are germane to their purpose. The organizations and their members are harmed by the lack of clarity in the election law at issue in this case and the probable lack of uniformity in its application throughout the State. Additionally, Intervenor-Plaintiffs League of Women Voters of Texas, League of Women Voters Austin Area, Workers Defense Action Fund, and Move Texas Action Fund have suffered and are suffering direct injury to their organizations from this lack of clarity and the probable lack of uniformity in its application throughout the State.
- 5) Intervenor State of Texas has stated its "strong interest in the uniform, consistent application of its election laws" while also stating that "each early-voting clerk [throughout the State] is responsible for determining whether an application to vote by mail complies with all requirements." And, the evidence reveals that the Secretary of State has advised those election officials that they "may have a need to modify certain voting procedures ... [and] may want to consider seeking a court order to authorize exceptions to the voting procedures outlined in certain chapters of the Texas Election Code."

- 6) The individual Plaintiffs and Intervenor-Plaintiffs are injured by the uncertainty in the law as to whether they are lawfully permitted to request a ballot by mail for elections in which they reasonably believe they may be at risk to contract COVID-19; absent clarity, they face either risk to their health or the threat of prosecution and having their ballots not counted and/or rejected;
- 7) COVID-19 is a global respiratory virus that poses an imminent threat of disaster, to which anyone is susceptible and which has a high risk of death to a large number of people and creates substantial risk of public exposure because of the disease's method of transmission;
- 8) The risk of transmission of COVID-19 during in-person voting is high for the July 14, 2020 Run-Off election and all subsequent elections for this year. The harm caused by transmission of COVID-19 during in-person voting on the one hand and not being able to cast a ballot that is counted on the other is imminent, irreparable, and seriously damaging;
- 9) The Run-Off Elections are scheduled to be held on July 14, 2020. Ordinarily, without adjusting other laws, Election Clerks and Election Administrators require at least 74 days to prepare for an election. 74 days from July 14, 2020 is May 1, 2020;
- 10) Plaintiffs will suffer immediate, irreparable injury without an injunction prohibiting Defendant from denying mail ballot applications based on the disability caused by COVID-19 and from rejection of mail-in ballots cast under those circumstances because they will be forced to either vote in-person and risk transmission of a deadly illness or lose their ability to vote entirely;
- 11) Tex. Elec. Code § 273.081 specifically provides, "A person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring." Although the standard set by statute is lower than the typical standard for granting a temporary injunction, Plaintiffs' and Plaintiff Intervenor's evidence meets both standards and an injunction should issue;
- 12) The oral testimony, exhibits and witness declarations have been accepted into evidence. I have carefully viewed the testimony and reviewed the documentary evidence in making the factual findings herein;
- 13) Based on the testimony and evidence I have received, it is reasonable for voters to expect that COVID-19 will continue to be in circulation without a vaccine or herd immunity through the elections this year and that limited or statewide government imposed social distancing will likewise continue through the elections this year, especially with regard to large public gatherings as occur at polling places. Furthermore, even to the extent there is easing of social distancing, it will still be a public health risk to attend larger gatherings such as those associated with voting at polling places because without a vaccine or herd immunity, communities will remain susceptible to surges in infection rates. Moreover, the evidence shows that voters and these Plaintiffs and Intervenor-Plaintiffs are

reasonable to conclude that voting in person while the virus that causes COVID-19 is still in general circulation presents a likelihood of injuring their health, and any voters without established immunity meet the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code § 82.002.

- 14) Voters and these Plaintiffs are reasonable to worry about the legality of their applications for ballots by mail given the uncertainty created, at least in part, from the lack of clear guidance from other state leadership. Voters should not have to guess at whether they are complying with the law in requesting a mail ballot and put themselves at risk of criminal liability.
- 15) Time is of the essence and election administrators as well as the TDP must have clarity without delay so that election preparations can be made.
- 16) Plaintiffs and Intervenor-Plaintiffs are likely to prevail on the merits of at trial; and
- 17) Plaintiffs and Intervenor-Plaintiffs have no other adequate remedy at law.

It is therefore, ORDERED that the State of Texas's Plea to the Jurisdiction is denied. The State petitioned to intervene in this case. The Court has jurisdiction. The issues are ripe, the Plaintiffs and Intervenor-Plaintiffs are currently suffering and will continue to suffer injury in the absence of a Court ruling.

It is further, ORDERED that, between now and entry of final judgment in this case:

(1) Travis County Defendant and her agents, servants, employees, representatives, and all person or entities of any type whatsoever acting in concert with them or acting on their behalf are enjoined from rejecting any mail ballot applications received from registered voters who use the disability category of eligibility as a result of the COVID-19 pandemic for the reason that the applications were submitted based on the disability category;

(2) Travis County Defendant and her agents, servants, employees, representatives, and all person or entities of any type whatsoever acting in concert with them or acting on their behalf are enjoined from refusing to accept and tabulate any mail ballots received from voters who apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic

for all elections affected by the pandemic for the reason that the ballots were submitted based on the disability category;

(3) Travis County Defendant and Intervenor-Defendant Texas and their agents, servants, employees, representatives, and all person or entities of any type whatsoever acting concert with them or acting on their behalf are enjoined from issuing guidance or otherwise taking actions that would prevent Counties from accepting and tabulating any mail ballots received from voters who apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic for all elections affected by the pandemic for the reason that the ballots were submitted based on the disability category;

(4) Travis County Defendant and Intervenor-Defendant Texas and their agents, servants, employees, representatives, and all person or entities of any type whatsoever acting in concert with them or acting on their behalf are enjoined from issuing guidance or otherwise taking actions during all elections affected by the COVID-19 pandemic, that would prohibit individuals from submitting mail ballots based on the disability category of eligibility or that would suggest that individuals may be subject to penalty solely for doing so; and

(5) Intervenor-Defendant Texas, acting through the appropriate state agency, shall publish a copy of this Court's Order on the appropriate agency website and circulate a copy of this Court's Order to the election official(s) in every Texas County.

It is further ORDERED that all Parties shall appear before this Court on July 27, 2020 at 2:00 PM for a status conference on the continued propriety of this Temporary Injunction Order.

It is further ORDERED that for this Temporary Injunction Order to be effective under the law, cash bond in the amount of \$0 shall be required of the Plaintiffs and filed with the District Clerk of Travis County, Texas. The Clerk of Court shall forthwith issue a writ of Temporary

Injunction in conformity with the law and terms of this Order. Once effective, this Order shall remain in full force and effect until final Judgment in the trial on this matter.

The Court ORDERS a final trial in this matter to begin August 10, 2020 at 9:00 AM.

SIGNED April 17, 2020.



THE HONORABLE TIM SULAK
JUDGE PRESIDING

Exhibit **G**

4/17/2020 4:09 PM

Velva L. Price
District Clerk
Travis County
D-1-GN-20-001610
Selina Hamilton

No. D-1-GN-20-001610

TEXAS DEMOCRATIC PARTY AND GILBERTO	§	IN THE DISTRICT COURT
HINOJOSA, IN HIS CAPACITY AS CHAIRMAN OF	§	
THE TEXAS DEMOCRATIC PARTY, JOSEPH	§	
DANIEL CASCINO and SHANDA MARIE	§	
SANSING,	§	
<i>Plaintiffs,</i>	§	
	§	
and	§	
	§	
ZACHARY PRICE, LEAGUE OF WOMEN VOTERS	§	
OF TEXAS, LEAGUE OF WOMEN VOTERS OF	§	
AUSTIN-AREA, MOVE TEXAS ACTION FUND,	§	TRAVIS COUNTY, TEXAS
WORKERS DEFENSE ACTION FUND,	§	
<i>Plaintiff-Intervenors</i>	§	
	§	
v.	§	
	§	
DANA DEBEAUVOIR, IN HER CAPACITY AS	§	
TRAVIS COUNTY CLERK,	§	
<i>Defendant.</i>	§	
	§	
STATE OF TEXAS,	§	
<i>Intervenor.</i>	§	201st JUDICIAL DISTRICT

NOTICE OF INTERLOCUTORY APPEAL

Pursuant to Texas Rules of Appellate Procedure 25.1(a) and 26.1(b), Intervenor the State of Texas, by and through its Attorney General, gives notice of appeal from the Order signed by Judge Tim Sulak on April 17, 2020 in Cause No. D-1GN-20-001610 and styled "*Texas Democratic Party, et al. v. Dana Debeauvoir, in her Capacity as Travis County Clerk.*" Said Order denied the Intervenor's Plea to the Jurisdiction and granted Plaintiffs' and Plaintiff-Intervenors' application for a temporary injunction. The Order enjoins Travis County and its agents from enforcing Texas Election Code § 82.002 pending final judgment in this action. The Order similarly

purports to enjoin the State and State actors from enforcing Texas Election Code § 82.002 in an unspecified geographic area.

Intervenor is entitled to an interlocutory appeal pursuant to Civil Practice and Remedies Code section 51.014(a)(4) and (8), which allows for an immediate appeal from an order that grants a temporary injunction or that denies a plea to the jurisdiction. Intervenor appeals to the Third Court of Appeals. This is an accelerated appeal as provided by Texas Rule of Appellate Procedure 28.1. This is not a parental termination or child protection case, as defined in Rule 28.4.

Pursuant to Texas Civil Practice and Remedies Code § 51.014(b), all further proceedings in this court are stayed pending resolution of Intervenor's appeal. Upon filing of this instrument, the April 17, 2020 Temporary Injunction is superseded pursuant to Texas Civil Practice and Remedies Code section 6.001(b) and Texas Rule of Appellate Procedure 29.1(b).

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General for Civil Litigation

THOMAS A. ALBRIGHT
Chief for General Litigation Division

/s/Anne Marie Mackin
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**ATTORNEYS FOR INTERVENOR
STATE OF TEXAS**

CERTIFICATE OF SERVICE

I certify that on April 17, 2020, the foregoing instrument was served electronically through the electronic-filing manager in compliance with TRCP 21a to:

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ATTORNEYS FOR DANA DEBAEUVOIR
IN HER CAPACITY AS TRAVIS COUNTY CLERK

/s/Anne Marie Mackin
ANNE MARIE MACKIN
Assistant Attorney General

Exhibit H



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 1, 2020

To: County Judges and County Election Officials

Re: Ballot by Mail Based on Disability

Due to misreporting and public confusion, the Texas Attorney General provides this guidance addressing whether a qualified voter, who wishes to avoid voting in-person because the voter fears contracting COVID-19, may claim a disability entitling the voter to receive a ballot by mail regardless of whether the voter would need personal assistance to vote in-person or risk injuring their health because of a sickness or physical condition. Based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code for purposes of receiving a ballot by mail. Accordingly, public officials shall not advise voters who lack a qualifying sickness or physical condition to vote by mail in response to COVID-19.

The Election Code establishes specific eligibility requirements to obtain a ballot by mail for early voting. TEX. ELEC. CODE §§ 82.001–.004. While any qualified voter is eligible to early vote by personal appearance, the Legislature has limited access to early voting by mail for individuals who meet specific qualifications. Section 82.002 of the Election Code, titled “Disability,” allows a qualified voter to early vote 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.” *See id.* § 82.002(a). Thus, a voter has a disability under this section and, therefore, is eligible to receive a ballot by mail if:

- (1) the voter has a sickness or physical condition; *and*
- (2) the sickness or physical condition prevents the voter from appearing in-person without:
 - (a) needing personal assistance; *or*
 - (b) injuring the voter’s health.

Only a qualifying sickness or physical condition satisfies the requirements of section 82.002. The Election Code does not define “sickness” or “physical condition.”¹ The

¹ Our objective in construing a statute is to give effect to the Legislature’s intent, which requires us to examine the statute’s plain language. *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008). We presume the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). In determining the plain meaning of undefined words in a statute, we consult dictionary definitions. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018); *see* Tex. Att’y Gen. Op. KP-

common understanding of the term “sickness” is “the state of being ill” or “having a particular type of illness or disease.” NEW OXFORD AM. DICTIONARY 1623 (3d ed. 2010).² A person ill with COVID-19 would certainly qualify as having a sickness. However, a reasonable fear of contracting the virus is a normal emotional reaction to the current pandemic and does not, by itself, amount to a “sickness,” much less the type of sickness that qualifies a voter to receive a ballot by mail under Election Code section 82.002.

In addition to “sickness,” the Election Code allows voters to vote by mail if they have a “physical condition” that prevents them from appearing at the polling place without assistance or without injury to their health. TEX. ELEC. CODE § 82.002(a). “Physical” is defined as “of or relating to the body as opposed to the mind.” NEW OXFORD AM. DICTIONARY 1341 (3d ed. 2010). “Condition” is defined as “an illness or other medical problem.” *Id.* at 362. Combining the two words, a physical condition is an illness or medical problem relating to the body as opposed to the mind. To the extent that a fear of contracting COVID-19, without more, could be described as a condition, it would at most amount to an emotional condition and not a physical condition as required by the Election Code to vote by mail. Thus, under the specifications established by the Legislature in section 82.002 of the Election Code, an individual’s fear of contracting COVID-19 is not, by itself, sufficient to meet the definition of disability for purposes of eligibility to receive a ballot by mail.

To the extent third parties advise voters to apply for a ballot by mail for reasons not authorized by the Election Code, including fear of contracting COVID-19 without an accompanying qualifying disability, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041. TEX. ELEC. CODE § 84.0041 (providing that a person commits an offense if the person “intentionally causes false information to be provided on an application for ballot by mail”); *see also id.* § 276.013 (a person commits election fraud if the person knowingly or intentionally causes a ballot to be obtained under false pretenses, or a misleading statement to be provided on an application for ballot by mail). However, whether specific activity constitutes an offense under these provisions will depend upon the facts and circumstances of each individual case.

A lawsuit recently filed in Travis County District Court does not change or suspend these requirements. In that case, the District Court ordered the Travis County Clerk to accept mail ballot applications from voters who claim disability based on the COVID-19 pandemic, and to tabulate mail ballots received from those voters. The Texas Attorney General immediately appealed that order. Accordingly, pursuant to Texas law, the District Court’s order is stayed and has no effect during the appeal. Moreover, even if the order were effective, it would not apply to any county

0009 (2015) (concluding that to be able to vote by mail, a voter must satisfy the standard of disability established under section 82.002, and that standards of disability set in other unrelated statutes are not determinative).

² *See also* Tex. Att’y Gen. Op. KP-0149 (2017) (noting that a behavioral abnormality of a sexually violent predator sufficient to result in civil commitment qualifies as a sickness, understood as an “unsound condition” or disease of the mind, under section 82.002(a)).

clerk or election official outside of Travis County. Those officials must continue to follow Texas law, as described in this letter, concerning eligibility for voting by mail ballot.

Sincerely,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style with a large, prominent "K" and "P".

KEN PAXTON
Attorney General of Texas

Exhibit I



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 14, 2020

The Honorable Stephanie Klick
Chair, Committee on Elections
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Dear Chairwoman Klick:

You have asked us for guidance on whether a qualified voter who wishes to avoid voting in-person because the voter fears contracting COVID-19 may claim a disability entitling the voter to receive a ballot by mail regardless of whether the voter would need personal assistance to vote in-person or risk injuring their health because of a sickness or physical condition.¹ We conclude that, based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Election Code for purposes of receiving a ballot by mail.

The Election Code establishes specific eligibility requirements to obtain a ballot by mail for early voting. TEX. ELEC. CODE §§ 82.001–.004. While any qualified voter is eligible to early vote by personal appearance, the Legislature has provided limited access to early voting by mail for individuals who meet specific qualifications. Section 82.002 of the Election Code, titled “Disability,” allows a qualified voter to early vote 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.” *See id.* § 82.002(a). Thus, we must construe this provision to determine whether the

¹ Related to this request, we understand that you have received correspondence in your capacity as Chair of the Texas House of Representatives Committee on Elections from other State lawmakers advocating that you support use of the early voting by mail option for such voters. We also understand that some voters have been encouraged by third parties to apply for a ballot by mail by identifying as disabled based on fear of COVID-19, and without reference to the voters’ health or physical condition. As a general rule, we do not opine through the formal opinion process on questions, such as these, that are the subject of pending litigation. *See Tex. Democratic Party, et al., v. Debeauvoir*, No. D-1-GN-001610 (201st Dist. Ct., Travis Cnty., Tex.). However, given the time-sensitive nature of your request and the urgency presented by the present COVID-19 crisis, we are providing this informal guidance to assist you.

Legislature intended to include within the population of individuals eligible to vote by mail those with a fear of contracting a disease—in this instance COVID-19—but without a then-present sickness or physical condition that would limit their ability to vote in-person.

Our objective in construing a statute is to give effect to the Legislature's intent, which requires us to first look to the statute's plain language. *Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008). We presume the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). In determining the plain meaning of undefined words in a statute, we typically first consult dictionary definitions. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018).

The Legislature has defined “disability” for purposes of voting by mail as a “sickness or physical condition” that prevents a person from voting in-person on election day without a likelihood of needing personal assistance or of injuring the voter's health. TEX. ELEC. CODE § 82.002(a). Thus, we look to the common meaning of those words to determine the Legislature's intent as to who qualifies to vote by mail by reason of disability. See Tex. Att'y Gen. Op. KP-0009 (2015) (concluding that to be able to vote by mail, a voter must satisfy the standard of disability established under section 82.002, and that standards of disability set in other unrelated statutes are not determinative). The common understanding of the term “sickness” is “the state of being ill” or “having a particular type of illness or disease.” NEW OXFORD AM. DICTIONARY 1623 (3d ed. 2010).² A person ill with COVID-19 would certainly qualify as having a sickness. However, a reasonable fear of contracting the virus is a normal emotional reaction to the current pandemic and does not, by itself, amount to a “sickness,” much less the type of sickness that qualifies a voter to vote a mail-in ballot under Texas Election Code section 82.002.

In addition to “sickness,” the Legislature has allowed voters having a physical condition that prevents them from appearing at the polling place without assistance or without injury to their health to vote by mail. TEX. ELEC. CODE § 82.002(a). “Physical” is defined as “of or relating to the body as opposed to the mind.” NEW OXFORD AM. DICTIONARY 1341 (3d ed. 2010). “Condition” is defined as “an illness or other medical problem.” *Id.* at 362. Combining the two words, a physical condition is an illness or medical problem relating to the body as opposed to the mind. To the extent that a fear of contracting COVID-19, without more, could be described as a condition, it would at most amount to a mental or emotional condition and not a physical condition as required by the Legislature to vote by mail. Thus, under the specifications established by the Legislature in section 82.002

² See also Tex. Att'y Gen. Op. KP-0149 (2017) (noting that a behavioral abnormality of a sexually violent predator sufficient to result in civil commitment qualifies as a sickness, understood as an “unsound condition” or disease of the mind, under section 82.002(a)).

of the Election Code, an individual's fear of contracting COVID-19 is not, by itself, sufficient to meet the definition of disability for purposes of eligibility to vote a mail-in ballot.

Finally, to the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041. TEX. ELEC. CODE § 84.0041 (providing that a person commits an offense if the person "intentionally causes false information to be provided on an application for ballot by mail"); *see also id.* § 276.013 (providing that a person commits election fraud if the person knowingly or intentionally causes a ballot to be obtained under false pretenses, or a misleading statement to be provided on an application for ballot by mail). However, whether specific activity constitutes an offense under these provisions will depend upon the facts and circumstances of each individual case.

Please note that as discussed above this response is not an official opinion of the Office of the Attorney General issued under section 402.042 of the Texas Government Code, nor is it an exhaustive memorandum of law; rather, it is an informal letter of legal advice offered for the purpose of general guidance.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Ryan M. Vassar', with a long horizontal flourish extending to the right.

Ryan M. Vassar
Deputy Attorney General for Legal Counsel

Exhibit J

Motion Granted in Part; Order and Dissent to Order filed May 14, 2020.



**In The
Fourteenth Court of Appeals**

NO. 14-20-00358-CV

STATE OF TEXAS, Appellant

V.

**TEXAS DEMOCRATIC PARTY, GILBERTO HINOJOSA, IN HIS CAPACITY
AS CHAIRMAN OF THE TEXAS DEMOCRATIC PARTY, JOSEPH
DANIEL CASCINO, SHANDA MARIE SANSING, ZACHARY PRICE,
LEAGUE OF WOMEN VOTERS OF TEXAS, LEAGUE OF WOMEN
VOTERS OF AUSTIN AREA, WORKERS DEFENSE ACTION FUND,
AND MOVE TEXAS ACTION FUND, Appellees**

**On Appeal from the 201st District Court
Travis County, Texas
Trial Court Cause No. D-1-GN-20-001610**

ORDER

On May 5, 2020, appellees Texas Democratic Party, Gilberto Hinojosa, in his capacity as Chairman of the Texas Democratic Party, Joseph Daniel Cascino, Shanda Marie Sansing, Zachary Price, League of Women Voters of Texas, League

of Women Voters of Austin Area, Workers Defense Action Fund, and MOVE Texas Action Fund filed an emergency motion pursuant to Texas Rules of Appellate Procedure 29.3 and 29.4, asking this court to either enforce the trial court's temporary injunction or to issue an order that the trial court's injunction remains in effect to preserve the parties' rights until the disposition of the appeal.

Texas Rule of Appellate Procedure Rule 29.3 states "When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal and may require appropriate security." Tex. R. App. P. 29.3.

In *Tex. Educ. Agency v. Houston Indep. Sch. Dist.*, No. 03-20-00025-CV, 2020 WL 1966314, at *5 (Tex. App.—Austin Apr. 24, 2020, order), the Austin Court of Appeals held that, pursuant to our appellate jurisdiction in an interlocutory appeal, Texas Rule of Appellate Procedure 29.3 provides a mechanism by which we may exercise the scope of our authority over parties, including our inherent power to prevent irreparable harm to parties properly before us. (citing *In re Geomet Recycling, LLC*, 578 S.W.3d 82, 90 (Tex. 2019) ("We find no reason to doubt that the court of appeals had the authority to make orders protecting EMR against irreparable harm using Rule 29.3.")).

We conclude that under the circumstances presented here, where appellees allege irreparable harm, under the binding authority of the Austin Court, we must exercise our inherent authority under Rule 29.3.¹ We conclude that such a temporary order is necessary in this case to preserve the parties' rights. Accordingly, we grant

¹ The Texas Supreme Court ordered the Third Court of Appeals to transfer this case to our court. Under the Texas Rules of Appellate Procedure, "the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court." Tex. R. App. P. 41.3.

appellees’ motion for temporary orders under Rule 29.3 and order that the trial court’s temporary injunction remains in effect until disposition of this appeal. No security is required from appellees because the State has not shown that it will incur monetary damages as a result of the injunction. *See* Tex. R. App. P. 29.3.

/s/ Margaret “Meg” Poissant

-

Margaret “Meg” Poissant
Justice

Panel consists of Chief Justice Frost and Justices Zimmerer and Poissant (Frost, C.J., dissenting).

Publish.

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Name
Thomas Buser-Clancy

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Associated Case Party: League of Women Voters of Texas

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Associated Case Party: League of Women Voters of Austin-Area

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Associated Case Party: MOVE Texas Action Fund

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Associated Case Party: MOVE Texas Action Fund

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Rebecca Harrison Stevens		beth@texascivilrightsproject.org	5/14/2020 11:36:07 AM	SENT
Sophia LinLakin		slakin@aclu.org	5/14/2020 11:36:07 AM	SENT
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Associated Case Party: Workers Defense Action Fund

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Sophia LinLakin		slakin@aclu.org	5/14/2020 11:36:07 AM	SENT
Joaquin Gonzalez		joaquin@texascivilrightsproject.org	5/14/2020 11:36:07 AM	SENT

Motion Granted in Part; Order and Dissent to Order filed May 14, 2020.



**In The
Fourteenth Court of Appeals**

NO. 14-20-00358-CV

STATE OF TEXAS, Appellant

V.

**TEXAS DEMOCRATIC PARTY, GILBERTO HINOJOSA, IN HIS
CAPACITY AS CHAIRMAN OF THE TEXAS DEMOCRATIC PARTY,
JOSEPH DANIEL CASCINO, SHANDA MARIE SANSING, ZACHARY
PRICE, LEAGUE OF WOMEN VOTERS OF TEXAS, LEAGUE OF
WOMEN VOTERS OF AUSTIN AREA, WORKERS DEFENSE ACTION
FUND, AND MOVE TEXAS ACTION FUND, Appellees**

**On Appeal from the 201st District Court
Travis County, Texas
Trial Court Cause No. D-1-GN-20-001610**

D I S S E N T T O O R D E R

Appellees Joseph Daniel Cascino, Shanda Marie Sansing, Texas Democratic Party, Gilberto Hinojosa in his capacity as Chairman of the Texas Democratic Party, Zachary Price, League of Women Voters of Texas, League of Women Voters of Austin Area, Workers Defense Action Fund, and MOVE Texas Action Fund

(collectively the “Cascino Parties”) filed an emergency motion asserting that (1) this court should enforce under Texas Rule of Appellate Procedure 29.4 the trial court’s temporary injunction against appellant the State of Texas based on the State’s alleged open defiance of the temporary injunction, an injunction that the Cascino Parties claim has not been superseded and thus remains in effect, or (2) if this court were to conclude that the temporary injunction has been superseded, then they urge this court to grant emergency relief under Texas Rule of Appellate Procedure 29.3 and this court’s inherent power by ordering that the trial court’s temporary injunction remains in effect, which the Cascino Parties claim is necessary to preserve their rights until the court disposes of this appeal. All of the alleged conduct that the Cascino Parties claim violated the injunction occurred after the State of Texas filed its notice of appeal. The State’s filing of the notice of appeal automatically superseded the temporary injunction. Therefore, this court should deny the Cascino Parties’ motion for Rule 29.4 relief.

The relief that the Cascino Parties seek under Rule 29.3 and this court’s inherent power conflicts with the Legislature’s determination that the State automatically supersedes an order or judgment by filing a notice of appeal and that courts cannot countermand the State’s ability to supersede unless the case arises from a contested case in an administrative-enforcement action. The Legislature’s statutes in this subject area and Texas Rule of Appellate Procedure 24.2(a)(3) do not violate the Texas Constitution’s separation-of-powers provision. Because this court cannot use Rule 29.3 or its inherent power to nullify Texas statutes, this court should deny the Cascino Parties’ request for relief under Rule 29.3 and the court’s inherent power.

Because the majority does not address the request for Rule 29.4 relief and grants the request for relief under Rule 29.3 and the court's inherent power, I respectfully dissent.

The trial court's injunction

On April 17, 2020, the trial court granted a temporary injunction (the "Injunction") in which it ordered the following:

- Defendant Dana DeBeauvoir, in her official capacity as the Travis County Clerk and Election Administrator ("DeBeauvoir"), her agents, servants, employees, representatives, and all persons or entities of any type whatsoever acting in concert with them or acting on their behalf are enjoined from rejecting any mail ballot applications received from registered voters who use the disability category of eligibility as a result of the COVID-19 pandemic for the reason that the applications were submitted based on the disability category.
- DeBeauvoir, her agents, servants, employees, representatives, and all persons or entities of any type whatsoever acting in concert with them or acting on their behalf are enjoined from refusing to accept and tabulate any mail ballots received from voters who apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic for all elections affected by the pandemic for the reason that the ballots were submitted based on the disability category.
- DeBeauvoir, the State of Texas, and their agents, servants, employees, representatives, and all persons or entities of any type whatsoever acting in concert with them or acting on their behalf are enjoined from issuing guidance or otherwise taking actions that would prevent "Counties"¹ from accepting and tabulating any mail ballots received from voters who apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic for all elections affected by the pandemic for the reason that the ballots were submitted based on the disability category.
- DeBeauvoir, the State of Texas, and their agents, servants, employees, representatives, and all persons or entities of any type whatsoever

¹ The term "Counties" in the trial court's temporary injunction was not a defined term.

acting in concert with them or acting on their behalf are enjoined from issuing guidance or otherwise taking actions during all elections affected by the COVID-19 pandemic, that would prohibit individuals from submitting mail ballots based on the disability category of eligibility or that would suggest that individuals may be subject to penalty solely for doing so.

The State of Texas filed a notice of interlocutory appeal.

DeBeauvoir did not file an interlocutory appeal from the Injunction. Thirty minutes after the trial court signed the Injunction, the State of Texas filed a notice of interlocutory appeal, perfecting its appeal from the Injunction. In the notice, the State of Texas stated that pursuant to Civil Practice and Remedies Code section 6.001 and Texas Rule of Appellate Procedure 29.1(b) the filing of the State's notice of appeal superseded the Injunction.

The Cascino Parties are not entitled to relief under Rule 29.4.

In their emergency motion, the Cascino Parties take issue with the State of Texas's statement in the notice of appeal. They assert that for the State to supersede the Injunction the State must seek to supersede the Injunction in the trial court under Rule of Appellate Procedure 24. The Cascino Parties assert that because the State did not do so, the Injunction has never been superseded and remains in effect. The Cascino Parties do not allege that the State of Texas violated the Injunction during the thirty-minute period between the trial court's signing of the Injunction and the State's filing of its notice of appeal. Instead, the Cascino Parties assert that the Attorney General of the State of Texas violated the Injunction by issuing a May 1, 2020 letter.

The Cascino Parties assert that Rule 24.2(a)(3) required the State to request that the Injunction be superseded, pointing to the following language: "When the judgment is for something other than money or an interest in property, the trial court

must set the amount and type of security that the judgment debtor must post.”² Though this sentence addresses the procedure for superseding a judgment under Rule 24 by providing alternate security ordered by the trial court, nothing in Rule 24 states that the rule stands as the exclusive means for superseding a judgment. To the contrary, the first sentence of Rule 24.1 provides that “[u]nless the law or these rules provide otherwise, a judgment debtor **may** supersede the judgment by: [the four means of superseding under Rule 24].”³ Thus, under its unambiguous language, Rule 24 does not prevent a judgment debtor from superseding an order or judgment under another rule or statute.⁴

Texas Rule of Appellate Procedure 29.1 provides that “[p]erfecting an appeal from an order granting interlocutory relief does not suspend the order appealed from unless: (a) the order is suspended in accordance with [Rule] 29.2; or (b) the appellant is entitled to supersede the order without security by filing a notice of appeal.”⁵ Under Rule 29.2, the trial court may permit an order granting interlocutory relief to be superseded under Rule 24 pending an appeal from the order.⁶ Thus, under Rule 29.1, an interlocutory appeal does not suspend the order from which an appeal is taken unless (1) the trial court allows the appealing party to supersede the order under Rule 24, or (2) the appellant is entitled to supersede the order without security by filing a notice of appeal.⁷ Under the plain text of Rule 29.1, if the State of Texas is entitled to supersede the Injunction without security by filing a notice of appeal,

² Tex. R. App. P. 24.2 (a)(3).

³ Tex. R. App. P. 24.1 (emphasis added).

⁴ See Tex. R. App. P. 24.

⁵ Tex. R. App. P. 29.1.

⁶ Tex. R. App. P. 29.2.

⁷ See Tex. R. App. P. 29.1.

then the State of Texas need not take any action under Rule 24 to supersede the Injunction.⁸

Under Civil Practice and Remedies Code section 6.001, the Legislature provides that “[a] governmental entity or officer listed in Subsection (b) may not be required to file a bond for court costs incident to a suit filed by the entity or officer or for an appeal or writ of error taken out by the entity or officer. . . .”⁹ This provision applies to the State of Texas, a department of the State of Texas, and the head of a department of the State of Texas.¹⁰ Under the plain text of this statute and long-standing Texas precedent interpreting this statute and its predecessors, the State of Texas is entitled to supersede an interlocutory order or final judgment without security by filing a notice of appeal.¹¹ So, under Rule 29.1, the State’s perfection of an appeal from the Injunction superseded the Injunction.¹²

In 1984, the Supreme Court of Texas amended the predecessor rule to Rule 24.2(a)(3) to provide that the trial court may decline to permit a judgment debtor to supersede a judgment if the plaintiff filed a bond or deposit fixed by the court in such an amount as would secure the defendant in any loss or damage occasioned by any relief granted if it was determined on final disposition that such relief was

⁸ *See id.*

⁹ Tex. Civ. Prac. & Rem. Code § 6.001(a) (West, Westlaw through 2019 R.S.).

¹⁰ Tex. Civ. Prac. & Rem. Code § 6.001(b) (West, Westlaw through 2019 R.S.).

¹¹ *See* Tex. Civ. Prac. & Rem. Code § 6.001; *In re State Board for Educator Certification*, 452 S.W.3d 802, 805–06 (Tex. 2014); *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 754 & n.19 (Tex. 2005); *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 480–81 (Tex. 1964).

¹² *See* Tex. R. App. P. 29.1; *In re State Board for Educator Certification*, 452 S.W.3d at 805–06; *Neeley*, 176 S.W.3d at 754 & n.19; *Ammex Warehouse Co.*, 381 S.W.2d at 480–81.

improper.¹³ This rule change raised the potential issue of whether a trial court had discretion under this rule to decline to permit a governmental entity to supersede a judgment, even though the entity had the right to supersede a judgment automatically by filing a notice of appeal.¹⁴

In *In re Long*, the Supreme Court of Texas stated that, “as a general rule,” the state’s perfection of appeal “automatically supersedes the trial court’s judgment, and that suspension remains in effect until all appellate rights are exhausted.”¹⁵ In that case, the court stated that the filing of a notice of appeal “operated as a supersedeas bond.”¹⁶ The high court noted that the plaintiffs could have invoked the predecessor to Rule of Appellate Procedure 24.2(a)(3) and asked the trial court to decline to permit the judgment to be superseded, but the plaintiffs in that case did not do so.¹⁷ Thus, the *Long* court suggested that a trial court might have discretion under the predecessor rule to Rule 24.2(a)(3) to deny an appealing governmental entity the ability to supersede the judgment, but the high court did not have to address that point in its holding.¹⁸

In *In re State Board for Educator Certification*, the supreme court addressed that issue for the first time and held that under Texas cases and Rule 25.1(h)¹⁹ a

¹³ See *In re State Board for Educator Certification*, 452 S.W.3d at 806, n.22.

¹⁴ See *id.* at 805–06.

¹⁵ 984 S.W.2d 623, 625 (Tex. 1999).

¹⁶ *Id.* at 626.

¹⁷ *Id.*

¹⁸ See *id.*

¹⁹ Rule 25.1(h), the analogue to Rule 29.1(b) in the context of appeals from final judgments, provides as follows: “The filing of a notice of appeal does not suspend enforcement of the judgment. Enforcement of the judgment may proceed unless: (1) the judgment is superseded in

governmental entity's notice of appeal automatically suspends enforcement of the judgment.²⁰ If the filing of a notice of appeal were enough to suspend the judgment under Rule 25.1(h) or Rule 29.1, there would seem to be no reason for a governmental entity to seek to supersede a judgment under Rule 24, and the "counter-supersedeas" language in Rule 24.2(a)(3) appears only to apply to an appellant seeking to supersede a judgment under Rule 24.1(a)(4) based on the security found to be adequate by the trial court under Rule 24.2(a)(3). Even so, the *In re State Board for Educator Certification* court determined that even though the filing of a notice of appeal by a governmental entity automatically suspends enforcement of the judgment, the judgment creditor still may ask the trial court to exercise its discretion under Rule 24.2(a)(3) to "decline supersedeas if the judgment creditor posts security."²¹ Under this holding a judgment creditor may offer to post the security ordered by the trial court and ask the trial court to "decline supersedeas" under Rule 24.2(a)(3) as to a judgment against a governmental entity, even though the governmental entity already superseded the judgment by perfecting appeal and even though the governmental entity never sought to supersede the judgment under Rule 24.²² Though Rule 24.2(a)(3) says, "the trial court may decline to permit the judgment to be superseded," the *In re State Board for Educator Certification* court effectively held that the trial court has discretion under this rule to declare that a judgment that already had been superseded would no longer be superseded if the judgment creditor posted the security specified by the trial court.²³ The supreme

accordance with Rule 24, or (2) the appellant is entitled to supersede the judgment without security by filing a notice of appeal." Tex. R. App. P. 25.1(h) (footnote omitted).

²⁰ See *In re State Board for Educator Certification*, 452 S.W.3d at 804–09.

²¹ *Id.* at 808.

²² See *id.*

²³ See *id.*

court premised this holding on the judgment creditor offering to post the security the trial court ordered and asking the trial court to “decline supersedeas” under Rule 24.2(a)(3) as to a judgment against a governmental entity.²⁴ In today’s case, the Cascino Parties did not offer to post the security, nor did they ask the trial court to “decline supersedeas” under Rule 24.2(a)(3) as to the Injunction.

The Texas Legislature did not look favorably upon the supreme court’s reconciliation of Rules 25.1(h) and Rule 24.2(a)(3) and the resulting ability of a trial court to decline supersedeas as to an order or judgment against the State of Texas, a department of the State of Texas, or the head of a department of the State.²⁵ In 2017, the Legislature decided to abrogate the *In re State Board for Educator Certification* holding as to those parties, except as to contested cases in administrative enforcement actions.²⁶ The Legislature required that “[t]he supreme court shall adopt rules to provide that the right of an appellant under Section 6.001(b)(1), (2), or (3), Civil Practice and Remedies Code, to supersede a judgment or order on appeal is not subject to being counter-superseded under Rule 24.2(a)(3), Texas Rules of Appellate Procedure, or any other rule. Counter-supersedeas shall remain available to parties in a lawsuit concerning a matter that was the basis of a contested case in an administrative enforcement action.”²⁷ In response, the supreme court amended Rule 24.2(a)(3) to add the following sentence: “When the judgment debtor is the state, a department of this state, or the head of a department of this state, the trial

²⁴ See *id.*

²⁵ See Tex. Gov’t Code Ann. § 22.004(i) (West, Westlaw through 2019 R.S.).

²⁶ See *id.*

²⁷ *Id.*

court must permit a judgment to be superseded except in a matter arising from a contested case in an administrative enforcement action.”²⁸

Today’s case does not involve a matter arising from a contested case in an administrative enforcement action. Thus, under the plain text of Rule 24.2(a)(3) and Government Code section 22.004(i), the Injunction is not subject to counter-supersedeas under Rule 24.2(a)(3), and under *In re State Board for Educator Certification* and prior cases, the State of Texas’s perfection of appeal automatically superseded the Injunction.²⁹ Even if, contrary to these authorities, the Cascino Parties had the ability to “counter-supersede” the Injunction by offering to post the security ordered by the trial court and asking the trial court to “decline supersedeas” under Rule 24.2(a)(3), the Cascino Parties never offered to do so and never sought this relief under Rule 24.2(a)(3).

The Cascino Parties interpret *In re State Board for Educator Certification* as holding that the governmental entity’s notice of appeal does not automatically supersede the judgment and that the governmental entity must ask the trial court to supersede the judgment. The *In re State Board for Educator Certification* court did not pronounce either holding.³⁰ Instead, if the Cascino Parties wanted to counter-supersede the Injunction, they had to offer to post the security ordered by the trial court and ask the trial court to “decline supersedeas” under Rule 24.2(a)(3).³¹ Their failure to do so did not prejudice them because the trial court had no discretion to “decline supersedeas” under the current version of Rule 24.2(a)(3), given that the

²⁸ Tex. R. App. P. 24.2(a)(3).

²⁹ See Tex. Gov’t Code Ann. § 22.004(i); Tex. R. App. P. 24.2(a)(3); *In re State Board for Educator Certification*, 452 S.W.3d at 804–09; *Ammex Warehouse Co.*, 381 S.W.2d at 480–81.

³⁰ See *In re State Board for Educator Certification*, 452 S.W.3d at 804–09.

³¹ See *id.*

case does not fall within the exception (involving a matter arising from a contested case in an administrative enforcement action).³²

For the foregoing reasons, the State of Texas’s filing of a notice of appeal superseded the Injunction. From that point to the present, the Injunction has been superseded.³³ Because all of the alleged violations of the Injunction occurred after the State of Texas filed the notice of appeal superseding the judgment, this court need not address whether the State of Texas violated the Injunction or go forward with a proceeding to enforce the Injunction under Rule 29.4.³⁴ This court should deny the Cascino Parties’ request for relief under Rule 29.4.

The Cascino Parties are not entitled to relief under Rule 29.3 or the court’s inherent power.

The Cascino Parties assert in the alternative that if this court were to conclude that the Injunction has been superseded, this court should grant emergency relief under Rule of Appellate Procedure 29.3 and this court’s inherent power by ordering that the Injunction remains in effect, an action the appellees claim is necessary to preserve their rights until the disposition of this appeal.³⁵ The Cascino Parties assert that a recent published order from the Third Court of Appeals is binding precedent

³² See Tex. Gov’t Code Ann. § 22.004(i); Tex. R. App. P. 24.2(a)(3); *In re State Board for Educator Certification*, 452 S.W.3d at 804–09.

³³ See Tex. Gov’t Code Ann. § 22.004(i); Tex. R. App. P. 24.2(a)(3); *In re State Board for Educator Certification*, 452 S.W.3d at 804–09; *Neeley*, 176 S.W.3d at 754 & n.19; *Ammex Warehouse Co.*, 381 S.W.2d at 480–81.

³⁴ See Tex. R. App. P. 29.4.

³⁵ Texas Rule of Appellate Procedure Rule 29.3 states that “[w]hen an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties’ rights until disposition of the appeal and may require appropriate security.” Tex. R. App. P. 29.3.

on this issue.³⁶ The majority agrees that this published order binds this court and grants the requested relief.³⁷

The supreme court ordered this appeal transferred to this court from the Third Court of Appeals. Under the Texas Rule of Appellate Procedure 41.3, this court must decide the appeal in accordance with the Third Court of Appeals’s precedent under principles of stare decisis if this court’s decision otherwise would have been inconsistent with the Third Court of Appeals’s precedent.³⁸ Under principles of stare decisis, the Third Court of Appeals’s published order in *Texas Education Agency v. Houston Independent School District* is not on point and so would not bind this court even if this court were the Third Court of Appeals. The *Texas Education Agency* court “conclude[d] that under the particular circumstances presented here, where the appellee alleges irreparable harm from ultra vires action that it seeks to preclude from becoming final, to effectively perform our judicial function and to preserve the separation of powers, we must exercise our inherent authority and use Rule 29.3 to make orders to prevent irreparable harm to parties that have properly invoked [our] jurisdiction in an interlocutory appeal.”³⁹ Thus, the Third Court of Appeals based that order on the “particular circumstances presented” and the appellee’s allegation of irreparable harm from ultra vires action that it sought to preclude from becoming final.⁴⁰ In today’s case, the Cascino Parties do not seek relief based on ultra vires action that they seek to preclude from becoming final; so, under stare decisis principles, the published order in *Texas Education Agency* is not a binding precedent

³⁶ See *Texas Education Agency v. Houston Indep. Sch. Dist.*, No. 03-20-00025-CV, 2020 WL 1966314, at *4–6 (Tex. App.—Austin Apr. 24, 2020) (published order).

³⁷ See *id.*

³⁸ Tex. R. App. P. 41.3.

³⁹ See *Texas Education Agency*, 2020 WL 1966314, at *6 (internal quotations omitted).

⁴⁰ See *id.*

for today’s case.⁴¹

Under Texas statutes and binding precedent from the Supreme Court of Texas, the State of Texas has a statutory right to supersede the Injunction by filing a notice of appeal, and the State invoked that right in its notice of appeal.⁴² By granting the Cascino Parties’ request for relief under Rule 29.3 and decreeing that “the trial court’s temporary injunction remains in effect until disposition of this appeal,”⁴³ this court takes action that conflicts with the State of Texas’s statutory right to supersede the Injunction by filing a notice of appeal. Under binding supreme-court precedent, because the State’s notice of appeal automatically superseded the Injunction, the Injunction has not been in effect since April 17, 2020.⁴⁴ Yet, today the majority orders that the Injunction “remains in effect,” thus indicating that the Injunction has been in effect since April 17, 2020, when under binding statutes and precedent, it has not.⁴⁵

When a rule of procedure conflicts with a statute, the statute prevails.⁴⁶ A court cannot exercise an inherent power in a manner that conflicts with an applicable

⁴¹ See *id.*; Tex. R. App. P. 41.3.

⁴² See Tex. Civ. Prac. & Rem. Code § 6.001(b); Tex. Gov’t Code Ann. § 22.004(i); *In re State Board for Educator Certification*, 452 S.W.3d at 804–09; *Neeley*, 176 S.W.3d at 754 & n.19; *Ammex Warehouse Co.*, 381 S.W.2d at 480–81.

⁴³ *Ante* at 3.

⁴⁴ See Tex. Civ. Prac. & Rem. Code § 6.001(b); Tex. Gov’t Code Ann. § 22.004(i); *In re State Board for Educator Certification*, 452 S.W.3d at 804–09; *Neeley*, 176 S.W.3d at 754 & n.19; *Ammex Warehouse Co.*, 381 S.W.2d at 480–81.

⁴⁵ See Tex. Civ. Prac. & Rem. Code § 6.001(b); Tex. Gov’t Code Ann. § 22.004(i); *In re State Board for Educator Certification*, 452 S.W.3d at 804–09; *Neeley*, 176 S.W.3d at 754 & n.19; *Ammex Warehouse Co.*, 381 S.W.2d at 480–81.

⁴⁶ See *Univ. of Tex. Health Science Ctr. at Houston v. Rios*, 542 S.W.3d 530, 538 (Tex. 2017).

statute.⁴⁷ By using its inherent power and Rule 29.3 to grant a temporary order that reinstates and revives an injunction that has been superseded for the past month, the majority violates applicable statutes and goes against high-court cases applying them.⁴⁸ Because this action is not a proper use of Rule 29.3 or the court’s inherent power, this court should deny the Cascino Parties’ request for relief under Rule 29.3 and the court’s inherent power.⁴⁹

The Cascino Parties assert that the supreme court’s 2018 amendment to Rule 24.2(a)(3) violated the Texas Constitution’s separation-of-powers provision by giving the State of Texas, a department of the State, and the head of a department of the State an unqualified right to supersede an order or judgment on appeal.⁵⁰ The Cascino Parties cite *In re State Board for Educator Certification* for this proposition, but based on the court’s holding that Rule 24.2’s counter-supersedeas provisions applied to the governmental entity in that case, the *In re State Board for Educator Certification* court did not rule on any constitutional issue.⁵¹ Though the *In re State Board for Educator Certification* court suggested in obiter dicta that there might be separation-of-powers issues with the State’s argument, the court did not say that a separation-of-powers violation would occur if a plaintiff had no ability under Rule

⁴⁷ See *Ashford v. Goodwin*, 131 S.W. 535, 538 (Tex. 1910).

⁴⁸ See Tex. Civ. Prac. & Rem. Code § 6.001(b); Tex. Gov’t Code Ann. § 22.004(i); *In re State Board for Educator Certification*, 452 S.W.3d at 804–09; *Neeley*, 176 S.W.3d at 754 & n.19; *Ammex Warehouse Co.*, 381 S.W.2d at 480–81.

⁴⁹ See *Rios*, 542 S.W.3d at 538; *Ashford*, 131 S.W. at 538.

⁵⁰ See Tex. Const. art. II, § 1. As noted above, the high court added the following language to Rule 24.2(a)(3): “When the judgment debtor is the state, a department of this state, or the head of a department of this state, the trial court must permit a judgment to be superseded except in a matter arising from a contested case in an administrative enforcement action.”

⁵¹ See *In re State Board for Educator Certification*, 452 S.W.3d at 804–09.

24.2(a)(3) to seek counter-supersedeas against a governmental entity.⁵² What is binding on this court is the supreme court’s statements that (1) “[w]e see nothing in this exemption statute [exempting the State of Texas and other governmental entities from having to post a bond to supersede a judgment] which is repugnant to any constitutional provision”⁵³; (2) “[t]he Legislature was well within its constitutional boundaries in providing that the State and the heads of its departments are exempt from giving bond when they elect to supersede a judgment of a trial court”⁵⁴; and (3) “[i]t may be that litigants’ substantive rights would be better protected by allowing enforcement of a trial court’s judgment pending appeal. . . . However, when and how supersedeas should be allowed is a policy question peculiarly within the legislative sphere and the Legislature has determined that the State and certain political subdivisions thereof may supersede judgments of trial courts.”⁵⁵

The Legislature did not violate the Texas Constitution’s separation-of-powers provision in determining that counter-supersedeas should not be allowed in appeals by the State of Texas except in cases arising from a contested case in an administrative-enforcement action.⁵⁶ Nor did the supreme court violate the Texas Constitution’s separation of powers in promulgating the 2018 revision to Rule 24.2

⁵² *See id.* at 808–09.

⁵³ *Ammex Warehouse Co.*, 381 S.W.2d at 481.

⁵⁴ *Id.* at 482.

⁵⁵ *Id.*

⁵⁶ *See* Tex. Const. art. II, § 1; Tex. Gov’t Code Ann. § 22.004(i); *In re Dean*, 393 S.W.3d 741, 748 (Tex. 2012); *General Servs. Com’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 599–600 (Tex. 2001); *Ammex Warehouse Co.*, 381 S.W.2d at 481–82.

under Texas Government Code section 22.004(i).⁵⁷

Because the Cascino Parties have not shown themselves entitled to the relief they seek under Rule 29.3 and this court's inherent power, this court should deny this part of the Cascino Parties' motion.

Conclusion

The majority errs in failing to address the Cascino Parties' request for relief under Rule 29.4 and in granting relief under Rule 29.3 and the court's inherent power without first determining whether the Injunction has been superseded. In any case, the court errs in granting relief under Rule 29.3 and the court's inherent power because granting that relief conflicts with Texas statutes. The court should deny the Cascino Parties' emergency motion in its entirety.

/s/ Kem Thompson Frost
Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Zimmerer and Poissant (Poissant, J., majority).

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⁵⁷ See Tex. Const. art. II, § 1; Tex. Gov't Code Ann. § 22.004(i); Tex. R. App. P. 24.2(a)(3); *In re Dean*, 393 S.W.3d at 748; *General Servs. Com'n*, 39 S.W.3d at 599–600; *Ammex Warehouse Co.*, 381 S.W.2d at 481–82.

Exhibit K

No. _____

In the Supreme Court of Texas

IN RE STATE OF TEXAS,

Relator.

On Petition for Writ of Mandamus
to the Harris County Clerk, the Travis County Clerk,
the Dallas County Elections Administrator, the Cameron County Elections
Administrator, and the El Paso County Elections Administrator

PETITION FOR WRIT OF MANDAMUS

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Remi Garza, in his official capacity as Cameron County Elections Administrator

Toni Pippins-Poole, in her official capacity as Dallas County Elections Administrator

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RECORD REFERENCES

“App.” refers to the appendix to this petition. “MR” refers to the mandamus record.

STATEMENT OF THE CASE

Nature of the underlying proceeding: Pursuant to section 273.061 of the Texas Election Code [App. C], this is a petition for a writ of mandamus compelling the early voting clerks for Dallas, Cameron, El Paso, Harris, and Travis Counties to perform their statutory duties to review voters’ applications to vote by mail and issue mail-in ballots in accordance with the Texas Election Code. *See* Tex. Elec. Code § 86.001 [App. B].

Respondents: Remi Garza, Cameron County Elections Administrator
Toni Pippins-Poole, Dallas County Elections Administrator
Lisa Wise, El Paso County Elections Administrator
Diane Trautman, Harris County Clerk
Dana DeBeauvoir, Travis County Clerk

Respondents’ challenged actions: Under Texas law, voting by mail is lawful only under limited circumstances. *See id.* §§ 82.001-.004. One of those circumstances is disability, meaning “a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood . . . of injuring the voter’s health.” *Id.* § 82.002(a) [App. A].

Respondents have proclaimed publicly that a healthy voter is eligible to vote by mail under section 82.002 based solely on risk of exposure to the novel coronavirus while voting in person. That is not the law, yet Respondents have publicly stated their intent to apply this incorrect reading of the Texas Election Code in performing their duties to review and issue mail-in ballots for the upcoming elections. *See* MR.1456-1509. Because statewide voting is fast approaching, and more voters seek impermissible mail-in ballots every day, mandamus relief is necessary.

STATEMENT OF JURISDICTION

The Court has original jurisdiction to issue a writ of mandamus “to compel the performance of any duty imposed by law in connection with the holding of an election.” Tex. Elec. Code § 273.061.

The State has a compelling reason to request mandamus from this Court in the first instance. *See* Tex. R. App. P. 52.3. Preparations for the upcoming elections have already begun, and Respondents are urging voters to apply to vote by mail even when those voters do not meet the Legislature’s test for eligibility to do so. Every day that passes, more applications are submitted, and it becomes increasingly challenging to disentangle voters who meet the statutory definition of “disabled” from those who do not. The damage to election integrity increases with every day that Respondents misapply Texas law. When time is of the essence, this Court has not hesitated to exercise its mandamus authority. *See, e.g., In re Woodfill*, 470 S.W.3d 473, 481 (Tex. 2015) (per curiam); *In re Carlisle*, 209 S.W.3d 93, 95-96 (Tex. 2006) (per curiam); *In re Tex. Senate*, 36 S.W.3d 119, 121 (Tex. 2000); *Sears v. Bayoud*, 786 S.W.2d 248, 250 & n.1 (Tex. 1990). The Court should do so again.

Relator respectfully requests relief within 14 days of this filing. For the July 14 elections, the deadline for early-voting clerks to provide mail-in ballots to military and overseas applicants is May 30. *See* Tex. Elec. Code § 86.004(b). Many clerks provide ballots to other applicants at the same time or sooner. *See id.* § 86.004(a). An expeditious decision is needed to prevent irreparable harm.

ISSUE PRESENTED

Whether Respondents have a duty to reject applications for mail-in ballots that claim “disability” under Texas Election Code section 82.002(a) based solely on the generalized risk of contracting a virus.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Among the State’s highest and most profound interests is protecting the integrity of its elections. To advance that interest, the Texas Legislature requires almost every voter to vote by personal appearance at a designated polling place, where trained poll workers confirm the voter’s identity before issuing him a ballot. After all, in-person voting is the surest way to prevent voter fraud and guarantee that every voter is who he claims to be.

At the same time, the Legislature has recognized that a voter may suffer from a “disability”—that is, a “sickness or physical condition”—that “prevents” him “from appearing at the polling place on election day.” Tex. Elec. Code § 82.002(a). Such a voter, the Legislature has determined, is “eligible for early voting by mail.” *Id.* Other voters may be eligible for early voting by mail if they are over 65 years old, *id.* § 82.003, or incarcerated, *id.* § 82.004, or absent from their county, *id.* § 82.001. But outside these specific, limited groups of voters, mail-in ballots are unavailable.

The Legislature has tasked local election officials with enforcing those policies. Section 86.001 of the Texas Election Code requires county officials to “review each application for a ballot to be voted by mail” and determine whether the applicant “is entitled to vote an early voting ballot by mail.” *Id.* § 86.001(a)-(b). If the applicant is not entitled to vote by mail, the county official must reject the application. *Id.* § 86.001(c).

Yet some county election officials around the State are now refusing to discharge that duty. They have instead determined that the coronavirus pandemic allows them to unilaterally expand the Legislature’s determination of who is eligible to vote by

mail. To the local election officials of Travis, Harris, Cameron, Dallas, and El Paso Counties—all Respondents here—a “disability” does not mean a “sickness or physical condition.” Instead, it means a generalized fear common to all voters of contracting disease. Respondents have publicly proclaimed that their definition of “disability” trumps the Legislature’s, and they have encouraged voters to apply to vote by mail regardless of whether they have any “disability,” as the Legislature defined that term. And rather than reject such improper applications, as section 86.001 requires, they are approving more and more each day.

Respondents’ actions are not only unlawful; they are also unnecessary. State officials are already taking steps to ensure the safety of voters. Just this week, the Governor of Texas expanded the period for early voting by personal appearance in the upcoming July 14 elections. MR.0249-52. And the Secretary of State has notified local officials that “early next week,” her office will issue “detailed recommendations for protecting the health and safety of voters and election workers at the polls.” MR.0259-60. State officials, in other words, are working diligently to preserve the integrity of elections by safeguarding in-person voting. Respondents seek to undermine those efforts.

This action asks the Court to order Respondents to cease their lawless conduct and execute the duties Texas law imposes on them as local election officials. The Legislature has reasonably determined that widespread mail-in balloting carries unacceptable risks of corruption and fraud. It has cabined mail-in voting to specific, narrow circumstances. And it has charged Respondents, as local election officials, with implementing that directive. Tex. Elec. Code § 86.001. Respondents instead

seek to mislead voters, impose their own policy preferences, and undermine the integrity of multiple upcoming elections. This Court should intervene. The petition for a writ of mandamus should be granted, and the Court should issue an order compelling Respondents to perform their duties in accordance with law.

STATEMENT OF FACTS

I. Texas Law Requires In-Person Voting Except in Narrow, Carefully Defined Circumstances.

Texas law has long required most voters to cast their ballots in person, either on Election Day, Tex. Elec. Code ch. 64, or during an early voting period prescribed by the Legislature, *id.* § 82.005. This is not merely a matter of tradition or an effort to mark the significance of voting. It represents a deliberate policy chosen by the Legislature to curb fraud and abuse. *See McGee v. Grissom*, 360 S.W.2d 893, 894 (Tex. App.—Fort Worth 1962, no writ) (per curiam).

Unfortunately, the potential for fraud and abuse with respect to mail-in ballots persists. In 2005, the Commission on Federal Election Reform found that “[a]bsentee ballots remain the largest source of potential election fraud.” MR.0054. “Blank ballots . . . might get intercepted,” “[c]itizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure . . . or to intimidation,” and “[v]ote buying schemes are far more difficult to detect when citizens vote by mail.” MR.0054. Texas is not immune. As the Austin American-Statesman recently reported:

Of the 91 Texas election fraud cases prosecuted from state investigations in the last decade, . . . [o]nly four of the 91 involved in-person voter

impersonation. Most cases involve abuse of mail-in ballots and of campaigns acting as voter assistants to help people mark their ballots.¹

Indeed, reports of voter fraud tied to mail-in balloting are all too common.²

The Texas Legislature has long balanced the risk of fraud against the unique hardships faced by certain voters who suffer from physical disabilities. In 1917, the Legislature passed the first absentee voting law to allow qualified voters to vote by mail if they expected to be away from their jurisdictions on election day. Act approved May 26, 1917, 35th Leg., 1st C.S., p. 62, ch. 40, 1917 Tex. Gen. Laws 62. Today, Texas law allows voters to vote by mail under four circumstances: (1) anticipated absence from the county; (2) a disability prevents the voter from appearing at the polling place; (3) the voter is 65 or older; or (4) the voter is confined in jail. Tex. Elec. Code §§ 82.001-.004.

To obtain a mail-in ballot, an eligible voter applies to his county's early voting clerk. *Id.* § 86.001. Respondents are the early voting clerks for Cameron, Dallas, El Paso, Harris, and Travis Counties. *See id.* §§ 31.043(2), 83.002.

The Election Code sets out the early voting clerk's duties: She must "review each application for a ballot to be voted by mail" and determine whether the applicant is "is entitled to vote an early voting ballot by mail." *Id.* § 86.001(a)-(c).

¹ Elizabeth Findell, *In election season in the Rio Grande Valley, watchful eyes at the polls* (Austin American-Statesman June 11, 2018), <https://www.statesman.com/news/20180611/in-election-season-in-rio-grande-valley-watchful-eyes-at-polls>.

² *See, e.g.,* Anna M. Tinsley and Deanna Boyd, *Four women in 'voter fraud ring' arrested. They targeted seniors on city's north side* (Fort Worth Star-Telegram Oct. 12, 2018), <https://www.star-telegram.com/news/local/fort-worth/article219920740.html>.

That review leads to one of two outcomes: “If the applicant is entitled to vote an early voting ballot by mail, the clerk shall provide an official ballot to the applicant.” *Id.* § 86.001(b). But “if the applicant is *not* entitled to vote by mail, the clerk shall reject the application, enter on the application ‘rejected’ and the reason for and date of rejection, and deliver written notice of the reason for the rejection to the applicant.” *Id.* § 86.001(c) (emphasis added). If the defect is technical (*e.g.*, failure to provide necessary information), the applicant is given an opportunity to cure it. If the voter is not eligible, this notice informs the voter that he may vote only by personal appearance.

II. State Officials Are Working Diligently to Protect the Safety of In-Person Voting.

The Governor is “responsible for meeting . . . the dangers to the state and people presented by disasters.” Tex. Gov’t Code § 418.011(1). To that end, the Governor has issued numerous proclamations and executive orders to safeguard Texas from the dangers of the coronavirus pandemic. *See* MR.0114-0252.

The Governor’s efforts to safeguard Texans include protections for in-person voting. There are two significant elections scheduled in Texas later this year. The first, slated for July 14, includes runoffs from the March primary and certain local and special elections. *See* MR.0118-19, MR.0124-25, MR.0138-40, MR.0246-48. The second, slated for November 3, is the general election. State officials are currently developing procedures to protect voters. On May 11, the Governor expanded the period of in-person early voting for all July 14 elections so “election officials can implement appropriate social distancing and safe hygiene practices.”

MR.0250-51. His order doubles the number of days for early voting, expanding it from ten days to twenty. *Id.*; *see* Tex. Elec. Code §§ 85.001(a)-(b).

That same day, the Secretary of State formally advised local election officials of the Governor’s proclamation. MR.0259-60. The Secretary reminded local officials that they can also extend hours of operation for the polls during the now-extended early voting period. MR.0259. And she advised that her office will shortly provide “guidance [regarding] proper conduct of in-person voting during the ongoing public health disaster,” including “detailed recommendations for protecting the health and safety of voters and election workers at the polls.” MR.0259-60.

III. A Travis County District Court Has Injected Widespread Uncertainty.

In late March, several organizations and voters filed a lawsuit against Travis County Clerk DeBeauvoir aimed at expanding voting by mail to all Texans. *See* MR.0264-75. They asked the court to declare that “any eligible voter, *regardless of age and physical condition*” may vote by mail “if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease.” MR.0270 (emphasis added). DeBeauvoir did not oppose the plaintiffs’ request for a temporary injunction.

The trial court obliged. On April 17, it issued a temporary injunction declaring:

[V]oting in person while the virus that causes COVID-19 is still in general circulation presents a likelihood of injuring [a voter’s] health, and any voters without established immunity meet the plain language definition of disability thereby entitling them to a mailed ballot under Tex. Elec. Code § 82.002.

MR.1217-22. It purported to prohibit DeBeauvoir from “rejecting any mail ballot applications received from registered voters who use the disability category of eligibility as a result of the COVID-19 pandemic.” MR.1220.

The State—which had intervened to protect the integrity of Texas law, MR.0276-86, MR.0878-88—immediately filed a notice of interlocutory appeal, MR.1223-28, which superseded the temporary injunction. *See* Tex. R. App. P. 29.1(b). On appeal, the State seeks vacatur of the temporary injunction and dismissal of the plaintiffs’ claims. *See* MR.1400. The appeal has been transferred to the Fourteenth Court of Appeals. *See* MR.1288-89.

IV. Early Voting Clerks for Five Texas Counties Broadcast their Intent to Approve Requests for Mail-In Ballots Based on Their Own Definition of “Disability.”

In response to the “public confusion” caused by the Travis County lawsuit, the Attorney General provided guidance to county election officials on May 1, 2020. MR.0256-58. “Based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Texas Election Code,” he explained. MR.0256. “Accordingly, public officials shall not advise voters who lack a qualifying sickness or physical condition to vote by mail in response to COVID-19.” MR.0256. And he explained that the Travis County lawsuit “does not change or suspend these requirements.” MR.0257-58; *see also* MR.0253-55.

But Respondents continue to maintain their own definition of “disability”:

Travis County. DeBeauvoir declares she will provide a mail-in ballot to any voter who claims “disability” because of fear of exposure to the novel coronavirus: “Based on the Travis County Trial Court’s recent order, mail-in-ballots are a legal alternative to in-person voting for many voters while COVID-19 is in general circulation.” MR.1456.³ DeBeauvoir, who neither opposed nor appealed the Travis County District Court’s temporary injunction, advocates the Travis County plaintiffs’ misreading of section 82.002. Her office had received 14,000 applications as of May 8, and DeBeauvoir has affirmed that “[i]f the voter swears [to be disabled], I believe the voter.”⁴

Harris County. In an amicus brief in the Travis County lawsuit, Harris County’s early voting clerk Diane Trautman (along with other Harris County officials) advocated treating “a healthy person who fears infection if he or she were to appear in person to vote” as disabled under section 82.002(a), MR.0545, and argued that

³ DeBeauvoir has a duty to correctly apply Texas law despite the erroneous ruling of the Travis County District Court. The Travis County temporary injunction is superseded by the State’s interlocutory appeal, so it is no barrier to DeBeauvoir performing her duties in compliance with law. *See* MR.1224; MR.1295-1310. If the court of appeals concludes that the temporary injunction remains in effect despite the interlocutory appeal—though it should not—this Court should order the Travis County District Court to vacate the order, Tex. Gov’t Code. § 22.002(a), for all the reasons set forth in the State’s brief on appeal, *see* MR.1290-1326. *See In re Francis*, 186 S.W.3d 534, 538 (Tex. 2006).

⁴ Chuck Lindell, *Legal fight: Is vote by mail a coronavirus option in Texas?* (Austin American-Statesman May 8, 2020), <https://www.statesman.com/news/20200508/legal-fight-is-vote-by-mail-coronavirus-option-in-texas>.

“all voters should be free to vote by mail in the July 14 run-off and the November election,” MR.0546-47; *see also* MR.1406-19. Trautman is further reported to have declared that “her office would not challenge any voter’s request for a mail ballot” — “effectively opening the [disability] accommodation to anyone.”⁵

On April 28, 2020, Trautman asked the Harris County Commissioners Court for \$12 million in funding to expand Harris County’s vote-by-mail program—a budget big enough to provide an absentee ballot to every voter in Harris County.⁶ Trautman promised to conduct a widespread voter information campaign promoting voting by mail.⁷ The Commissioner’s Court granted her request.⁸

Cameron County. The Cameron County Elections Administrator’s public website presently declares the following:

COVID-19 Voting by mail update: Texas District Judge Tim Sulak issued a temporary injunction on April 17, 2020 allowing registered voters to use the coronavirus as a reason to request a mail-in ballot. In light of this temporary judgement and its underlying reasoning, the Cameron County Elections Department will not reject any voter’s request for a mail-in ballot based on the eligibility category of disability. Our office has no legal authority to

⁵ See Zach Despart, *Harris County OKs up to \$12M for mail ballots amid coronavirus concerns* (Houston Chron. April 28, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-OKs-up-to-12M-for-mail-ballots-15232775.php>.

⁶ A recording of the April 28, 2020, Harris County Commissioner’s Court hearing is available at <https://harriscountytexasnew.swagit.com/videos/56616>. Trautman’s budget request is discussed at 3:53:33-5:50:17.

⁷ See *id.* 5:29:45-5:30:55.

⁸ *Id.* 5:50:10-17; *see also* MR.1488.

administratively require voters to substantiate their disability at the time the application is submitted.

MR.1497.

Dallas County. On May 5, 2020, the Dallas County Commissioner’s Court issued a resolution stating that, in light of the COVID-19 threat, “a Dallas County voter who wants to vote by mail can send an application for ballot by mail to Dallas County Elections, check the box on the application indicating ‘Disability’ as the reason for voting by mail, and the elections division will process that application as normal.” MR.1509; MR.1500-01.⁹ Pippins-Poole provided the Attorney General’s May 1 opinion to the Commissioner’s Court while stating, “however . . . we do not investigate the reason or require further explanation for the disability if the application is marked disability.”¹⁰

El Paso County. Lisa Wise, El Paso County’s Election Administrator, told the El Paso County Commissioner’s Court that she plans to provide mail-in ballots to any voter who requests one due to the COVID-19 pandemic unless the Travis County temporary injunction is reversed.¹¹ El Paso County’s Commissioner’s Court

⁹ A recording of the Dallas County Commissioner’s Court’s May 5, 2020, meeting is available at <https://dallascounty.civicweb.net/document/643591?splitscreen=true&media=true>. Discussion of the resolution is at 0:20:40-1:38:00.

¹⁰ *Id.* at 36:12-37:13.

¹¹ A recording of the May 4, 2020, El Paso County Commissioner’s Court hearing is available at https://youtu.be/B_NcmKFcpnM. Voting by mail is discussed from 11:31 AM to 12:30 PM and 1:35 to 1:46 PM.

voted to file an amicus brief in the Travis County lawsuit supporting the plaintiffs' interpretation of section 82.002.¹²

V. Respondents' Actions are Creating Widespread Confusion and Prompting Increasing Applications to Vote by Mail.

Respondents' public interpretation of the Election Code has contributed to confusion and disarray as state and local officials prepare for the July 14 elections. On May 11, two individuals accused the Attorney General of felony election fraud because his May 1, 2020, guidance letter disagrees with the Travis County District Court's interpretation of "disability," MR.1510-28, even though the temporary injunction is stayed during the State's appeal. The Texas Democratic Party and others filed a lawsuit in federal court alleging that Election Code chapter 82 violates the Fourteenth Amendment, the Twenty-Sixth Amendment, and the Voting Rights Act, among other federal causes of action, and accusing the Attorney General of voter intimidation. *See Tex. Democratic Party v. Abbott*, No. 5:20-cv-00438-FB (W.D. Tex.).

ARGUMENT

I. Respondents Refuse to Perform their Ministerial Duties in Compliance with Texas Law.

Voting by mail is a privilege granted by the Legislature in rare and narrow circumstances. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807

¹² *Id.* 1:35-45; MR.1505; see Aaron Martinez, *El Paso commissioners vote to support mail-in ballots to protect voters from COVID-19* (El Paso Times May 4, 2020), <https://www.elpasotimes.com/story/news/politics/2020/05/04/coronavirus-el-paso-commissioners-support-vote-mail-covid-19/3081120001/>.

(1969). The Texas Legislature has extended eligibility to vote by mail where “the voter has a sickness or physical condition that prevents the voter” from voting in person “without a likelihood of . . . injuring the voter’s health.” Tex. Elec. Code. § 82.002(a). The bare possibility of exposure to a virus is not a “sickness or physical condition.” But Respondents take the position that fear of exposure to the novel coronavirus—even where the voter is healthy—makes a voter eligible to vote by mail. This Court’s intervention is needed to correct this ongoing misapplication of Texas law.

A. Fear of exposure to a virus does not make a healthy voter eligible to vote by mail based on “disability.”

Texas statutes are to be interpreted based on their plain language. *See Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008). The Court presumes the Legislature included each word for a purpose and that words not included were purposefully omitted. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). It also presumes the Legislature understood and followed the rules of English grammar. Tex. Gov’t Code § 311.011; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 140 (2012) (describing the presumption as “unshakeable”).

Properly construed, section 82.002 does not permit an otherwise healthy person to vote by mail merely because going to the polls carries some risk to public health. The clause that does the primary work of the sentence is “voter has a sickness or physical condition.” Sidney Greenbaum, *The Oxford English Grammar* § 6.3 (1996). The remainder of the sentence (beginning with the word “that”) is a dependent clause defining sickness and condition. *See id.* § 5.10; *Spradlin v. Jim Walter Homes*,

Inc., 34 S.W.3d 578, 580-81 (Tex. 2000). This clause does not become relevant unless a voter satisfies the clause “has a sickness or physical condition.” Greenbaum, *supra*, § 6.5.

A healthy person does not have a “sickness or physical condition” within the meaning of section 82.002. The common understanding of “sickness” is the “state of being ill” or “having a particular type of illness or disease.” New Oxford Am. Dictionary 1623 (3d ed. 2010). A person *currently infected with* COVID-19 would certainly qualify as having a sickness. But fear of contracting a sickness is not the same thing as “ha[ving] a sickness.” Tex. Elec. Code § 82.002.

Nor does a fear of contracting COVID-19 qualify as a “physical condition.” The term “physical” means “of or relating to the body as opposed to the mind.” New Oxford Am. Dictionary 1341. “Condition” is defined as “an illness or other medical problem.” *Id.* at 362. Combining the two words, a “physical condition” is an illness or medical problem relating to the body. By contrast, to the extent that a fear of contracting COVID-19, without more, could be described as a “condition,” it is a mental or emotional condition, not a “physical condition.”

B. Respondents’ characterization of “disability” is contrary to the plain text of the Election Code.

Respondents’ position is without foundation. To begin with, it ignores that the relevant statutory term requires a “likelihood” of injury to the particular “voter’s health.” Tex. Elec. Code § 82.002. The terms “likely” and “likelihood” “[m]ost often indicate[] a degree of probability greater than five on a scale of one to ten.” Bryan A. Garner, *Modern Legal Usage* 530 (2d ed. 1995); *accord* New Oxford Am.

Dictionary 1012. There is no indication that COVID-19 makes it probable that any voter will become ill by voting in person.

But even if some lesser degree of probability sufficed, this reading inverts the terms of section 82.002. Indeed, the Travis County plaintiffs asked for a declaration that Texans are disabled “*regardless of age and physical condition.*” MR.0271 (emphasis added). The ordinary rules of grammar disallow this reading; “without a likelihood . . . of injuring the voter’s health” is an adverbial clause twice subordinated to the requirement that a voter have a “sickness or physical condition.” Greenbaum, *supra*, § 6.11, Figure 6.4.4. It cannot be elevated over the independent clause without rewriting the sentence. That would violate the Court’s duty to take “statutes as [it] find[s] them.” *Shinogle v. Whitlock*, 596 S.W.3d 772, 776 (Tex. 2020) (per curiam) (quotation marks omitted); see *Cadena Comercial USA Corp. v. TABC*, 518 S.W.3d 318, 326 (Tex. 2017).

And lack of immunity to the novel coronavirus similarly does not qualify as a “physical condition.” Reading lack of immunity as a disability would render every voter “disabled,” and thus the carefully balanced rules created by the Legislature over the last century surplusage. No one can be immune to all possible diseases. Take the seasonal flu. Influenza viruses mutate each year (and even in the course of the flu season), so not even regular vaccination can provide complete immunity. The flu

vaccine is based on predictions of which influenza viruses are likely to be circulated in the coming season.¹³ Sometimes those predictions are wrong.¹⁴

And that is just one disease. In the last few years, there have been reports in this country of outbreaks of measles, typhus, and tuberculosis.¹⁵ Any one of those diseases is potentially deadly. The argument that “physical condition” is so broad as to encompass “lack of immunity” thus proves too much.

Protecting the public health is without doubt a noble goal—which is why state officials are working diligently to safeguard the health of Texas voters. *See supra* pp. 5-6. But the Legislature has not defined “disability” by reference to such generalized policy goals. Instead, the “disability” category is limited to voters suffering a “sickness or physical condition” on election day. Tex. Elec. Code § 82.002(a).

* * *

As early voting clerks, Respondents have a duty to review and approve applications to vote by mail in accordance with state law. *Id.* § 86.001. This duty is

¹³ *See* CDC, *Selecting Viruses for the Seasonal Influenza Vaccine* [MR.1528-29]; CDC, *How the Flu Virus Can Change: “Drift” and “Shift”* [MR.1531].

¹⁴ *See, e.g.,* Mike Stobbe, *Vaccine no match against flu bug that popped up near end* (Associated Press June 27, 2019), <https://apnews.com/343b72f67a8d4ad29bd3b69a052dcd39>.

¹⁵ *E.g.,* Manisha Patel, et al., *National Update on Measles Cases and Outbreaks — United States, January 1–October 1, 2019* (CDC Oct. 11, 2019) [MR.1532-35]; Anna Gorman, *Medieval Diseases Are Infecting California’s Homeless* (The Atlantic, Mar. 8, 2019), <https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosis-medieval-diseases-spreading-homeless/584380/>.

ministerial; Respondents have no discretion to do anything but determine whether the voter is entitled to vote by mail and process the application accordingly. *Id.* §§ 86.001(a)-(b). Yet Respondents intend to issue mail-in ballots to voters who are *not* eligible to vote by mail. *See supra* pp.7-11. Each of them swore an oath to “preserve, protect, and defend . . . the laws of” the State of Texas and “faithfully execute [her] duties” accordingly. Tex. Const. art. XVI, § 1(a). Their persistence in misleading voters about eligibility to vote by mail threatens the integrity of the upcoming elections. Mandamus is necessary to compel Respondents to comply with the law.

II. The State Has No Other Adequate Remedy, and Time Is of the Essence.

The State seeks a writ of mandamus because it has no other means of ensuring that Respondents comply with Texas law in the fast-approaching elections. Despite guidance from the Attorney General, Respondents have persisted in their mistaken application of the Election Code.

Respondents’ mistake of law is particularly pernicious because it misleads voters. By encouraging voters who are not eligible to claim that they are, Respondents undermine the presumption of good faith underlying the Election Code. Respondents recognize that they do not investigate applicants’ veracity. *See supra* pp.8-11. But that is no justification for willful blindness. If an early voting clerk knows the applicant is ineligible to vote by mail, her duty is to reject the application. Tex. Elec. Code § 86.001(c); *see id.* § 86.008(a). And if Respondents persist in

issuing mail-in ballots to ineligible voters, the State will have no practical way to restore the integrity of the upcoming elections.

The pending appeal in the Travis County lawsuit is no substitute for a writ of mandamus compelling Respondents to comply with Texas law for three reasons.

First, prevailing in that lawsuit will not give the State the relief it seeks here. Judgment for the State in the Travis County lawsuit will result in vacatur of the temporary injunction and dismissal of the Travis County plaintiffs' claims, not an order requiring Respondents to comply with Texas law. *See* MR.1400. An order from this Court is necessary to protect the integrity of Texas's upcoming elections.

Second, Respondents' misapplication of Texas law is independent of the Travis County District Court's order. Because four of the Respondents are not parties to the Travis County lawsuit, its resolution, regardless of outcome, will not bind them. And DeBeauvoir, too, intends to misapply Texas law without regard to the temporary injunction. *See supra* n.3.

Third, resolution of the Travis County lawsuit will come too late. To maintain the status quo, the State filed an immediate interlocutory appeal. The State's notice of appeal suspended the temporary injunction in its entirety, yet Respondents have disregarded that supersedeas. *See, e.g.*, MR.1456, MR.1497, MR.1509. Even the accelerated appellate process will not result in a decision by the court of appeals in time for it to matter. Though the State filed ahead of even the accelerated schedule set by the Fourteenth Court, MR.1288-89, MR.1454-55, briefing is not scheduled to be completed until June 11, MR.1455. By that time, it will be too late to prevent

Respondents from improperly issuing scores of mail-in ballots to ineligible voters based on their unlawful application of section 82.002(a).

In short, final resolution of the Travis County lawsuit will come too late to correct the damage caused if Respondents persist in misleading the public and providing absentee ballots to unqualified voters. When the ordinary appellate process cannot afford timely relief, mandamus is proper. *See Woodfill*, 470 S.W.3d at 480-81; *In re Francis*, 186 S.W.3d 534, 538 (Tex. 2006).

PRAYER

The Court should issue a writ of mandamus compelling Respondents to perform their duties as early voting clerks in accordance with law.

Respectfully submitted.

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CERTIFICATION

Under Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this petition and that every factual statement in the petition is supported by competent evidence included in the appendix or record. I further certify that, under Rule 52.3(k)(1)(A), every document contained in the appendix is a true and correct copy.

/s/ Kyle D. Hawkins
KYLE D. HAWKINS

CERTIFICATE OF SERVICE

On May 13, 2020, this document was served electronically on Leslie Dippel, counsel for Respondent Dana DeBeauvoir, via Leslie.Dippel@traviscountytexas.gov; Luis V. Saenz, counsel for Respondent Remi Garza, via district.attorney@co.cameron.tx.us; Russel H. Roden, counsel for Respondent Toni Pippins-Poole, via russell.roden@dallascounty.org; Douglas P. Ray and Susan Hays, counsel for Respondent Diane Trautman, via hayslaw@me.com and Douglas.Ray@cao.hctx.net; and Jo Ann Bernal, counsel for Lisa Wise, via jbernal@epcounty.com.

/s/ Kyle D. Hawkins
KYLE D. HAWKINS

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this document contains 4,483 words, excluding the portions of the document exempted by Rule 9.4(i)(1).

/s/ Kyle D. Hawkins
KYLE D. HAWKINS

No. _____

In the Supreme Court of Texas

IN RE STATE OF TEXAS,
Relator.

On Petition for Writ of Mandamus
to the Harris County Clerk, the Travis County Clerk,
the Dallas County Elections Administrator, the Cameron County Elections
Administrator, and the El Paso County Elections Administrator

APPENDIX

	Tab
1. Texas Government Code § 82.002	A
2. Texas Government Code § 86.001.....	B
3. Texas Government Code § 273.061	C

TAB A: TEXAS GOVERNMENT CODE § 82.002

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 7. Early Voting
Subtitle A. Early Voting
Chapter 82. Eligibility for Early Voting (Refs & Annos)

V.T.C.A., Election Code § 82.002

§ 82.002. Disability

Currentness

(a) 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.

(b) Expected or likely confinement for childbirth on election day is sufficient cause to entitle a voter to vote under Subsection (a).

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 1987, 70th Leg., ch. 472, § 19, eff. Sept. 1, 1987; Acts 1991, 72nd Leg., ch. 203, § 2.05; Acts 1991, 72nd Leg., ch. 554, § 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 864, § 69, eff. Sept. 1, 1997.

V. T. C. A., Election Code § 82.002, TX ELECTION § 82.002
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

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TAB B: TEXAS GOVERNMENT CODE § 86.001

Vernon's Texas Statutes and Codes Annotated
 Election Code (Refs & Annos)
 Title 7. Early Voting
 Subtitle A. Early Voting
 Chapter 86. Conduct of Voting by Mail (Refs & Annos)

V.T.C.A., Election Code § 86.001

§ 86.001. Reviewing Application and Providing Ballot

Effective: September 1, 2013

Currentness

- (a) The early voting clerk shall review each application for a ballot to be voted by mail.
- (b) If the applicant is entitled to vote an early voting ballot by mail, the clerk shall provide an official ballot to the applicant as provided by this chapter.
- (c) Except as provided by Section 86.008, if the applicant is not entitled to vote by mail, the clerk shall reject the application, enter on the application “rejected” and the reason for and date of rejection, and deliver written notice of the reason for the rejection to the applicant at both the residence address and mailing address on the application. A ballot may not be provided to an applicant whose application is rejected.
- (d) If the application does not include the applicant's correct voter registration number or county election precinct of residence, the clerk shall enter the appropriate information on the application before providing a ballot to the applicant.
- (e) If the applicant does not have an effective voter registration for the election, the clerk shall reject the application unless the clerk can determine from the voter registrar that the applicant has submitted a voter registration application and the registration will be effective on election day.
- (f) Repealed by Acts 2013, 83rd Leg., ch. 1178 (S.B. 910), § 23.
- (g) If a ballot is provided to the applicant, the clerk shall indicate beside the applicant's name on the list of registered voters that a ballot to be voted by mail was provided to the applicant and the date of providing the ballot unless the form of the list makes it impracticable to do so.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 1987, 70th Leg., ch. 472, § 26, eff. Sept. 1, 1987; Acts 1991, 72nd Leg., ch. 203, § 2.12; Acts 1991, 72nd Leg., ch. 554, § 1, eff. Sept. 1, 1991; Acts 1997, 75th Leg., ch. 1381, § 13, eff. Sept. 1, 1997; Acts 2013, 83rd Leg., ch. 1178 (S.B. 910), § 23, eff. Sept. 1, 2013.

§ 86.001. Reviewing Application and Providing Ballot, TX ELECTION § 86.001

V. T. C. A., Election Code § 86.001, TX ELECTION § 86.001

Current through the end of the 2019 Regular Session of the 86th Legislature

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TAB C: TEXAS GOVERNMENT CODE § 273.061

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 16. Miscellaneous Provisions
Chapter 273. Criminal Investigation and Other Enforcement Proceedings
Subchapter D. Mandamus by Appellate Court (Refs & Annos)

V.T.C.A., Election Code § 273.061

§ 273.061. Jurisdiction

Currentness

The supreme court or a court of appeals may issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer.

Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986.

V. T. C. A., Election Code § 273.061, TX ELECTION § 273.061

Current through the end of the 2019 Regular Session of the 86th Legislature

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Exhibit L

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TEXAS DEMOCRATIC PARTY, GILBERTO §
HINOJOSA, Chair of the Texas Democratic §
Party, JOSEPH DANIEL CASCINO, §
SHANDA MARIE SANSING, and §
BRENDA LI GARCIA §
Plaintiffs, §

v. §

GREG ABBOTT, Governor of Texas; RUTH §
HUGHS, Texas Secretary of State, DANA §
DEBEAUVOIR, Travis County Clerk, and §
JACQUELYN F. CALLANEN, Bexar County §
Elections Administrator §
Defendants. §

CIVIL ACTION NO.
5: 20-CV-00438-FB

PLAINTIFFS' FIRST AMENDED COMPLAINT

1. FACTS

1. Texas has an extensive history of disenfranchising voters and in this moment of national crisis, poised to do so again unless this Court intervenes.

2. The citizens of this state are facing the worst pandemic in modern history. Because of a novel coronavirus, and the disease it causes termed COVID-19, federal, state, county and city officials have ordered various limitations statewide, the central feature of which is to limit contact between persons.

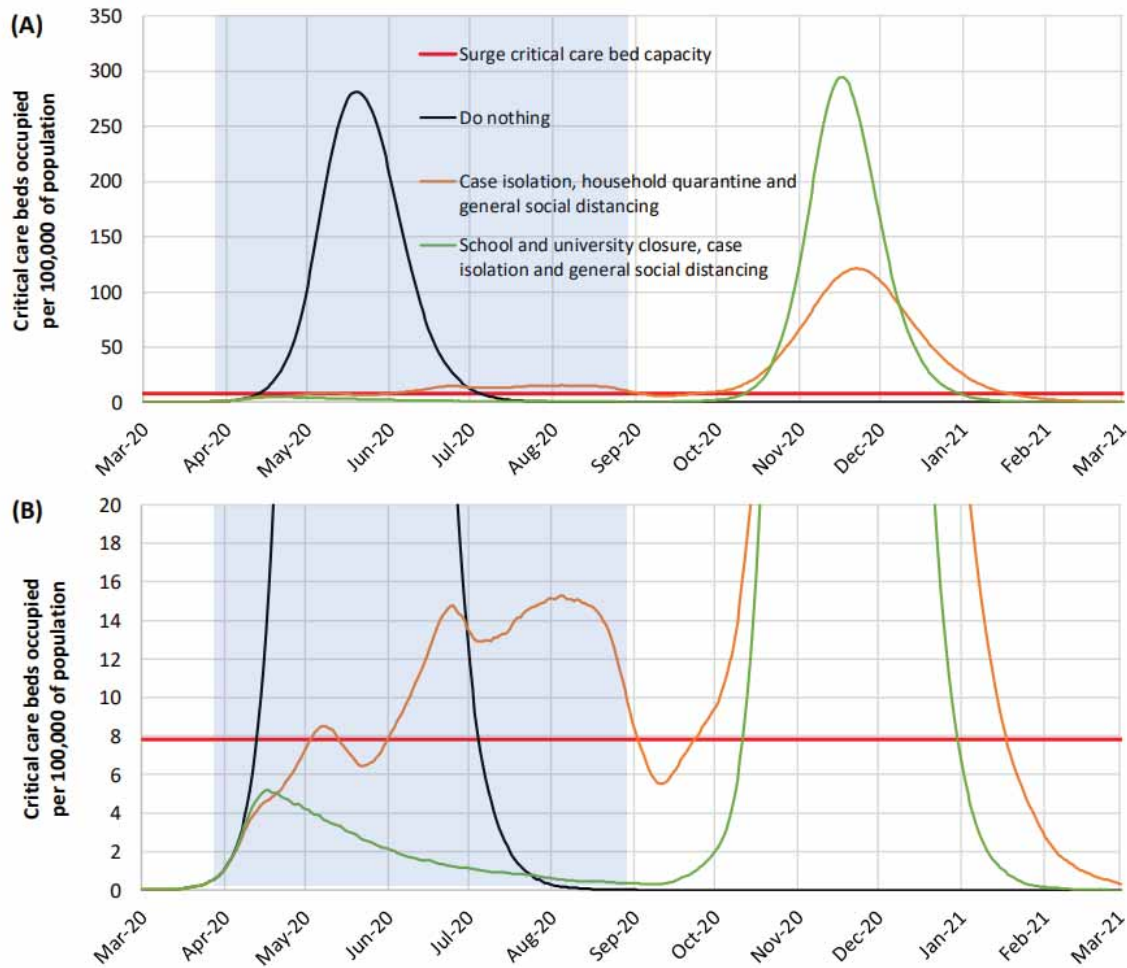
3. Public Health Officials warn that government ordered “social distancing” will probably be in effect, in whole or in part, for a number of months and, even after it is lifted, will in all likelihood be re-imposed at additional intervals.

4. Researchers at Harvard University describe three potential scenarios of upcoming events and all of them would include a significant barrier to wide-scale in-person voting.¹

5. An influential report from the Imperial College in the United Kingdom² that seemingly convinced the President of the United States to view the coronavirus as a public health emergency rather than a “hoax,” sets out some startling facts about the severity and longevity of the crisis facing the public.

¹ <https://ethics.harvard.edu/when-can-we-go-out>

² <https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf>



6. According to experts, the expected outcome of the various measures ordered by levels of government, if effective, will be to “flatten the curve,” as these diagrams demonstrate.

7. These measures will not, of course, eliminate the risk of addition waves or localized infection hotspots.

8. These circumstances, public health experts agree, should however extend the coronavirus infection rate over a longer time period allowing the medical community to prepare and handle the onslaught of severe cases.

9. The University of Washington uploads real-time data projections of peak death rates and hospitalizations.³

10. These projections show that the peak infection rate of the first wave is later in Texas than other states.

11. Some countries have reduced the rate of virus transmission only to see them rise again once more commerce is allowed.

12. For example, South Korea widely hailed as having a model response to the pandemic, upon releasing its citizens from social distancing orders, have experienced new emerging cases that have required re-imposition of those measures.⁴

13. Indeed, it is very likely true that the globe, and Texas, is in for wave after wave of new infections until there is an effective treatment, a vaccine and/or greater than approximately 60% of the population survive the epidemic, creating some measure of “herd immunity”.⁵

14. Given these conditions, upcoming elections for federal, state, county, city and other local offices will be vastly impacted.

15. Importantly, voter behavior will change.

16. Historically, most voters in Texas elections vote “in person” where they have contact with electronic equipment, election personnel, other voters and observers.

17. These very activities are now heavily discouraged by various government orders and are being discouraged in an enormous public education campaign.

³ <https://covid19.healthdata.org/projections>

⁴ <https://www.nbcnews.com/news/world/south-korea-s-return-normal-interrupted-uptick-coronavirus-cases-n1176021>

⁵ <http://www.euro.who.int/en/health-topics/communicable-diseases/influenza/data-and-statistics/pandemic-influenza/about-pandemic-phases>

18. Even were this pandemic to cease, certain populations will feel the need and/or be required to continue social distancing, to avoid injuring their health or the health of others.

19. The upcoming party primary runoff elections and the November General Election are certain to be influenced by these conditions and all medical studies support the proposition that the mail is safe.

20. Recent events pertaining to elections that occurred in Wisconsin demonstrate the disarray and voter confusion that results from inadequately planned elections held during a pandemic.

21. Importantly, the U.S. Supreme Court decision from April 6th, 2020, served notice that cases like the one at bar seek an early remedy and before an unknown deadline after which the federal courts will not decide the issues.

22. The Supreme Court held, “[t]his Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.” *Citing Purcell v. Gonzalez*, 549 U. S. 1 (2006) (per curiam).⁶

23. In holding that it was too late for the Supreme Court to remedy constitutional harms in Wisconsin, the Supreme Court held, “[t]he Court’s decision on the narrow question before the Court and should not be viewed as expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of COVID–19 are appropriate. That point cannot be stressed enough.”⁷

⁶ https://www.supremecourt.gov/opinions/19pdf/19a1016_o759.pdf

⁷ *Id.*

24. These Plaintiffs filed this suit at the earliest possible moment after receiving this Supreme Court guidance to ensure timely merits review.

25. It is critically important that election officials and voters begin to prepare for an election where fewer ballots are cast in-person.

ELECTION ADVISORY

26. On April 2, 2020, the Texas Secretary of State issued an election advisory concerning “voting for individuals that may be affected by COVID-19, and in preparing for the conduct of elections in the context of this public health issue.”⁸

27. Unhelpfully, the advisory gives local election administrators no material guidance on who can avail themselves of the vote by mail procedure because of the pandemic.

28. On the one hand, the Advisory envisions more voters using vote by mail: “Additional Ballot by Mail Supplies: Because there may be a higher volume of ballot by mail requests in 2020, we strongly recommend that you review your current supply of applications, balloting materials, and ballot stock for future elections. It is important you have the necessary supply on hand to meet increased requests you may receive.”⁹

29. On the other hand the Advisory says only the following in regards to who can vote by mail:

⁸ Exhibit B - ELECTION ADVISORY N0. 2020-14

⁹ *Id.* at p. 7.

Voting Procedures Authorized under the Texas Election Code.

Below we have described some of the procedures that are authorized under Texas law that may be of assistance to voters that are affected by a recent sickness or a physical disability.

Voting by Mail

In Texas, in order to vote by mail, a voter must have a qualifying reason. A voter may vote early by mail if they:

will be away from their county on Election Day and during early voting;
are sick or disabled;
are 65 years of age or older on Election Day; or
are confined in jail, but eligible to vote.

One of the grounds for voting by mail is disability. The Election Code defines "disability" to include "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." (Sec. 82.002). Voters who meet this definition and wish to vote a ballot by mail must submit an application for ballot by mail.

30. The Advisory gives no guidance as to the meaning of "disability," as it appears in the statute.

31. Worse still, the Advisory imagines a situation where each county could enforce their own voting methods based upon not yet sought local court orders:

Other Modifications to Voting Procedures: A court order could provide for modifications to other voting procedures as necessary to address the impact of COVID-19 within the jurisdiction. For example, in 2014, Dallas County obtained a court order authorizing modified voting procedures for individuals affected by the Ebola quarantine, modeled on the procedures outlined in Section 105.004 of the Texas Election Code for certain military voters in hostile fire pay zones. If your county obtains a court order allowing modifications to voting procedures to address COVID-19, please send a copy of the court order to the Secretary of State's Office.

STATE COURT CASE

32. Given the pandemic conditions and their effects on election procedures, on March 27, 2020, some of these Plaintiffs filed a state court lawsuit seeking to determine application of state law., more specifically the exception to voting in person.

33. In that case, Plaintiffs contend that existing state law allows voters to elect to cast their ballots by mail under the circumstances of this pandemic.

34. TEX. ELEC. CODE § 82.002 provides in full:

Sec. 82.002. DISABILITY. (a) 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.

(b) Expected or likely confinement for childbirth on election day is sufficient cause to entitle a voter to vote under Subsection (a).

35. Plaintiffs contend that participating in social distancing, to prevent known or unknown spread of what Governor Abbott has described as an “invisible disease”¹⁰ is a “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.”

36. Texas authorities support the conclusion that the mail-in ballots are permitted under these circumstances.

37. According to Texas Attorney General Opinion KP-0009, “[t]he plain language of section 82.002 does not require that a person satisfy any specific definition or standard of ‘disability’ outside of the Election Code in order to qualify to vote by mail.” In that opinion, the

¹⁰ <https://www.kxan.com/news/coronavirus/live-gov-abbott-to-hold-press-conference-on-states-current-efforts-against-covid-19/>

Attorney General found that a person who claimed a disability but had not been adjudicated by the Social Security Administration nevertheless qualified for a mail ballot under Section 82.002. Op. Tex. Att'y Gen. No. KP-009 (2015).

38. In a more recent opinion, the Attorney General opined, "a court would likely conclude that an individual civilly committed pursuant to chapter 841 and residing at the Center is eligible to vote by mail ..." Op. Tex. Att'y Gen. No. KP-0149 (2017). A person who considers herself to be confined at home in order to avoid the spread of disease plainly falls into the persons entitled to vote by mail under this statute and the Court should so declare to prevent uneven application of this provision and in order to give election officials and voters clarity on the matter.

39. The manner and procedure of casting absentee ballots, which includes mail-in ballots, "is mandatory and directed by statutory requirements." *Tiller v. Martinez*, 974 S.W.2d 769, 775 (Tex. App.-San Antonio 1998, pet. dism'd w.o.j.). The Secretary of State has argued that persons who submit mail ballots without authorization to do so are subject to having their ballots voided.

40. The state case presents only state law claims seeking to interpret this one provision of state law; no federal constitutional claims are urged.

41. The state has filed an intervention in the state court case but notably initially took no position on the merits of whether people between the age of 18 and 65 can avail themselves of vote by mail procedures.¹¹

42. The state argued that vote by mail decisions are left up to county level officers.

¹¹ Exhibit A – Intervention of State of Texas

43. On April 15, 2020 the state court heard evidence of the plaintiff's temporary injunction motion and Texas' plea to the jurisdiction.

44. The state court, after hearing evidence and argument, verbally announced the denial of the plea to the jurisdiction and the granting of the temporary injunction.

45. On April 17, 2020, Travis County District Court Judge Tim Sulak issued his written order granting a temporary injunction and enjoining Travis County and the state of Texas from rejecting mail ballots received from voters who voted by mail based on the disability category of eligibility as a result of the COVID-19 pandemic.

46. The order also enjoined the state of Texas from issuing guidance or taking other actions during all elections affected by the COVID-19 pandemic that would prohibit eligible voters from submitting ballots based on the disability category, or suggest that these individuals be subject to penalty for doing so.

47. In response to the order, as it was being verbally announced by State Court District Judge Sulak, Attorney General Paxton made public a letter he sent to the Chair of the Texas House of Representatives Committee on Elections.

48. In this letter, Attorney General Paxton gave a non-official, advisory opinion in which he addressed whether the risk of transmission of COVID-19 would entitle Texas voters to a mail-in ballot.

49. Attorney General Paxton wrote that "[w]e conclude that, based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a

qualifying sickness or physical condition does not constitute a disability under the Election Code for the purposes of receiving a ballot by mail.”

50. Attorney General Paxton made clear that the executive branch of the state government would not be bound by the state district court’s ruling, stating that “[he is] disappointed that the district court ignored the plain text of the Texas Election Code too allow perfectly healthy voters to take advantage of special protection made available to Texans with actual illness or disabilities.”

51. Attorney General Paxton characterized the state district court’s ruling as an “unlawful expansion of mail-in voting.”

52. Attorney General Paxton’s letter threatened criminal prosecution and the timing of his letter was not by accident.

53. Attorney General Paxton’s letter threatened third party groups for engaging in political speech with voters concerning vote by mail.

54. The state appealed and claimed the ruling was “superseded” automatically.

55. Whether or not a state court declaration of what state law requires is automatically “superseded” under these circumstances, the order remains binding of Dana DeBeauvoir.

56. Travis County has announced on their website that the county will accept mail-in ballots as a legal alternative to voting in person based on the Trial Courts order.

57. Cameron County has announced they will not reject any voter’s request for a mail-in ballot on the eligibility category of disability due to Texas District Court Judge Sulak’s order.

58. Harris County has proceeded to follow the ruling and the County Attorney has written an opinion that Judge Sulak's ruling should be followed.

59. The City of Mont Belvieu and Barbers Hill ISD proceed with elections scheduled next week, in compliance with Judge Sulak's ruling.

60. Meanwhile, other jurisdictions are left to determine how to proceed, balancing the state court order, Paxton's letter and the SOS Advisory.

61. Importantly, Article I, Section 28 of the Texas Constitution prescribes that: "No power of suspending laws in this State shall be exercised except by the Legislature." Tex. Const. Art. I, § 28.

62. Thus, if Texas Courts or the Texas Secretary of State do not find that "disability" under this statute includes people who are social distancing, then

63. Nearly every voter, including Plaintiffs, under the age of 65 faces a legally significant increased burden on their voting rights amid these circumstances. It forces millions of Texas voters to choose, risk infection from a dangerous and often fatal disease or be disenfranchised.

64. TDP Is harmed by having the state's efforts to quell its political speech.

65. Given the state's executive branch's actions, it is now clear that resolution of the state court case will not come timely and even were it to do so, would not remedy the ongoing constitutional harms befalling these Plaintiffs.

66. This case should proceed so that the Court can timely determine, before the *Purcell* deadline, the constitutional rights of these Plaintiffs..

67. In addition, election officials need time to prepare for vote by mail.

JURISDICTION AND VENUE

68. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 1357, and 2284; and pursuant to 42 U.S.C. §§ 1973, 1973j(f). Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201, 2202, and 2284, as well as by Rules 57 and 65 of the Federal Rules of Civil Procedure. Venue is proper pursuant to 28 U.S.C. §§ 1391(b).

PARTIES

Plaintiffs

69. Plaintiff Texas Democratic Party is a political party formed under the Texas Election Code, whose address is 314 East Highland Mall Blvd. Suite 508, Austin, Travis County, TX 78752.

70. Plaintiff Gilberto Hinojosa is Chairman of the Texas Democratic Party and a registered voter in Texas.

71. Joseph Daniel Cascino is a registered voter in Travis County, Texas who is eligible to vote, is a resident of Travis County, Texas, a citizen of the United States and who voted in-person in the March 3, 2020 Texas Democratic Primary Election, desires to vote in the Texas Democratic Party Runoff Election and under the pandemic circumstances would seek to do so by mail-in ballot.

72. Shanda Marie Sansing is a registered voter in Travis County, Texas who is eligible to vote, is a resident of Travis County, Texas, a citizen of the United States and who voted in-person in the March 3, 2020 Texas Democratic Primary Election, desires to vote in the Texas

Democratic Party Runoff Election and under the pandemic circumstances would seek to do so by mail-in ballot.

73. Brenda Li Garcia is a registered voter in Bexar County, Texas who is eligible to vote, is a resident of Bexar County, Texas, a citizen of the United States and who voted in-person in the March 3, 2020 Texas Democratic Primary Election, desires to vote in the Texas Democratic Party Runoff Election and under the pandemic circumstances would seek to do so by mail-in ballot.

Defendants

74. Defendant Greg Abbot is the Governor of Texas and pursuant Article IV, Section I to the Texas Constitution is the chief executive officer of the State of Texas.

75. Defendant Ruth Hughs is sued in her official capacity as the Texas Secretary of State and may be served with process at 900 Congress, Suite 300 Austin, Travis County, Texas 78701.

76. Defendant Ken Paxton is sued in his official capacity as the Texas Attorney General and may be served with process at 300 W. 15th Street, Austin, Travis County, Texas 78701.

77. Defendant Dana DeBeauvoir is sued in her official capacity as the Travis County Clerk and Election Administrator and may be served with process at 5501 Airport Blvd, Austin, Travis County, TX 78751.

78. Defendant Jacquelyn F. Callanen, is sued in her official capacity as the Bexar County Elections Administrator and may be served with process at 1103 S. Frio, Suite 100, San Antonio, TX 78207.

CLAIMS

Count 1

Race and Language Minority Discrimination, Section 2, Voting Rights Act

79. Plaintiffs reallege the facts set forth above.

80. These Election Conditions¹² violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because they results in a denial of the right to vote on account of race and language minority, in that, under the totality of the circumstances, Plaintiffs and minority voters are denied an equal opportunity to participate effectively in the political process.

81. These Election Conditions also violate Section 2 because they deny and abridges the right to vote on account of race and language minority.

Count 2

Race Discrimination, 14th Amendment

82. Plaintiffs reallege the facts set forth above.

83. These Election Conditions violate the Fourteenth Amendment to the Constitution of the United States because they purposely deny equal protection in voting to Plaintiffs and other minority voters on account of race and ethnic origin.

¹² As described in the Facts section above.

Count 3

Race Discrimination, 15th Amendment

84. Plaintiffs reallege the facts set forth above.

85. These Election Conditions violate the Fifteenth Amendment to the Constitution of the United States because they purposely deny and abridge the right to register and vote to Plaintiffs and other minority voters on account of race and ethnic origin.

Count 4

Non-racial discrimination in Voting, 14th Amendment

86. Plaintiffs reallege the facts set forth above.

87. These Election Conditions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because they mandate arbitrary and disparate treatment of voters and deny equal access to the right to vote to eligible citizens.

88. These Election Conditions impose severe burdens on voters, in time, inconvenience and expense. The burden is severe whether measured by how it affects a single voter or by how many voters it affects.

89. These Election Conditions facially discriminate between classes of voters (such as between those having and those over the age of 65 or those with a disability that do not fit under the ultimate definition the state or various counties impose).

90. Either the severe burden described above, standing alone as applied, or the facial discrimination, standing alone, are sufficient to require that These Election Conditions be judged by strict scrutiny, and can survive only if their specific terms meet a compelling state interest

(actual, not hypothetical) and if each of its provisions is narrowly tailored to meet that compelling interest in the least restrictive way. In this inquiry, the burden of proof is on Texas. These Election Conditions cannot meet this exacting test.

91. Indeed, these Election Conditions cannot even meet the less exacting test (applicable where a voting regulation is not burdensome and does not classify on its face) of balancing Texas' interest claimed here (modest at best) against the critically important interests of Plaintiffs and other Texas registered voters who are disfranchised by these Election Conditions, especially as that balancing test is applied against the background of Texas' longstanding and recent history of purposeful racial and ethnic discrimination, and in light of the number of poor, disabled and under age 65 voters targeted by these Election Conditions.

Count 5

Denial of Free Speech, First Amendment applied through the 14th Amendment

92. Plaintiffs reallege the facts set forth above.

93. Voting and participating in the electoral process is a form of expression which is the ultimate form of political speech. As such, it is entitled to First Amendment protection. In light of the Supreme Court's cases giving strong First Amendment protection to campaign funds spent to influence voters, the voters themselves can hardly be entitled to less protection.

94. As a restriction on free speech and association, these Election Conditions must be judged by the same strict scrutiny outlined above, a scrutiny that these Election Conditions cannot survive.

Count 6

Violation of Procedural Due Process for Vagueness, 14th Amendment

95. Plaintiffs reallege the facts set forth.

96. The Texas Election Code surrounding mail ballot eligibility are poorly defined, enforced, and understood.

97. A restriction to the right to vote due to vagueness of a statutory provision creates Election Conditions that violate voters' Due Process rights under the 14th Amendment because the law fails to provide people of ordinary intelligence with a reasonable opportunity to understand if they are permitted to vote by mail during the COVID-19 pandemic, and because the vagueness of the statutory provision encourages arbitrary and discriminatory enforcement by Attorney General Paxton.

98. When a vague statute infringes upon basic First Amendment freedoms and/or imposes criminal prosecution, a more stringent vagueness test must apply. Under this stringent test, these Election Conditions cannot survive.

Count 7

Abridgment of the Right to Vote based on Age, 26th Amendment

99. Plaintiffs reallege the facts set forth above.

100. These Election Conditions amount to abridgment of the right to vote based on the age of the voter.

101. The abridgement of the right to vote based on age complained of in this case is unconstitutional as applied to these Plaintiffs during these pandemic circumstances.

102. The abridgement of the right to vote based on age complained of in this case is also facially unconstitutional.

103. Nearly all voters under the age of 65 face an unconstitutional burden on their fundamental right to vote because of their age.

Count 7

Voter Intimidation

104. Plaintiffs reallege the facts set forth above.

105. Title 42 U.S.C. § 1985, part of the Civil Rights Act of 1871, creates a private civil remedy for three prohibited forms of conspiracy to interfere with civil rights under that section."

106. The defendants state actors are part of conspiracy of two or more persons;

107. The conspiracy is for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and

108. Attorney General Paxton's letter was an act in furtherance of the conspiracy;

109. Upon information and belief, other acts have been taken in further of this conspiracy;

110. The conspiracy causes injury to a person or property, or deprives her of a right or privilege of a United States citizen.

EQUITY

111. Plaintiffs have no adequate remedy at law. Unless restrained, Defendants will injure and continue to injure Plaintiffs and other Texas voters in the manner set forth above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

112. Issue a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rules of Civil Procedure Rule 57, declaring that these Election Conditions are illegal and unconstitutional as described above, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973 and the First, Fourteenth, Fifteenth and Twenty-Sixth Amendments to the United States Constitution.

113. Enjoin the Defendants, their agents, employees, and those persons acting in concert with them, from enforcing or giving any effect to the requirements of these Election Conditions, including enjoining Defendants from conducting any elections utilizing these Election Conditions.

114. Make all further orders as are just, necessary, and proper to ensure complete fulfillment of this Court's declaratory and injunctive orders in this case.

115. Issue an order requiring Defendants to pay Plaintiffs' costs, expenses and reasonable attorneys' fees incurred in the prosecution of this action, as authorized by the Voting Rights Act and the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §§ 1973j(e) & 1988.

116. Retain jurisdiction and require Texas to obtain preclearance pursuant to Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c) with respect to its voting practices and procedures.

117. Grant such other and further relief as it deems proper and just.

This the 29th day of April, 2020.

Respectfully submitted,

TEXAS DEMOCRATIC PARTY

By: /s/ Chad W. Dunn

Chad W. Dunn

General Counsel

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Exhibit M

03-20-00251-CV

REPORTER'S RECORD

VOLUME 2 OF 3

TRIAL COURT CAUSE NO. D-1-GN-20-001610

COURT OF APPEALS NUMBER: 03-20-00251-CV

FILED IN

3rd COURT OF APPEALS
AUSTIN, TEXAS

4/29/2020 5:43:08 PM

JEFFREY D. KYLE

Clerk

TEXAS DEMOCRATIC PARTY, § IN THE DISTRICT COURT OF
 AND GILBERTO HINOJOSA, IN §
 HIS CAPACITY AS CHAIRMAN §
 OF THE TEXAS DEMOCRATIC §
 PARTY, JOSEPH DANIEL §
 CASCINO and SHANDA MARIE §
 SANSING, §

Plaintiffs,

and

ZACHARY PRICE, LEAGUE OF §
 WOMEN VOTERS OF TEXAS, §
 LEAGUE OF WOMEN VOTERS OF §
 AUSTIN-AREA, MOVE TEXAS §
 ACTION FUND, WORKERS §
 DEFENSE ACTION FUND, §

Plaintiff-Intervenors,

TRAVIS COUNTY, TEXAS

V.

DANA DEBEAUVOIR, IN HER §
 CAPACITY AS TRAVIS COUNTY §
 CLERK, §

Defendant,

STATE OF TEXAS,

Intervenor.

§ 201ST JUDICIAL DISTRICT

 HEARING ON APPLICATION FOR TEMPORARY INJUNCTIONS AND
 PLEA TO THE JURISDICTION

On the 15th day of April, 2020, the following
 remote proceedings came on to be heard in the
 above-entitled and numbered cause before the Honorable
 Tim Sulak, Judge presiding in Austin, Travis County,
 Texas, held via videoconference.

Proceedings reported by machine shorthand.

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A P P E A R A N C E S
(ALL PARTIES APPEARED REMOTELY VIA VIDEOCONFERENCE)

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MS. SHARON M. TALLEY
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PHONE: (512) 475-4263

ALSO PRESENT:

Mr. Joseph Cascino
Ms. Shanda Sansing
Mr. George Korbel
Mr. Glen Maxey
Dr. Cathy Troisi
Dr. Mitch Carroll
Ms. Dana DeBeauvoir
Ms. Grace Chimene

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VOLUME 2

HEARING ON APPLICATION FOR TEMPORARY
INJUNCTIONS AND PLEA TO THE JURISDICTION

APRIL 15, 2020

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2	Declaration of Grace Chimene	27	28	2
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DEFENDANT'S

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1	Secretary of State Election Advisory 2020-14	28	29	2
2	Proclamation by the Governor of the State of Texas dated 3/16/20 (SD 14 Proclamation)	28	29	2
3	Secretary of State Election Advisory 2020-13	28	29	2
4	Governor Abbott's Executive Order GA-09 3/22/20	28	29	2
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P R O C E E D I N G S

* * * * *

(Open court.)

09: 05AM 4 THE COURT: Good morning to you all. I am
09: 05AM 5 Judge Tim Sulak. I'm in the 353rd District Court of
09: 05AM 6 Travis County, Texas, and I'm calling this hearing to
09: 05AM 7 order. This is Cause Number D-1-GN-20-00160. The style
09: 05AM 8 of the case and, as Plaintiffs, Zachary Price, League of
09: 05AM 9 Women Voters of Texas, League of Women Voters of
09: 05AM 10 Austin-Area, MOVE Texas Action Fund, and Worker Defense
09: 06AM 11 Action Fund, as Intervenor-Plaintiffs v. Dana
09: 06AM 12 DeBeauvoir, in her capacity as Travis County Clerk as a
09: 06AM 13 Defendant, and the State of Texas as an
09: 06AM 14 Intervenor-Defendant.

09: 06AM 15 Pursuant to the existing emergency orders
09: 06AM 16 resulting from the COVID-19 pandemic, we're holding this
09: 06AM 17 hearing remotely through Zoom. This hearing is being
09: 06AM 18 live-streamed on the Court's YouTube Channel pursuant to
09: 06AM 19 the open court's provision of the Texas Constitution.
09: 06AM 20 No recordings of this hearing are permitted by anyone
09: 06AM 21 participating or watching other than by my official
09: 06AM 22 court reporter, Ms. Rachelle Primeaux.

09: 06AM 23 Any violations of this prohibition on
09: 06AM 24 recording, and all other instructions, are punishable by
09: 07AM 25 contempt of court. There is a record being made by my

1 court reporter, and that is the official record, so in
2 the event there is a need for some retrieval or some
3 review, that is the mechanism by which that will occur.

4 On the Zoom meeting with me are my staff
5 members; Ms. Pam Seger, my judicial executive assistant;
6 my court reporter, Ms. Rachelle Primeaux; and perhaps at
7 times, my staff attorney, Ms. Megan Johnson, who is
8 otherwise out on some leave time.

9 When you are not speaking, please mute your
10 microphone. And please be aware that you should not
11 speak over each other or over me. There are
12 technological issues here. Sometimes there's a bit of a
13 delay between the spoken word and the heard word, so be
14 aware that that may occur. In the event that objections
15 are to be made, I would request that simply the word
16 "objection" be stated and that you then wait in order to
17 be heard into the substance of the objection.

18 I would ask that any witnesses obviously
19 stop speaking immediately upon hearing the word
20 "objection," and that lawyers cease questioning when
21 they hear the word "objection," witnesses cease talking
22 when they hear the word objection; and not until I then
23 give the go ahead, does it continue.

24 Let me look here at the rest of these
25 instructions. This, by the way, is my virgin effort at

09: 08AM 1 having a Zoom hearing, and it's a big one in the sense
09: 08AM 2 of the number of people and the complexity of the issues
09: 09AM 3 and my inadequacy with technology, so please indulge me
09: 09AM 4 some and be patient in this process.

09: 09AM 5 While we are in the hearing, the chat
09: 09AM 6 option on the option bars shall not be used unless I
09: 09AM 7 grant permission. If anyone needs to have a private
09: 09AM 8 attorney-client conference or sidebar conference, you
09: 09AM 9 may be asked to be placed in what are called breakout
09: 09AM 10 rooms for those private conversations. Everyone must
09: 09AM 11 log into Zoom using their real name, and now is the time
09: 09AM 12 to make any corrections in that regard.

09: 09AM 13 And soon, I will ask the lawyers and the
09: 09AM 14 participants to introduce themselves. I will ask,
09: 09AM 15 though, at this point of the participants, did you
09: 09AM 16 receive and understand the rules and procedures for
09: 09AM 17 remote hearings that was sent in advance? Is there
09: 10AM 18 anyone who does not understand these rules or
09: 10AM 19 instructions or who has questions before we begin this
09: 10AM 20 hearing?

09: 10AM 21 (No response.)

09: 10AM 22 THE COURT: Hearing nothing, we will then
09: 10AM 23 proceed. Let me also confirm that at least the lawyers
09: 10AM 24 received an e-mail from my executive assistant,
09: 10AM 25 Ms. Seger, a few days ago, April 14th, regarding some

09: 10AM 1 disclosures about my background and my abilities here.

09: 10AM 2 Is there anyone who had any commentary or who did not

09: 10AM 3 receive that who feels the need to see or hear that?

09: 10AM 4 (No response.)

09: 10AM 5 THE COURT: All right. Let me also tell

09: 10AM 6 the participants that I have received and reviewed a

09: 10AM 7 number of documents in advance of this hearing. I

09: 11AM 8 appreciate the professionalism shown, the preparation

09: 11AM 9 that's gone into this, and we're hoping that we can have

09: 11AM 10 a more streamlined presentation, but giving everyone the

09: 11AM 11 opportunity to be fully heard with regard to the issues

09: 11AM 12 here.

09: 11AM 13 I'll also state on a personal note that I

09: 11AM 14 feel a bit humbled and a bit inadequate here, which is

09: 11AM 15 not an unusual thing when there's a hearing of this

09: 11AM 16 magnitude. The lawyers have undoubtedly spent countless

09: 11AM 17 hours, days, weeks, years getting into these areas of

09: 11AM 18 the law in great depth with great analysis, and I have

09: 11AM 19 not. I am a generalist at best and a specialist not at

09: 11AM 20 all.

09: 11AM 21 So please understand that I am looking to

09: 11AM 22 you all for the edification as well as the advocacy, but

09: 12AM 23 as officers of the Court, obviously you have duties of

09: 12AM 24 candor and honesty. Now, I think we have a number of

09: 12AM 25 issues here, a number of motions here. And as I see

09: 12AM 1 them, they involve a plea to the jurisdiction filed by
09: 12AM 2 the State, the Defendant, Ms. DeBeauvoir's request for
09: 12AM 3 an order that would, in essence, align dates for the
09: 12AM 4 elections, the primary elections and the special
09: 12AM 5 elections for Senate District 14, and then, of course,
09: 12AM 6 the request for temporary injunction by the Plaintiffs
09: 12AM 7 and the Plaintiffs-Intervenors. Are there other matters
09: 12AM 8 that I have not mentioned at this juncture that any of
09: 12AM 9 you think are on the docket this morning?

09: 12AM 10 (No response.)

09: 13AM 11 THE COURT: All right. Let me also then
09: 13AM 12 preface with a few -- a few perspectives, and then we
09: 13AM 13 will get into the actual presentation. It would seem to
09: 13AM 14 me that the order of the proceedings this morning might
09: 13AM 15 be to hear the plea to the jurisdiction at the outset.
09: 13AM 16 But I'll also tell you in all candor that from the
09: 13AM 17 perspective of a trial Judge in a matter of this
09: 13AM 18 magnitude and complexity that I realistically view
09: 13AM 19 myself as something of a weigh station. I fully expect
09: 13AM 20 and predict that, regardless to my determinations of any
09: 13AM 21 of these motions, there is likely to be, as there should
09: 13AM 22 be, review by a higher tribunal. The appellate courts
09: 13AM 23 have greater collaboration and the greater attention and
09: 14AM 24 the ability to speak with more definite kind of impact;
09: 14AM 25 so, I often begin by looking at what are the procedural

09: 14AM 1 aspects, what are the decision-tree components of what I
09: 14AM 2 may end up doing here.

09: 14AM 3 And from that perspective, I will ask for
09: 14AM 4 the lawyers to clarify and correct me in my impressions,
09: 14AM 5 but I believe that my ruling on a plea to the
09: 14AM 6 jurisdiction is subject to, in essence, an immediate
09: 14AM 7 appeal. If I grant the plea to the jurisdiction, the
09: 14AM 8 case ends, and the parties who have brought the case
09: 14AM 9 would undoubtedly want to pursue that and see if that
09: 14AM 10 could be reviewed by an appellate court.

09: 14AM 11 Conversely, if I deny the plea to the
09: 14AM 12 jurisdiction, because it is being brought by the State,
09: 15AM 13 it is my understanding that while the underlying case
09: 15AM 14 could go forward in the trial court, there is the
09: 15AM 15 prospect, the likelihood of an interlocutory appeal from
09: 15AM 16 the denial of the plea to the jurisdiction, which, once
09: 15AM 17 again, puts the case in the lap of the appellate courts.

09: 15AM 18 If that is likely to occur, either way I go
09: 15AM 19 on the plea to the jurisdiction, then I am inclined to
09: 15AM 20 say, well, then let me go ahead and hear out the merits
09: 15AM 21 of the request for the injunction. And that, then, is
09: 15AM 22 either again subject to being denied or granted.

09: 15AM 23 In either event, that would then be before
09: 15AM 24 the appellate court as well. So, if the appellate
09: 15AM 25 court, in its wisdom, says that I made an error in the

1 plea to the jurisdiction, they will either end the case
2 there or they will say the case can and should go
3 forward. If I have made a determination on the
4 injunction, then the appellate court would be in a
5 position to say that injunction was properly granted or
6 that injunction was improperly granted or that was
7 improperly denied or properly denied, putting all the
8 issues possible squarely in the lap of the appellate
9 court. And that's important, it seems, in this sense of
10 recognizing the allegations of urgency and the
11 exigencies that seem to be involved here, at least from
12 the perspective of some of the parties.

13 I do know that there are similar issues
14 pending in federal court in San Antonio; and those are
15 also, I presume, likely to be heard in short time and
16 then also likely to be appealed, but those are not my
17 concerns. Those will be dealt with in that tribunal or
18 those tribunals.

19 So my thought was that we would begin by
20 having all of the lawyers for all of the parties
21 identify themselves and then talk about the order of the
22 proceedings if you-all see it in any way different than
23 what I have just laid out before you.

24 So with that being said, let me ask the
25 lead lawyers for the Plaintiffs to identify yourselves

09: 17AM 1 on this record.

09: 17AM 2 MR. DUNN: Good morning, Your Honor. This
09: 17AM 3 is Chad Dunn on behalf of the Texas Democratic Party,
09: 17AM 4 its Chairman Gilberto Hinojosa, and two individual
09: 17AM 5 Plaintiffs, Joseph Cascino, and Shanda Sansing.

09: 17AM 6 With me representing the same parties is
09: 17AM 7 Scott Brazil, Dicky Grigg, and Marty Golando.

09: 17AM 8 THE COURT: All right. And would each of
09: 18AM 9 those speak just briefly so that we see you and can
09: 18AM 10 identify you in that regard?

09: 18AM 11 MS. SANSING: My name is Shanda Sansing.

09: 18AM 12 MR. CASCINO: My name is Joseph Cascino.

09: 18AM 13 MR. GRIGG: My name is Dicky Grigg.

09: 18AM 14 THE COURT: Thank you.

09: 18AM 15 MR. BRAZIL: This is Scott Brazil, Your
09: 18AM 16 Honor.

09: 18AM 17 MR. GOLANDO: Your Honor, this is Martin
09: 18AM 18 Golando.

09: 18AM 19 THE COURT: Mr. Golando, your identifier is
09: 18AM 20 just "Marty," and I don't know whether you have the
09: 18AM 21 ability to put your full name there; but if you do, that
09: 18AM 22 would be welcomed. If not, we'll allow it to go
09: 18AM 23 forward.

09: 18AM 24 MR. GOLANDO: I'll do my best, Your Honor.

09: 18AM 25 THE COURT: All right. Thank you.

09: 18AM 1 So now, lawyers for the Plaintiffs have now
09: 18AM 2 been identified. I will now call on lawyers for the
09: 18AM 3 Plaintiff-Intervenors to identify themselves.

09: 18AM 4 MR. GONZALEZ: Good morning, Your Honor.
09: 19AM 5 My name is Joaquin Gonzalez on behalf of Zachary Price,
09: 19AM 6 League of Women Voters of Texas, League of Women Voters
09: 19AM 7 Austin-Area, Worker Defense Action Fund and MOVE Texas.
09: 19AM 8 And with me are Rebecca Stevens, Edgar Saldivar, Sophia
09: 19AM 9 Lakin and Thomas Clancy.

09: 19AM 10 THE COURT: All right. There are
09: 19AM 11 limitations obviously on this display of all of the
09: 19AM 12 individuals, but if those others who are on your team,
09: 19AM 13 perhaps we could have your visual as well.

09: 19AM 14 MR. SALDIVAR: Your Honor, this is Edgar
09: 19AM 15 Saldivar.

09: 19AM 16 THE COURT: Your last name?

09: 19AM 17 MS. STEVENS: Good morning, Your Honor.
09: 19AM 18 Pardon me.

09: 19AM 19 THE COURT: I just said that the name is --
09: 19AM 20 the last name is lacking there as well, Counsel. So if
09: 19AM 21 you can, that would be helpful for me.

09: 19AM 22 MR. SALDIVAR: I will definitely try that.
09: 19AM 23 Yes, sir.

09: 19AM 24 THE COURT: Ms. Stevens, you were going to
09: 20AM 25 speak?

09: 20AM 1 MS. STEVENS: Yes, Your Honor. Good
09: 20AM 2 morning. Rebecca Stevens on behalf of the
09: 20AM 3 Intervenor-Plaintiffs.

09: 20AM 4 MS. LAKIN: Good morning, Your Honor.
09: 20AM 5 Sophia Lakin on behalf of the Plaintiff-Intervenors.

09: 20AM 6 MR. GONZALEZ: And, Your Honor, I believe
09: 20AM 7 Thomas Buser-Clancy is having technical issues. I think
09: 20AM 8 he got kicked out of the meeting, and he's trying to
09: 20AM 9 rejoin.

09: 20AM 10 THE COURT: All right. Thank you.

09: 20AM 11 And that reminds me. I think we have
09: 20AM 12 perhaps applications for pro hac vice. I don't know
09: 20AM 13 whether we need to deal with those at this time or
09: 20AM 14 before the end of the morning, but we can and will do
09: 20AM 15 that if necessary.

09: 20AM 16 Having the Plaintiff-Intervenors' lawyers
09: 20AM 17 been identified, I will now ask for the Defendant
09: 20AM 18 lawyers to identify themselves.

09: 20AM 19 MS. DIPPEL: Good morning, Your Honor.
09: 20AM 20 This is Leslie Dippel with the Travis County Attorney's
09: 20AM 21 Office representing the County Clerk Dana DeBeauvoir.
09: 20AM 22 And with me are Sherine Thomas, Andrew Williams, Sharon
09: 21AM 23 Talley and Cynthia Veidt.

09: 21AM 24 THE COURT: All right. Thank you. And if
09: 21AM 25 each of you will also speak, so that we can recognize

09: 21AM 1 the face with the name.

09: 21AM 2 MS. TALLEY: Good morning, Your Honor.

09: 21AM 3 This Sharon Talley.

09: 21AM 4 MS. VEIDT: Good morning, Your Honor. This
09: 21AM 5 is Cindy Veidt.

09: 21AM 6 MR. WILLIAMS: Good morning, Your Honor.

09: 21AM 7 This is Drew Williams.

09: 21AM 8 THE COURT: And I think, Ms. Thomas, you
09: 21AM 9 attempted to speak, but you're muted at the moment.

09: 21AM 10 MS. THOMAS: Good morning, Your Honor.

09: 21AM 11 Sherine Thomas.

09: 21AM 12 THE COURT: Thank you.

09: 21AM 13 MS. THOMAS: Your Honor, for purposes, it's
09: 21AM 14 our understanding that it's better to move to a
09: 21AM 15 photograph of no picture if you aren't speaking. Is
09: 21AM 16 that okay with the Court?

09: 21AM 17 THE COURT: That's fine. That's fine if
09: 21AM 18 you choose to do that if you're not speaking, but we do
09: 21AM 19 have the speaker view, here on my end at least, so that
09: 22AM 20 I can see framed or bordered the speaker, and that's
09: 22AM 21 obviously very helpful to me and probably to the rest of
09: 22AM 22 you.

09: 22AM 23 All right. In addition now, then, I guess,
09: 22AM 24 the remaining team to be identified is the team that
09: 22AM 25 represents the State.

09: 22AM 1 MS. MACKIN: Good morning, Your Honor.
09: 22AM 2 Anna Mackin with the Texas Attorney General's office on
09: 22AM 3 behalf of the Intervenor, State of Texas, and with me is
09: 22AM 4 Michael Abrams.

09: 22AM 5 THE COURT: And, Mr. Abrams, would you
09: 22AM 6 identify yourself, please?

09: 22AM 7 MR. ABRAMS: Yes. Good morning, Your
09: 22AM 8 Honor.

09: 22AM 9 THE COURT: All right. Are there others
09: 22AM 10 that I have failed to call upon?

09: 22AM 11 MS. DIPPEL: Your Honor, this is Leslie
09: 22AM 12 Dippel. I think you'll see on the screen that there are
09: 22AM 13 two individuals, Dana Hess, but she's appearing twice.
09: 23AM 14 And one of those is Dana DeBeauvoir. Dana Hess is the
09: 23AM 15 Chief Deputy Clerk, and they're trying to arrange that
09: 23AM 16 and get Ms. DeBeauvoir logged in under her own name so
09: 23AM 17 that you can recognize her.

09: 23AM 18 THE COURT: All right. Thank you. I do
09: 23AM 19 see a "Dana Hess" and then a "Hess, A."

09: 23AM 20 I also see a Cathy Troisi, if I'm
09: 23AM 21 pronouncing that, and I see someone who is only
09: 23AM 22 identified by a phone number. And I would certainly
09: 23AM 23 like to know --

09: 23AM 24 (Inaudible.)

09: 23AM 25 THE COURT: Pardon me. I'm sorry, who is

09: 23AM 1 the phone number here? Is that our IT person, or is
09: 23AM 2 that someone who is a participant? It shows it as
09: 23AM 3 "1-512***988."

09: 23AM 4 Bueller? Anyone?

09: 23AM 5 (Laughter.)

09: 24AM 6 MR. SALDIVAR: Your Honor, that may be one
09: 24AM 7 of our colleagues, Thomas Buser-Clancy, so I'm
09: 24AM 8 confirming that right now.

09: 24AM 9 THE COURT: I would like to have everyone
09: 24AM 10 identified by their name, and I would like, to the
09: 24AM 11 extent possible, to have that available to us.

09: 24AM 12 Whoever it is, they can unmute their
09: 24AM 13 microphone and tell us who they are.

09: 24AM 14 MR. SALDIVAR: Your Honor, it does look
09: 24AM 15 like Mr. Clancy. Are you able to unmute your
09: 24AM 16 microphone? He says he's trying to talk.

09: 24AM 17 MR. KORBEL: This is George Korbel,
09: 24AM 18 K-O-R-B-E-L.

09: 24AM 19 THE COURT: I'm sorry, there was a delay.
09: 24AM 20 You'll need to reidentify yourself, please.

09: 24AM 21 MR. KORBEL: I'm sorry, Judge.

09: 25AM 22 MR. BUSER-CLANCY: Your Honor, my
09: 25AM 23 apologies. I think I was muted within the room. This
09: 25AM 24 is Thomas Buser-Clancy with the Intervenor-Plaintiffs.
09: 25AM 25 I'm having some Internet trouble right now, but I'm here

09: 25AM 1 on the phone.

09: 25AM 2 THE COURT: All right. And to the extent
09: 25AM 3 you can over the course of this hearing -- there you go.
09: 25AM 4 You just did what I was about to ask you to do, identify
09: 25AM 5 yourself by your full name.

09: 25AM 6 All right. Thank you.

09: 25AM 7 All right. So, again, as the lawyers know,
09: 25AM 8 the standards that apply here, both for me and for the
09: 25AM 9 appellate court review that's likely to occur, is that
09: 25AM 10 ruling on the plea to the jurisdiction is reviewed
09: 25AM 11 de novo by the appellate court, which means they simply
09: 25AM 12 look at everything I looked at and make their own
09: 25AM 13 independent decision, at least that's my simplistic way
09: 25AM 14 of understanding it and describing it.

09: 26AM 15 The ruling on the temporary injunction, I
09: 26AM 16 believe, standard of review to be one of abuse of
09: 26AM 17 discretion based on my determination of the equities
09: 26AM 18 based on the testimony that is produced.

09: 26AM 19 With regard to the testimony, perhaps as a
09: 26AM 20 preliminary matter before we actually get into the
09: 26AM 21 merits of the various pleas, is there an agreement or is
09: 26AM 22 there some way that we can identify the written
09: 26AM 23 documents that you wished to be marked as exhibits and
09: 26AM 24 considered for admission?

09: 26AM 25 MR. DUNN: Your Honor, this is Chad Dunn on

09: 26AM 1 behalf of the Democratic Party Plaintiffs. I believe
09: 26AM 2 the State yesterday -- well, let me back up. We had
09: 26AM 3 some productive conversations Monday of last week of all
09: 26AM 4 counsel on how to streamline this matter before the
09: 27AM 5 Court. And there was an agreement reached that
09: 27AM 6 declarations could be used to offer affirmative
09: 27AM 7 testimony in lieu of in-person testimony, subject to the
09: 27AM 8 State or any other party having evidentiary objections
09: 27AM 9 to the materials within the testimony.

09: 27AM 10 As I believe I understood that, and other
09: 27AM 11 Plaintiff's counsel understood it, that witnesses would
09: 27AM 12 not be compelled to come live, especially given the
09: 27AM 13 pandemic circumstances; but, obviously, the State would
09: 27AM 14 still be able to object to the substance of the
09: 27AM 15 testimony.

09: 27AM 16 Somewhere in the last few days, I think
09: 27AM 17 maybe we had a communication disconnect on that. I'm
09: 27AM 18 hopeful. It sounds like it's resolved late yesterday.
09: 27AM 19 The State filed a document with it's substantive
09: 27AM 20 evidentiary objections to the individual declarations,
09: 27AM 21 but also conceded in writing that the Court and the
09: 27AM 22 parties can rely on declaration testimony in this case
09: 28AM 23 to resolve the issues of fact.

09: 28AM 24 So I think that's where we're at, but I
09: 28AM 25 think it is worth having this discussion just because

09: 28AM 1 there has been some disconnect off and on about the
09: 28AM 2 issue.

09: 28AM 3 THE COURT: Well, I think -- and, again, I
09: 28AM 4 applaud you and I appreciate that you-all have worked
09: 28AM 5 together collaboratively as much as adversaries can.
09: 28AM 6 It's my impression that the declarations from the
09: 28AM 7 Plaintiff have been marked as exhibits, and I presume
09: 28AM 8 there is going to be, at this point, if not later, an
09: 28AM 9 offer of those exhibits.

09: 28AM 10 And so, I guess at this point, Mr. Dunn, do
09: 28AM 11 you want to make that offer by identifying the exhibit
09: 28AM 12 numbers?

09: 28AM 13 MR. DUNN: Yes, Your Honor. The TDP
09: 28AM 14 Plaintiffs move admission of their exhibits as
09: 28AM 15 previously marked and provided to the Court and counsel
09: 28AM 16 as Exhibits 1 through 10.

09: 28AM 17 Would you like me to describe them in
09: 29AM 18 detail or reference the exhibit list in the record?

09: 29AM 19 THE COURT: I think the latter would be
09: 29AM 20 best.

09: 29AM 21 MR. DUNN: Provided to court and counsel
09: 29AM 22 yesterday through Box.com is Plaintiff's Exhibit list,
09: 29AM 23 which describes these materials. Roughly the first half
09: 29AM 24 of them are government-related documents, and the last
09: 29AM 25 half are the declarations of the TDP Plaintiffs'

09: 29AM 1 witnesses.

09: 29AM 2 THE COURT: I'm looking at the moment, and
09: 29AM 3 I'm not sure that these are -- I believe perhaps I see
09: 29AM 4 nine exhibits, 1 being Zachary Price's declaration, 2
09: 29AM 5 Grace Chimene's declaration.

09: 29AM 6 MR. GONZALEZ: Your Honor, those are
09: 29AM 7 Plaintiff-Intervenors' exhibits.

09: 30AM 8 THE COURT: I'm sorry. Then, I will stand
09: 30AM 9 corrected on that. So let me look and see if I can grab
09: 30AM 10 the notebook that might have the Plaintiff's Exhibits.

09: 30AM 11 (Pause.)

09: 30AM 12 THE COURT: Well, I'm not sure that I can
09: 30AM 13 put my hands on it at the moment.

09: 30AM 14 MR. DUNN: Your Honor, if it's helpful, I
09: 30AM 15 could work through just the titles of them by exhibit
09: 30AM 16 number for the record.

09: 30AM 17 THE COURT: Well, perhaps; but maybe if
09: 30AM 18 there's no objection, or if there's only objections to
09: 30AM 19 some of the ten, those could be discussed at this point
09: 30AM 20 in time.

09: 30AM 21 Obviously, if there's no objection,
09: 30AM 22 everything comes in. So is this -- is there any
09: 31AM 23 objection to any of Plaintiff's Exhibits that have been
09: 31AM 24 offered numbered 1 through 10?

09: 31AM 25 MR. ABRAMS: Your Honor, we have no

09: 31AM 1 objection to the exhibits being admitted. We have filed
09: 31AM 2 substantive objections, as Mr. Dunn mentioned, but those
09: 31AM 3 to the weight of the evidence. Those don't go to the
09: 31AM 4 actual offering of those exhibits, and we don't object
09: 31AM 5 to them in that regard.

09: 31AM 6 THE COURT: All right. Hearing no
09: 31AM 7 objections to the admissions, Plaintiff's Exhibits 1
09: 31AM 8 through 10 are admitted.

09: 31AM 9 (Plaintiff's Exhibits 1 through 10
09: 31AM 10 admitted.)

09: 31AM 11 THE COURT: I did see, in advance of
09: 31AM 12 calling the case, the written objections, which did
09: 31AM 13 strike me as going to the weight and the credibility,
09: 31AM 14 rather than to the admissibility, and so I will make
09: 31AM 15 note of that and carry that forward.

09: 31AM 16 All right. Are there then exhibits to be
09: 31AM 17 offered by the Plaintiff-Intervenors?

09: 31AM 18 MR. GONZALEZ: Yes, Your Honor. At this
09: 31AM 19 time, I would like to offer Plaintiff-Intervenor
09: 32AM 20 Exhibits 1 through 7. Exhibits 1 through 5 are client
09: 32AM 21 declarations. Exhibit 6 is an expert declaration and
09: 32AM 22 you will hear also live testimony from this witness and
09: 32AM 23 there will be a chance to cross-examine. And Exhibit 7
09: 32AM 24 is a declaration with various attachments such as
09: 32AM 25 official government documents and news sources.

09: 32AM 1 And, Your Honor, the State did provide in
09: 32AM 2 writing objections to the weight of the declarations,
09: 32AM 3 but not to the admission. And this morning we filed a
09: 32AM 4 written response to that and provided the Court with a
09: 32AM 5 courtesy copy.

09: 32AM 6 THE COURT: All right. Thank you. I have
09: 32AM 7 not had an opportunity to see the response; but, again,
09: 32AM 8 if these are objections that go to weight rather than to
09: 32AM 9 admissibility, I will certainly look into those at an
09: 32AM 10 appropriate stage.

09: 32AM 11 Is there an objection to the admissibility
09: 33AM 12 of Plaintiff-Intervenors' Exhibits 1 through 7?

09: 33AM 13 MR. ABRAMS: No, Your Honor.

09: 33AM 14 THE COURT: All right. Then
09: 33AM 15 Plaintiff-Intervenors' Exhibit 1 through 7 are admitted
09: 33AM 16 at this time.

09: 33AM 17 (Plaintiff-Intervenors' Exhibits 1 through
09: 33AM 18 7 admitted.)

09: 33AM 19 THE COURT: Are there exhibits to be
09: 33AM 20 offered by the Defendant, Ms. DeBeauvoir?

09: 33AM 21 MS. DIPPEL: Yes, Your Honor.

09: 33AM 22 The exhibits presented and offered are
09: 33AM 23 Exhibits numbers 1 through 5. They consist mainly of
09: 33AM 24 Governor's proclamations and Secretary of State
09: 33AM 25 advisories.

09: 33AM 1 Exhibit 5 is Ms. DeBeauvoir's declaration,
09: 33AM 2 and that's the last one, so 1 through 5.

09: 33AM 3 THE COURT: All right. Thank you. Are
09: 33AM 4 there any objections to admission of Defendant
09: 33AM 5 DeBeauvoir Exhibits 1 through 5?

09: 33AM 6 (No response.)

09: 33AM 7 THE COURT: Hearing no objections,
09: 33AM 8 Defendant Exhibits 1 through 5 are admitted.

09: 33AM 9 (Defendant DeBeauvoir Exhibits 1 through 5
09: 34AM 10 admitted.)

09: 34AM 11 THE COURT: Are there offers of exhibits
09: 34AM 12 from the Intervenor-Defendants, Secretary of State?

09: 34AM 13 MR. ABRAMS: No, Your Honor.

09: 34AM 14 THE COURT: All right. Thank you. So
09: 34AM 15 having gotten those housekeeping matters out of the way,
09: 34AM 16 it's probably the appropriate juncture to begin with the
09: 34AM 17 presentation of the lawyers. And if at any point in the
09: 34AM 18 morning as we go into the afternoon any of you feel the
09: 34AM 19 need for a break, please let me know. Obviously, we
09: 34AM 20 will be taking breaks for everyone's comfort, probably
09: 34AM 21 sometime mid-morning, of about 15 minutes, probably
09: 34AM 22 something in the nature of an hour or so during the
09: 34AM 23 lunchtime period, and, then, likewise, if we're into the
09: 34AM 24 afternoon, another short recess, midafternoon. But if
09: 35AM 25 there are needs that arise in between those times,

09: 35AM 1 please let me know and we'll see what we can do to
09: 35AM 2 accommodate.

09: 35AM 3 That being said, I had already talked about
09: 35AM 4 beginning with the plea to the jurisdiction, just
09: 35AM 5 because that seems to be a threshold issue, and I would
09: 35AM 6 request that we start there, unless there is some reason
09: 35AM 7 you-all think it should be done in a different order.
09: 35AM 8 Go ahead, Mr. Dunn.

09: 35AM 9 MR. DUNN: This is Chad Dunn on behalf of
09: 35AM 10 the Texas Democratic Party. A number of the issues
09: 35AM 11 raised in the plea to the jurisdiction necessarily
09: 35AM 12 involve the Court weighing facts. The issues that are
09: 35AM 13 raised on ripeness, standing, for example, mootness all
09: 35AM 14 have to do with the Court considering factual
09: 35AM 15 conditions, both as it relates to election
09: 35AM 16 administration, but also the individual factual
09: 36AM 17 conditions as alleged and can be proven now by the
09: 36AM 18 admitted evidence and the testimony of the individual
09: 36AM 19 Plaintiffs and Plaintiff-Intervenors. I think --
09: 36AM 20 obviously, we will work at the Court's will, but it
09: 36AM 21 might be the most efficient use of time and resource to
09: 36AM 22 proceed with the hearing, roll the plea to the
09: 36AM 23 jurisdiction into it and argue it at the time of closing
09: 36AM 24 after the Court has the benefit of all the evidence.

09: 36AM 25 THE COURT: Well, that's fine. There's

1 certainly sense in that. The declarations have now all
2 been admitted. The declarations have now all been read.
3 There may be some desire to challenge through
4 cross-examination some of those declarations; and if you
5 think that those challenges, should they be requested
6 would be more appropriately heard before I hear the plea
7 to the jurisdiction arguments, I'm certainly willing to
8 go that way.

9 But I think that the Plaintiffs and the
10 Plaintiff-Intervenors' declarations are of an
11 evidentiary character, and they are now part of the
12 record, and, as I said, have been reviewed, so they
13 would go to the basis for either the denial -- well, I
14 guess from the Plaintiff-Intervenors -- Plaintiffs and
15 Intervenor-Plaintiffs go to the denial of the plea to
16 the jurisdiction. And if there's something that is
17 offered up in the way of a grant of the plea to the
18 jurisdiction, I suppose that would be based on
19 challenging that evidence through cross-examination,
20 since there are no witnesses being called by the
21 defense, and argument of counsel.

22 And so, again, I am willing to go either
23 direction. But Mr. Dunn, have you not already given me
24 everything that you're essentially going to give me of
25 an affirmative nature that shows why the plea to the

09: 38AM 1 jurisdiction should be denied?

09: 38AM 2 MR. DUNN: Well, I think -- again, this is
09: 38AM 3 Chad Dunn, Your Honor. I think what we have provided is
09: 38AM 4 more than sufficient to overcome the plea to the
09: 38AM 5 jurisdiction. I do think that there will be additional
09: 38AM 6 oral testimony that augments that evidence, but I'll
09: 38AM 7 just be candid with the Court. My experience has been
09: 38AM 8 that if the Court were to give an indication on a ruling
09: 38AM 9 one way or the other on the plea to the jurisdiction, we
09: 38AM 10 will see a motion from the State immediately asking for
09: 38AM 11 a stay to these proceedings.

09: 38AM 12 And we very much share the belief that it's
09: 38AM 13 in everybody's benefit to package this case and get it
09: 38AM 14 to the Court of Appeals. If jurisdiction doesn't exist
09: 38AM 15 for the Supreme Court, those courts will tell us it
09: 38AM 16 doesn't. If it does exist, the evidence will be in the
09: 38AM 17 record to resolve the material issue. So the principal
09: 38AM 18 concern I have with rolling this into one proceeding
09: 38AM 19 arguing it together at the end of the case is to ensure
09: 39AM 20 that there is not an event that can be used to prevent a
09: 39AM 21 final ruling in this case today or when the Court can
09: 39AM 22 get to it.

09: 39AM 23 THE COURT: I appreciate that perspective,
09: 39AM 24 and I should have probably stated that I intend to hear
09: 39AM 25 all of the motions before rendering any decisions. And

09: 39AM 1 whether I'm in a position to render the decisions at the
09: 39AM 2 end immediately of this hearing or whether I take them
09: 39AM 3 under advisement and consider them going forward and
09: 39AM 4 rendering a decision at a later time, that's my plan.
09: 39AM 5 So I appreciate your concern. It makes sense from your
09: 39AM 6 client's perspective, I think, but if where we are is
09: 39AM 7 we're just going to hear arguments of counsel with
09: 39AM 8 regard to plea to the jurisdiction, I'm fine with
09: 39AM 9 hearing them upfront, or I'm fine with hearing them at
09: 39AM 10 the conclusion.

09: 39AM 11 MR. DUNN: Understood, Your Honor.

09: 39AM 12 THE COURT: And it may be now that, since
09: 40AM 13 we have -- presumably, we may have some live witnesses
09: 40AM 14 with some cross-examination, I suppose we need to talk
09: 40AM 15 about a couple of things. One is, is there a need for
09: 40AM 16 breakout rooms at any point along the way? And if so,
09: 40AM 17 if you can identify for me at this time who would think
09: 40AM 18 they need a breakout room, we can get that set up
09: 40AM 19 through our technological aide here.

09: 40AM 20 Is there anything that you envision over
09: 40AM 21 the course of this hearing where you or your clients or
09: 40AM 22 others might need to be put into that breakout-room
09: 40AM 23 posture?

09: 40AM 24 MR. DUNN: On behalf of the TDP, we don't
09: 40AM 25 believe we'll need that, Your Honor.

09: 40AM 1 MR. GONZALEZ: And Plaintiff-Intervenors
09: 40AM 2 don't believe so either.

09: 40AM 3 THE COURT: All right. How about
09: 41AM 4 Defendant? Do you-all feel that there may be a reason
09: 41AM 5 where you would need to be given the opportunity to be
09: 41AM 6 in a breakout room or the necessity to be in one?

09: 41AM 7 MS. DIPPEL: Defendant DeBeauvoir does not
09: 41AM 8 believe we need one, no.

09: 41AM 9 THE COURT: All right. And how about the
09: 41AM 10 Defendant-Intervenor, the State of Texas?

09: 41AM 11 MS. MACKIN: No, thank you, Your Honor.

09: 41AM 12 THE COURT: All right. Thank you.

09: 41AM 13 All right. So you-all had sent out a
09: 41AM 14 proposed schedule or order of presentation, beginning
09: 41AM 15 with opening statements, and then going into witnesses.
09: 41AM 16 Certainly, I can allow you to make opening statements if
09: 41AM 17 you feel the need and of a brief nature, or if for
09: 41AM 18 scheduling purposes and consideration of witnesses that
09: 41AM 19 would be testifying live, if you wish to forego the
09: 41AM 20 opening statements and dispose of the testimony aspects,
09: 42AM 21 we can certainly go that way as well.

09: 42AM 22 So, Counsel for Plaintiff, your pleasure.

09: 42AM 23 MR. DUNN: Thank you, Your Honor. As we
09: 42AM 24 referenced, typically when the Court asks us, makes that
09: 42AM 25 statement about opening statements, we proceed to the

09: 42AM 1 evidence. To be candid with the Court, we have a bit of
09: 42AM 2 timing issue with one of the live witnesses, as a
09: 42AM 3 practicing physician, needs to see a patient.

09: 42AM 4 I think if we proceed and still do about
09: 42AM 5 five minutes a piece for opening statements, that will
09: 42AM 6 get us right where we need to be scheduling with witness
09: 42AM 7 availability. So with the Court's consent, I will go
09: 42AM 8 ahead and give a brief opening statement.

09: 42AM 9 THE COURT: All right. And so you're
09: 42AM 10 envisioning speaking to the merits of your request to
09: 42AM 11 the temporary injunction and not speaking to the plea to
09: 42AM 12 the jurisdiction?

09: 42AM 13 MR. DUNN: Well, I understood from the
09: 42AM 14 Court's latest direction that that's what I was
09: 42AM 15 planning. But I also understand the State wants to
09: 42AM 16 start off and argue its plea, we can respond to that and
09: 43AM 17 then proceed into the matter of the injunction. So in
09: 43AM 18 light of the Court's comments up until now, whatever is
09: 43AM 19 the Court's pleasure obviously works best.

09: 43AM 20 THE COURT: I'll certainly entertain your
09: 43AM 21 opening statement.

09: 43AM 22 MR. DUNN: Thank you, Your Honor.

09: 43AM 23 May it please the Court, my name is Chad
09: 43AM 24 Dunn, and on behalf of the Texas Democratic Party, it's
09: 43AM 25 Chairman Gilberto Hinojosa and two eligible voters who

09: 43AM 1 are registered in Travis County, Texas, under the age of
09: 43AM 2 65, we come to the Court asking to exercise jurisdiction
09: 43AM 3 granted under state law and also it's equitable
09: 43AM 4 jurisdiction under state law. And we're obviously in an
09: 43AM 5 unprecedented time. As the Court has noted, we're
09: 43AM 6 undertaking this evidentiary proceeding through webinar
09: 43AM 7 technology. I don't believe any of the lawyers here,
09: 43AM 8 the jurists had any expectation that one day the
09: 43AM 9 courthouse procedure would undertake in this way.

09: 43AM 10 For the vast majority of us, except the
09: 43AM 11 oldest, there's no one in living memory to have
09: 44AM 12 experienced a time like this. All sorts of things have
09: 44AM 13 changed, and they've changed in a short amount of time.
09: 44AM 14 But, as much as changed, a few things remain the same.
09: 44AM 15 One of those is that we are a people who elect our
09: 44AM 16 representatives. We choose the people who will make the
09: 44AM 17 decisions on behalf of government. We do it in
09: 44AM 18 elections that we have confidence in, and it's that
09: 44AM 19 confidence that gives credibility to the officers who
09: 44AM 20 are elected.

09: 44AM 21 There's another thing that has not changed,
09: 44AM 22 and that's that the founders of this State and of our
09: 44AM 23 Nation have set up a three-legged stool of government,
09: 44AM 24 as my grade school teacher described it. That is an
09: 44AM 25 executive branch, the legislative branch, and the

09: 44AM 1 judiciary. Our legislative branch, both in Washington
09: 44AM 2 and here where I am in Austin, make the laws. The
09: 44AM 3 legislature decides what they will be. The executive
09: 44AM 4 administers them; and when it comes necessary, the
09: 44AM 5 Courts will tell us what they are when there is a
09: 44AM 6 dispute.

09: 44AM 7 It's that jurisdiction that we invoke
09: 45AM 8 today. And it's who we are as a people that we have to
09: 45AM 9 stand up for in this case, both as it comes to the right
09: 45AM 10 to vote, and as it becomes how we govern ourselves.
09: 45AM 11 Now, I would like to take a moment to discuss what this
09: 45AM 12 case is not. As the Court noted, there is a separate
09: 45AM 13 case on file in the federal court. That case addresses
09: 45AM 14 important issues of federal law, federal statutes and
09: 45AM 15 important protections provided for under the U.S.
09: 45AM 16 Constitution.

09: 45AM 17 Those issues have not been presented by the
09: 45AM 18 parties in this case. What has been presented by the
09: 45AM 19 parties in this case is a straightforward court
09: 45AM 20 interpretation, much like the Court sees on a day-to-day
09: 45AM 21 basis in numerous aspects on what exactly does state law
09: 45AM 22 provide, what exactly has the legislature made as the
09: 45AM 23 law in Texas.

09: 45AM 24 Now, in this case, the Texas legislature,
09: 45AM 25 over two decades ago, has provided for voting by mail at

09: 46AM 1 home. And the vote-by-mail provision allows certain
09: 46AM 2 people access to the ballot. That's what we're asking
09: 46AM 3 this Court to clarify. What we're not asking this Court
09: 46AM 4 to do, as some have argued, is that -- is to ban
09: 46AM 5 in-person voting. The Texas Democratic Party and these
09: 46AM 6 Plaintiffs continue to believe in-person voting should
09: 46AM 7 be allowed, but besides that, state law allows for
09: 46AM 8 in-person voting for the people who require it, for the
09: 46AM 9 people who want it.

09: 46AM 10 But much like the public health experts
09: 46AM 11 tell us we have the reduce the curve or reduce the
09: 46AM 12 demand on hospital beds and ventilators, we too have to
09: 46AM 13 reduce the demand on in-person voting. As a matter of
09: 46AM 14 practicality, as a matter of public health, and,
09: 46AM 15 fortunately, our state law allows for that.

09: 46AM 16 Section 82.002 of the Texas Election Code
09: 46AM 17 provides the standard of a disability in order to be
09: 46AM 18 entitled to a vote-by-mail ballot under Texas law. That
09: 47AM 19 legislative enactment plainly provided for circumstances
09: 47AM 20 such as this, when public health makes it dangerous for
09: 47AM 21 individuals to vote in person.

09: 47AM 22 Historically, people who have been
09: 47AM 23 permitted to vote by mail have been military and
09: 47AM 24 overseas voters who are granted that right under federal
09: 47AM 25 law. Also, under state law, people over the age of 65,

09: 47AM 1 people who have a disability, people who are otherwise
09: 47AM 2 unable to participate in in-person voting because of
09: 47AM 3 their condition.

09: 47AM 4 The question, then, is under section 82.002
09: 47AM 5 and the definition it contains, does that include
09: 47AM 6 people, who by their own decision, or as a result of a
09: 47AM 7 local, state, or federal order, are at home social
09: 47AM 8 distancing in order to prevent further spread of the
09: 47AM 9 COVID-19 disease. There are no cases on this point.
09: 47AM 10 But there are important explanations of this law from
09: 47AM 11 the State Attorney General that have been recently
09: 48AM 12 issued.

09: 48AM 13 Two Attorney General opinions have
09: 48AM 14 attempted to determine what a court would decide should
09: 48AM 15 this issue come before the Court, and those
09: 48AM 16 interpretations are persuasive authority. In one case,
09: 48AM 17 an individual was asking for a vote-by-mail ballot.
09: 48AM 18 They had not been declared disabled by the Social
09: 48AM 19 Security Administration. And a government authority
09: 48AM 20 asked the Attorney General's Office to confirm they were
09: 48AM 21 entitled to a vote-by-mail ballot. In that case, the
09: 48AM 22 Attorney General ruled that there was no set definition
09: 48AM 23 of disability and that person was entitled to receive a
09: 48AM 24 ballot.

09: 48AM 25 In a second case, the Attorney General was

asked an individual who had been deemed a sexual deviant by Texas courts and who had been ordered to stay away from other people, but was otherwise under the age of 65, the issue arose as to whether that person was entitled to a vote-by-mail ballot. And, in that case, again, the Texas Attorney General ruled that they were entitled to vote by home essentially because, without using this term, they were social distancing as a result of a government order.

The balance of these authorities and the plain language of the statutes, which we think is clear, allow voters in Texas to, and of all ages, who are social distancing to request a vote-by-mail ballot. Ultimately, though, it is up to the Court to tell us what the law is. But it is an important feature of this case that the individual Plaintiffs and State Democratic Party, who has its own rights, are not placed in the position of having to guess what the State will do with this law later, whether it's to call into question the outcome of elections, or criminally prosecute people who seek to avail themselves of this law.

It is critically important that the Court provide a solution and a resolution to this legal question. One final note: The Texas Democratic Party is not simply a political participant in this matter.

09: 49AM 1 The upcoming elections that the Governor has moved by
09: 50AM 2 proclamation to July 14th is the Texas Democratic
09: 50AM 3 Party's election. It is their runoff election, as well
09: 50AM 4 as the Republican party and others, where that will
09: 50AM 5 determine who gets to carry the infra mater as the
09: 50AM 6 nominee of the Texas Democratic Party, the oldest
09: 50AM 7 political party in Texas.

09: 50AM 8 The State purports to regulate that
09: 50AM 9 process. The State purports to tell the Texas
09: 50AM 10 Democratic Party how it is that they can enroll voters
09: 50AM 11 and select their nominees. The Texas Democratic Party
09: 50AM 12 has a critical interest in understanding how it is that
09: 50AM 13 the State intends to limit the ability of people to
09: 50AM 14 weigh in on the Democratic Party nomination. These are
09: 50AM 15 important rights. And as much as everything has
09: 50AM 16 changed, one thing has remained the same; and that is
09: 50AM 17 that the right to vote is granted by the state. It's
09: 50AM 18 granted by the State Constitution. The Texas Supreme
09: 50AM 19 Court in Andrade v. NAACP of Austin has ruled that it is
09: 50AM 20 the fundamental right of which all the other rights are
09: 50AM 21 secure.

09: 50AM 22 That being the case, it cannot be the
09: 51AM 23 situation and it is not the fact that the Texas
09: 51AM 24 legislature provided a situation that in a pandemic
09: 51AM 25 circumstance the right to vote is in conflict with

09: 51AM 1 public health. They didn't do so. They provided a
09: 51AM 2 clear language in 82.002 of the Election Code on
09: 51AM 3 disability, and we think the Court is well within its
09: 51AM 4 jurisdiction and well witness the jurisprudence to
09: 51AM 5 clarify that that disability can be utilized by all
09: 51AM 6 persons who are social distancing in upcoming elections
09: 51AM 7 as long as the COVID-19 epidemic and pandemic continues.

09: 51AM 8 Thank you, Your Honor.

09: 51AM 9 THE COURT: Thank you, Mr. Dunn.

09: 51AM 10 Counsel for Plaintiff-Intervenors, do you
09: 51AM 11 wish to make anything in the way of an opening
09: 51AM 12 statement?

09: 51AM 13 MR. GONZALEZ: Yes, Your Honor, we have a
09: 51AM 14 brief opening statement.

09: 51AM 15 THE COURT: All right. Thank you.

09: 51AM 16 MR. GONZALEZ: May it please the Court, as
09: 51AM 17 we are all aware, that COVID-19 is wreaking havoc on
09: 52AM 18 civil life in Texas and across the globe. This
09: 52AM 19 dangerous disease prevents conducting elections as
09: 52AM 20 unusual. However, Texas law provides a mechanism for
09: 52AM 21 safe elections by allowing individuals to vote by mail
09: 52AM 22 when a physical condition prevents them from appearing
09: 52AM 23 at a polling place in person without risking injury to
09: 52AM 24 their health.

09: 52AM 25 Our clients include an individual voter and

09: 52AM 1 four organizations. Our individual client Zachary Price
09: 52AM 2 is a student at the University of Texas at Austin.
09: 52AM 3 Mr. Price wants to vote by mail because he has the
09: 52AM 4 reasonable belief that he will be unable to vote in
09: 52AM 5 person without risking injury to his health due to
09: 52AM 6 COVID.

09: 52AM 7 He has voted by mail previously and found
09: 52AM 8 it difficult to receive his ballot on time. That was
09: 52AM 9 during the normal election, and those difficulties will
09: 52AM 10 be exponentially compounded if there is a last-minute
09: 52AM 11 surge of mail-ballot voters, which the county is
09: 52AM 12 unprepared for.

09: 52AM 13 Mr. Price wants to, and is legally allowed,
09: 53AM 14 to apply for a mail ballot right now; and he wants to
09: 53AM 15 apply because he knows that he will have to follow up
09: 53AM 16 with the county to make sure his application is
09: 53AM 17 processed and his ballot is received on time. The three
09: 53AM 18 membership organizations we represent have individual
09: 53AM 19 members who face the same dilemma as Mr. Price. All of
09: 53AM 20 our organizational clients are civic engagement
09: 53AM 21 non-profits whose work is directly hindered by the lack
09: 53AM 22 of clear guidance surrounding voting by mail during
09: 53AM 23 COVID.

09: 53AM 24 Our clients need clarity because they want
09: 53AM 25 to know that they, their members, and the voters they

1 contact will have their ballots counted and that they
2 will not be subject to potential prosecution. But
3 there's no clarity their ballots are subject to being
4 challenged and potentially voided after the fact or even
5 serving as the basis for an election contest.

6 Despite this urgent need for clarity, our
7 clients have received none from the State. All of our
8 organizational clients have requested interpretations
9 from the Secretary of State's office multiple times, but
10 have received no meaningful guidance. All of our
11 clients are likely to succeed on their claims because
12 the plain language of the Election Code supports the
13 ability of voters to submit mail-ballot applications if
14 they reasonably believe they will not be able to vote in
15 person without risking their physical health.

16 Because of COVID, this applies to every
17 registered voter right now. Other states have
18 interpreted similar language exactly as we do. Alabama,
19 for instance, has the same July 14th primary election
20 runoff date as Texas. And their Secretary of State
21 issued guidance telling voters they can vote by mail
22 under the current disability language if it is
23 unreasonable to vote at their polling place. The
24 evidence we present, which will go both towards
25 responding to the State's plea to the jurisdiction and

1 the merits of the temporary injunction will show that
2 every individual is susceptible to being inflicted by
3 COVID, which is caused by a highly contagious virus that
4 spreads mainly from person through close contact, that
5 COVID can result in hospitalization, admission to
6 intensive care, and death. And this can happen to
7 people of all ages.

8 In order to mitigate the spread of COVID,
9 individuals must stay away from large public gatherings.
10 The virus that causes COVID is likely to still be in
11 significant circulation through the summer, and it is
12 unlikely there will be a vaccine for a year or longer.
13 New outbreaks will continue to occur, and these will be
14 exacerbated by public gathering.

15 Voting in person poses a risk to voters and
16 election workers by forcing large groups into close
17 contact and forcing voters to share equipment. The
18 potential risk of voting in person will be compounded if
19 the vast majority of Texans are forced to vote in
20 person, but this risk will be mitigated if more voters
21 exercise their option to vote by mail. Voting by mail
22 is a physically safe alternative recommended by experts
23 in the Centers For Disease Control.

24 It is reasonable for an individual to
25 believe right now that they will be unable to vote in

1 person in July without risking injury to their health.

2 In order to run a successful vote-by-mail
3 program, Travis County, like every other county, must
4 begin preparations yesterday. If they do not prepare
5 now, it will result in widespread confusion, chaos, and
6 ultimately disenfranchisement because voters will not
7 get their ballots in time to return them. We've seen
8 this happen recently in Wisconsin.

9 Counties have limited resources and need
10 clarity so they can determine whether they need to
11 dedicate resources to operate a larger than normal
12 vote-by-mail program. Our clients, like all Texas
13 voters, should not be forced to choose between their
14 physical safety and their right to vote. This is an
15 untenable choice. And that is why our clients need this
16 relief, to ensure they can apply to vote by mail without
17 their applications being rejected, without having to
18 face not receiving their ballots on time, or face their
19 ballots being voided after the fact, or, worst of all,
20 potentially facing unjustifiable prosecution.

21 Thank you.

22 THE COURT: Thank you, Mr. Gonzalez.

23 Is there something of an opening statement
24 that the Defendant chooses to make at this point in
25 time, Ms. DeBeauvoir?

09: 57AM 1 And I should know that there's apparently a
09: 57AM 2 specific petition also filed by Ms. DeBeauvoir, or what
09: 57AM 3 appears to be a petition, seeking to have a unified
09: 57AM 4 early voting period, and I failed to ask at the outset
09: 58AM 5 if that was opposed. But my presumption is that it is,
09: 58AM 6 or you would have advised me otherwise. So with that,
09: 58AM 7 is there something from Ms. DeBeauvoir?

09: 58AM 8 MS. DIPPEL: Dana DeBeauvoir does not have
09: 58AM 9 an opening statement at this time, but we would like to
09: 58AM 10 be heard at some point before the evidence is closed,
09: 58AM 11 Your Honor.

09: 58AM 12 THE COURT: Certainly. And am I correct in
09: 58AM 13 there is an affirmative request for some type of relief
09: 58AM 14 that is something of a different character, slightly, at
09: 58AM 15 least, from that being sought by the petitioners, the
09: 58AM 16 Plaintiffs, and the Plaintiff-Intervenors and would
09: 58AM 17 still face opposition, to your understanding, from the
09: 58AM 18 State-Intervenor?

09: 58AM 19 MS. DIPPEL: That is correct.

09: 58AM 20 THE COURT: All right. Thank you,
09: 58AM 21 Ms. Dippel.

09: 58AM 22 So is there an opening from the
09: 58AM 23 State-Intervenors?

09: 59AM 24 MS. MACKIN: No, Your Honor. We'll reserve
09: 59AM 25 our time for argument on the plea to the jurisdiction,

09: 59AM 1 which should capture all of the points that were raised
09: 59AM 2 in Plaintiff's opening statements. Thank you.

09: 59AM 3 THE COURT: All right. Thank you.

09: 59AM 4 So at this point in time, I will entertain
09: 59AM 5 testimonial evidence. It's my understanding that there
09: 59AM 6 is a physician that's going to be called. If that is,
09: 59AM 7 in fact, who is to be called, we'll need to swear them
09: 59AM 8 in and hear from them through cross-examination.

09: 59AM 9 Is that the nature of where we are,
09: 59AM 10 Mr. Dunn?

09: 59AM 11 MR. DUNN: Your Honor, in part. There will
09: 59AM 12 be two physicians, as I understand it, that will be
09: 59AM 13 called, but the first witness is Glen Maxey, the
09: 59AM 14 legislative and primary director for the Texas
09: 59AM 15 Democratic Party, who is not a physician.

09: 59AM 16 THE COURT: Okay. Well, that's fine. I
09: 59AM 17 was understanding that someone had a logistical or
09: 59AM 18 scheduling issue that was a concern, and so certainly we
09: 59AM 19 can take witnesses out of order to accommodate those
10: 00AM 20 things. But if you're offering Mr. Maxey, you have,
10: 00AM 21 again, put his declaration into evidence, and so I'm
10: 00AM 22 assuming there will be some cross-examination by the
10: 00AM 23 State-Intervenors.

10: 00AM 24 Mr. Maxey, are you here with us?

10: 00AM 25 MR. MAXEY: I am, Your Honor.

10: 00AM 1 THE COURT: Sir, if you would please raise
10: 00AM 2 your right hand for the oath.

10: 00AM 3 GLEN MAXEY,
10: 00AM 4 having been first duly sworn, testified as follows:

10: 00AM 5 THE COURT: All right. Thank you. Then,
10: 00AM 6 counsel for Defendant-Intervenor -- I'm sorry -- yes, if
10: 00AM 7 you'll -- if you're interested in cross-examining, is
10: 00AM 8 that the way we are envisioning this going?

10: 00AM 9 MR. DUNN: Your Honor, we had intended to
10: 00AM 10 do some short amount of direct; but if that's how the
10: 00AM 11 Court would prefer, we can hand him off for
10: 00AM 12 cross-examination.

10: 00AM 13 MS. MACKIN: We don't object to --

10: 01AM 14 THE COURT: I'm sorry, Ms. Mackin.

10: 01AM 15 MS. MACKIN: I'm sorry, Your Honor. I
10: 01AM 16 just wanted to say we didn't object to Mr. Dunn doing a
10: 01AM 17 brief direct.

10: 01AM 18 THE COURT: All right. Thank you.

10: 01AM 19 Go ahead, Mr. Dunn.

10: 01AM 20 MR. DUNN: Okay. And, Your Honor, on the
10: 01AM 21 issue of the doctor's schedule, it is the case that he
10: 01AM 22 was tied up at 10 for a patient, and so that's why he's
10: 01AM 23 scheduled where he is.

10: 01AM 24 THE COURT: All right.

10: 01AM 25

DIRECT EXAMINATION

BY MR. DUNN:

Q. Mr. Maxey, please tell us your name.

A. Tommy Glen Maxey.

Q. How are you employed?

A. I am.

Q. How so?

A. I'm employed by the Texas Democratic Party.

Q. In what capacity?

A. I serve as the primary director that conducts the primary and primary runoff elections. I'm also the legislative director who lobbies on behalf of the Texas Democratic Party.

COURT REPORTER: I'm sorry, Judge. I'm sorry, this is the court reporter. Can he repeat that last answer?

THE COURT: We had something lost there at the end of testimony, if you could repeat the question or answer.

THE WITNESS: I'm employed by the Texas Democratic Party as their primary director that conducts the primary and primary runoff elections. And I also serve as the legislative director for the Texas Democratic Party that lobbies for the Texas Democratic Party on election issues before the Texas Legislature.

10: 02AM 1 Q. (BY MR. DUNN) Mr. Maxey, as you may have
10: 02AM 2 heard, the Judge has admitted into evidence your
10: 02AM 3 declaration, so we don't need to cover everything. But
10: 02AM 4 give us a brief version of your background in government
10: 02AM 5 and elections.

10: 02AM 6 A. I have been involved in electoral activities
10: 02AM 7 since the age of 16, which is over 50 years ago. I
10: 02AM 8 worked in over 150 different political campaigns over
10: 03AM 9 the years. I've served six terms in the Texas
10: 03AM 10 legislature. I have lobbied and drafted legislation on
10: 03AM 11 election issues before the legislature over the last
10: 03AM 12 20 years. Significant portions of the Election Code
10: 03AM 13 have been pinned by me and then passed by the
10: 03AM 14 legislature.

10: 03AM 15 And I have been fully involved in all of
10: 03AM 16 the debates on mail ballots in the last decade or so
10: 03AM 17 before the Texas legislature.

10: 03AM 18 Q. All right. When is it that you came to realize
10: 03AM 19 that the pandemic would have an effect in Texas
10: 03AM 20 elections?

10: 03AM 21 A. I think immediately upon the announcement that
10: 03AM 22 there would be social distancing and that there was a
10: 03AM 23 virus that was highly contagious, conversations began
10: 03AM 24 almost immediately among election administrators. As
10: 04AM 25 the administrator of the Democratic primary election, I

1 interact with county chairs in 254 counties that do
2 elections, the Democratic primary and primary runoff
3 elections.

4 I interact with the election administrators
5 and county clerks in many counties in that role. And
6 conversations began almost immediately about whether
7 there would be adequate ability to hold an election. It
8 became very evident on March the 3rd when there were
9 reports around the State, especially in Houston and
10 Dallas and here in Austin, that significant numbers of
11 election workers refused or failed to show up on
12 election morning saying that they were in fear of
13 COVID-19 infection; therefore, they would not -- we had
14 polling places that did not open on time because
15 election Judges were not available or election workers
16 were not available because of the pandemic.

17 And that was the -- sort of the bell for me
18 that we were going to have major problems going into the
19 runoff election and the November election.

20 Q. And you said a few things here. I want to make
21 sure one thing is clear. As the administrator of the
22 Texas Democratic Party's primary election, does that
23 also mean that you're an election administrator for some
24 counties? And if so, how is that?

25 A. Under the Texas Election Code, each county has

10: 05AM 1 a Democratic primary if they have a Democratic county
10: 05AM 2 chair to administer that election locally. The statute
10: 05AM 3 allows the State chair, Gilberto Hinojosa, to step in in
10: 06AM 4 counties where there is not a county chair. I am
10: 06AM 5 employed at his direction to be the administrator of the
10: 06AM 6 primary election in 42 counties in 2020 where I am the
10: 06AM 7 direct contractor with the clerk to hold the Democratic
10: 06AM 8 primary and Democratic runoffs in 42 counties.

10: 06AM 9 Q. Ultimately, does that mean in those 42 counties
10: 06AM 10 that you need direction on who can request a
10: 06AM 11 vote-by-mail ballot under these circumstances?

10: 06AM 12 A. Directly in those counties, but because I am
10: 06AM 13 the chief primary officer over all 254 counties, county
10: 06AM 14 clerks and county chairs rely on me to get
10: 06AM 15 interpretations of the law to them, to explain the law
10: 06AM 16 to them. And I have been asked by dozens of county
10: 06AM 17 chairs whether people between the ages of 18 and 65 who
10: 07AM 18 are social distancing can do it by mail.

10: 07AM 19 And to this point, I have not been able to
10: 07AM 20 give them a definitive answer because I have no guidance
10: 07AM 21 from the Secretary of State.

10: 07AM 22 Q. Setting aside of whatever your opinion is of
10: 07AM 23 what the law provides, is there any definitive guidance
10: 07AM 24 that you, election administrators, voters can rely on,
10: 07AM 25 in your opinion?

10: 07AM 1 A. There is none. I have made a direct question
10: 07AM 2 of the SOS, orally of the Chief Election Officer Keith
10: 07AM 3 Ingram, and I was not given an answer.

10: 07AM 4 Q. And let's talk about that. At some point in
10: 07AM 5 time, were you on a call with a group of election
10: 07AM 6 administrators and the Secretary of State's office?

10: 07AM 7 A. Yes. The Texas Democratic party instigated a
10: 07AM 8 call with election administrators, their association.
10: 07AM 9 There were approximately six election administrators or
10: 07AM 10 county clerks on the call, including their legislative
10: 07AM 11 chair, Chris Davis from Williamson County, and Heather
10: 08AM 12 Hawthorne from Chambers, who is one of their chief
10: 08AM 13 legislative persons.

10: 08AM 14 Invited to that call were both Keith Ingram
10: 08AM 15 and the legal counsel Christina Adkins of the Secretary
10: 08AM 16 of State's office.

10: 08AM 17 Q. Let me pause you right there. For our record,
10: 08AM 18 who is Keith Ingram?

10: 08AM 19 A. Keith Ingram is the chief elections officer of
10: 08AM 20 the Texas Secretary of State's office.

10: 08AM 21 Q. Did this call take place before this lawsuit
10: 08AM 22 was filed?

10: 08AM 23 A. Yes.

10: 08AM 24 Q. And was an inquiry made of Mr. Ingram and the
10: 08AM 25 Secretary of State officials about the disability option

10: 08AM 1 for getting vote by mail?

10: 08AM 2 MS. MACKIN: Objection, hearsay.

10: 08AM 3 THE COURT: I will overrule the objection.
10: 08AM 4 Obviously if there is to be a recitation of comments by
10: 08AM 5 someone who is not testifying, I will weigh that as
10: 09AM 6 hearsay; but in advance of hearing the answer, I'm
10: 09AM 7 unable to make that call, so at this point, your
10: 09AM 8 objection is overruled.

10: 09AM 9 MR. DUNN: And we were just saying for the
10: 09AM 10 record, Your Honor, the statement we would elicit is
10: 09AM 11 from a government official, State of Texas, admission by
10: 09AM 12 a party opponent, and it's also goes to show intent or
10: 09AM 13 motive.

10: 09AM 14 Q. (BY MR. DUNN) Mr. Maxey, what is the inquiry
10: 09AM 15 that you made?

10: 09AM 16 A. I specifically asked the -- Keith Ingram the
10: 09AM 17 question of does the statute currently on the books in
10: 09AM 18 Section 82.002 -- I think that's the cite, correct
10: 09AM 19 cite -- does it allow a person who is social distancing
10: 09AM 20 to be able to request a ballot by mail.

10: 09AM 21 Q. Did you receive any guidance?

10: 09AM 22 A. No. I think his answer was, "We're here just
10: 09AM 23 to listen."

10: 10AM 24 Q. Ultimately, to your knowledge, has there been a
10: 10AM 25 number of attempts to get some definitive guidance from

10: 10AM 1 the executive branch on how the disability exemption
10: 10AM 2 works for vote by mail in these circumstances?

10: 10AM 3 A. It is my understanding through conversations
10: 10AM 4 that multiple people have asked that question. As
10: 10AM 5 already has been stated in the hearing, other
10: 10AM 6 organizations have made those inquiries. Other staffers
10: 10AM 7 from the Democratic Party. Democratic county chairs
10: 10AM 8 have told me they have asked, and, so far, we have
10: 10AM 9 gotten no guidance at all on point.

10: 10AM 10 MR. DUNN: Your Honor, at this point, I
10: 10AM 11 would like to share my screen so I can ask the witness
10: 10AM 12 about an exhibit.

10: 10AM 13 Could I be granted leave to do so?

10: 10AM 14 THE COURT: Yes, sir.

10: 10AM 15 MR. DUNN: It says that the "host disabled
10: 10AM 16 participant screen-sharing."

10: 10AM 17 THE COURT: Well, let me see if my
10: 11AM 18 ghost-host can address that, and --

10: 11AM 19 MR. VALDEZ: Absolutely, Judge.

10: 11AM 20 THE COURT: All right. Thank you.

10: 11AM 21 MR. VALDEZ: I'll make them cohost. Who
10: 11AM 22 needed to share their screen?

10: 11AM 23 THE COURT: Mr. Dunn, Chad Dunn.

10: 11AM 24 MR. VALDEZ: Absolutely. One moment. He
10: 11AM 25 should now have that ability.

10: 11AM 1 THE COURT: Thank you.

10: 11AM 2 MR. DUNN: Thank you. If I've done this
10: 11AM 3 correctly, the Court and the witness should have in
10: 11AM 4 front of it Election Advisory 2020-14, which has
10: 11AM 5 previously been admitted as Plaintiff's Exhibit 1.

10: 11AM 6 Q. (BY MR. DUNN) Is that visible, Mr. Maxey?

10: 11AM 7 A. Yes, I can see it.

10: 11AM 8 Q. All right, sir. Is this an advisory that was
10: 11AM 9 issued by the Secretary of State relative to the
10: 11AM 10 COVID-19 pandemic?

10: 11AM 11 A. Yes, sir.

10: 11AM 12 Q. All right. Does this advisory, in your
10: 11AM 13 opinion, provide any guidance about what to do with
10: 11AM 14 disability procedures for vote by mail, and does it give
10: 12AM 15 you an answer to the question that we've been
10: 12AM 16 discussing?

10: 12AM 17 A. I've reviewed this, and it does not give
10: 12AM 18 specific guidance on the question at hand. It
10: 12AM 19 basically, if I recall -- not being able to read it
10: 12AM 20 totally here, it basically restates the election
10: 12AM 21 definition of disability, and it leaves it up to local
10: 12AM 22 election officials to interpret that statute. And we
10: 12AM 23 don't have clear guidance of whether our interpretation
10: 12AM 24 is correct or that we're going to have the same
10: 12AM 25 interpretation in 254 counties.

10: 12AM 1 Q. Let me ask you, Mr. Maxey, focusing here on
10: 12AM 2 page 2, which I have on the screen in front of you.
10: 12AM 3 This is the discussion in there about disability, is it
10: 13AM 4 not? And nowhere else is there guidance from the
10: 13AM 5 Secretary of State of exactly what disability means
10: 13AM 6 other than to quote the statute; is that an accurate
10: 13AM 7 representation?

10: 13AM 8 A. That's accurate, yes.

10: 13AM 9 Q. There are some other provisions in here just
10: 13AM 10 worthy of pointing out. There is a notation about
10: 13AM 11 efforts to be put to sanitize equipment for in-person
10: 13AM 12 voting, is that true? I'm showing you here on page 4.

10: 13AM 13 A. Yes.

10: 13AM 14 Q. There's also a discussion of locating --
10: 13AM 15 locations and how some locations will be unavailable; is
10: 13AM 16 that true?

10: 13AM 17 A. That's true, yes.

10: 13AM 18 Q. And then it mentions here on page 7, quote,
10: 13AM 19 "Because there may be a higher volume of ballot-by-mail
10: 14AM 20 requests in 2020, we strongly recommend that you review
10: 14AM 21 your current supply of applications, balloting materials
10: 14AM 22 and ballot stock for future elections. It is important
10: 14AM 23 you have necessary supply on hand to meet increased
10: 14AM 24 requests you may receive."

10: 14AM 25 Did I read that accurately?

10: 14AM 1 A. That is correct.

10: 14AM 2 Q. Would you describe this advisory as having sent
10: 14AM 3 a mixed message of how vote by mail would be handled?

10: 14AM 4 A. Well, yes.

10: 14AM 5 MS. MACKIN: Objection. Mischaracterizes
10: 14AM 6 the evidence.

10: 14AM 7 MR. DUNN: Let me see if I can clarify the
10: 14AM 8 question, Your Honor.

10: 14AM 9 Q. (BY MR. DUNN) Mr. Maxey, in your position as
10: 14AM 10 the election administrator in 40-plus counties and as
10: 14AM 11 the advisor to the remaining counties, are you able to
10: 14AM 12 get definitive direction from this advisory on how
10: 14AM 13 disability exemption should work with mail ballots?

10: 15AM 14 A. It is muddled at best in that it seems to say
10: 15AM 15 make sure you have supplies to deal with the COVID-19
10: 15AM 16 and that you have adequate mail ballot materials, but we
10: 15AM 17 don't know the volume of mail ballots because we don't
10: 15AM 18 know the definition of who can ask for a mail ballot in
10: 15AM 19 this current pandemic.

10: 15AM 20 It's a very different answer if everyone
10: 15AM 21 can ask for a mail ballot. The election administrators
10: 15AM 22 have a very different amount of supplies they will need
10: 15AM 23 versus the traditional number of only seniors and people
10: 15AM 24 out of the county and people with traditional
10: 15AM 25 disability.

1 Q. And, lastly, on this advisory Exhibit 1 -- now
2 I'm on page 3 where I'm pointing with the cursor -- it
3 says, "In these circumstances, you may want to consider
4 seeking a court order to authorize exceptions to the
5 voting procedures outlined in certain chapters of the
6 Texas Election Code for these voters," voters are
7 affected by the pandemic. What is your understanding of
8 that, if you have one?

9 A. My understanding is that 254 different election
10 administrators or county clerks are being invited by the
11 Secretary of State to get 254 different legal opinions
12 from courts in 254 different counties, and we're going
13 to have a mishmash of who can vote and who cannot vote
14 in this election by mail if we leave it up to 254
15 different courts.

16 Q. All right. And one final area of inquiry. Are
17 you aware of whether or not there are criminal offenses
18 provided for people who seek to vote by mail without
19 being authorized to do so?

20 A. There are not only criminal penalties, the
21 Attorney General has been very active in doing cases to
22 make a point that people who misunderstand the law can
23 go to jail for considerable sentencing, as we have seen
24 around the State of Texas.

25 Q. In the current state of affairs, what is your

1 belief on how voters can -- whether they can navigate
2 the disability exemption without fear of criminal or
3 civil penalties?

4 MS. MACKIN: Objection. Lack of
5 foundation.

6 THE COURT: I think this is calling for a
7 lay opinion in a matter that may fall within the realm
8 of lay opinion, although it certainly may call for
9 expert opinion as well. So I'm going to consider -- I'm
10 going to allow this witness to testify, recognizing that
11 he is of the experience and knowledge level that he
12 identified at the outset and in his declaration, and
13 that he is nothing other than those disclosures at this
14 point. Overrule the objection.

15 THE WITNESS: Mr. Dunn, could you restate
16 the question?

17 Q. (BY MR. DUNN) Yes, sir. Based as an election
18 administrator for 40-plus counties and the primary
19 director of the Democratic Party, what is your opinion
20 as to whether voters can navigate this guidance and know
21 whether or not they can request a ballot by mail under
22 the age of 65 for social distancing and not face a
23 criminal or civil penalty?

24 A. Well, I think at this point, voters are unclear
25 whether or not if they're between 18 and 65 they can ask

1 for a mail ballot. And with the history of prosecutions
2 of people who have mistakenly misunderstood the law and
3 ended up with eight-year sentences in specific cases
4 that I'm aware of, that voters are very unclear of what
5 they can and can't do. Because under the current
6 guidance of the Secretary of State, 254 different county
7 clerks are going to make interpretations of the
8 disability statute.

9 Some are going to encourage people who are
10 18 to 65 who are social distancing to be able to vote.
11 Others might say that they don't believe that they can,
12 and we're going to have different people using different
13 guidance and then different prosecutors making different
14 opinions about whether somebody can be prosecuted or
15 not, so I think this is a total muddled mess.

16 Q. So other than the criminal and civil potential
17 penalties to voters, what are the potential outcomes
18 after the election under the current circumstance?

19 MS. MACKIN: Objection. Calls for
20 speculation.

21 THE COURT: I think that the Court can
22 envision circumstances, and perhaps what may occur is
23 that some ballots may be rejected and that some may not
24 and that that can lead to additional legal challenges,
25 either by the purported voter or against the purported

10: 20AM 1 voter, that that can potentially lead to criminal
10: 20AM 2 prosecutions of the voter, that that can lead to
10: 20AM 3 potential litigation in the nature of election contests
10: 20AM 4 by the candidates and any number of those matters. So
10: 21AM 5 I'm not sure that I need that in the way of testimony,
10: 21AM 6 but I certainly can allow a little latitude if that's
10: 21AM 7 where you're going.

10: 21AM 8 MR. DUNN: That's fine, Your Honor. Then,
10: 21AM 9 I'll move on to one last part of this topic.

10: 21AM 10 Q. (BY MR. DUNN) With respect to the Democratic
10: 21AM 11 Party's nominations, there are a number of nominations
10: 21AM 12 that are subject to runoff elections that, under the
10: 21AM 13 Governor's order, would be held July 14th; is that true?

10: 21AM 14 A. That's true.

10: 21AM 15 Q. Do you know approximately for us the number of
10: 21AM 16 nominations or, you know, an estimate?

10: 21AM 17 A. It's probably in the number of about 50 to 60,
10: 21AM 18 I believe.

10: 21AM 19 Q. And is it fair to say there may be pockets
10: 21AM 20 where there are no runoffs, but these runoffs largely
10: 21AM 21 take place all around the State?

10: 21AM 22 A. There's a runoff in every county because the
10: 21AM 23 U.S. Senate and the Railroad Commission race are both in
10: 21AM 24 runoffs, and they are in all 254 counties.

10: 22AM 25 Q. If this is the condition come July that, as it

10: 22AM 1 is today, or that individuals have to, under the age of
10: 22AM 2 65, have to vote in person and risk contracting
10: 22AM 3 COVID-19, what is your opinion about the Democratic
10: 22AM 4 Party's confidence in those election outcomes to make
10: 22AM 5 nominations?

10: 22AM 6 A. Well, I think that under the current situation,
10: 22AM 7 my knowledge from county clerks is that few of them
10: 22AM 8 believe that they can have more than perhaps 20 percent
10: 22AM 9 of the traditional election workers actually willing to
10: 22AM 10 work in an election; that we will be having to
10: 22AM 11 consolidate precincts in a major way that will impede
10: 22AM 12 access to the ballot geographically for people all over
10: 22AM 13 the State; that people in rural counties are going to
10: 22AM 14 have to probably travel considerable distance, in the
10: 23AM 15 10- to 50-mile range to get to a polling place.

10: 23AM 16 And in the urban areas, consolidated into
10: 23AM 17 only a handful of voting centers, which means that the
10: 23AM 18 people who do go vote will face considerable wait times
10: 23AM 19 and lines, much like we saw on the news in Wisconsin
10: 23AM 20 when that happens. We will have that situation of
10: 23AM 21 in-person voting being collapsed into just a handful of
10: 23AM 22 voting centers that will be overrun. Social distancing
10: 23AM 23 will be not able to be practiced because of how many
10: 23AM 24 people are going to have to go to single locations just
10: 24AM 25 because there's not enough workers.

10: 24AM 1 So if there's not alternatives to relieve
10: 24AM 2 that, we're going to have an election in the Democrat
10: 24AM 3 primary in July, in my opinion, that's going to be
10: 24AM 4 untenable. It's going to actually cause people to not
10: 24AM 5 be able to cast a ballot.

10: 24AM 6 And the second piece of this is that the
10: 24AM 7 argument that's been made by the State that we can just
10: 24AM 8 wait until July 14th and see what's there is -- I mean,
10: 24AM 9 I'll use the analogy of growing up in Baytown, Texas,
10: 24AM 10 that often there were hurricanes off in the Gulf. And
10: 24AM 11 the emergency people would say, "You need to prepare to
10: 24AM 12 evacuate."

10: 24AM 13 The State of Texas' advice to us right now
10: 24AM 14 is wait until July 14th. Much like in a hurricane
10: 24AM 15 situation, it would be wait until the hurricane has hit
10: 25AM 16 the coast and see if it hit where you are, and at that
10: 25AM 17 point, then we'll make decisions.

10: 25AM 18 Well, in a hurricane, when it hits, the
10: 25AM 19 water is too high to evacuate. The roads are closed.
10: 25AM 20 People drown because they can't get out. And that's the
10: 25AM 21 same situation I think the Secretary of State and the
10: 25AM 22 Attorney General in these guidances or the State of
10: 25AM 23 Texas in their opinions about us just waiting until July
10: 25AM 24 14th -- you can't wait until July 14th and then make
10: 25AM 25 decisions that, oh, we need to do mail balloting.

10: 25AM 1 Because if a county now has to print, you know, 50,000
10: 25AM 2 mail ballots, they don't have time to do that. We can't
10: 25AM 3 wait until the July 2nd deadline for mail ballots and
10: 25AM 4 have 50,000 of them come in on the deadline and counties
10: 25AM 5 be able to do that.

10: 25AM 6 Their advice of see how many -- if you have
10: 26AM 7 enough applications or enough ballot materials on hand
10: 26AM 8 now, the county clerks don't know that unless we know
10: 26AM 9 now that people can vote by mail. So we're in a catch
10: 26AM 10 22 of epic proportions here.

10: 26AM 11 Q. And so one final question. On those election
10: 26AM 12 circumstances you described, were they to remain in
10: 26AM 13 place through July 14th and the election to take place
10: 26AM 14 as you've just described it, what confidence does that
10: 26AM 15 give you in the outcome of the Democratic nominations
10: 26AM 16 that are decided by runoffs? Were they democratic?

10: 26AM 17 A. They were not little D, democratic. If people
10: 26AM 18 don't have access to cast a meaningful ballot, if people
10: 26AM 19 are forced to travel long distances, stand in long lines
10: 26AM 20 because of consolidated polling places, know that when
10: 26AM 21 they get into a voting situation that they will put
10: 27AM 22 their health at risk could be deadly to them, all of
10: 27AM 23 those factors means that many people will decide that
10: 27AM 24 their right to vote, their ability to vote has been
10: 27AM 25 impeded by decisions of the State of Texas so that

10: 27AM 1 there's not a meaningful election and democracy is not
10: 27AM 2 served.

10: 27AM 3 MR. DUNN: Your Honor, we pass the witness.

10: 27AM 4 THE COURT: All right. We are at a point
10: 27AM 5 where we might be well served to take a little recess.
10: 27AM 6 But at the same time, if you-all are comfortable
10: 27AM 7 proceeding on, if it's not going to be very lengthy, we
10: 27AM 8 could do that as well.

10: 27AM 9 Ms. Mackin and Mr. Maxey, you-all are the
10: 27AM 10 next up, I assume. Maybe I'm cutting out Mr. Gonzalez,
10: 27AM 11 but I think from the proposed order or the proposed
10: 27AM 12 schedule, agenda so to speak that you-all sent, that
10: 27AM 13 there was the thought following this direct examination,
10: 28AM 14 there would be cross-examination. So weigh in with
10: 28AM 15 whatever your preference is, whether to take a 15-minute
10: 28AM 16 recess here or wait a little longer before we do.

10: 28AM 17 MS. MACKIN: I have a few questions, and
10: 28AM 18 I'm ready to proceed now. I can also wait. No strong
10: 28AM 19 feelings.

10: 28AM 20 THE WITNESS: I can proceed.

10: 28AM 21 THE COURT: Let's do that then.

10: 28AM 22 Well, let me ask -- actually, I should ask
10: 28AM 23 probably ask the most important person in this whole
10: 28AM 24 proceeding, and that's Ms. Primeaux, our court reporter.
10: 28AM 25 She's -- her fingers have been working since we started

10: 28AM 1 almost without stop, and her mind has been involved
10: 28AM 2 deeply in all this.

10: 28AM 3 Ms. Primeaux, do you need or want to take a
10: 28AM 4 recess at this point?

10: 28AM 5 COURT REPORTER: No, Judge. I'm fine.

10: 28AM 6 THE COURT: You're a trooper. Thank you.
10: 28AM 7 Go ahead then, Counsel.

10: 29AM 8 MS. MACKIN: Thank you, Your Honor.

10: 29AM 9 CROSS-EXAMINATION

10: 29AM 10 BY MS. MACKIN:

10: 29AM 11 Q. Mr. Maxey, you're not a medical doctor, are
10: 29AM 12 you?

10: 29AM 13 A. No.

10: 29AM 14 Q. So you're not giving the Court an expert
10: 29AM 15 opinion on what conduct might or might not place a
10: 29AM 16 voters's health at risk in July of 2020, are you?

10: 29AM 17 A. I'm not, and neither, I guess, is the Governor
10: 29AM 18 or the Attorney General a doctor.

10: 29AM 19 MS. MACKIN: I'm going to object to the
10: 29AM 20 last part of the answer as nonresponsive.

10: 29AM 21 THE COURT: Sustained.

10: 29AM 22 Q. (BY MS. MACKIN) Are you giving the Court an
10: 29AM 23 expert opinion on what conduct might or might not place
10: 29AM 24 a voters's health at risk in November?

10: 29AM 25 A. I'm not giving a medical opinion, but I did --

10: 29AM 1 Q. Thank you. That was the only question I had.

10: 29AM 2 Are you aware that the Governor has
10: 29AM 3 postponed several elections and given local authorities
10: 29AM 4 the authority to postpone others?

10: 29AM 5 A. Yes.

10: 29AM 6 Q. And the Governor didn't wait until the dates
10: 29AM 7 those elections were scheduled to postpone them, did he?

10: 30AM 8 A. No.

10: 30AM 9 Q. You and Mr. Dunn spoke a little bit about the
10: 30AM 10 deadlines for completing ballot information, and your
10: 30AM 11 declaration addresses that as well. Those deadlines are
10: 30AM 12 set by the Texas Election Code, correct?

10: 30AM 13 A. Which deadlines?

10: 30AM 14 Q. The deadlines for preparing the content of
10: 30AM 15 ballots.

10: 30AM 16 A. Yes, before the election.

10: 30AM 17 Q. And the Secretary of State doesn't write the
10: 30AM 18 Election Code; the Legislature does, correct?

10: 30AM 19 A. Correct.

10: 30AM 20 Q. Do you know if there are any states to allow
10: 30AM 21 all eligible voters to vote by mail?

10: 30AM 22 A. Yes.

10: 30AM 23 Q. But not every state, right?

10: 30AM 24 A. Not every state.

10: 31AM 25 Q. So it would be fair to say that's the policy

10: 31AM 1 choice that's made by the state legislature?

10: 31AM 2 A. Yes.

10: 31AM 3 MS. MACKIN: Pass the witness.

10: 31AM 4 THE COURT: Any redirect examination,
10: 31AM 5 Mr. Dunn?

10: 31AM 6 MR. DUNN: No, Your Honor.

10: 31AM 7 THE COURT: Again, I just did glance over,
10: 31AM 8 gloss over. Anyone else that might feel they are
10: 31AM 9 entitled or wish to put questions to Mr. Maxey? Other
10: 31AM 10 Intervenors or Defendant, any questions for Mr. Maxey at
10: 31AM 11 this time?

10: 31AM 12 (No response.)

10: 31AM 13 THE COURT: All right. Thank you, then.
10: 31AM 14 We'll excuse Mr. Maxey and allow him to go about his
10: 31AM 15 business. And at this point in time, why don't we take
10: 31AM 16 a short recess. It looks like it's about 10:30 here by
10: 31AM 17 my watch. Why don't we resume at 10:45.

10: 31AM 18 (Recess 10:30 a.m. to 10:47 a.m.)

10: 47AM 19 THE COURT: The Court is now in session.

10: 47AM 20 All right. Thank you. We are back on
10: 47AM 21 record. I appreciate everyone's indulgences and
10: 47AM 22 understanding, forgiveness. I will remind, for the
10: 47AM 23 benefit of any who joined these proceedings after we
10: 47AM 24 began, that there are to be no audio or video recordings
10: 47AM 25 of any kind of this proceeding. There is an official

10: 47AM 1 record being made by my official court reporter, and
10: 47AM 2 should anyone need to be able to review these
10: 47AM 3 proceedings, that is a mechanism by which they will be
10: 47AM 4 officially preserved.

10: 48AM 5 That being said, I think we're ready to
10: 48AM 6 resume with the next witness, and my understanding is
10: 48AM 7 that the Plaintiffs or the Plaintiff-Intervenors have
10: 48AM 8 someone in the queue for that. You may proceed.

10: 48AM 9 MR. DUNN: Thank you, Your Honor.

10: 48AM 10 MR. SALDIVAR: I call Dr. Troisi, please.

10: 48AM 11 Doctor, can you please state your full name
10: 48AM 12 for the record?

10: 48AM 13 THE COURT: Hold on. Just a moment. I
10: 48AM 14 think I need to swear the witness. So if you will,
10: 48AM 15 please raise your right hand.

10: 48AM 16 DR. CATHERINE TROISI
10: 48AM 17 having been first duly sworn, testified as follows:
10: 48AM 18 Catherine Troisi

10: 48AM 19 THE COURT: All right. Dr. Troisi and
10: 48AM 20 Attorney Saldivar, you may proceed.

10: 48AM 21 DIRECT EXAMINATION

10: 48AM 22 BY MR. SALDIVAR:

10: 48AM 23 Q. Please state your name for the record.

10: 48AM 24 A. Catherine Lynn Troisi.

10: 48AM 25 Q. And, Dr. Troisi, can you tell us a little bit

10: 48AM 1 about your educational background for the Court's
10: 49AM 2 information?

10: 49AM 3 A. Yes. I have a bachelor's degree in chemistry
10: 49AM 4 in the University of Rochester in New York. I have a
10: 49AM 5 master's degree in biochemistry from Michigan State
10: 49AM 6 University and a Ph.D. in epidemiologic sciences from
10: 49AM 7 the University of Michigan.

10: 49AM 8 Q. Now, can you explain to us what is
10: 49AM 9 epidemiology?

10: 49AM 10 A. Yes. Epidemiology is the study of disease
10: 49AM 11 distribution, so who gets infected or afflicted; where,
10: 49AM 12 why, when, with the eye to prevent disease from
10: 49AM 13 occurring.

10: 49AM 14 Q. And it's my understanding that you are also in
10: 49AM 15 the department of virology at Baylor. Could you explain
10: 49AM 16 to the Court what virology is?

10: 49AM 17 A. Yes. Virology is the study of viruses.

10: 49AM 18 Q. Now, after your academic background and your
10: 49AM 19 education, where did you go work? Can you tell us about
10: 50AM 20 your work experience or academia?

10: 50AM 21 A. Yes. We moved to Houston, and I joined the
10: 50AM 22 Baylor College of Medicine in the Department of Virology
10: 50AM 23 and Epidemiology. And I was then promoted to the
10: 50AM 24 faculty. I was there for about 15 years and then I
10: 50AM 25 joined the University of Texas Health Science Center at

10: 50AM 1 Houston aka UT Health, School of Public Health.

10: 50AM 2 I was on the faculty there in disease
10: 50AM 3 control and biological sciences for seven years. I then
10: 50AM 4 wanted to see how public health was practiced rather
10: 50AM 5 than in academia, so I joined Houston Health Department
10: 50AM 6 for seven years again. I started as HIV-STD Bureau
10: 50AM 7 Chief. I was promoted to assistant director over
10: 50AM 8 communicable diseases and then was allowed to create my
10: 50AM 9 own position in office of public health practice.

10: 50AM 10 While I was at the health department, I did
10: 50AM 11 a lot of preparedness training for public health
10: 51AM 12 disasters. And one of the roles that I served was as
10: 51AM 13 incident commander, which is basically the top person in
10: 51AM 14 charge of the health department's response to the 2009
10: 51AM 15 H1-N1 influenza pandemic.

10: 51AM 16 Q. Now, we've heard the word -- go ahead.

10: 51AM 17 A. I'm sorry, I then returned to the School of
10: 51AM 18 Public Health in 2010.

10: 51AM 19 Q. And you're referring to the School of Public
10: 51AM 20 Health at the University of Texas, correct?

10: 51AM 21 A. Yes.

10: 51AM 22 Q. Now, we've heard the word "pandemic" used. Can
10: 51AM 23 you just explain to us what pandemic is and how it
10: 51AM 24 compares to, for example, an epidemic?

10: 51AM 25 A. Sure. An epidemic means that there are more

1 than the expected number of cases of a disease in a
2 limited geographic area. Pandemic means more than
3 expected number of cases of disease throughout basically
4 the whole world.

5 Q. Now, what is your current position or job?

6 A. I am an associate professor at UT Health School
7 of Public Health in the departments of management,
8 policy and community health practice, as well as
9 epidemiology, human genetics, and environmental
10 sciences. And I am a member of the Center for
11 Infectious Diseases, as well as having an adjunct
12 position at Baylor College of Medicine in the department
13 of molecular virology.

14 Because that's such a long title, I usually
15 am just called an infectious disease epidemiologist.

16 Q. Doctor, have you ever given testimony to any
17 governmental bodies or agencies; and if so, could you
18 give us a brief description of those?

19 A. Yes. In 2014 when there was a case of Ebola in
20 Dallas, I testified before the U.S. House of
21 Representatives Homeland Security Committee on whether
22 we were at risk of Ebola widely spreading in the United
23 States and about public health preparedness in general.

24 I did the same thing for the Texas
25 Legislature in Governor Perry's task force on

10: 53AM 1 preparedness, and I testified last year, 2019, before a
10: 53AM 2 committee on county affairs about syringe exchange
10: 53AM 3 programs.

10: 53AM 4 Q. And can you just tell me briefly what was the
10: 53AM 5 result of that Ebola pandemic? Did it affect us here in
10: 53AM 6 the United States?

10: 53AM 7 A. Ebola was not a pandemic. It did not spread
10: 53AM 8 around the world. It was limited to parts of Africa, so
10: 53AM 9 it did not spread in the United States.

10: 53AM 10 Q. So is it fair to say that in your 40-year
10: 53AM 11 career in public health, it's been in the area of
10: 53AM 12 infectious disease epidemiology specializing in viruses?

10: 53AM 13 A. Yes.

10: 53AM 14 Q. Now, let's talk about the current virus that's
10: 53AM 15 at issue here that's been wreaking havoc. When did you
10: 53AM 16 first learn about the novel COVID-19, and how did you
10: 54AM 17 learn about it?

10: 54AM 18 A. Yeah, it was January 1st or 2nd of this year.
10: 54AM 19 The first cases were reported on December 31st in Wuhan.
10: 54AM 20 I subscribe to a Listserv called ProMED that every day
10: 54AM 21 has what's happening in the world in terms of outbreaks
10: 54AM 22 of disease, and so it would have been January 1st or 2nd
10: 54AM 23 that I read that.

10: 54AM 24 Q. Now, is it part of your job as an infectious
10: 54AM 25 disease epidemiologist to study, analyze, or review

10: 54AM 1 reports or information about viruses like the novel
10: 54AM 2 coronavirus?

10: 54AM 3 A. Yes, that's a major part of my job. And,
10: 54AM 4 indeed, I was particularly interested, not just because
10: 54AM 5 it was a virus, but because we've been talking about a
10: 54AM 6 pandemic for many decades, and this looked like it could
10: 54AM 7 be the one.

10: 54AM 8 Q. Now, could you tell us about -- what is this
10: 54AM 9 novel coronavirus, and what does it cause?

10: 54AM 10 A. This novel, new, coronavirus has never been
10: 55AM 11 seen in humans before. We are pretty sure it came from
10: 55AM 12 bats, through a pangolin animal, and it's a member of
10: 55AM 13 the coronavirus family.

10: 55AM 14 Some other members of that family are SARS
10: 55AM 15 and what's called MERS-CoV from Middle East Respiratory
10: 55AM 16 Syndrome. And then there are four other coronaviruses
10: 55AM 17 that circulate among humans, but just cause mild colds.
10: 55AM 18 This virus causes more significant disease. And it runs
10: 55AM 19 the gamut from no symptoms, and we're learning that
10: 55AM 20 maybe one in four people who are infected don't have any
10: 55AM 21 symptoms, and yet, can still transmit the disease up to
10: 55AM 22 death.

10: 55AM 23 And even if people survive the infection,
10: 55AM 24 they may have -- we're learning again about some
10: 55AM 25 sequelae that may happen; heart disease, neurologic

10: 55AM 1 damage. It's not a fun thing to have.

10: 56AM 2 Q. Now, we've heard the word or the phrase
10: 56AM 3 COVID-19 mentioned. Can you tell us what COVID-19 is?

10: 56AM 4 A. Yes. Technically, COVID-19 refers to the
10: 56AM 5 disease itself, and the virus is called SARS CoV-2
10: 56AM 6 because of its similarity to the original SARS, but it's
10: 56AM 7 often COVID-19 is used to refer to the virus as well.

10: 56AM 8 Q. And how did this victim transmit? How does the
10: 56AM 9 transmission of the virus occur?

10: 56AM 10 A. This is a respiratory virus, which means that
10: 56AM 11 it infects the respiratory system, as well as transmits
10: 56AM 12 that way. So there are two main ways it transmits: One
10: 56AM 13 is through the air. When somebody coughs or sneezes,
10: 56AM 14 sings, even talks, you produce droplets of little
10: 56AM 15 droplets of saliva. And if you're infected, there can
10: 56AM 16 be virus in those droplets.

10: 56AM 17 So if someone is close enough to breathe in
10: 56AM 18 those droplets, they can become infected. The other way
10: 56AM 19 that it's transmitted is through fomites, which is a
10: 57AM 20 fancy word for environmental surfaces. So if someone is
10: 57AM 21 infected, coughs on their hand, those droplets get on
10: 57AM 22 their hands, now they touch a doorknob. Somebody else
10: 57AM 23 comes along, touches that doorknob and then touches
10: 57AM 24 their eyes or their mouth or nose. The virus can get in
10: 57AM 25 that way as well.

1 Q. And who is susceptible to contracting this
2 virus?

3 A. Because this is a new virus that we've never
4 seen before in humans, nobody is immune to the virus.
5 That means that everybody is at risk of getting
6 infected, except for the very small proportion of people
7 who have been infected already and recovered from the
8 infection. But even in those cases, it's not clear
9 whether everybody becomes immune; that is, can't be
10 reinfected, and if they are immune, how long it lasts.

11 With other coronaviruses, that immunity
12 only lasts a year, two years. We're still -- you know,
13 since we're so close to the start of the pandemic, we're
14 still looking at that.

15 Q. And can a young person or a healthy person get
16 COVID-19?

17 A. Yes, definitely. And, in fact, about two out
18 of five people who are hospitalized with this virus,
19 meaning they have a very severe case, are between the
20 ages of 20 and 44.

21 Q. And can you describe to us what actually
22 happens once a person is infected? What does the virus
23 do to the human body?

24 A. Viruses cannot replicate by themselves, so they
25 have to attach to a cell in the human body, and they

10: 58AM 1 hijack that cell to make more viruses. So this virus
10: 58AM 2 attaches to cells in your upper respiratory tract, your
10: 59AM 3 nasal mucosal membranes, your mouth, your eyes, and
10: 59AM 4 replicates, makes more of itself, and then it can move
10: 59AM 5 down into your lower respiratory tract and infect your
10: 59AM 6 lungs.

10: 59AM 7 Q. So we're talking about, you know, body parts,
10: 59AM 8 respiratory pathways, lungs that every person has?

10: 59AM 9 A. Yes.

10: 59AM 10 Q. Can COVID-19 be remedied by a vaccine? Is
10: 59AM 11 there a vaccine for this?

10: 59AM 12 A. No. Unfortunately, we do not have a vaccine
10: 59AM 13 for this new virus.

10: 59AM 14 Q. How soon would we be able to get one, you
10: 59AM 15 think?

10: 59AM 16 A. Making a vaccine is a very long process. And
10: 59AM 17 there are a number of steps; but because you're giving
10: 59AM 18 vaccines to healthy people, we have to have very high
10: 59AM 19 standards about safety. And so the best estimates are
10: 59AM 20 at least 12 to 18 months. I've seen estimates saying
11: 00AM 21 ten years. And it really just depends on what happens
11: 00AM 22 during the development, but I will say that the fastest
11: 00AM 23 we have ever developed a vaccine is four years.

11: 00AM 24 Q. Is there any possibility that this virus can go
11: 00AM 25 away in the hot summer months, for example?

11: 00AM 1 A. The indications are that, no, it will not go
11: 00AM 2 away, and there's a couple of reasons for that. Some
11: 00AM 3 viruses have what we call seasonality; that is, they are
11: 00AM 4 more active in certain parts of the year.

11: 00AM 5 But if we look at this virus, this novel
11: 00AM 6 coronavirus' cousins, so to speak, SARS and MERS-CoV,
11: 00AM 7 they do not show seasonality; that is, they are around
11: 00AM 8 all year long. We don't have a vaccine yet. We will
11: 00AM 9 not for this summer, and so we will not have herd
11: 00AM 10 immunity; that is, enough people immune to the virus
11: 01AM 11 that transmission is unlikely to occur.

11: 01AM 12 We have also, because there are so many
11: 01AM 13 people that are susceptible, because, again, it's a new
11: 01AM 14 virus, nobody with those, you know, few people -- not
11: 01AM 15 few, but, you know, a low percent of people in the world
11: 01AM 16 who have been infected since it first appeared, there
11: 01AM 17 are -- there are a lot of people that can get infected,
11: 01AM 18 and so a wide pool of susceptible people.

11: 01AM 19 I will also say that in terms of the
11: 01AM 20 seasonality, when we look at other countries that have
11: 01AM 21 climates like ours -- like we have in the summer, but
11: 01AM 22 they have it right now, like Singapore, we have not seen
11: 01AM 23 any diminution of virus activity.

11: 01AM 24 Q. Now, in your expert opinion as an infectious
11: 01AM 25 disease epidemiologist, is this novel coronavirus likely

11: 02AM 1 to continue or be transmitted or spread in Texas through
11: 02AM 2 the summer months?

11: 02AM 3 A. Yes. In my expert opinion, it's highly likely
11: 02AM 4 for the reasons I mentioned that we will see continued
11: 02AM 5 spread through the summer.

11: 02AM 6 Q. So, as you can see from this court proceeding,
11: 02AM 7 we're all engaging in social distancing. Can you
11: 02AM 8 explain to us what social distancing is and what role
11: 02AM 9 does it play in controlling the spread of this virus?

11: 02AM 10 A. Social distancing, which is actually more
11: 02AM 11 correctly referred to as physical distancing, means that
11: 02AM 12 we do not have close contact with people other than
11: 02AM 13 those in our household. And because, as I said, the
11: 02AM 14 virus can only spread about six feet from one infected
11: 02AM 15 person, as long as we stay more than six feet from
11: 02AM 16 everybody else, it means we can't get infected through
11: 02AM 17 that route. You can still touch a doorknob. But that's
11: 03AM 18 the purpose of it, to flatten to curve; that is, the
11: 03AM 19 number of cases so as not to overwhelm our medical
11: 03AM 20 system and also to delay cases until we have better
11: 03AM 21 therapies and/or a vaccine.

11: 03AM 22 Q. Now, where does Texas fall in terms of social
11: 03AM 23 distancing and those measures?

11: 03AM 24 A. Texas first instituted the Executive Order from
11: 03AM 25 the Governor was on April 2nd. And it was the 34th

11: 03AM 1 state to institute social distancing. In terms of the
11: 03AM 2 severity of that distancing, you know, social distancing
11: 03AM 3 can range from virtual lockdown like we saw in Wuhan and
11: 03AM 4 Italy. We have not instituted that here in Texas.

11: 03AM 5 And so there are essential businesses that
11: 03AM 6 are still open where contact between non-household
11: 04AM 7 members can occur. So in terms of that continuum from
11: 04AM 8 nothing to very, very strict, again, like in China,
11: 04AM 9 we're probably someplace in the middle.

11: 04AM 10 Q. Now, if some measures of social distancing are
11: 04AM 11 relaxed or eased, how will that affect public health?

11: 04AM 12 A. There is great concern that social distancing
11: 04AM 13 guidelines will be relaxed before it will -- in a manner
11: 04AM 14 that will not help stop the spread of the virus. Right
11: 04AM 15 now, we are all isolated at least to some extent. But
11: 04AM 16 as soon -- the virus is still circulating; and as soon
11: 04AM 17 as we start having closer contact with non-household
11: 04AM 18 members, the opportunity for spread will certainly be
11: 04AM 19 there, and that will be the case until we have a
11: 04AM 20 vaccine.

11: 04AM 21 Q. And remind us again how long it takes to get a
11: 04AM 22 vaccine.

11: 04AM 23 A. At the very minimum, a year to 18 months; but
11: 05AM 24 in my expert opinion, probably longer than that.

11: 05AM 25 Q. Is there a risk that cities in Texas would be

11: 05AM 1 vulnerable to future waves or resurgences of COVID-19?

11: 05AM 2 A. Yes. Once social distancing guidelines are
11: 05AM 3 relaxed, I think, in my expert opinion, it's inevitable
11: 05AM 4 we will see a rise in cases. And for that reason, it's
11: 05AM 5 not going to be like a light switch where one day we're
11: 05AM 6 like this and tomorrow we're suddenly back to normal.
11: 05AM 7 There are going to be gradual lifting of those social
11: 05AM 8 distancing guidelines with public health monitoring very
11: 05AM 9 carefully what's happening. And if we see a rise in
11: 05AM 10 cases, some of those restrictions may go back into play.

11: 05AM 11 Indeed, in China right now, we are seeing a
11: 05AM 12 rise in cases as they lift those social distancing
11: 05AM 13 guidelines. And, as I mentioned, because nobody is
11: 06AM 14 immune, and because we do not have a vaccine, that's
11: 06AM 15 pretty predictable that this will happen. We'll see
11: 06AM 16 more cases once social distancing guidelines are lifted.

11: 06AM 17 Q. In your expert opinion, do you expect some
11: 06AM 18 level of social distancing measures to still be needed
11: 06AM 19 then to protect the public itself for a while; and if
11: 06AM 20 so, how long and why?

11: 06AM 21 A. Yes. In my expert opinion, I do think we're
11: 06AM 22 going to need social distancing guidelines for a while.
11: 06AM 23 And by that, I mean months. How long is difficult to
11: 06AM 24 predict because it's a new virus. However, you know,
11: 06AM 25 it's going to be months, because for all those reasons I

11: 06AM 1 said. As soon as we lift social distancing guidelines,
11: 06AM 2 we're going to see a surge in cases and so we need to
11: 06AM 3 have some mechanism in place to deal with that and we
11: 07AM 4 need to be monitoring the situation very carefully.

11: 07AM 5 Right now because we don't have enough testing --
11: 07AM 6 testing supplies, it's difficult for epidemiologists to
11: 07AM 7 truly understand what's happening in the community.

11: 07AM 8 Q. Thank you, Doctor. As you know, this case is a
11: 07AM 9 voting rights case, and elections are upcoming in July
11: 07AM 10 here in Texas. Are you familiar with polling locations
11: 07AM 11 where people gather to go vote?

11: 07AM 12 A. Yes. I have voted in every single election.

11: 07AM 13 Q. Could the novel coronavirus spread or transmit
11: 07AM 14 at a polling location where people gather to vote?

11: 07AM 15 A. Yes. In my expert opinion, there's two kinds
11: 07AM 16 of risks. One is through the air. You know, people
11: 07AM 17 have to come into the polls. You're interacting with
11: 07AM 18 other people, standing in line. When you sign your name
11: 07AM 19 on the voters registrar list, you are close to a poll
11: 07AM 20 worker. The polling stations are close together, and so
11: 07AM 21 there's possibility for spread there, as well as when
11: 08AM 22 people leave.

11: 08AM 23 The other way that the virus could be
11: 08AM 24 spread at a polling location is when -- if somebody is
11: 08AM 25 infected and has coughed into their hand, and then they

11: 08AM 1 touch that knob that you use to select your candidates,
11: 08AM 2 and you push enter, they can deposit virus on that
11: 08AM 3 fomite, that environmental surface, and then the next
11: 08AM 4 person coming in could touch it, get virus on their hand
11: 08AM 5 and touch their face, which we all do a lot, and
11: 08AM 6 inoculate themselves.

11: 08AM 7 Q. So, in your expert opinion, do voting locations
11: 08AM 8 or polling locations pose a special risk during this
11: 08AM 9 coronavirus pandemic?

11: 08AM 10 MR. ABRAMS: Objection. This witness
11: 08AM 11 hasn't been tendered as an expert on voting locations
11: 08AM 12 and hasn't established a foundation for an expertise in
11: 09AM 13 that regard.

11: 09AM 14 THE COURT: I'm sorry, I was not sure who
11: 09AM 15 was the speaker on that.

11: 09AM 16 MR. ABRAMS: This is Michael Abrams.

11: 09AM 17 THE COURT: I'm sorry. Thank you,
11: 09AM 18 Mr. Abrams.

11: 09AM 19 I overrule the objection. I note the
11: 09AM 20 weight to be given to it and the credibility to be
11: 09AM 21 assessed, but I am going to allow the testimony to
11: 09AM 22 proceed.

11: 09AM 23 THE WITNESS: Anyplace where people are
11: 09AM 24 less than six feet apart represent an opportunity for
11: 09AM 25 virus spread, so, yes, a polling place would offer that

11: 09AM 1 opportuni ty.

11: 09AM 2 Q. (BY MR. SALDIVAR) And who would be at risk for
11: 09AM 3 infection of the virus at a polling location where
11: 09AM 4 people would gather to vote?

11: 09AM 5 A. Anybody who has not already had the virus and
11: 09AM 6 recovered. Right now, we've had about a little over
11: 09AM 7 600,000 cases in the United States, and in Texas, about
11: 09AM 8 146,000 cases. That's a very small percent of the
11: 09AM 9 population. So that the majority of the population, the
11: 10AM 10 vast majority are going to be susceptible to this virus,
11: 10AM 11 and it's independent of age or anything else.

11: 10AM 12 Q. Would election workers or officials also be at
11: 10AM 13 risk?

11: 10AM 14 A. Yes.

11: 10AM 15 Q. And why?

11: 10AM 16 A. Again, they're probably actually at higher risk
11: 10AM 17 than the people coming into vote, because the people
11: 10AM 18 coming in to vote are only there for a certain amount of
11: 10AM 19 time. The election workers are there for a longer time
11: 10AM 20 and are exposed to a number of different people so that
11: 10AM 21 they're -- and also, as I said, we think that about one
11: 10AM 22 in four people who get infected do not show any symptoms
11: 10AM 23 and feel fine; therefore, it's not just that sick people
11: 10AM 24 should stay home. It's that somebody may feel fine,
11: 10AM 25 come to the polls, and yet, transmit the virus to

11: 10AM 1 somebody else.

11: 10AM 2 Q. Can the novel coronavirus that causes COVID-19
11: 10AM 3 spread through the mail, Doctor?

11: 11AM 4 A. There is no evidence at all that it can.
11: 11AM 5 Studies have shown -- have not looked at virus -- how
11: 11AM 6 long it lasts on paper, but on cardboard, we're talking
11: 11AM 7 an hour or so. And, you know, because of the time in
11: 11AM 8 the mail, the virus just would not be viable after a
11: 11AM 9 couple of days or indeed a couple of hours.

11: 11AM 10 Q. Now, in your expert opinion, if people had the
11: 11AM 11 option to vote by mail in addition to voting in person
11: 11AM 12 during the COVID-19 pandemic, would this help limit
11: 11AM 13 transmission of the virus and put people at risk for
11: 11AM 14 their health?

11: 11AM 15 A. While voting in person does represent a risk,
11: 11AM 16 voting by mail does not. And so, yes, voting by mail
11: 11AM 17 would protect the public health and public safety of
11: 11AM 18 Texans.

11: 11AM 19 Q. And in your expert opinion, if this virus will
11: 11AM 20 still be circulating during the voting season; namely,
11: 12AM 21 at least through July, would voting by mail be a safer
11: 12AM 22 option to protect the public's health, and can you tell
11: 12AM 23 us why?

11: 12AM 24 A. Yes. Because, as I said, anyplace where you
11: 12AM 25 are in contact with other people represents an

1 opportunity for an infected person to transmit the
2 virus, so that would be at polling places; whereas,
3 voting by mail, there is negligible, if any, risk of
4 transmission by mail.

5 MR. SALDIVAR: Thank you, Doctor. I pass
6 the witness.

7 THE COURT: Cross-examination, Mr. Abrams.

8 MR. ABRAMS: Thank you.

9 CROSS-EXAMINATION

10 BY MR. ABRAMS:

11 Q. Good morning, Dr. Troisi.

12 A. Good morning.

13 Q. I would like to start with your discussion
14 about polling locations. And you stated in your
15 declaration that locations where people cannot maintain
16 physical distance represent a heightened danger for
17 COVID-19 transmission; do you recall that?

18 A. Yes.

19 Q. Have you reviewed any of the other declarations
20 submitted as part of this case?

21 A. No, I have not.

22 Q. So you wouldn't be aware that the Harris County
23 elections administrator testified that by consolidating
24 to larger locations, it will enable appropriate social
25 distancing?

11: 13AM 1 A. I have not, but if you have fewer locations,
11: 13AM 2 then there would be more people there and more
11: 13AM 3 opportunity for transmission.

11: 13AM 4 Q. Doctor, my question would be do you agree that
11: 13AM 5 election officials can practice appropriate social
11: 13AM 6 distancing for elections?

11: 13AM 7 A. I -- my -- my expert opinion, based on my
11: 13AM 8 experience at voting locations, is no. It's very
11: 13AM 9 difficult to maintain, as we're finding, aren't we, in
11: 13AM 10 grocery stores, in drug stores, et cetera? It's very
11: 13AM 11 difficult to maintain that six feet distance, and if you
11: 13AM 12 have a lot of people who are lined up to vote, that line
11: 13AM 13 could go on for, you know, blocks and blocks and blocks.

11: 14AM 14 And adding to that is the issue that not
11: 14AM 15 everybody is as good at maintaining social distance. So
11: 14AM 16 what I see in my neighborhood when I go out walking is
11: 14AM 17 that some people are maintaining that six feet distance.
11: 14AM 18 Some people are not.

11: 14AM 19 Q. So you would disagree with the assessment of an
11: 14AM 20 elections administrator that they could maintain social
11: 14AM 21 distancing?

11: 14AM 22 A. I think it would be very hard to do that. As I
11: 14AM 23 mentioned, there are a lot of cases -- a lot of
11: 14AM 24 situations where virus transmission can occur. And
11: 14AM 25 then, unless you have someone wiping off with Lysol or

11: 14AM 1 Clorox the knob on the voting booth after every single
11: 14AM 2 voter, that's another opportunity for spread.

11: 14AM 3 Q. And you're aware that this case is focused in
11: 14AM 4 Travis County, correct?

11: 14AM 5 A. Yes.

11: 14AM 6 Q. Have you taken any actions to educate yourself
11: 14AM 7 about what precautions the Travis County election
11: 14AM 8 officials might take?

11: 14AM 9 A. No, I have not.

11: 15AM 10 Q. You note in your declaration that the models of
11: 15AM 11 the spread of COVID-19 are only as good as the
11: 15AM 12 assumptions that we put into them. Do you recall that?

11: 15AM 13 A. Yes.

11: 15AM 14 Q. Is it fair to say that we are still learning
11: 15AM 15 about COVID-19?

11: 15AM 16 A. Yes, very fair to say.

11: 15AM 17 Q. And when you reference those models in your
11: 15AM 18 report, or in your declaration, you didn't create any of
11: 15AM 19 those models, correct?

11: 15AM 20 A. No, I did not.

11: 15AM 21 Q. Okay. And so would it be fair to say that the
11: 15AM 22 models could be -- of projections of transmission of
11: 15AM 23 COVID-19 might be revised as we learn more about the
11: 15AM 24 spread of the virus?

11: 15AM 25 A. Yes. In fact, I believe the one from

11: 15AM 1 University of Washington is revised every couple of days
11: 15AM 2 as we learn more.

11: 15AM 3 Q. So and would you agree that there are different
11: 15AM 4 public health initiatives that are introduced as we
11: 15AM 5 learn more about the virus?

11: 15AM 6 A. Public health initiatives. Probably --

11: 16AM 7 Q. Well, let me rephrase that. Let me give one
11: 16AM 8 example.

11: 16AM 9 A. Okay.

11: 16AM 10 Q. Would you agree that for a period of time
11: 16AM 11 before, I believe last week, it was not recommended that
11: 16AM 12 individuals needed to wear masks in public, CDC did not
11: 16AM 13 recommend that?

11: 16AM 14 A. CDC did not recommend it, yes, that's correct.

11: 16AM 15 Q. And then that position changed as of a week ago
11: 16AM 16 approximately?

11: 16AM 17 A. Yes.

11: 16AM 18 Q. Okay.

11: 16AM 19 A. As you said, we're learning as we go.

11: 16AM 20 Q. And so if the public began widespread use of
11: 16AM 21 wearing masks in public, would that be something that
11: 16AM 22 the models would need to take -- potentially need to
11: 16AM 23 take into account with respect to projections for how
11: 16AM 24 COVID-19 would spread?

11: 16AM 25 A. Yes, but I have to --

11: 16AM 1 Q. Thank you. That was just my question.

11: 16AM 2 MR. SALDIVAR: Objection, Your Honor. I
11: 16AM 3 would ask counsel to allow the witness to let her finish
11: 16AM 4 her answer.

11: 16AM 5 THE COURT: I will allow you to redirect
11: 17AM 6 examination. He is entitled to control his own
11: 17AM 7 examination. Overruled.

11: 17AM 8 MR. ABRAMS: Thank you, Your Honor.

11: 17AM 9 Q. (BY MR. ABRAMS) One of the other witnesses in
11: 17AM 10 this case, Dr. Mitchell Carroll, testified that there
11: 17AM 11 could be statewide or localized outbreaks of the
11: 17AM 12 coronavirus. Do you agree with that?

11: 17AM 13 A. Yes. Although we are now seeing the virus
11: 17AM 14 spread throughout the state, and about three out of four
11: 17AM 15 counties in Texas have reported cases and I would expect
11: 17AM 16 that number to increase, I think it would be unlikely
11: 17AM 17 that any county would escape having at least some cases.

11: 17AM 18 Q. But that raises a point. Would you agree that
11: 17AM 19 at this moment there are some counties in Texas that
11: 17AM 20 have not reported a case, at this moment?

11: 17AM 21 A. I would agree they have not reported a case.
11: 17AM 22 It's a separate question of whether they have had a
11: 17AM 23 case.

11: 18AM 24 Q. But there have been no reported cases in at
11: 18AM 25 least some Texas counties, correct?

11: 18AM 1 A. Yes, that's correct.

11: 18AM 2 Q. So wouldn't it be true, then, that if there's a
11: 18AM 3 difference in the spread of the coronavirus in different
11: 18AM 4 counties, you might need to take localized approaches to
11: 18AM 5 handle that?

11: 18AM 6 A. Yes, and we don't stay within our county. We
11: 18AM 7 move around a lot. And so it would really be better to
11: 18AM 8 have a national strategy, because, again, anybody --
11: 18AM 9 even if we were able to control it in, say, Harris
11: 18AM 10 County, people from other counties in Texas, from other
11: 18AM 11 states come into the county. So unless you have a
11: 18AM 12 complete lockdown where you don't allow that, there's
11: 18AM 13 always the possibility of new cases, you know, of an
11: 18AM 14 infected person coming in and starting the spread again.

11: 18AM 15 Q. And Dr. Troisi, you had mentioned that the --
11: 18AM 16 you have a concern about the social distancing
11: 19AM 17 guidelines might be relaxed, correct? That was your
11: 19AM 18 testimony?

11: 19AM 19 A. Yes, yes.

11: 19AM 20 Q. Thank you. And that testimony that there might
11: 19AM 21 be gradual relaxation of distancing, that would be a
11: 19AM 22 policy decision, correct?

11: 19AM 23 A. With input from public health hopefully.

11: 19AM 24 Q. But it would ultimately be a decision of
11: 19AM 25 elected officials?

11: 19AM 1 A. Yes, yes.

11: 19AM 2 Q. Okay. Thank you. And that policy is still
11: 19AM 3 being developed on a day-to-day basis, right?

11: 19AM 4 A. So I understand, yes.

11: 19AM 5 Q. So we don't necessarily know what the policy in
11: 19AM 6 the state of Texas will be with respect to even two or
11: 19AM 7 three weeks from now; we've got to see as we go, right?

11: 19AM 8 A. Yes, but in all my preparedness training --

11: 19AM 9 Q. That was my question. Thank you. Your counsel
11: 19AM 10 can redirect you.

11: 19AM 11 You had indicated that someone going to
11: 19AM 12 polls in July or August would risk contracting COVID-19,
11: 19AM 13 correct?

11: 19AM 14 A. Yes.

11: 19AM 15 Q. And that would be, I believe you had mentioned,
11: 19AM 16 the risk of proximity to other people, correct?

11: 20AM 17 A. As well as touching environmental surfaces.

11: 20AM 18 Q. Right. And so I wanted to -- and you had also
11: 20AM 19 testified that some essential businesses in Texas are
11: 20AM 20 still open, correct?

11: 20AM 21 A. Yes.

11: 20AM 22 Q. And one of those would be grocery stores,
11: 20AM 23 right?

11: 20AM 24 A. Yes.

11: 20AM 25 Q. So if an individual goes to the grocery store

11: 20AM 1 and pays with a credit card, they could contract the
11: 20AM 2 virus because the infected person might have touched the
11: 20AM 3 number pad or the touch screen, right?

11: 20AM 4 A. Yes.

11: 20AM 5 Q. Or if you go to the gas station and pay at the
11: 20AM 6 pump, you could risk contracting the virus because an
11: 20AM 7 infected person might have touched the screen, right?

11: 20AM 8 A. Yes.

11: 20AM 9 Q. And at the grocery store, if you have people
11: 20AM 10 within six feet of you, you could contract the virus
11: 20AM 11 that way, correct?

11: 20AM 12 A. Correct.

11: 20AM 13 Q. And those businesses are still open, correct?

11: 20AM 14 A. Correct.

11: 20AM 15 Q. Okay. And those same -- the factors that you
11: 20AM 16 discussed, close proximity, touching surfaces, coughing
11: 21AM 17 and sneezing, are those also ways that something like
11: 21AM 18 the common cold would spread?

11: 21AM 19 A. Yes.

11: 21AM 20 Q. And that's also how the flu would spread,
11: 21AM 21 right?

11: 21AM 22 A. Yes.

11: 21AM 23 Q. Influenza?

11: 21AM 24 A. Yes.

11: 21AM 25 Q. To be more precise, yes.

1 So it could be that a person going to the
2 polls in July or August would be at risk of contracting
3 a common cold based on those same factors, right?

4 A. Yes, but people don't die from the common cold.

5 MR. ABRAMS: I'm going to object to the
6 last part as nonresponsive.

7 THE COURT: Overrule the objection. It
8 will go to the weight.

9 Q. (BY MR. ABRAMS) And it's also true that
10 someone going to the polls in July or August could
11 contract the influenza virus with a subsequent injury to
12 their health, correct?

13 A. The influenza virus does not circulate in the
14 summer to any great extent, so it would be highly
15 unlikely to contract influenza, and we have a vaccine
16 against -- a very effective vaccine against influenza.

17 Q. And so that's one way to mitigate the harms
18 caused by a virus, right, a vaccine?

19 A. Yes, through vaccination.

20 Q. There are ways to mitigate the risk of
21 contracting coronavirus, correct?

22 A. Yes, through social distancing and
23 environmental control.

24 Q. And potentially wearing a mask, right?

25 A. Potentially, but the studies are not there

11: 22AM 1 showing how effective they are.

11: 22AM 2 Q. And we can also practice social distancing in
11: 22AM 3 public locations that are open at the moment, right,
11: 22AM 4 like grocery stores?

11: 22AM 5 A. Yes.

11: 22AM 6 Q. And is it your testimony that no grocery stores
11: 22AM 7 are taking those appropriate precautions right now?

11: 22AM 8 A. I have not been in a grocery store since social
11: 22AM 9 distancing started, so I can't speak to that.

11: 22AM 10 Q. I wanted to address for a second, you had
11: 22AM 11 discussed the seasonality of the virus?

11: 23AM 12 A. Uh-huh.

11: 23AM 13 Q. And you testified, in your opinion, it's
11: 23AM 14 unlikely that we'll see a decrease in spread of
11: 23AM 15 coronavirus in the summer?

11: 23AM 16 A. Correct.

11: 23AM 17 Q. Would it be fair, though, to say that the
11: 23AM 18 seasonality of the virus is something that scientists
11: 23AM 19 are still studying at the moment?

11: 23AM 20 A. Yes, that's fair. But based on its cousins,
11: 23AM 21 SARS and MERS-CoV, that the best informed decision or
11: 23AM 22 opinion is that it will not exhibit seasonality.

11: 23AM 23 Q. But scientists haven't reached a uniform
11: 23AM 24 consensus on that, have they?

11: 23AM 25 A. We're not in summer yet, so we don't have an

11: 23AM 1 opportunity to see.

11: 23AM 2 Q. But that's a "no," correct?

11: 23AM 3 A. Correct.

11: 24AM 4 Q. Would you agree that it's common for polling
11: 24AM 5 places to limit the number of people who are inside at
11: 24AM 6 any time?

11: 24AM 7 A. The polling place I go to has done that when
11: 24AM 8 there are a lot of people, yes.

11: 24AM 9 Q. Are you aware of any logistical -- well, let me
11: 24AM 10 back up for a second. So if the people in line at the
11: 24AM 11 polling place stayed six feet apart, would that reduce
11: 24AM 12 the risk of spreading coronavirus in the line?

11: 24AM 13 A. It would reduce the risk in the line, but there
11: 24AM 14 are other places the virus can be spread.

11: 24AM 15 Q. And you have not discussed the means -- you
11: 24AM 16 have not discussed how -- with an election
11: 24AM 17 administrator, how they plan to conduct their elections
11: 25AM 18 in July, correct?

11: 25AM 19 A. Correct.

11: 25AM 20 Q. One last question, Dr. Troisi. You stated that
11: 25AM 21 voting by mail will be safer than voting in person.
11: 25AM 22 Relatively, wouldn't it be fair to say that that's
11: 25AM 23 always true; there's always some risk of contracting
11: 25AM 24 something if you're in person versus voting where you're
11: 25AM 25 just sending something out by mail?

11: 25AM 1 A. Yes, but weighing the risks of what, you know,
11: 25AM 2 a common cold versus this new virus plays into
11: 25AM 3 discussions of the safety of voting my mail versus at
11: 25AM 4 the polling place.

11: 25AM 5 MR. ABRAMS: We'll pass the witness.

11: 25AM 6 MR. SALDIVAR: Your Honor, if I may
11: 25AM 7 redirect.

11: 25AM 8 THE COURT: Yes, sir.

11: 25AM 9 MR. GRIGG: Your Honor, at some point, I do
11: 26AM 10 have some questions for the Plaintiff in this, but I'll
11: 26AM 11 certainly wait after Mr. Saldivar.

11: 26AM 12 THE COURT: Well, all right.

11: 26AM 13 THE WITNESS: Either way is fine.

11: 26AM 14 MR. SALDIVAR: Would you like me to
11: 26AM 15 proceed, Your Honor?

11: 26AM 16 THE COURT: Well, I guess I'm a little bit
11: 26AM 17 confused here on this.

11: 26AM 18 Mr. Saldivar, you called this witness, or
11: 26AM 19 you took this witness. I was under the assumption that
11: 26AM 20 that was a direct examination.

11: 26AM 21 MR. SALDIVAR: It is.

11: 26AM 22 THE COURT: But I'm now questioning that.
11: 26AM 23 So, Mr. Grigg, I'm not sure -- what you're saying, that
11: 26AM 24 you are, as the Plaintiff, desiring to make some -- ask
11: 26AM 25 some questions as well?

11: 26AM 1 MR. GRIGG: Yes, Your Honor. I had a few
11: 26AM 2 questions of this witness, and I don't mind going before
11: 26AM 3 or after Mr. Saldivar.

11: 26AM 4 THE COURT: Let's let you go, Mr. Grigg,
11: 26AM 5 because Mr. Saldivar is the proponent of the witness,
11: 26AM 6 and he would then be in a position to redirect with
11: 26AM 7 regard to anything that has been called into question.

11: 27AM 8 Go ahead, Mr. Grigg.

11: 27AM 9 MR. GRIGG: Thank you, Your Honor.

11: 27AM 10 CROSS-EXAMINATION

11: 27AM 11 BY MR. GRIGG:

11: 27AM 12 Q. Doctor, a few quick questions, if I may,
11: 27AM 13 please. You mentioned there are localized pockets where
11: 27AM 14 this disease is much more deadly and concentrated, such
11: 27AM 15 as New York, Seattle; is that correct?

11: 27AM 16 A. I'm not sure I mentioned that, but that is
11: 27AM 17 correct.

11: 27AM 18 Q. So in Dallas if there is an outbreak, having a
11: 27AM 19 shelter in place order, Houston and other parts of the
11: 27AM 20 state would not have such an order; is that correct?

11: 27AM 21 A. That is possible, yes.

11: 27AM 22 Q. So it would really eliminate a lot of voters
11: 27AM 23 being able to vote in Dallas, where, throughout the
11: 27AM 24 state, others could vote, correct, Doctor?

11: 27AM 25 A. Yes.

11: 27AM 1 MR. ABRAMS: Objection. Can the counsel
11: 27AM 2 rephrase the question? I'm not sure I understood what
11: 27AM 3 that question was.

11: 27AM 4 THE COURT: I'll overrule the objection.

11: 28AM 5 MR. GRIGG: Thank you, Doctor.

11: 28AM 6 Q. (BY MR. GRIGG) I want to make sure, you said
11: 28AM 7 that this disease can be spread by people who are
11: 28AM 8 positive for the virus but don't know that they have it?

11: 28AM 9 A. Yes.

11: 28AM 10 Q. If I understood what you said, the only people,
11: 28AM 11 until we have a vaccine, that will be immune are those
11: 28AM 12 that have had the disease and developed antibodies; is
11: 28AM 13 that true, Doctor?

11: 28AM 14 A. That is correct.

11: 28AM 15 Q. And which would be more effective in stopping
11: 28AM 16 the spread of this virus: To allow people who want to
11: 28AM 17 vote by mail to vote by mail or requiring them to go to
11: 28AM 18 a polling place?

11: 28AM 19 A. Because of the possibility of spread at a
11: 29AM 20 polling place -- and I mentioned I had a lot of
11: 29AM 21 preparedness training. You know, one of the things we
11: 29AM 22 say is hope for the best, but prepare for the worst.
11: 29AM 23 And because of that possibility in July, it would be
11: 29AM 24 safer and stop transmission of the virus to vote by
11: 29AM 25 mail.

11: 29AM 1 MR. GRIGG: No more questions, Your Honor.

11: 29AM 2 THE COURT: Mr. Saldivar.

11: 29AM 3 MR. SALDIVAR: Thank you, Your Honor.

11: 29AM 4 REDIRECT EXAMINATION

11: 29AM 5 BY MR. SALDIVAR:

11: 29AM 6 Q. Dr. Troisi, Counsel Abrams asked you about the
11: 29AM 7 common cold and the flu. Would it be improper to
11: 29AM 8 conflate the common flu -- I mean, the common cold and
11: 29AM 9 the flu with the novel coronavirus? And if so, why?
11: 29AM 10 What's the difference between them?

11: 29AM 11 A. Yes, it would be improper, and it has to do
11: 29AM 12 with the severity of disease and the number that die.
11: 29AM 13 Even though a number of people, and it ranges from year
11: 29AM 14 to year, die from seasonal influenza, this new
11: 30AM 15 coronavirus had -- kills about ten times -- that's --
11: 30AM 16 I'm sorry, I'm saying that wrong because not as many
11: 30AM 17 have been infected yet, but we talk about the case
11: 30AM 18 fatality rate; that is, the number of people who are
11: 30AM 19 infected who die.

11: 30AM 20 And the case fatality rate for influenza is
11: 30AM 21 about one-tenth of what it is with this new coronavirus,
11: 30AM 22 so it is a much more serious infection. And, as I
11: 30AM 23 mentioned, we do have a vaccine against flu so people
11: 30AM 24 can protect themselves.

11: 30AM 25 Q. Thank you, Doctor. Now, Counsel Abrams also

11: 30AM 1 asked you or mentioned that that the State could revise
11: 30AM 2 their social distancing measures and implement other
11: 30AM 3 orders in the future and that things could change in two
11: 30AM 4 to three weeks.

11: 30AM 5 In your expert opinion, are we in a
11: 30AM 6 position to risk the public health and wait two to three
11: 31AM 7 weeks for implementing something to protect the public?

11: 31AM 8 A. I'm sorry, could you rephrase that? I'm not
11: 31AM 9 sure I understand what you're asking.

11: 31AM 10 Q. Sure. In your expert opinion, if we wait two
11: 31AM 11 to three weeks to take measures to protect the public,
11: 31AM 12 would that be too late or could it be too late?

11: 31AM 13 A. Well, we're practicing some sort of social
11: 31AM 14 distancing right now. If you're asking are we going to
11: 31AM 15 be ready in two or three weeks to lift social distancing
11: 31AM 16 guidelines, from a public health standpoint, no, for a
11: 31AM 17 couple of reasons. One is we have not reached our peak
11: 31AM 18 number of cases; and, number two, because of the lack of
11: 31AM 19 testing, it's really supplies at this point, not so much
11: 31AM 20 tests. And because the tests themselves have a high
11: 31AM 21 percentage of false negatives; that is, people who truly
11: 32AM 22 have the disease, but test negative, it is too soon, in
11: 32AM 23 my expert opinion, to start lifting these social
11: 32AM 24 distancing guidelines.

11: 32AM 25 Q. Doctor, you also were asked about models or

11: 32AM 1 modeling. Can you explain to the Court what models and
11: 32AM 2 modeling are?

11: 32AM 3 A. Yeah. Models are mathematical methods to try
11: 32AM 4 to predict what's going to happen with something, and
11: 32AM 5 they're used in many different fields. So the models
11: 32AM 6 that are being used for SARS CoV-2 and COVID-19
11: 32AM 7 infection are really in place to look at demands on
11: 32AM 8 hospital beds and ICU beds and project deaths. But
11: 32AM 9 there's a lot of assumptions that go into them, and
11: 32AM 10 different models use different assumptions.

11: 32AM 11 And, in fact, the University of Washington
11: 32AM 12 model, which has been quoted a lot, uses a different
11: 33AM 13 method of prediction. They looked at the number of
11: 33AM 14 cases in China and what happened there and then used
11: 33AM 15 that information to predict what would happen in the
11: 33AM 16 United States based on the number of cases we see today.
11: 33AM 17 The issue with this is that in China they had very, very
11: 33AM 18 strict social distancing, really lockdown, which we do
11: 33AM 19 not have in the United States, so that possibility of
11: 33AM 20 the spread of the virus within communities in the United
11: 33AM 21 States just is much higher.

11: 33AM 22 So this University of Washington model is
11: 33AM 23 really a very optimistic one. They also talk about
11: 33AM 24 model -- I'm sorry, social distancing continuing until
11: 33AM 25 the end of May, and that's not a given. And they -- the

11: 33AM 1 big assumption also that I think may not be warranted is
11: 34AM 2 that they are assuming we have reached the peak number
11: 34AM 3 of cases. And while it is true that maybe Washington --
11: 34AM 4 Seattle has, that is not true for the country or many
11: 34AM 5 parts of the country.

11: 34AM 6 Q. And, Doctor, in addition to the University of
11: 34AM 7 Washington model, you've also taken a look at the model
11: 34AM 8 that was prepared by the University of Texas by
11: 34AM 9 Dr. Meyers, correct?

11: 34AM 10 A. Yes.

11: 34AM 11 Q. And what does that model tell us?

11: 34AM 12 A. So this model is making the assumption that
11: 34AM 13 school closures continue, which is reasonable, since
11: 34AM 14 we're nearing the end of the school year anyways, and
11: 34AM 15 that we have between 50 and 90 percent reduction in
11: 34AM 16 non-household contacts. And even if we have 90 percent
11: 34AM 17 reduction, which is quite high, they are still showing
11: 34AM 18 we will be seeing cases in July and August.

11: 34AM 19 Q. And, Doctor, is that model sort of consistent
11: 35AM 20 with your expert opinion of how long transmission of the
11: 35AM 21 novel coronavirus can last in Texas?

11: 35AM 22 A. Yes.

11: 35AM 23 Q. And just to be clear, your expert opinion as an
11: 35AM 24 infectious disease epidemiologist is not dependent on
11: 35AM 25 any of these models or forecasts or predictions,

11: 35AM 1 correct?

11: 35AM 2 A. Correct. I'm making my predictions based on my
11: 35AM 3 knowledge of viruses, my knowledge of epidemiology and
11: 35AM 4 my experience in 40 years in public health.

11: 35AM 5 MR. SALDIVAR: Thank you. No further
11: 35AM 6 questions.

11: 35AM 7 THE COURT: Mr. Abrams, did you have any
11: 35AM 8 cross-examination?

11: 35AM 9 MR. ABRAMS: Nothing further.

11: 35AM 10 THE COURT: Anything further for
11: 35AM 11 Dr. Troisi?

11: 35AM 12 MR. ABRAMS: No, Your Honor.

11: 35AM 13 THE COURT: Thank you, Doctor. Thank you
11: 35AM 14 very much for your testimony.

11: 35AM 15 THE WITNESS: Thank you, Your Honor.

11: 36AM 16 THE COURT: All right. So, next witness.

11: 36AM 17 MR. GRIGG: Your Honor, at this time, the
11: 36AM 18 Plaintiff would call Dr. Mitchell Carroll. And on the
11: 36AM 19 screen, he's identified as S. Jemente (phonetic). That
11: 36AM 20 is a computer, as a social distancing, he's borrowing,
11: 36AM 21 and we tried yesterday, but me being old and him being
11: 36AM 22 old, we could not change it. But I do represent, as an
11: 36AM 23 Officer of the Court, this is -- and there is his
11: 36AM 24 license -- this is Dr. Mitchell Carroll.

11: 36AM 25 THE WITNESS: Good morning.

11: 36AM 1 THE COURT: Dr. Carroll, if you would
11: 36AM 2 please raise your right hand for the oath.

11: 36AM 3 DR. MITCHELL CARROLL
11: 36AM 4 having been first duly sworn, testified as follows:

11: 36AM 5 THE COURT: Thank you.

11: 36AM 6 Mr. Grigg, you may proceed.

11: 36AM 7 MR. GRIGG: Thank you, Your Honor.

11: 36AM 8 DIRECT EXAMINATION

11: 36AM 9 BY MR. GRIGG:

11: 36AM 10 Q. Tell us your name please, sir.

11: 36AM 11 A. My name is James Mitchell Carroll.

11: 37AM 12 Q. And tell us how you are employed. What's your
11: 37AM 13 profession?

11: 37AM 14 A. I'm a physician specializing in internal
11: 37AM 15 medicine.

11: 37AM 16 Q. Are you board certified in internal medicine?

11: 37AM 17 A. Yes, I am.

11: 37AM 18 Q. You signed a declaration for the Court in this
11: 37AM 19 case, did you not?

11: 37AM 20 A. Yes, I did.

11: 37AM 21 Q. And that has already been admitted into
11: 37AM 22 evidence as Exhibit 6. So let me ask you just briefly,
11: 37AM 23 the qualifications that you have listed on there on your
11: 37AM 24 declaration, are they true and accurate?

11: 37AM 25 A. They are, sir.

11: 37AM 1 Q. Briefly tell the Court what your practice
11: 37AM 2 consists of.

11: 37AM 3 A. I do internal medicine, outpatient primary
11: 37AM 4 care. The vast majority of my patient population
11: 37AM 5 consists of seniors, mostly geriatrics-focused, so
11: 37AM 6 almost all of my patients are 65 years or older and are,
11: 37AM 7 therefore, considered high risk for this virus.

11: 37AM 8 Q. Tell the Court -- because he has to evaluate
11: 38AM 9 the weight to be placed on your opinions, tell the Court
11: 38AM 10 what you've done in your medical practice to prepare for
11: 38AM 11 coronavirus.

11: 38AM 12 A. In our office, we have been enforcing social
11: 38AM 13 distancing, masking and gloving for over a month.
11: 38AM 14 That's between me and my colleagues and other people in
11: 38AM 15 our hospital. And this predates any masking from CDC or
11: 38AM 16 any social distancing guidelines from the Texas state
11: 38AM 17 government. We've also been trying very hard to keep
11: 38AM 18 our patients out of the office, the assumption being
11: 38AM 19 that corona is in our office now. And if I bring a
11: 38AM 20 little old lady in to follow up on her diabetes, I have
11: 38AM 21 to assume that she could contract it at my office.
11: 38AM 22 Therefore, the risk of her having slightly less
11: 38AM 23 controlled diabetes is not as high as the risk of coming
11: 38AM 24 in and catching something that could kill her.

11: 38AM 25 So what we're doing is, unless we have no

11: 39AM 1 other choice, we're trying to do telemedicine for my
11: 39AM 2 patients.

11: 39AM 3 Q. What have you done in your medical practice
11: 39AM 4 that qualifies you to testify to this Court about the
11: 39AM 5 coronavirus?

11: 39AM 6 A. I've been taking care of a geriatric population
11: 39AM 7 for 19 or 20 years. And I've been reading everything I
11: 39AM 8 can get my hands on about this virus because it will
11: 39AM 9 kill my whole patient population. I joke with all my
11: 39AM 10 friends that the obituaries is this the first thing I
11: 39AM 11 read when I open up the paper because I just want to
11: 39AM 12 make sure I'm not missing a sympathy note on one of my
11: 39AM 13 patients. It's gallows humor, but I think the passion I
11: 39AM 14 have for taking care of my patients and the deep fear
11: 39AM 15 that I have for them has prompted me to really pay
11: 39AM 16 attention to the pandemic.

11: 39AM 17 Q. What have you done to pay attention and to
11: 39AM 18 learn about this pandemic?

11: 39AM 19 A. There are some articles that are cited in the
11: 39AM 20 statement that I made. Of course, I've read others
11: 39AM 21 since. I am detailed on webinars or bulletins from my
11: 40AM 22 health care system on almost a daily basis. There was
11: 40AM 23 another e-mail this morning detailing what happened in
11: 40AM 24 our health care system today. I did another webinar
11: 40AM 25 just yesterday. I'm trying to consume every bit of

11: 40AM 1 information that I can.

11: 40AM 2 Q. The opinions that you have given in your
11: 40AM 3 declaration, are those opinions based upon a reasonable
11: 40AM 4 medical probability?

11: 40AM 5 A. Yes.

11: 40AM 6 Q. And are there opinions that you have formed,
11: 40AM 7 not for this case, but in your medical practice?

11: 40AM 8 A. Yes.

11: 40AM 9 Q. And the same opinions you're giving this Court
11: 40AM 10 are those that you would give a patient that came to you
11: 40AM 11 for treatment?

11: 40AM 12 A. Yes.

11: 40AM 13 Q. You were able to listen to the testimony of
11: 40AM 14 Dr. Troisi, were you not?

11: 40AM 15 A. Yes, I was. I was --

11: 40AM 16 Q. I'm sorry?

11: 40AM 17 A. It was wonderful to listen to. I wish I could
11: 40AM 18 be that articulate. I'll try.

11: 40AM 19 Q. Well, because of some of the testimony from
11: 41AM 20 her, I'm going to shorten some of the opinions that
11: 41AM 21 you've rendered. But let me ask you, she mentioned that
11: 41AM 22 it's probably more dangerous for election officials in a
11: 41AM 23 polling place, as far as the spread of the virus is
11: 41AM 24 concerned, that it is for voters. What would you
11: 41AM 25 recommend to protect -- if people are going to vote in

11: 41AM 1 person, what would you recommend to protect these
11: 41AM 2 election officials?

11: 41AM 3 A. Oh, goodness, aside from not having to get near
11: 41AM 4 anybody to help with a pen or pencil. So just besides
11: 41AM 5 the social distancing, which is so impossible in a place
11: 41AM 6 like that, I would recommend they have the same personal
11: 41AM 7 protective equipment that I use in the office.

11: 41AM 8 When I have a patient that we suspect has
11: 41AM 9 come in and may be what we call "a person under
11: 41AM 10 investigation" or "a person of interest" for
11: 41AM 11 coronavirus, we don personal protective equipment, which
11: 41AM 12 includes a mask, preferably an N-95 mask, the really,
11: 42AM 13 really tight ones that are in short supply, a sort of
11: 42AM 14 splash sneeze-guard, which goes in front of your face,
11: 42AM 15 kind of a quick little shield that you look through, and
11: 42AM 16 then a gown which ties in the back, and then gloves.

11: 42AM 17 Q. And is this kind of equipment that you've
11: 42AM 18 described they would need for their personal protection,
11: 42AM 19 is it readily available?

11: 42AM 20 A. It is not.

11: 42AM 21 Q. Is it possible to, just looking at someone, to
11: 42AM 22 know if they are a carrier of the virus or not?

11: 42AM 23 A. No, sir.

11: 42AM 24 Q. What is the only way available to us right now
11: 42AM 25 to know if someone is a potential carrier and can spread

11: 42AM 1 the virus?

11: 42AM 2 A. The only way to know it are to do the nasal
11: 42AM 3 swab, which we've been hearing about, for a PCR test to
11: 42AM 4 look for the antigen for the virus, or if we think
11: 43AM 5 someone has contracted it, to confirm that with antibody
11: 43AM 6 testing.

11: 43AM 7 Q. All right. Are those tests readily available
11: 43AM 8 today?

11: 43AM 9 A. In certain clinical environments, they are
11: 43AM 10 getting more available. Generally speaking, no.

11: 43AM 11 Q. The fact that you cannot tell if a voter or
11: 43AM 12 someone has the virus and is capable of transmitting it,
11: 43AM 13 does that increase or decrease the danger of voting in
11: 43AM 14 closed spaces such as polling places?

11: 43AM 15 A. It increases it.

11: 43AM 16 Q. Now, you have heard Dr. Troisi testify that the
11: 43AM 17 only way to be immune from this virus is to have
11: 43AM 18 antibodies, and later, at some point, hopefully a
11: 44AM 19 vaccine. In your opinion, are there any other ways to
11: 44AM 20 be immune other than having antibodies until we have a
11: 44AM 21 vaccine?

11: 44AM 22 A. No, sir.

11: 44AM 23 Q. Let me ask you this. If a person is lacking
11: 44AM 24 immunity because there's no vaccine and they haven't had
11: 44AM 25 the virus and developed the antibodies, so if they're

11: 44AM 1 not immune -- I want to ask your professional opinion --
11: 44AM 2 is that lack of immunity a physical condition that would
11: 44AM 3 prevent them from appearing in a polling place without
11: 44AM 4 the likelihood of risking their health?

11: 44AM 5 A. Correct.

11: 44AM 6 MR. ABRAMS: Objection. Lack of foundation
11: 44AM 7 and improper legal conclusion.

11: 44AM 8 THE COURT: Overrule the objection.

11: 44AM 9 Q. (BY MR. GRIGG) And, Doctor, please understand
11: 45AM 10 all these questions I'm asking you are based upon you
11: 45AM 11 and your experience as a medical doctor, not any kind of
11: 45AM 12 legal conclusion. Do you understand that, Doctor?

11: 45AM 13 A. I do, yes, sir.

11: 45AM 14 Q. Now, based upon all the information, scientific
11: 45AM 15 and medical information that is available to us today,
11: 45AM 16 will there be a risk of this virus spreading in July?

11: 45AM 17 A. Yes, sir.

11: 45AM 18 Q. Doctor, medically speaking, in your opinion,
11: 45AM 19 will the danger of spreading this virus be increased by
11: 45AM 20 people voting in person at a polling station as opposed
11: 45AM 21 to by mail?

11: 45AM 22 A. Yes, sir.

11: 45AM 23 Q. Now, let me ask you, based on all the available
11: 45AM 24 scientific and medical information that is available to
11: 46AM 25 doctors today, will there still be the probability of

11: 46AM 1 spreading this virus in November?

11: 46AM 2 A. Yes, sir.

11: 46AM 3 Q. And why do you say that?

11: 46AM 4 A. Because we do not anticipate enough people will
11: 46AM 5 have become infected with it to develop herd immunity by
11: 46AM 6 that point, nor do we anticipate that the vaccine will
11: 46AM 7 have been invented that works at that point.

11: 46AM 8 Q. Well, people voting in enclosed polling places
11: 46AM 9 as opposed to people voting by mail, based on the best
11: 46AM 10 information we have today, will that increase the danger
11: 46AM 11 of spreading the virus?

11: 46AM 12 A. Yes, sir.

11: 46AM 13 Q. One final question. Speaking medically, as a
11: 46AM 14 doctor, is voting at a polling place, as opposed to by
11: 47AM 15 mail, is that medically a dangerous and unacceptable
11: 47AM 16 risk?

11: 47AM 17 A. Yes, sir.

11: 47AM 18 MR. GRIGG: Pass the witness.

11: 47AM 19 THE COURT: Cross-examination?

11: 47AM 20 MR. ABRAMS: Thank you, Your Honor.

11: 47AM 21 CROSS-EXAMINATION

11: 47AM 22 BY MR. ABRAMS:

11: 47AM 23 Q. Good morning, Dr. Carroll.

11: 47AM 24 A. Good morning, Mr. Abrams. How are you?

11: 47AM 25 Q. I'm good. Thank you.

11: 47AM 1 I want to go through some of your testimony
11: 47AM 2 and some of what you provided in your declaration. You
11: 47AM 3 stated in your declaration and today in your testimony
11: 47AM 4 that you've been keeping up with the scientific
11: 47AM 5 information in the medical community about coronavirus,
11: 47AM 6 correct?

11: 47AM 7 A. Yes.

11: 47AM 8 Q. And you also testified that you treat an older
11: 47AM 9 population of patients, correct?

11: 47AM 10 A. Uh-huh.

11: 47AM 11 Q. Have any of your patients -- or have you
11: 47AM 12 treated any patients with COVID-19?

11: 47AM 13 A. Yes, sir. One of my patients died this morning
11: 47AM 14 of it. Sorry.

11: 47AM 15 Q. No, no. How many other patients have you
11: 47AM 16 treated?

11: 47AM 17 A. Thus far, we've had -- he and his wife are my
11: 48AM 18 two confirmed.

11: 48AM 19 Q. Okay. None of the individual Plaintiffs in
11: 48AM 20 this case are your patients, though, correct?

11: 48AM 21 A. No, sir.

11: 48AM 22 Q. You had indicated that coronavirus is spread in
11: 48AM 23 enclosed spaces. You aren't offering an opinion in this
11: 48AM 24 case on the rate of spread of coronavirus, correct?

11: 48AM 25 A. The only information that I have is the similar

11: 48AM 1 information that Dr. Troisi presented. I'm not an
11: 48AM 2 epidemiologist myself. She would be the expert on the
11: 48AM 3 rate of spread.

11: 48AM 4 Q. Okay. Thank you. And you had also stated in
11: 48AM 5 your testimony that coronavirus would be a threat to the
11: 48AM 6 public in July and November, correct?

11: 48AM 7 A. Yes, sir, I did.

11: 48AM 8 Q. Is it -- and but in your expert report or in
11: 48AM 9 your report, you didn't indicate the specific level or
11: 48AM 10 degree of the threat, right?

11: 48AM 11 A. Correct.

11: 48AM 12 Q. So is it possible that the threat posed by
11: 48AM 13 coronavirus could be lower in July than it is today?

11: 48AM 14 A. I don't -- in all honesty, I don't think it's
11: 49AM 15 necessarily possible to answer that, because even if
11: 49AM 16 there's a lower activity rate, if social distancing is
11: 49AM 17 relaxed, it could reflare. So depending on our behavior
11: 49AM 18 with the information we know then, I think it could be
11: 49AM 19 just as dangerous. I don't -- (Inaudible Zoom audio.)

11: 49AM 20 COURT REPORTER: Sorry, Judge. Sorry, this
11: 49AM 21 is the court reporter. I'm so sorry. I lost the end of
11: 49AM 22 the last answer.

11: 49AM 23 THE WITNESS: Oh, sure. Was I talking too
11: 49AM 24 fast, or was it -- sure. Should I repeat?

11: 49AM 25 COURT REPORTER: Please. It was an audio

11: 49AM 1 difficulty situation.

11: 49AM 2 (The record was read back.)

11: 50AM 3 THE COURT: You may want to clarify or
11: 50AM 4 expand or say that's sufficient.

11: 50AM 5 THE WITNESS: Yes, Your Honor. Your audio
11: 50AM 6 was a little bit hinky on me too; but hearing the
11: 50AM 7 snippets, it sounds like a good summation of what I
11: 50AM 8 recall saying.

11: 50AM 9 THE COURT: All right.

11: 50AM 10 Q. (BY MR. ABRAMS) Dr. Carroll, so just to sort
11: 50AM 11 of go back to that, you're not specifying an opinion on
11: 51AM 12 the level of the threat to the public in July, correct?

11: 51AM 13 A. No, sir, except that just to say that if it
11: 51AM 14 persists, then it is in and of itself dangerous, but I
11: 51AM 15 cannot quantify it.

11: 51AM 16 Q. And you're not quantifying the risk in Travis
11: 51AM 17 County versus other counties in the State?

11: 51AM 18 A. No, sir.

11: 51AM 19 Q. And you're also not quantifying the risk in
11: 51AM 20 November, correct?

11: 51AM 21 A. No, sir, I'm not.

11: 51AM 22 Q. And in terms of the threat to public health,
11: 51AM 23 wouldn't one factor that would go into the degree of the
11: 51AM 24 threat be the success of the public health measures that
11: 51AM 25 the State has taken as they're being implemented?

11: 51AM 1 A. Yes.

11: 51AM 2 Q. So, for example, if more individuals are
11: 51AM 3 keeping appropriate distance, that could be one way that
11: 51AM 4 the threat is mitigated, right?

11: 52AM 5 A. That is one way. It's not the only way.

11: 52AM 6 Q. That's right. So an individual could also wear
11: 52AM 7 a mask, right, and that could potentially mitigate. If
11: 52AM 8 a wide portion of the population is wearing masks, that
11: 52AM 9 could result in mitigating the threat?

11: 52AM 10 A. We hope so, yes, sir.

11: 52AM 11 Q. And in your report, at least as I read it,
11: 52AM 12 Dr. Carroll, you didn't go into the specific ways that
11: 52AM 13 we can mitigate the threat; is that right?

11: 52AM 14 A. I did not -- I did not specifically articulate
11: 52AM 15 them. I think what Dr. Troisi said is very accurate,
11: 52AM 16 and I would just refer you back to her testimony or I
11: 52AM 17 could ape it for you because I think that it's correct.

11: 52AM 18 Q. Thank you. So, and you had testified in your
11: 52AM 19 declaration that the virus may not be nationwide or
11: 52AM 20 statewide, correct?

11: 52AM 21 A. I don't have the material in front of me
11: 52AM 22 because I didn't think I was supposed to bring any
11: 52AM 23 materials to look at. It's just me on my little TV
11: 52AM 24 tray.

11: 52AM 25 Q. Sure.

11: 52AM 1 A. But what I --

11: 52AM 2 Q. I can read the sentence for you if it would be
11: 53AM 3 helpful.

11: 53AM 4 A. Give me the context of it, please.

11: 53AM 5 Q. Sure. So you had said, "although the virus may
11: 53AM 6 be not nationwide or statewide, it can break out in
11: 53AM 7 localized pockets"?

11: 53AM 8 A. Yes, yes. And I think I intended that to be at
11: 53AM 9 this moment or at any moment.

11: 53AM 10 Q. Okay. And --

11: 53AM 11 A. I didn't have a time period on that. That's
11: 53AM 12 what I was confused about. Thank you.

11: 53AM 13 Q. And you had also cited in your declaration the
11: 53AM 14 materials that you reviewed for your testimony for
11: 53AM 15 preparing the declaration, correct?

11: 53AM 16 A. Yes. There have been more, but those are the
11: 53AM 17 ones that were listed.

11: 53AM 18 Q. Of the materials that you reviewed, were any of
11: 53AM 19 the materials specific to the coronavirus in the state
11: 53AM 20 of Texas?

11: 53AM 21 A. Oh, goodness, no, sir.

11: 53AM 22 Q. So, Dr. Carroll, based on your testimony that
11: 53AM 23 the virus may not be nationwide or statewide, as I
11: 53AM 24 understand it, that would mean that the coronavirus
11: 54AM 25 might not necessarily be present in every county in the

11: 54AM 1 state at any given time; is that a fair assessment?

11: 54AM 2 A. At any given time, any county may or may not
11: 54AM 3 have a case, with the caveat that we don't have the
11: 54AM 4 proper testing to confirm that there isn't a case in any
11: 54AM 5 given county.

11: 54AM 6 Q. And this case is focused specifically on Travis
11: 54AM 7 County. Have you done any particular research on the
11: 54AM 8 coronavirus in Travis County?

11: 54AM 9 A. No, sir, I have not.

11: 54AM 10 Q. You had also testified that, in your opinion,
11: 54AM 11 election workers should use a personal protection
11: 54AM 12 equipment similar to that used by hospital personnel.
11: 54AM 13 And you had said that there's an extreme shortage of
11: 54AM 14 that PPE at the moment, right?

11: 54AM 15 A. Yes, sir.

11: 54AM 16 Q. Is it possible that there could be more PPE
11: 54AM 17 available in July or by November?

11: 54AM 18 A. It's possible. May I expand on that a tiny
11: 55AM 19 bit? Is that okay?

11: 55AM 20 Q. Sure.

11: 55AM 21 A. The other concern which I didn't finish, I
11: 55AM 22 didn't articulate, when I wear that PPE, I wear it for a
11: 55AM 23 short amount of time. By the end of my wearing it for
11: 55AM 24 five to ten minutes, I'm pouring sweat and my glasses
11: 55AM 25 have fogged up, and it's intermittent wearing.

11: 55AM 1 My concern for election officials is that
11: 55AM 2 they would have to wear it for hours at a time and it
11: 55AM 3 might be physically impossible and it might be older
11: 55AM 4 too. Even if we do have the equipment, I don't know how
11: 55AM 5 well it could be used by the people that need it the
11: 55AM 6 most.

11: 55AM 7 Q. But, again, with respect to your testimony
11: 55AM 8 today, you don't know for certain what the level of PPE
11: 55AM 9 will be in July?

11: 55AM 10 A. I do not know for certain, that's correct,
11: 55AM 11 Mr. Abrams.

11: 55AM 12 Q. And you had stated in your direct testimony
11: 55AM 13 that your opinions are based on a reasonable medical
11: 55AM 14 probability. Can you quantify what that is for the
11: 56AM 15 Court?

11: 56AM 16 A. I cannot quantify, no, sir. It's a state of
11: 56AM 17 complete flux. As Dr. Troisi was saying, models are
11: 56AM 18 adjusted moment to moment. Every e-mail that I get
11: 56AM 19 that's updating me has new and conflicting information.
11: 56AM 20 We're doing the best that we can.

11: 56AM 21 Q. And to clarify, you're a medical doctor, you
11: 56AM 22 are not an epidemiologist?

11: 56AM 23 A. Correct.

11: 56AM 24 Q. And this case is obviously about elections.
11: 56AM 25 You are not an expert in election law or conducting

11: 56AM 1 elections in the State of Texas?

11: 56AM 2 A. No, sir, I'm not.

11: 56AM 3 MR. ABRAMS: We will pass the witness.

11: 56AM 4 THE WITNESS: Thank you.

11: 56AM 5 THE COURT: Any further questions for
11: 56AM 6 Dr. Carroll?

11: 56AM 7 MR. GRIGG: I have some, Your Honor, a
11: 56AM 8 couple.

11: 56AM 9 THE COURT: Please proceed.

11: 56AM 10 MR. GRIGG: Thank you.

11: 56AM 11 REDIRECT EXAMINATION

11: 56AM 12 BY MR. GRIGG:

11: 56AM 13 Q. One, when we talk about your opinions and
11: 56AM 14 medical certainty, have you based them all on what, in
11: 56AM 15 your opinion, is more likely than not to occur?

11: 57AM 16 A. Yes, sir.

11: 57AM 17 Q. And my boss pointed out to me that you may not
11: 57AM 18 have answered the question that the State objected to
11: 57AM 19 and the Judge overruled, so let me ask to make sure
11: 57AM 20 while we have it on the record.

11: 57AM 21 If a person lacks immunity; in other words,
11: 57AM 22 they haven't had the disease and the developed
11: 57AM 23 antibodies, and with there being no vaccine, is this
11: 57AM 24 lack of immunity a physical condition that would prevent
11: 57AM 25 that person from appearing in a polling place without

11: 57AM 1 the likelihood of them injuring their health?

11: 57AM 2 A. Yes, sir.

11: 57AM 3 MR. GRIGG: Thank you. No more questions,
11: 57AM 4 Your Honor.

11: 57AM 5 THE COURT: All right. May this witness be
11: 57AM 6 excused?

11: 57AM 7 THE WITNESS: Your Honor, thank you. Thank
11: 58AM 8 you to you-all. Stay safe and good luck with all of it.
11: 58AM 9 I enjoyed it.

11: 58AM 10 THE COURT: Thank you, sir, as well. We're
11: 58AM 11 near the lunch hour, and certainly we will be taking a
11: 58AM 12 break momentarily; but before anyone jumps off and
11: 58AM 13 perhaps doesn't return, I would like to have a
11: 58AM 14 confirmation or a representation from Dr. Troisi about
11: 58AM 15 the matters into November.

11: 58AM 16 She may have testified to them, but I would
11: 58AM 17 just like, while she's still here available, to ask of
11: 58AM 18 her what her assessments are, what her beliefs and
11: 58AM 19 opinions and projections based on the totality of
11: 58AM 20 everything that she has learned about this particular
11: 58AM 21 virus and the years of her experience, what the best
11: 58AM 22 prognosis or prognostication is with regard to the
11: 59AM 23 prospects for the COVID-19 to be a significant concern
11: 59AM 24 beyond the summer months into the fall months,
11: 59AM 25 specifically going into the November period of our

11: 59AM 1 general elections.

11: 59AM 2 DR. TROISI: Yes, sir. Even if the virus
11: 59AM 3 were to disappear this summer or it not be as active,
11: 59AM 4 and, as I said, I think that's unlikely, the risk of it
11: 59AM 5 reappearing in the fall is very, very high due to a
11: 59AM 6 number of reasons, which really has to do a lot with
11: 59AM 7 school children and people congregating more in the
11: 59AM 8 fall.

11: 59AM 9 Now, we don't know what's going to happen
11: 59AM 10 with schools in the fall. But should we not have social
11: 59AM 11 distancing in place, there's a very high probability, in
12: 00PM 12 my expert opinion, that we will see the virus in the
12: 00PM 13 fall. Until we have the vaccine, there's really not a
12: 00PM 14 whole lot -- and because we have so many susceptible
12: 00PM 15 people, you know, I hate to say this -- it's bad news --
12: 00PM 16 but the chances of successfully containing this virus
12: 00PM 17 are very small.

12: 00PM 18 THE COURT: Thank you, Doctor.

12: 00PM 19 Counsel, since I interjected those matters
12: 00PM 20 back in or interjected them for the first time, if you
12: 00PM 21 have any questions in that vein, you may ask them of the
12: 00PM 22 Doctor at this time.

12: 00PM 23 MR. GRIGG: I have none, Your Honor.

12: 00PM 24 RECROSS-EXAMINATION

12: 00PM 25 BY MR. ABRAMS:

12: 00PM 1 Q. Dr. Troisi, just a quick follow-up on that. It
12: 00PM 2 sounds like you had used the word prognostication and
12: 00PM 3 sort of the assumption. So am I just correct in
12: 00PM 4 interpreting, your answer is, it's still dependent on a
12: 01PM 5 lot of factors that of what will happen over the next
12: 01PM 6 five or six months?

12: 01PM 7 A. Yes, it's dependent on both the virus,
12: 01PM 8 characteristics of the virus, and human behavior.

12: 01PM 9 MR. ABRAMS: Thank you.

12: 01PM 10 MR. SALDIVAR: I have no further questions.

12: 01PM 11 THE COURT: All right. Thank you. We are
12: 01PM 12 at the lunch hour. And since we've concluded this
12: 01PM 13 witness, we should be taking a break, I would think,
12: 01PM 14 unless there's something of a relatively short nature
12: 01PM 15 that someone needs or wants to try to get on record
12: 01PM 16 before we would take a lunch recess. Is there anything
12: 01PM 17 of that nature?

12: 01PM 18 MR. DUNN: Your Honor, this is Chad Dunn.
12: 01PM 19 I think it makes sense to take a break. I thought I
12: 01PM 20 might preview what's to come in the afternoon so that we
12: 01PM 21 could prepare if the Court sees it differently.

12: 01PM 22 THE COURT: Please.

12: 01PM 23 MR. DUNN: In light of the admissions of
12: 01PM 24 exhibits, the conversation we had about declarations and
12: 01PM 25 the Court's comments about having reviewed the

12: 01PM 1 declarations, we were proposing to forego what we had
12: 02PM 2 put on our proposed schedule of having counsel summarize
12: 02PM 3 some of the declarations. And from at least TDP's
12: 02PM 4 standpoint, and I think also the Plaintiff-Intervenors,
12: 02PM 5 we called our last live witness. I think Travis County
12: 02PM 6 or Dana DeBeauvoir might be the remaining live witness;
12: 02PM 7 and then, from my standpoint, I think we're ready to
12: 02PM 8 move into closing arguments, unless the State has some
12: 02PM 9 evidence.

12: 02PM 10 THE COURT: Thank you for that. So, yes,
12: 02PM 11 the declarations are in evidence, part of the record,
12: 02PM 12 and have been reviewed. And certainly, in the event
12: 02PM 13 that there are portions that are particularly worth
12: 02PM 14 emphasis, that can be dealt with in your closing
12: 02PM 15 arguments respectively.

12: 02PM 16 So it sounds to me as though the Plaintiffs
12: 02PM 17 are at a somewhat of a conditional rest at this point in
12: 03PM 18 time and that the Intervenors and the Defendants would
12: 03PM 19 then be entitled to make their presentations after our
12: 03PM 20 recess.

12: 03PM 21 Is that accurate from what you were saying,
12: 03PM 22 Mr. Dunn, and is that the consensus of the others as to
12: 03PM 23 where we are?

12: 03PM 24 MR. DUNN: That is what I'm saying, Your
12: 03PM 25 Honor, with the caveat that we may be relying upon the

12: 03PM 1 testimony in full or in part of Dana DeBeauvoir, so we
12: 03PM 2 don't rest in full, but that is certainly the position
12: 03PM 3 the TDP is taking.

12: 03PM 4 MR. SALDIVAR: Your Honor, that's fine with
12: 03PM 5 us as well as the Plaintiff-Intervenors.

12: 03PM 6 MS. DIPPEL: For Defendant DeBeauvoir as
12: 03PM 7 well.

12: 03PM 8 MS. MACKIN: That's fine with the State, as
12: 03PM 9 long as we still get to argue our plea to the
12: 03PM 10 jurisdiction, which I anticipate we will towards the end
12: 03PM 11 of today.

12: 03PM 12 THE COURT: Well, I intend to and I hope to
12: 04PM 13 give everyone a full opportunity to make their record
12: 04PM 14 here and to give me all of the information that I need
12: 04PM 15 in order to make the best decision that I can based on
12: 04PM 16 the law and the facts. If where we are is that the last
12: 04PM 17 live witness is Ms. DeBeauvoir and that she has
12: 04PM 18 likewise, if I'm recalling correctly, filed a
12: 04PM 19 declaration that has been admitted into evidence, I
12: 04PM 20 guess the question is how long do we anticipate or
12: 04PM 21 estimate that she will be testifying, and is that
12: 04PM 22 something that can be completed for her benefit before
12: 04PM 23 the break or just go ahead and take the break and deal
12: 04PM 24 with it after we've had an hour or so to take a lunch?

12: 04PM 25 MS. DIPPEL: Your Honor, I think that would

12: 04PM 1 be my preference. My anticipation is that it would be
12: 04PM 2 very short, if any. We may also indeed decide to rely
12: 05PM 3 on the declaration, but we would like the lunch hour to
12: 05PM 4 make that decision.

12: 05PM 5 MR. SALDIVAR: And Your Honor --

12: 05PM 6 MS. DIPPEL: I'm sorry. And then, of
12: 05PM 7 course, Your Honor, there's still the issue of her
12: 05PM 8 request to align the early voting periods to address as
12: 05PM 9 well.

12: 05PM 10 THE COURT: Right. And that is something
12: 05PM 11 that is still in dispute. You-all have shared your
12: 05PM 12 perspectives and your requests and your positions, and
12: 05PM 13 you're still in a place where that's a live issue for me
12: 05PM 14 to speak to?

12: 05PM 15 MS. DIPPEL: It is something that needs
12: 05PM 16 your decision. We've exchanged draft agreed orders, and
12: 05PM 17 the parties were not able to agree to that order. There
12: 05PM 18 was only one formal opposition filed to that by the
12: 05PM 19 Plaintiff-Intervenors that I can address at that time.

12: 05PM 20 THE COURT: Okay. Can you foreshadow that
12: 05PM 21 for me, just generally very briefly as to what the
12: 05PM 22 disputed portion of the request is?

12: 06PM 23 MS. DIPPEL: Yes. I think it really hinges
12: 06PM 24 on a misunderstanding of what she is requesting. The
12: 06PM 25 County Clerk is not requesting to shorten the voting

12: 06PM 1 period, which I think there was a concern that that
12: 06PM 2 would increase and place more people into the voting
12: 06PM 3 period at one time. And what she is asking to do is
12: 06PM 4 align those two voting periods, because they overlap
12: 06PM 5 with one another, with a little part in the middle where
12: 06PM 6 they might come together at one point, so she's wanting
12: 06PM 7 to actually combine those into one period that would
12: 06PM 8 prevent voters from coming twice to the polls to vote in
12: 06PM 9 both of those elections, so it would actually decrease.

12: 06PM 10 THE COURT: And despite your efforts, you
12: 06PM 11 feel that that simply has not been properly understood?

12: 06PM 12 MS. DIPPEL: That's my understanding from
12: 06PM 13 the opposition. That was the only opposition that was
12: 06PM 14 filed by the Plaintiff-Intervenors, although no
12: 06PM 15 Plaintiffs were able to agree to the agreed order.

12: 07PM 16 MR. BUSER-CLANCY: Your Honor, this is
12: 07PM 17 Thomas Buser-Clancy for the Intervenor-Plaintiffs. It's
12: 07PM 18 our understanding that the request to align the voting
12: 07PM 19 periods would necessarily truncate one of the voting
12: 07PM 20 periods, and thus, result overall in a less period of
12: 07PM 21 time to vote in these special elections.

12: 07PM 22 And while we agree with the county
12: 07PM 23 regarding the underlying facts, we think that it merits
12: 07PM 24 the opposite result. Because it will be more dangerous
12: 07PM 25 for an individual to go to the polling place and for

12: 07PM 1 there to be larger crowds of individuals, we think that
12: 07PM 2 there needs to be a longer time in early voting, and
12: 07PM 3 that truncating the special election for early voting
12: 07PM 4 will actually increase the danger, and that's the --
12: 07PM 5 that's the basis for our opposition.

12: 07PM 6 THE COURT: And the State, where is the
12: 07PM 7 State on this?

12: 08PM 8 MS. MACKIN: Your Honor.

12: 08PM 9 MR. DUNN: I'm sorry, Your Honor, this is
12: 08PM 10 Chad Dunn. Go ahead.

12: 08PM 11 MS. MACKIN: The State takes no position on
12: 08PM 12 the proposed agreed order.

12: 08PM 13 THE COURT: All right. Mr. Dunn, you were
12: 08PM 14 going to say something?

12: 08PM 15 MR. DUNN: Yes, sir. Just saying that we
12: 08PM 16 had previously expressed to Travis County the same
12: 08PM 17 objection the Plaintiff-Intervenors have. And I would
12: 08PM 18 just add to what was already said about this, is that,
12: 08PM 19 you know, part of the issue here, at least speaking on
12: 08PM 20 behalf of my clients, if we're going to ultimately have
12: 08PM 21 what I call a survival of the fittest election where
12: 08PM 22 people have to go down and risk their public health to
12: 08PM 23 vote in person, then we're going to need as long as
12: 08PM 24 possible in early voting.

12: 08PM 25 And, you know, incidentally, this is

12: 08PM 1 normally a request we would try to work with and be
12: 08PM 2 collaborative on, and clarity on the vote-by-mail issue
12: 08PM 3 is absolutely critical to understanding this issue. And
12: 08PM 4 the final thing I would say about it is that the notion
12: 09PM 5 that we should -- I mean, this request, I've heard no
12: 09PM 6 argument would violate state law. I mean, state law
12: 09PM 7 provides for something different.

12: 09PM 8 So it's essentially a request, as the
12: 09PM 9 advisory, Mr. Maxey, testified to, that the county
12: 09PM 10 softened, weakened, forgave, whatever verb you want to
12: 09PM 11 use, state law. And the Democratic Party at least is
12: 09PM 12 willing to work on such measures, but on those measures,
12: 09PM 13 insofar as they address voter issues in total, and not
12: 09PM 14 just singular issues as they come up. So that's the
12: 09PM 15 nature of our opposition in addition as to the
12: 09PM 16 Plaintiff-Intervenors have stated.

12: 09PM 17 THE COURT: Well, I don't mean to serve as
12: 09PM 18 a mediator and I don't mean to invade settlement
12: 09PM 19 discussions that may have occurred, but a question that
12: 09PM 20 occurs to me as I hear you speak about this is, if I'm
12: 10PM 21 understanding the discrepancy sufficiently, would
12: 10PM 22 Ms. DeBeauvoir be willing, instead of moving that early
12: 10PM 23 voting period forward for the SD-14 race, would she be
12: 10PM 24 in any way amenable to moving that early voting period
12: 10PM 25 backwards or earlier, I guess I should say? Well, I'm

12: 10PM 1 getting it all confused. I'm sorry, I'm not being
12: 10PM 2 clear.

12: 10PM 3 What the County Clerk is asking for is a
12: 10PM 4 uniform period for early voting. And what I'm hearing
12: 10PM 5 here, it sounds like, is that the Plaintiffs or the
12: 10PM 6 Plaintiff-Intervenors say that shortening that period
12: 11PM 7 for early voting is a concern to them. And so is there
12: 11PM 8 a prospect that Ms. DeBeauvoir would agree to move that
12: 11PM 9 early voting period to an earlier time for both
12: 11PM 10 elections, if I haven't gotten it all balled up?

12: 11PM 11 And you don't have to tell me about
12: 11PM 12 attorney-client communications. You don't have to tell
12: 11PM 13 me about negotiations. You don't even have to tell me
12: 11PM 14 anything in that regard, but that's a question that, I'm
12: 11PM 15 wondering, would that in some way minimize one of the
12: 11PM 16 decisions that I might otherwise be asked to make?

12: 11PM 17 MS. DIPPEL: The concern with that, Your
12: 11PM 18 Honor, is that the statewide primary elections and the
12: 11PM 19 early voting periods for that is designated by statute,
12: 11PM 20 whereby the special election was designated by the
12: 11PM 21 Governor's order.

12: 11PM 22 THE COURT: But what I -- and I don't know
12: 11PM 23 that the State is the Governor. But we do have the
12: 12PM 24 Attorney General's Office here representing the State of
12: 12PM 25 Texas. And is there then the concern that even if the

12: 12PM 1 State has no opposition to moving it in that way, that
12: 12PM 2 there could be or that there's a probability that there
12: 12PM 3 would be some objection from some other corridor? Is
12: 12PM 4 that what's potentially involved in that?

12: 12PM 5 I'm not hearing any voices. I'm seeing
12: 12PM 6 that people have unmuted themselves, but I'm not hearing
12: 12PM 7 anything here on my end.

12: 12PM 8 MR. GONZALEZ: Just, Your Honor, from
12: 12PM 9 Plaintiff-Intervenors' perspective, we would support
12: 12PM 10 what you were talking about.

12: 13PM 11 THE COURT: Well, I understand. I think I
12: 13PM 12 understand that. But what I'm wondering is, if you-all
12: 13PM 13 are telling me, well, it's statutory or it's a conflict
12: 13PM 14 between a statutory requirement and a gubernatorial
12: 13PM 15 declaration/statute is in print and says what it says --
12: 13PM 16 gubernatorial order or declaration is in print and says
12: 13PM 17 what it says.

12: 13PM 18 Is there potentially a concern that one --
12: 13PM 19 that the Governor would take a separate position than
12: 13PM 20 that of the State, because the State is here and
12: 13PM 21 presumably the State is coming at this litigation from
12: 13PM 22 the standpoint of, we're trying to preserve statutory
12: 13PM 23 legislative pronouncements, but we don't have an
12: 13PM 24 objection to this as a possible way to go forward on
12: 14PM 25 behalf of the State of Texas.

12: 14PM 1 So is there something where there is a
12: 14PM 2 concern, and maybe this needs to be explored over the
12: 14PM 3 lunch break where the Governor might come and say, well,
12: 14PM 4 you have now violated my declaration, and I am objecting
12: 14PM 5 and I am contesting that kind of approach? Is that
12: 14PM 6 making any kind of sense or am I just getting it all
12: 14PM 7 balled up here for everybody?

12: 14PM 8 MR. BUSER-CLANCY: Your Honor, this is
12: 14PM 9 Thomas Buser-Clancy.

12: 14PM 10 THE COURT: I guess I'm talking to myself.
12: 14PM 11 Well, then, y'all talk amongst yourselves. We're going
12: 14PM 12 to take a lunch break, I guess. And when we come back,
12: 14PM 13 we may hear from Ms. DeBeauvoir, we may not; and if we
12: 14PM 14 do, we will do that. If we don't, then we will move
12: 14PM 15 into the summations on this or we may move into the plea
12: 15PM 16 to the jurisdiction aspects and then deal with a sort of
12: 15PM 17 a combined summation on all of those.

12: 15PM 18 So unless there's something else that
12: 15PM 19 you-all think might facilitate matters before we take
12: 15PM 20 our break, if there is, please let me know that now. If
12: 15PM 21 not, I'm proposing that we take an hour, and it looks
12: 15PM 22 like it's about 12:15, so that would mean about 1:15.

12: 15PM 23 MR. SALDIVAR: Your Honor, I do have one
12: 15PM 24 thing. May I excuse Dr. Troisi? She has a commitment
12: 15PM 25 with a student this afternoon.

12: 15PM 1 THE COURT: I certainly have no control
12: 15PM 2 over her. I mean, the others may or may not have
12: 15PM 3 something that they would have a problem with, but
12: 15PM 4 you-all have put your evidence on. And if you, as the
12: 15PM 5 proponent, are saying, I've got what I need, and if the
12: 16PM 6 others have had their opportunity to challenge, then I
12: 16PM 7 don't know any reason why she should need to remain.

12: 16PM 8 MR. GRIGG: Your Honor.

12: 16PM 9 THE COURT: I'm sorry?

12: 16PM 10 MR. GRIGG: I'm sorry, Your Honor.
12: 16PM 11 Plaintiff has no objection to her being excused.

12: 16PM 12 THE COURT: Well, thank you, Dr. Troisi.
12: 16PM 13 It's been very enlightening, and it's appreciated what
12: 16PM 14 you have to present to us for consideration and what
12: 16PM 15 you're doing to help us all get through these difficult
12: 16PM 16 situations.

12: 16PM 17 DR. TROISI: Thank you. I was just going
12: 16PM 18 to say if Mr. Saldivar could -- if I'm needed again, if
12: 16PM 19 he could text me, I could be available. I just won't be
12: 16PM 20 here round the clock.

12: 16PM 21 THE COURT: Well, thank you for that if
12: 16PM 22 there's something where we're needing your additional
12: 17PM 23 testimony. So what I'll do then is I'll ask our
12: 17PM 24 technology folks to post up a placard that we are in
12: 17PM 25 recess, and we will resume at 1:15. Thank you.

01: 16PM 1 (Lunch recess 12:17 p.m. to 1:19 p.m.)

01: 19PM 2 THE BAILIFF: Good afternoon. The
01: 19PM 3 afternoon session is about to start. The 353rd District
01: 19PM 4 Court Judge, the Honorable Tim Sulak, presiding.

01: 19PM 5 THE COURT: All right. Welcome back. We
01: 19PM 6 are back in session following the lunch recess. I hope
01: 19PM 7 that everyone had sufficient time to partake, and I
01: 19PM 8 trust that our court reporter is with us at this point
01: 19PM 9 and ready to resume.

01: 19PM 10 I will remind anyone who was not present
01: 19PM 11 for the preliminary announcements that our court
01: 19PM 12 reporter is the official record-keeper of these
01: 20PM 13 proceedings and that no audio and video recordings are
01: 20PM 14 permitted by anyone and that violation of those orders,
01: 20PM 15 as well as any of the orders that apply to this hearing,
01: 20PM 16 are subject to contempt of the Court.

01: 20PM 17 Where we left off was that the Plaintiffs
01: 20PM 18 had made something of a conditional rest, and unless
01: 20PM 19 that has changed over the recess, we'll then hear from
01: 20PM 20 the Counter-Petitioner/Defendant, Ms. Dana DeBeauvoir as
01: 20PM 21 the County Clerk of Travis County.

01: 20PM 22 So, Ms. Dippel, if you are ready to proceed
01: 20PM 23 in that regard, please do so.

01: 20PM 24 MS. DIPPEL: Thank you very much, Your
01: 20PM 25 Honor. I only want to just summarize for a moment.

01: 21PM 1 THE COURT: Please do.

01: 21PM 2 MS. DIPPEL: I'm sorry, we're going to rely
01: 21PM 3 on her declaration, as agreed by counsel, but I do want
01: 21PM 4 to highlight just a couple of points. The number one
01: 21PM 5 thing I want to emphasize is that Ms. DeBeauvoir's
01: 21PM 6 number one objective has been, and always is, to run an
01: 21PM 7 election that is efficient and compliant with the law
01: 21PM 8 and available to as many voters as possible. And that's
01: 21PM 9 a balance on any election, and it's an insurmountable
01: 21PM 10 one during these current extraordinary circumstances.

01: 21PM 11 The Secretary of State's advisory does
01: 21PM 12 provide some information. It raises the issue on this
01: 21PM 13 question of disability, but on that specific issue, it
01: 21PM 14 doesn't give guidance to election administrators on the
01: 21PM 15 obvious concerns that that issue raises. And now, like
01: 21PM 16 no other time, there's a need for consistency in the
01: 21PM 17 interpretation of the definition of disability across
01: 21PM 18 the state.

01: 22PM 19 And from the perspective of the County
01: 22PM 20 Clerk, she has several concerns that make that
01: 22PM 21 determination necessary.

01: 22PM 22 1. Without a court opinion on the
01: 22PM 23 definition of disability, and without guidance from any
01: 22PM 24 other source, it would result in county clerks
01: 22PM 25 interpreting 82.002 differently resulting in

01: 22PM 1 i n c o n s i s t e n c y .

01: 22PM 2 2. W i t h o u t t h a t d i r e c t i o n , i n d i v i d u a l
01: 22PM 3 v o t e r s a r e l e f t t o d e t e r m i n e f o r t h e m s e l v e s t h a t t h e y
01: 22PM 4 q u a l i f y , w h i c h c o u l d l e a d t o d e c r e a s e d v o t e r
01: 22PM 5 p a r t i c i p a t i o n . O n t h e f l i p s i d e , t h e y m a y c h o o s e t h e
01: 22PM 6 o t h e r w a y a n d a l l f l e e t o t h e p o l l s , w h e n t h e y m i g h t
01: 22PM 7 o t h e r w i s e q u a l i f y , b u t y e t , t h e y ' r e u n s u r e .

01: 22PM 8 3. A s s t a t e d i n h e r d e c l a r a t i o n , s h e
01: 22PM 9 c e r t a i n l y h a s c o n c e r n s f r o m v o t e r s f e e l i n g s a f e t o g o t o
01: 22PM 10 t h e i r p o l l i n g l o c a t i o n , b e i n g s a f e o n c e t h e y g e t t h e r e ,
01: 22PM 11 a n d p r o t e c t i n g t h e p o l l w o r k e r s a s w e g u a r d a g a i n s t
01: 22PM 12 t r a n s m i s s i o n f o r a l l o f t h e r e a s o n s t h a t w e h e a r d f r o m
01: 22PM 13 D r . T r o i s i a n d D r . C a r r o l l .

01: 23PM 14 A n d b a s e d o n h e r e x p e r i e n c e w i t h t h e
01: 23PM 15 M a r c h 4 t h p r i m a r y e l e c t i o n , t h e r e i s a l i k e l y s h o r t a g e
01: 23PM 16 o f e l e c t i o n w o r k e r s , c o m p o u n d i n g t h e p r o b l e m . M a n y w e r e
01: 23PM 17 c a l l i n g i n s i c k w i t h o u t n o t i c e . A n d y o u m i g h t r e m e m b e r
01: 23PM 18 t h e n e w s c o v e r a g e o f d e l a y e d o p e n i n g s b e c a u s e t h e r e j u s t
01: 23PM 19 s i m p l y w e r e n ' t e n o u g h w o r k e r s , a n d t h a t ' s b e f o r e w e k n e w
01: 23PM 20 w h a t t h e b e s t p r a c t i c e s a r e a n d t h e l o c a l l i m i t a t i o n s
01: 23PM 21 a n d o r d e r s o n s o c i a l d i s t a n c i n g .

01: 23PM 22 S o w e c e r t a i n l y e x p e c t , b a s e d o n
01: 23PM 23 e x p e r i e n c e , f o r t h a t t o c o n t i n u e . T o g e t h e r , a l l o f
01: 23PM 24 t h o s e f a c t o r s w i l l s u b s t a n t i a l l y r e d u c e t h e n u m b e r o f
01: 23PM 25 p e o p l e t h a t a r e a v a i l a b l e a n d w i l l i n g t o w o r k . A n d k e e p

01: 23PM 1 in mind, please, that the large majority of the poll
01: 23PM 2 workers and election workers are the very vulnerable
01: 23PM 3 population that we're hearing so much about and need to
01: 23PM 4 protect. And we heard about the measures that at least
01: 23PM 5 Dr. Carroll would recommend that might be difficult to
01: 23PM 6 obtain and ensure their safety.

01: 24PM 7 Finally, we simply do not know how long
01: 24PM 8 these limitation will remain in place. We heard from
01: 24PM 9 Dr. Troisi that it is quite possible there's a
01: 24PM 10 resurgence in November, through November in the general
01: 24PM 11 election, where that's a concern. So we need to know
01: 24PM 12 now, and we need to know what the arrangements are for
01: 24PM 13 the location of polling places right now because those
01: 24PM 14 preparations are already underway and need to be done.

01: 24PM 15 The preparations for ballot production is
01: 24PM 16 already in place, and all of those things are influenced
01: 24PM 17 by the number of people that may be eligible to vote by
01: 24PM 18 mail. In conclusion, without an order of the Court on
01: 24PM 19 what constitutes a disability that prevents the voter
01: 24PM 20 from appearing without injuring their health under
01: 24PM 21 882.002 has a consequence. Voters will not understand
01: 24PM 22 that they qualify. And we know the concerns with that,
01: 24PM 23 that they will either choose not to vote at all because
01: 25PM 24 they're unsure, or they will all decide not to take
01: 25PM 25 advantage of the exceptions that the law does provide

01: 25PM 1 them, and that compounds the problem of transmission.

01: 25PM 2 Finally, different jurisdictions will have
01: 25PM 3 different opinions on what constitutes a disability,
01: 25PM 4 placing election results in flux. Contests work their
01: 25PM 5 way through the courts, and we have to wait. And we
01: 25PM 6 don't know who the proper candidates are. We don't know
01: 25PM 7 the results of those elections, and we're right back in
01: 25PM 8 this same uncertain and chaotic spot during the general
01: 25PM 9 election.

01: 25PM 10 And moving that July date even farther
01: 25PM 11 back, which is a possibility, would not allow her to
01: 25PM 12 meet those deadlines in time for November. So a ruling
01: 25PM 13 from the Court on who qualifies for a mail-in ballot
01: 25PM 14 based on all of these factors on the disability will
01: 25PM 15 avoid these conflicts. And I wanted to highlight just
01: 25PM 16 those positions from Ms. DeBeauvoir taken from her
01: 25PM 17 declaration. Thank you.

01: 25PM 18 THE COURT: All right. Thank you. That
01: 25PM 19 seemed to me to be something of both an opening
01: 26PM 20 statement and a closing argument.

01: 26PM 21 MS. DIPPEL: That's right.

01: 26PM 22 THE COURT: But it was well stated and
01: 26PM 23 efficient in its presentation. I don't know whether or
01: 26PM 24 not there is any other party who wishes to weigh in, in
01: 26PM 25 support of or in opposition, to the clerk's

01: 26PM 1 counter-petition.

01: 26PM 2 We talked a little bit about it in sort of
01: 26PM 3 an informal exploratory way just before we took our
01: 26PM 4 lunch recess, and so perhaps there's been some
01: 26PM 5 reconsideration or some additional perspective that
01: 26PM 6 you-all wish to add at this time.

01: 26PM 7 Is there anything with respect to the
01: 26PM 8 Counter-Petitioner, Travis County Clerk Dana
01: 26PM 9 DeBeauvoir's, counter-petition that any of other parties
01: 27PM 10 wish to offer at this moment?

01: 27PM 11 MS. DIPPEL: Your Honor, if I may. I would
01: 27PM 12 like to point out a couple of things in addition to
01: 27PM 13 that, if we're going to address the motion to align, as
01: 27PM 14 well that may be helpful.

01: 27PM 15 THE COURT: Yes. If your motion to align
01: 27PM 16 is to try to bring into symmetry or coincide the dates
01: 27PM 17 for the early voting for the primary races as well as
01: 27PM 18 for the Senate District 14 race, is that what you're
01: 27PM 19 speaking of at this point?

01: 27PM 20 MS. DIPPEL: That's correct.

01: 27PM 21 THE COURT: Yes, then please do so.

01: 27PM 22 MS. DIPPEL: Thank you. Thank you.

01: 27PM 23 I thought it might be helpful to lay out a
01: 27PM 24 little bit of a timeline to let you know and kind of lay
01: 27PM 25 out how we got here. As Plaintiffs mentioned at the

01: 27PM 1 beginning of the hearing, all of this is based upon a
01: 27PM 2 need to reduce the demand on in-person voting for the
01: 27PM 3 voters and the election workers' health and safety.

01: 27PM 4 Defendant DeBeauvoir's Exhibit 2 is the Governor's
01: 28PM 5 Proclamation where he ordered the special election to
01: 28PM 6 fill the vacancy by Senator Watson's resignation.

01: 28PM 7 And in that proclamation, he set the period
01: 28PM 8 for early voting was to begin on June 29th. And by
01: 28PM 9 statute, that means it ends July 10th.

01: 28PM 10 So Senate District 14 special election
01: 28PM 11 early voting is June 29th through July 10th. Several
01: 28PM 12 days later, also due to COVID-19 concerns, he delayed
01: 28PM 13 the statewide primary runoff elections that were
01: 28PM 14 scheduled for May 26th. He postponed those until July
01: 28PM 15 14th, the same day as the Senate District 14 special
01: 28PM 16 election. And the period for early voting set by
01: 28PM 17 statute for the primary runoff elections runs from July
01: 28PM 18 6th through July 10th.

01: 28PM 19 So senate district special election, June
01: 28PM 20 29th through July 10th. Primary runoff, July 6th
01: 28PM 21 through July 10th. So, you see, there's an overlap. So
01: 29PM 22 that's how we got here today where there's a special
01: 29PM 23 election that has two weeks of early voting and a
01: 29PM 24 primary that has one with some overlap into that.

01: 29PM 25 We're focused on the Election Code Section

01: 29PM 1 85.001(d). And that states that, "If the cause of the
01: 29PM 2 date for which an election is ordered is not possible to
01: 29PM 3 begin early voting by personal appearance, the early
01: 29PM 4 voting shall begin on the earliest date practical after
01: 29PM 5 the prescribed date as set by the authority ordering the
01: 29PM 6 election, the County Clerk."

01: 29PM 7 So the County Clerk does not have the
01: 29PM 8 authority to extend it backwards, only forwards. So
01: 29PM 9 that's where we are in trying to align those two periods
01: 29PM 10 together. The different early voting periods for those
01: 29PM 11 elections create an unnecessary risk to the health and
01: 29PM 12 safety of the voters and the poll workers, first of
01: 29PM 13 which we all know about the risk of safety. We've spent
01: 29PM 14 a lot of time talking about that today, but I want to
01: 29PM 15 talk about the unique circumstance of those two voting
01: 30PM 16 periods overlapping with one another.

01: 30PM 17 If no action is taken to align them, what
01: 30PM 18 will happen is voters who come for that early week to
01: 30PM 19 vote in the Senate District 14 special election will
01: 30PM 20 only be allowed to receive a ballot for that election.
01: 30PM 21 Primary runoff hasn't started yet. So they should only
01: 30PM 22 get that vote. Will only be able to get a ballot for
01: 30PM 23 that special election.

01: 30PM 24 And then, if they want to vote in the
01: 30PM 25 primary election, they'll have to come back during that

01: 30PM 1 second week that the primary early voting is running.
01: 30PM 2 So we're going to double the amount of people or the
01: 30PM 3 opportunity to double the amount of people that will be
01: 30PM 4 coming out into the public and possibly transmitting to
01: 30PM 5 someone else or transmitting or contracting it
01: 30PM 6 themselves.

01: 30PM 7 Poll workers will have to require
01: 30PM 8 additional staff to work that extra voting period and
01: 30PM 9 extending their time, days and hours, and risk their
01: 30PM 10 additional exposure for all of the reasons we heard
01: 30PM 11 about this morning. And for those reasons, it's going
01: 31PM 12 to be critical to align those, not only for health and
01: 31PM 13 safety for both categories of people, but for the actual
01: 31PM 14 running of the election with the amount of staff that we
01: 31PM 15 know is going to be limited.

01: 31PM 16 These risks are unnecessary, and they're
01: 31PM 17 unnecessary to the degree that it is impossible under
01: 31PM 18 85.001(d). Because of all those risks, Ms. DeBeauvoir
01: 31PM 19 has determined that it is impossible to conduct an
01: 31PM 20 in-person early voting with those divergent and
01: 31PM 21 conflicting periods. And then, she's further determined
01: 31PM 22 that the practical alternative to reduce those risks is
01: 31PM 23 that early voting periods are set by the primaries for
01: 31PM 24 July 6th through July 10th.

01: 31PM 25 And this is not a new or novel idea to have

01: 31PM 1 those periods running during that time. If you'll look
01: 31PM 2 at Ms. DeBeauvoir's declaration -- it's Exhibit 5,
01: 32PM 3 paragraph 13 -- she relates that for every special
01: 32PM 4 election the Governor has set scheduled for July 14th,
01: 32PM 5 since he moved the primary runoffs to that date, he has
01: 32PM 6 specified that the early voting runs July 6th and ends
01: 32PM 7 on July 10th. That makes the most sense.

01: 32PM 8 The difference is that the Senate District
01: 32PM 9 14 special election is the only one that the Governor
01: 32PM 10 had ordered before the primary runoffs were moved. And
01: 32PM 11 it is the only one that has a different early voting
01: 32PM 12 period. Ms. DeBeauvoir's declaration, Exhibit 1, is the
01: 32PM 13 Secretary of State Advisory 14 that we spent some time
01: 32PM 14 talking about this morning. It recommends to election
01: 32PM 15 workers to seek court orders.

01: 32PM 16 So although there is that statute 85.001(d)
01: 32PM 17 that gives that authority to the County Clerk, the
01: 32PM 18 Secretary of State Advisory is recommending that court
01: 32PM 19 orders are obtained to help provide consistency. And
01: 33PM 20 finally, it's particularly important that the Court
01: 33PM 21 provide this guidance because the special election
01: 33PM 22 affects only Travis County and Bastrop County, and it's
01: 33PM 23 important that those procedures are consistent with
01: 33PM 24 both.

01: 33PM 25 Importantly, the election officials in

01: 33PM 1 Bastrop County and their attorney, the District
01: 33PM 2 Attorney, are in agreement with aligning those two
01: 33PM 3 periods and moving the early voting to July 6th through
01: 33PM 4 July 10th. I have his agreement, the District
01: 33PM 5 Attorney's agreement, and I have his signature on that
01: 33PM 6 proposed order that I can provide the Court, that I
01: 33PM 7 provided a draft of earlier.

01: 33PM 8 So for all of those reasons, that's why
01: 33PM 9 Ms. DeBeauvoir is here asking the Court to align those
01: 33PM 10 early voting periods from Senate District 14 special to
01: 33PM 11 the primary election, so that they run together to
01: 33PM 12 minimize the risk of having voters having to appear at
01: 33PM 13 the polling place twice and for that period to run July
01: 33PM 14 6th to July 10th. And the only county for whom that
01: 34PM 15 matters, Bastrop, agrees. Thank you.

01: 34PM 16 THE COURT: Thank you. So now I will
01: 34PM 17 invite and consider any statements of any parties in
01: 34PM 18 support or opposition to the request of the
01: 34PM 19 Counter-Petitioner.

01: 34PM 20 Anything from the Plaintiffs?

01: 34PM 21 MR. DUNN: Yes, sir, on behalf of the TDP
01: 34PM 22 Plaintiff parties. So, in response to the request from
01: 34PM 23 the county, I think it's helpful to analyze it as two
01: 34PM 24 different issues. One issue is whether or not to
01: 34PM 25 overlap the early voting period so that, as

01: 34PM 1 Ms. DeBeauvoir eloquently described, it's unnecessary
01: 34PM 2 for voters to return on two separate days, receive two
01: 34PM 3 separate ballots. It seems to me that's a hard request
01: 34PM 4 to oppose. I mean, it's perfectly reasonable, and I
01: 34PM 5 think it's supported by the evidence.

01: 34PM 6 The second issue, though, is more
01: 34PM 7 troublesome, and that is that whether or not it's for
01: 34PM 8 just one of those elections or for both of them, the
01: 35PM 9 amount of in-person voting available gets reduced. And
01: 35PM 10 we have no additional evidence to offer. We stand on
01: 35PM 11 the -- on this subject, we stand on the record that's
01: 35PM 12 been created. And we certainly don't argue with the
01: 35PM 13 notion that it is the case that there will be a
01: 35PM 14 difficulty finding enough staff to work in-person
01: 35PM 15 voting, that there will certainly be trouble finding
01: 35PM 16 locations, and all the other sort of issues that the
01: 35PM 17 clerk testified to in her declaration and that other
01: 35PM 18 witnesses have testified to in this case.

01: 35PM 19 We obviously offer our own evidence of
01: 35PM 20 that, but I think the larger point is when the Court
01: 35PM 21 balances the equities, as it enters an injunction, the
01: 35PM 22 evidence disfavors cutting down on in-person voting if
01: 35PM 23 it's the case that the vast majority of people under the
01: 35PM 24 age of 65 are required to go potentially harm their
01: 35PM 25 health and harm the health of others to vote in person.

01: 35PM 1 And that's why it's such a keystone issue
01: 36PM 2 to all of these matters. If we can reduce the demand,
01: 36PM 3 as the epidemiologist just testified, to in-person
01: 36PM 4 voting and people can avail themselves of the disability
01: 36PM 5 exception for vote-by-mail ballots, then I think it
01: 36PM 6 becomes a lot easier to solve this issue that Travis
01: 36PM 7 County has raised.

01: 36PM 8 But as it's presented here, as long as the
01: 36PM 9 State continues to oppose the interpretation of the
01: 36PM 10 vote-by-mail provision and interpretation of it as
01: 36PM 11 allowing voting under these circumstances, then there's
01: 36PM 12 obviously a controversy, and we think the evidence and
01: 36PM 13 the equities weigh against taking away from voters
01: 36PM 14 in-person voting opportunities, unless, as I said,
01: 36PM 15 they're allowed to vote by mail.

01: 36PM 16 So, unfortunately, I heard Your Honor's
01: 36PM 17 direction, and there was some communication during the
01: 36PM 18 break, but we have not been able to get there.

01: 36PM 19 THE COURT: All right. Thank you.

01: 36PM 20 So let me see if I'm clearly following you.
01: 37PM 21 If -- obviously, this is contingent -- but if I were to
01: 37PM 22 decide to order or to find that an injunction or a
01: 37PM 23 declaration, as requested by the Plaintiffs, was
01: 37PM 24 meritorious, and then if I were to also grant the
01: 37PM 25 alignment that the clerk is seeking, that would resolve

01: 37PM 1 or in large part alleviate any concerns that the
01: 37PM 2 Plaintiffs have?

01: 37PM 3 MR. DUNN: That would be true for the
01: 37PM 4 Democratic Party Plaintiffs, Your Honor.

01: 37PM 5 THE COURT: All right. Thank you. I
01: 37PM 6 thought that's what you were saying, but sometimes I
01: 37PM 7 need to say it out loud to make sure I'm getting it
01: 37PM 8 right. I've learned that around this household on
01: 37PM 9 occasion after many, many years.

01: 38PM 10 Yes, Intervenors, Plaintiff-Intervenors.

01: 38PM 11 MR. BUSER-CLANCY: Yes, Your Honor. If I
01: 38PM 12 may, Thomas Buser-Clancy. Your Honor, with respect to
01: 38PM 13 that, I think we agree with Mr. Dunn that the concern
01: 38PM 14 expressed by Ms. DeBeauvoir certainly highlight and
01: 38PM 15 animate the need for the ability to vote by mail. We
01: 38PM 16 would still have some concerns with a ruling that
01: 38PM 17 shortened the amount of time individuals could vote in
01: 38PM 18 person, as opposed to a ruling that elongated that time
01: 38PM 19 for the runoff election.

01: 38PM 20 That being said, we do agree that a
01: 38PM 21 decision that allowed everyone to vote by mail, and
01: 38PM 22 thus, reduced the strain put on in-person voting, would
01: 38PM 23 alleviate at least part of those concerns.

01: 38PM 24 THE COURT: All right. Thank you,
01: 38PM 25 Mr. Clancy. And if I'm also thinking about this in the

01: 38PM 1 context that you-all are articulating it, if -- again,
01: 39PM 2 the contingency being as I've previously said it -- were
01: 39PM 3 to be my determination and the petition for alignment of
01: 39PM 4 the clerk were granted, that would potentially eliminate
01: 39PM 5 a challenge as to the law being or the order being in
01: 39PM 6 violation of the statutory provisions, would it not?

01: 39PM 7 MR. DUNN: Your Honor, may I take a play
01: 39PM 8 from your playbook and restate your question and see if
01: 39PM 9 I got it correctly?

01: 39PM 10 THE COURT: Sure. Yeah, I didn't say it
01: 39PM 11 very well, and I appreciate it if you can improve on it.

01: 39PM 12 MR. DUNN: Well, I'm not sure of that. But
01: 39PM 13 what I'm hearing you say is, if you were to ultimately
01: 39PM 14 grant the relief requested on vote by mail and also
01: 39PM 15 grant the relief requested from Dana DeBeauvoir on the
01: 39PM 16 early voting periods, would that at least eliminate the
01: 40PM 17 Plaintiff and Plaintiff-Intervenors' ability to appeal
01: 40PM 18 or complain that the relief granted to Dana DeBeauvoir
01: 40PM 19 is in violation of state law?

01: 40PM 20 THE COURT: You, as well as the State of
01: 40PM 21 Texas?

01: 40PM 22 MR. DUNN: I think so, yes, Judge, offhand.
01: 40PM 23 I feel like I'm in law school a bit, but, yes, I think
01: 40PM 24 that's the answer.

01: 40PM 25 THE COURT: Okay. All right. Having heard

01: 40PM 1 from the --

01: 40PM 2 MR. BUSER-CLANCY: Your Honor, we agree
01: 40PM 3 with that.

01: 40PM 4 THE COURT: All right. Having heard from
01: 40PM 5 the Counter-Petitioner, the Plaintiffs, and the
01: 40PM 6 Plaintiff-Intervenors, is there something to be said
01: 40PM 7 from the perspective of the State with regard to the
01: 40PM 8 petition to align?

01: 40PM 9 MS. MACKIN: We do not have a position on
01: 40PM 10 the petition to align.

01: 40PM 11 THE COURT: All right. Thank you.

01: 40PM 12 Well, then, I think that moves us into the
01: 40PM 13 next matter in controversy or potentially in
01: 40PM 14 controversy. And if I'm keeping score correctly, that's
01: 41PM 15 the plea to the jurisdiction as requested or urged by
01: 41PM 16 the State. And so if that is, in fact, what's left,
01: 41PM 17 I'll hear from the proponent or the movant on that.

01: 41PM 18 MS. MACKIN: Thank you, Your Honor. No one
01: 41PM 19 disputes that the coronavirus has disrupted the daily
01: 41PM 20 lives of Texans and people across the world, but the
01: 41PM 21 current public health situation is rapidly evolving.
01: 41PM 22 Officials at all levels of government are responding in
01: 41PM 23 real time to this ever-changing situation, and there's no
01: 41PM 24 reason to believe that they will not continue to do so.

01: 41PM 25 So with that in mind, the Court lacks

1 jurisdiction for at least three reasons; first, the
2 Plaintiffs lack standing; second, the Plaintiffs' claims
3 are not ripe and may never ripen; and, finally, the
4 Plaintiffs ask the Court to conclude that the Election
5 Code's definition of disability should be read in a
6 manner that conflicts with the statutory text.

7 So starting with standing, the individual
8 Plaintiffs have not alleged a concrete and
9 particularized injury. Fear of the coronavirus is
10 understandable, but we simply don't know what the public
11 health situation will be in the upcoming elections. To
12 find their standing, Plaintiffs are effectively asking
13 the Court to speculate that coronavirus will pose a
14 severe public health crisis in Travis County in July and
15 November despite the fact that we heard testimony today
16 that we're still learning about this virus and that it
17 is difficult to predict how it will unfold.

18 They are also effectively asking the Court
19 to speculate that there will not be sufficient
20 developments in medical research and the availability of
21 social distancing measures to allow people to safely
22 visit a polling place, and the evidence just doesn't
23 support that. And they're finally asking the Court to
24 speculate that state officials will not continue to take
25 appropriate measures to protect public health in the

01: 43PM 1 election context despite the fact that state officials
01: 43PM 2 have done exactly that.

01: 43PM 3 So because the Plaintiffs have not shown
01: 43PM 4 any previous failure by either Travis County or the
01: 43PM 5 Texas Governor to appropriately address this evolving
01: 43PM 6 situation, we believe they don't have standing. In
01: 43PM 7 fact, the opposite is true. The government's recent --
01: 43PM 8 Governor, excuse me -- Governor's recent proclamation
01: 43PM 9 empowers local election officials to postpone the
01: 43PM 10 upcoming May elections. Travis County has postponed
01: 44PM 11 those elections.

01: 44PM 12 So the Plaintiffs's fear that coronavirus
01: 44PM 13 will make it impossible to vote in person in Travis
01: 44PM 14 County three to seven months from now assumes the worst
01: 44PM 15 potential outcome for the virus and assumes that
01: 44PM 16 government will not appropriately act to protect public
01: 44PM 17 safety, so this is, by definition, conjectural and not
01: 44PM 18 concrete. The Plaintiff organizations also lack
01: 44PM 19 standing for the reasons set forth in our briefing,
01: 44PM 20 which the Court is familiar, so I will not belabor the
01: 44PM 21 point, unless there are specific questions about that.

01: 44PM 22 But I will turn now to the ripeness issue.
01: 44PM 23 Even if any Plaintiff had standing, their claims are
01: 44PM 24 unripe and may never ripen, and this provides an
01: 44PM 25 independently sufficient basis to defeat the Court's

01: 44PM 1 jurisdiction. Ripeness, like standing, is a
01: 45PM 2 jurisdictional prerequisite to suit because courts are
01: 45PM 3 not empowered to reach legal conclusions based on
01: 45PM 4 hypothetical facts.

01: 45PM 5 The case is not ripe if it involves
01: 45PM 6 uncertain or contingent future events that may not occur
01: 45PM 7 as anticipated or may not occur at all. And the data
01: 45PM 8 and testimony presented today show that aspects of
01: 45PM 9 COVID-19's progression hasn't occurred as anticipated.
01: 45PM 10 According to Dr. Troisi, we're still learning about
01: 45PM 11 COVID, how it spreads, how to treat it.

01: 45PM 12 And we also know that Texas officials are
01: 45PM 13 empowered to modify election dates and procedures; for
01: 45PM 14 example, the Governor's power to suspend laws under the
01: 45PM 15 Texas Disaster Act, beginning at Government Code Section
01: 45PM 16 418.001, which he has acted pursuant to thus far. So
01: 46PM 17 there is no reason to believe that he wouldn't do so
01: 46PM 18 here, if it were necessary, to protect public health.

01: 46PM 19 In fact, since the March 13th disaster
01: 46PM 20 declaration, the Governor has issued numerous
01: 46PM 21 proclamations and suspended laws as necessary to protect
01: 46PM 22 public health and safety, both in the context of
01: 46PM 23 elections and in the various other machinery of the
01: 46PM 24 State.

01: 46PM 25 So, since it's undisputed that we don't

1 know exactly how coronavirus will progress, that the
2 Governor has the power to suspend laws where necessary
3 during a state of disaster and has done that, this case
4 is unripe because the events Plaintiffs anticipate may
5 not occur as expected and indeed might not occur at all.

6 And turning to the Plaintiff's argument
7 about statutory construction, which is sort of
8 predicated on Election Code Section 271.081, which
9 allowed courts to enjoin violations of the Election
10 Code. The Court doesn't have jurisdiction under this
11 provision because the Plaintiffs have not alleged any
12 violation of the Election Code. To the contrary, the
13 declaration that the Plaintiffs are seeking itself would
14 violate the Election Code.

15 The definition of disability at Election
16 Code Section 82.002(a) is clear: "A qualified voter is
17 eligible for early voting by mail if they have a
18 sickness or physical condition that prevents the voter
19 from appearing at the polling place without a likelihood
20 of needing personal assistance or injuring the voter's
21 health."

22 Looking to the plain language of that
23 statute, looking to the Oxford American Dictionary
24 definition of sickness, that is the state of being ill
25 or having a particular type of illness or disease. So a

1 person ill with COVID-19 would certainly qualify as
2 having a sickness, but a reasonable fear of contracting
3 the coronavirus, that's a normal reaction to the current
4 situation in which we all find ourselves, and it does
5 not by itself amount to a sickness sufficient to meet
6 the definition in 82.002(a).

7 The legislature also provided for someone
8 with a physical condition to vote by mail. Physical,
9 going back to the dictionary, is defined as "of or
10 relating to the body as opposed to the mind." And
11 "condition," an "illness or other medical problem."

12 So reading these together, a physical
13 condition is an illness or medical problem relating to
14 the body as opposed to the mind. So, here again, to the
15 extent that a fear of contracting COVID-19 without more
16 would be described as a condition, it would at most be
17 an emotional condition and not a physical condition as
18 required by the legislature to vote by mail.

19 I would like to revisit two Attorney
20 General opinions that Mr. Dunn mentioned in his opening
21 statement. The first is KP-0009, an Attorney General
22 opinion from 2015. That opinion, which of course does
23 not bind this Court, but is persuasive authority,
24 addressed whether the disability definition in the
25 Social Security Act was dispositive for purposes of

01: 50PM 1 disability under the Election Code.

01: 50PM 2 The Court concluded that, to be able to
01: 50PM 3 vote by mail, the only relevant definition is the
01: 50PM 4 definition of disability under Section 82.002. And that
01: 50PM 5 the standards of disability set in other unrelated
01: 50PM 6 statutes were not determinative. So I just wanted to
01: 50PM 7 make it clear on the record that that opinion did not
01: 50PM 8 hold -- did not opine, as was suggested earlier that
01: 50PM 9 there is no definition of disability. It's simply that
01: 50PM 10 the definition is what appears on the face of the
01: 50PM 11 statute.

01: 50PM 12 And the other Attorney General opinion in
01: 50PM 13 this realm, KP-0149, addressed whether individuals who
01: 50PM 14 were confined because they had been adjudicated by a
01: 51PM 15 court to be sexually violent qualified under the
01: 51PM 16 definition of disability. And that opinion predicted
01: 51PM 17 that a court would find someone who had been adjudicated
01: 51PM 18 sexually violent, had a disease of the mind, their mind
01: 51PM 19 was abnormal rendering them sexually violent. Again,
01: 51PM 20 that's distinct from the rational fear that most folks
01: 51PM 21 share of the ongoing pandemic.

01: 51PM 22 So to the extent that anyone has the
01: 51PM 23 authority to change this definition, it is the
01: 51PM 24 legislature or perhaps the Governor under emergency
01: 51PM 25 powers, but not the Court under the guise of enjoining

1 the violation of the Election Code because the
2 Plaintiffs haven't alleged one.

3 And I would like to come back to what the
4 Plaintiffs are actually asking the Court to do. If we
5 look at paragraph 22(a) of the original petition, it
6 requests a declaration that Election Code Section
7 82.002, and I'm quoting, "Allows any eligible voter,
8 regardless of age and physical condition to request,
9 receive, and have counted a mail-in ballot if they
10 believe they should practice social distancing in order
11 to hinder the known or unknown spread of a virus or
12 disease."

13 That eviscerates the Legislature's
14 definition of disability. It's not limited in terms of
15 the coronavirus pandemic. It, in fact, directly
16 contradicts the statute, regardless of physical
17 condition, whereas the definition itself requires a
18 disability or physical condition.

19 So, while I know the focus today has been
20 on the current pandemic, the request that's actually in
21 the pleadings is effectively limitless. The known or
22 unknown spread of a virus or disease. Viruses and
23 diseases spread all the time, and sometimes we don't
24 know about them. So I would respectfully urge the Court
25 not to allow this global crisis to be manipulated as a

01: 53PM 1 basis for rewriting a provision of the Election Code in
01: 53PM 2 a manner that is fundamentally inconsistent with its
01: 53PM 3 text. Doing so would fall outside any jurisdiction
01: 53PM 4 conferred by Election Code Section 271.081.

01: 53PM 5 Additionally, it is based upon allegations
01: 53PM 6 that are unripe and may never ripen and which Plaintiffs
01: 54PM 7 lack standing to bring besides. And if I can be helpful
01: 54PM 8 to the Court on any specific questions on our arguments
01: 54PM 9 or authorities, I would be happy to. Otherwise, I will
01: 54PM 10 yield.

01: 54PM 11 THE COURT: All right. Thank you very
01: 54PM 12 much. I appreciate that presentation. So is there
01: 54PM 13 something to be said by any parties in response to or
01: 54PM 14 defense of the request for a plea to the jurisdiction
01: 54PM 15 being granted in this matter?

01: 54PM 16 MR. DUNN: Yes, Your Honor. This is Chad
01: 54PM 17 Dunn on behalf of the Texas Democratic Party Plaintiff.
01: 54PM 18 I would like to be heard in argument in opposition.

01: 54PM 19 THE COURT: Yes, sir.

01: 54PM 20 MR. DUNN: There has been some discussion
01: 54PM 21 of Ms. Mackin of the merits of the interpretation of
01: 54PM 22 Section 82.002. I will hold that off for closing
01: 54PM 23 argument, unless the Court feels differently about it,
01: 55PM 24 and, instead, focus solely on the jurisdictional issues.

01: 55PM 25 Let me start with an overview. As I

01: 55PM 1 understand Ms. Mackin's comments and the State's briefs
01: 55PM 2 in this case, the position is essentially let's hope for
01: 55PM 3 the best against all the evidence. And if somehow we
01: 55PM 4 end up wrong, don't worry, the Governor can write the
01: 55PM 5 law for us and tell us how to handle our elections.
01: 55PM 6 That doesn't describe a state or nation of laws. That
01: 55PM 7 describes a state where an executive is laying down what
01: 55PM 8 it thinks ought to happen without regard to the
01: 55PM 9 policy-elected leaders in the legislature.

01: 55PM 10 That's why we brought this case in part,
01: 55PM 11 was to make sure that what the legislature lays down as
01: 55PM 12 the law is what is followed. But I do want to address
01: 55PM 13 for a second the notion that the Governor, at some point
01: 55PM 14 in time if this Court doesn't act or the higher court
01: 55PM 15 doesn't act, that the Governor can somehow issue an
01: 55PM 16 order, and if I may have leave again to share my screen,
01: 55PM 17 Your Honor.

01: 55PM 18 THE COURT: Certainly. I would ask that
01: 55PM 19 our technician allow that to occur. Thank you.

01: 56PM 20 MR. DUNN: I want to take the Court first
01: 56PM 21 to the Texas Constitution. I'm drawing it directly from
01: 56PM 22 the State's website. You can see in the URL this is
01: 56PM 23 Article I, The Bill of Rights, and I'll take you to
01: 56PM 24 Section 28 of the Texas Constitution, which explicitly
01: 56PM 25 says, and I quote, "Suspension of laws. No power of

01: 56PM 1 suspending laws in this state shall be exercised, except
01: 56PM 2 by the legislature."

01: 56PM 3 Now, the State claims that there is some
01: 56PM 4 statutory provision, Section 18.001 of the Government
01: 56PM 5 Code that allows the Governor to suspend some laws.
01: 56PM 6 Whether or not the statute provides for that, the
01: 56PM 7 Constitution clearly prohibits it. And it is true that
01: 56PM 8 the Governor has moved the election, including the
01: 56PM 9 election of the Texas Democratic Party, to July 14, and
01: 56PM 10 whether or not that is a lawful decision in the State
01: 56PM 11 Constitution isn't an issue the party has raised here or
01: 56PM 12 anyplace else as of yet.

01: 56PM 13 But there is -- there is an issue as to
01: 56PM 14 what the rules will be under the election as the
01: 57PM 15 Governor has purported to move it. And ultimately,
01: 57PM 16 turning to the condition of the Governor rewriting
01: 57PM 17 election provisions on the basis of what the medical
01: 57PM 18 condition is when they come, even if the Court were to
01: 57PM 19 review the state statutes that were cited by the State
01: 57PM 20 and confirm or believe, come to the conclusion that the
01: 57PM 21 Governor has some power to suspend laws, despite the
01: 57PM 22 State Constitution, even that power is circumspect --
01: 57PM 23 and there's one 30-day period that the Governor can
01: 57PM 24 arguably suspend laws, and it can be extended by one
01: 57PM 25 other 30-day period -- in either case, neither 30-day

01: 57PM 1 period will interact with the July 14th or November
01: 57PM 2 elections.

01: 57PM 3 So it is not the case that the Governor can
01: 57PM 4 issue some orders down the road without the parties and
01: 57PM 5 critical parties' consent and address the issues that
01: 57PM 6 the Court has heard evidence on here. And it also
01: 57PM 7 shouldn't be the case that elected executives can, by
01: 58PM 8 fiat, overrule duly elected laws, even in this state of
01: 58PM 9 crisis.

01: 58PM 10 Indeed, as people have varying degrees of
01: 58PM 11 panic and concern about their public health and the
01: 58PM 12 public health of their loved ones, the last thing they
01: 58PM 13 need is an upset in the basic powers of balance in the
01: 58PM 14 government. That I mentioned during opening. The
01: 58PM 15 legislature makes the laws, the executive executes those
01: 58PM 16 laws, and the courts tell us what those are when there
01: 58PM 17 is a dispute.

01: 58PM 18 Now, I would like to look at a few
01: 58PM 19 authorities on the actual matter of jurisdiction. And
01: 58PM 20 the State raises in its briefing that there's no
01: 58PM 21 jurisdiction to begin with, and it raises jurisdiction
01: 58PM 22 as a general sense in the Court not being granted
01: 58PM 23 jurisdiction. It also says the Court does not have
01: 58PM 24 jurisdiction because of a lack of standing, because of
01: 58PM 25 ripeness, and because the parties can't prove their

01: 58PM 1 case.

01: 58PM 2 This has been the State's typical response
01: 59PM 3 to much litigation recently. And, fortunately, because
01: 59PM 4 of that, the State Supreme Court has ruled on a number
01: 59PM 5 of these topics. I think the best place for the Court
01: 59PM 6 to start is with the Patel decision, which I'll take you
01: 59PM 7 to here. This is a 2015 decision from the Texas Supreme
01: 59PM 8 Court. This case was brought by commercial eyebrow
01: 59PM 9 threaders who were complaining about the regulatory
01: 59PM 10 environment that state law and state agencies subjected
01: 59PM 11 them to.

01: 59PM 12 The State was a defendant in the case, and
01: 59PM 13 it defended on many bases. But the first defense is the
01: 59PM 14 same it makes here, is that there's no jurisdiction.
01: 59PM 15 And I think, as well as anything here, on page 8 of the
01: 59PM 16 Westlaw version of this decision, the Texas Supreme
01: 59PM 17 Court outlines what exactly it means by sovereign
01: 59PM 18 immunity in these environments. And they start by
01: 59PM 19 summarizing some of their recent decisions, including
02: 00PM 20 the Heinrich decision, where the Court decided sovereign
02: 00PM 21 immunity does not prohibit suits brought to require
02: 00PM 22 state officials, in this case, the state county clerk
02: 00PM 23 election official, to comply with statutory or
02: 00PM 24 constitutional provision.

02: 00PM 25 So there's no sovereign immunity to try to

1 figure out what the law of the state or the Constitution
2 says with regard to government officers' behaviors.

3 Now, the Court went on and summarized
4 additional cases, and many of these cases, to some
5 degree, were discussed by the parties and by the State
6 in their brief. And here in the Supreme Court decision,
7 it says, "Contrary to the State's position, Heinrich,
8 Reconveyance," another case, "does not represent a
9 departure from the rule that sovereign immunity is
10 inapplicable in a suit against a government entity that
11 challenges the constitutionality of the statute and
12 seeks equitable relief."

13 Of course, here it discusses some other
14 authorities, but the key point is, is if the Plaintiffs
15 are not requesting money, instead they're requesting
16 equitable relief, enforcement of the law, description of
17 the law's requirements, that's not something that's
18 subject to sovereign immunity. We'll come back to Patel
19 because, in Patel, all the same other issues addressed
20 are disposed of that the State raises here; the ripeness
21 issue, the standing issues.

22 But it's not just that sovereign immunity
23 doesn't apply to cases where individuals go before the
24 judiciary and ask it to interpret what the law means.
25 It's also been the case, as the Supreme Court described

02: 01PM 1 in the City of El Paso case, that even when plaintiffs
02: 01PM 2 sue the State and want a determination that would result
02: 01PM 3 in the plaintiffs recovering funds, the sovereign
02: 01PM 4 immunity has been waived.

02: 01PM 5 So it's not even just if you're getting an
02: 01PM 6 injunction. If you're trying to recover money, but it
02: 01PM 7 has to do with determining what the State's role is and
02: 01PM 8 what the statutes say, you're entitled to a declaration
02: 01PM 9 as to that as well. And here when they quote the
02: 02PM 10 Federal Sign opinion, "A state official's illegal or
02: 02PM 11 unauthorized acts are not acts of the State.
02: 02PM 12 Accordingly, an action to determine or protect a private
02: 02PM 13 party's rights against the State official has acted
02: 02PM 14 without legal or statutory authority is not a suit
02: 02PM 15 against the State that sovereign immunity bars."

02: 02PM 16 But setting that aside, the Texas Supreme
02: 02PM 17 Court has already considered specifically in election
02: 02PM 18 cases what authority courts have to consider. I take
02: 02PM 19 the Court to the In Re Gamble decision, a 2002 decision
02: 02PM 20 from the Texas Supreme Court, where a Harris County
02: 02PM 21 District Judge was challenging his place to be on the
02: 02PM 22 ballot.

02: 02PM 23 In that case, the Supreme Court recognized
02: 02PM 24 two bases of authority. The first was that courts have
02: 02PM 25 equitable jurisdiction to decide whether or not state

02: 02PM 1 laws have been followed with respect to elections.

02: 02PM 2 That's an important point, because in a

02: 02PM 3 separation-of-powers instance, if it were the case that

02: 02PM 4 the courts didn't have equitable jurisdiction and we're

02: 03PM 5 relying upon the legislature or some other branch to

02: 03PM 6 grant its authority, it would effectively have no

02: 03PM 7 authority at all.

02: 03PM 8 And so it has inherent equitable authority

02: 03PM 9 as a co-equal branch of government to decide what law

02: 03PM 10 is; but, additionally, the legislature has granted

02: 03PM 11 authority to the Court to decide issues in election

02: 03PM 12 matters. And it did so in adoption of Texas Election

02: 03PM 13 Code 273.081, which is referenced here in this

02: 03PM 14 paragraph, in which the Texas Supreme Court explicitly

02: 03PM 15 provides that it gives jurisdiction to the Court.

02: 03PM 16 And just to be clear, this isn't an issue

02: 03PM 17 of first impression. It's not a hard question.

02: 03PM 18 Recently the Dallas Court of Appeals found it in a case

02: 03PM 19 two years ago. Here is another case in 2002 where the

02: 03PM 20 Texas Supreme Court finds, Section 27 -- I'm sorry,

02: 03PM 21 Dallas Court of Appeals finds -- Section 273.081 of the

02: 04PM 22 Election Code gives the Court jurisdiction to enjoin

02: 04PM 23 violations of the Election Code.

02: 04PM 24 As a jurisdictional matter, there is both

02: 04PM 25 equity. There is the fact it's not based -- it's not

02: 04PM 1 protected by sovereign immunity anyway because it's
02: 04PM 2 trying to determine the law, and there's the Election
02: 04PM 3 Code. But, finally, we have also brought suit asking
02: 04PM 4 for declaratory judgment. And in that case, the
02: 04PM 5 Texas -- in those kinds of cases, the Texas Supreme
02: 04PM 6 Court, through its opinions as interpreted by the Austin
02: 04PM 7 Court of Appeals, also provide for jurisdiction.

02: 04PM 8 In the Holt v. Texas Department of
02: 04PM 9 Insurance case, a 2018 case out of the Austin Court of
02: 04PM 10 Appeals, the Texas Supreme Court found: The Uni form
02: 04PM 11 Declaratory Judgement Act expressly waives sovereign
02: 04PM 12 immunity when a person whose rights, status, or other
02: 04PM 13 legal relations are affected by a statute sues under the
02: 04PM 14 The Uni form Declaratory Judgement Act to have a court
02: 04PM 15 determine, quote, "any question of construction or
02: 05PM 16 validity under," close quotes, the statute.

02: 05PM 17 So also the Uni form Declaratory Judgement
02: 05PM 18 Act grants jurisdiction. So now I'll turn to the issue
02: 05PM 19 of standing, and I'll return to the Patel matter.
02: 05PM 20 Again, after dispatching with the State's arguments on
02: 05PM 21 jurisdiction, the Texas Supreme Court also addressed the
02: 05PM 22 issue of standing. And in standing in this case, there
02: 05PM 23 were several individuals who had filed suit, again,
02: 05PM 24 about the regulatory system for eyebrow weavers.

02: 05PM 25 And here, you'll see on page 9 of the

Westlaw version of this decision, the Court addresses the individual threaders who were at issue and finds that they have standing because they're precisely the kind of people who are going to be affected by the government's decision. It even references later in the opinion individuals in the office who are performing this work that had not yet been given notice that they were going to be pursued against had a right to know how it is to comply with the law.

That is exactly the case with these individuals here. And the notion that these individuals don't yet know whether or not they will be harmed is, as a factual matter, false.

First, as the Election Code points out, starting in January 1st of the year of election, so approximately four and a half months ago, voters in Texas were entitled to begin submitting applications for ballot by mail. What the Court has heard by evidence today is that they're, including the State's advisory, is there's a very real concern that election administrators will be able to begin to administer the election in this pandemic environment.

Individuals have every reason to want to get their requests in early for their vote-by-mail ballot to ensure they receive it in time. Also,

02: 06PM 1 importantly, under the State's vote-by-mail system,
02: 06PM 2 there are deadlines to return the ballot.

02: 06PM 3 THE COURT: Can I get you to pause for just
02: 07PM 4 a moment, please. Can I get you to pause for just a
02: 07PM 5 moment, Mr. Dunn?

02: 07PM 6 (Pause.)

02: 07PM 7 Mr. Dunn?

02: 07PM 8 MR. DUNN: Yes, sir.

02: 07PM 9 THE COURT: Okay. I had lost a connection
02: 07PM 10 there briefly. Let me see how far back that goes. Give
02: 07PM 11 me just a moment to see if I can pick up where I lost
02: 08PM 12 you.

02: 08PM 13 All right. The last thing that I got from
02: 08PM 14 you was that the election pointed out that starting in
02: 08PM 15 January 1 of the year of the election, about four months
02: 08PM 16 ago, voters were entitled to begin submitting
02: 08PM 17 applications for mail ballots. And I heard evidence
02: 08PM 18 here that included the State's advisory about a real
02: 08PM 19 concern about the pandemic and that individuals have
02: 08PM 20 every reason to want to get their requests in early to
02: 08PM 21 ensure they received them in time, and that's where I
02: 08PM 22 lost you.

02: 08PM 23 MR. DUNN: All right. So I'll pick up
02: 08PM 24 there, Your Honor. So with respect to the individual
02: 08PM 25 plaintiff voters of this case, they are today entitled

1 to submit a vote-by-mail application. There are
2 vote-by-mail applications, according to the
3 declarations, already coming in, and already coming in
4 at a higher rate than we would normally expect.

5 And these individual Plaintiffs are placed
6 with the choice of they submit a vote-by-mail
7 application now. If they end up being wrong about their
8 determination of the law, they can be subjected to
9 Election Code offenses contained in Chapter 84. They
10 can also be subjected to Penal Code offenses for making
11 representations to the government on an official
12 document.

13 And on top of that, they have no way to
14 know whether they will actually receive the ballot,
15 whether they're requesting the ballot in that manner
16 that later may be determined to be illegal prohibits
17 them from risking their health and voting in person, and
18 they furthermore have no way to know whether the ballot
19 would ultimately be counted and that their vote choices
20 would be included. This is an untenable position from
21 the standpoint of the voter. But, as you've also heard,
22 it's an untenable position, from the standpoint of the
23 election administrators, who, quite simply, cannot
24 produce thousands of paper mail ballots at the last
25 minute in this election, and, again, to prepare for that

02: 10PM 1 reality now.

02: 10PM 2 But in addition to the individual standing,
02: 10PM 3 there is also associational standing. And the Court --
02: 10PM 4 I'll call the Court's attention to the most applicable
02: 10PM 5 case there is the Texas Association of Business case,
02: 10PM 6 which is a Texas Supreme Court case from 1993. I'll
02: 10PM 7 take you to page 7 of the Westlaw version of the
02: 10PM 8 opinion.

02: 10PM 9 And here is where the Texas Supreme Court
02: 10PM 10 talks about standing on behalf of associations. And
02: 11PM 11 this case, I think, really what the Court needs to know
02: 11PM 12 about the facts is, the Texas Association of Business
02: 11PM 13 sued on behalf of a few or on behalf of some of its
02: 11PM 14 members who were complaining of the Texas Air Quality
02: 11PM 15 Board's regulation pertaining to air quality. What I
02: 11PM 16 think is interesting and noteworthy about those facts is
02: 11PM 17 the Texas Association of Business, of course, represents
02: 11PM 18 an unlimited amount of businesses and types. It was
02: 11PM 19 only a small subset of the businesses that are members
02: 11PM 20 that had associational standing.

02: 11PM 21 And despite that condition, the Texas
02: 11PM 22 Supreme Court ruled that the Texas Association of
02: 11PM 23 Business had associational standing. And I want to
02: 11PM 24 point out that the Texas Supreme Court explicitly quoted
02: 11PM 25 from and decided to follow the U.S. Supreme Court

02: 11PM 1 decision in Hunt v. The Washington State Apple
02: 11PM 2 Advertising Commission as to the standard to follow to
02: 11PM 3 determine whether or not an association has standing.

02: 11PM 4 And one more case on this point is a U.S.
02: 12PM 5 Court of Appeals for The Fifth Circuit case called Texas
02: 12PM 6 Democratic Party v. Benkiser, a 2006 case where the Hunt
02: 12PM 7 test was explored by The Fifth Circuit as to whether or
02: 12PM 8 not the Texas Democratic Party had standing to sue in
02: 12PM 9 court to enforce the U.S. Constitution and a State
02: 12PM 10 Election Code Provision on the replacement of a
02: 12PM 11 candidate on the ballot.

02: 12PM 12 And, ultimately, the Court went through the
02: 12PM 13 Hunt standard. It cited to the Hunt standard, and it
02: 12PM 14 said because of the Texas Democratic Party's voter
02: 12PM 15 members, because of its candidates, because it had a
02: 12PM 16 need to have confidence in the result, because of its
02: 12PM 17 pocketbook in terms of having knowledge about how to
02: 12PM 18 expend money on campaigns, that the Texas Democratic
02: 12PM 19 Party under the Hunt standard has standing.

02: 12PM 20 So we believe the Texas Democratic Party
02: 12PM 21 has standing from an associational standpoint, but we
02: 13PM 22 also believe the Court is well within the authorities to
02: 13PM 23 find the Texas Democratic Party has standing in its own
02: 13PM 24 right. As Mr. Maxey testified to, it is the Democratic
02: 13PM 25 Party's election on July 14th. It's handing out

02: 13PM 1 nominations based upon those election results. And the
02: 13PM 2 people who receive those nominations enjoy the benefit
02: 13PM 3 of being labeled as a Democratic Party nominee in the
02: 13PM 4 general election.

02: 13PM 5 The State purports to regulate that
02: 13PM 6 process. The State purports to tell the Democratic
02: 13PM 7 Party how it will determine who its nominees are, and it
02: 13PM 8 purports to do so requiring an election. And now, based
02: 13PM 9 upon the State's arguments here, we're providing for an
02: 13PM 10 election where voters under the age of 65 are at a much
02: 13PM 11 greater burden than voters over the age of 65. If that
02: 13PM 12 is to remain the case, by no question it challenges and
02: 13PM 13 injures the Texas Democratic Party.

02: 13PM 14 And although not an issue raised here,
02: 14PM 15 instead would be raised in the federal case, the Texas
02: 14PM 16 Democratic Party has a right to decide its nominees and
02: 14PM 17 be free from imposition to its First Amendment
02: 14PM 18 associational rights from the State controlling its
02: 14PM 19 nomination process.

02: 14PM 20 In order for the Texas Democratic Party to
02: 14PM 21 determine how its nominees will be decided, it first
02: 14PM 22 needs to know what the state law provides for this
02: 14PM 23 election in these circumstances. That, independent of
02: 14PM 24 all these other circumstances, also creates standing.
02: 14PM 25 And, as you'll see, if you haven't already, in the Patel

02: 14PM 1 case and others, the Texas Supreme Court says if one
02: 14PM 2 party has standing, that is the end of the analysis.
02: 14PM 3 The Court needs one party with standing to resolve the
02: 14PM 4 case.

02: 14PM 5 So now, I'll turn to the matter of
02: 14PM 6 ripeness. The Court suggests that this is an issue that
02: 14PM 7 can never be decided, that it will never be ripe
02: 14PM 8 essentially and that where we're at, we'll have to wait
02: 14PM 9 for the Governor to make a decision. Well, first the
02: 15PM 10 U.S. Supreme Court has addressed the issue of ripeness.
02: 15PM 11 It's based in the Constitution. The U.S. Supreme Court
02: 15PM 12 called Virginia v. America Book Seller's Association in
02: 15PM 13 1988, the Supreme Court said that -- addressed this
02: 15PM 14 issue where the State complained the Supreme Court
02: 15PM 15 couldn't take up an issue and couldn't decide an issue
02: 15PM 16 on whether or not certain books were banned in certain
02: 15PM 17 book stores. And they concluded where they say, "We
02: 15PM 18 conclude the Plaintiffs have alleged actual and
02: 15PM 19 well-founded fear that the law will be enforced against
02: 15PM 20 them."

02: 15PM 21 And these Plaintiffs have not only proven
02: 15PM 22 that, the declaration of Mr. Korbel, a decades -- many
02: 15PM 23 decades experienced voting rights lawyer in Texas,
02: 15PM 24 documents for the Court all the recent criminal
02: 15PM 25 prosecutions the State has undertaken with respect to

02: 15PM 1 voting. There is an extremely real danger for
02: 15PM 2 individual voters who would fill out a vote-by-mail
02: 15PM 3 application about their possible criminal and civil
02: 16PM 4 penalties to be assessed to them later.

02: 16PM 5 And for all the reasons I mentioned
02: 16PM 6 earlier, these decisions are ripe now. They are
02: 16PM 7 entitled to request these ballots now, and they are
02: 16PM 8 entitled to do so early enough to ensure they get that
02: 16PM 9 ballot and can return it after voting it and have it
02: 16PM 10 counted.

02: 16PM 11 Now, there's additional discussion of the
02: 16PM 12 ripeness standard in the Patel decision where the Court
02: 16PM 13 goes on, as I mentioned at the beginning of this, at the
02: 16PM 14 outset of this, and discussed ripeness, and again,
02: 16PM 15 rejects the State's position that the case there, which
02: 16PM 16 is very similar to this one in terms of trying to
02: 16PM 17 determine what the law is, was not yet ripe. And
02: 16PM 18 indeed, the topic sentence in the discussion is, the
02: 16PM 19 State next argues that the claims brought by these
02: 16PM 20 individuals are not ripe because the individuals have
02: 16PM 21 not faced an administrative enforcement, and the Supreme
02: 17PM 22 Court rejects that position.

02: 17PM 23 Ultimately, besides all these authorities
02: 17PM 24 being against the arguments asserted by the State, the
02: 17PM 25 main issue here is that if it were true that nobody

02: 17PM 1 could come in under these circumstances and ask for
02: 17PM 2 resolution of what the law says, that effectively the
02: 17PM 3 judiciary has been eliminated as a co-equal branch of
02: 17PM 4 government.

02: 17PM 5 As I mentioned at the outset, I'll hold my
02: 17PM 6 discussion as to what 82.002 means, but we believe that
02: 17PM 7 the evidence and the law clearly support our position in
02: 17PM 8 this case. Thank you, Your Honor.

02: 17PM 9 THE COURT: Thank you, Mr. Dunn.

02: 17PM 10 Mr. Saldivar or Mr. Grigg.

02: 17PM 11 MR. BUSER-CLANCY: Thank you, Your Honor.
02: 17PM 12 Mr. Buser-Clancy for the Intervenor-Plaintiffs. I will
02: 17PM 13 be brief so as to not repeat a lot of the issues that
02: 17PM 14 will be raised in the closing. But I do want to address
02: 18PM 15 a few key points on each of the issues that the State
02: 18PM 16 has raised. The first is, with respect to standing, we
02: 18PM 17 agree with Mr. Dunn, that what gives the individual
02: 18PM 18 Intervenor-Plaintiffs standing and the members of the
02: 18PM 19 Intervenor organization standing is the fact that right
02: 18PM 20 now, by law, they are entitled to apply for a
02: 18PM 21 mail-ballot application. And right now they want to
02: 18PM 22 because they reasonably fear that appearing at the
02: 18PM 23 polling place in July and later on could injure their
02: 18PM 24 health.

02: 18PM 25 And right now, in addition to that, they

1 know, including Mr. Price, as he sets forth in his
2 declaration, that in the past, it has taken a while to
3 get a mail ballot back and to go vote. So there's a
4 distinct legal entitlement to apply for a mail ballot
5 application and a desire to do so. However, these
6 individuals and the members of the Intervenor
7 organizations are fundamentally concerned that if they
8 do so, and the State turns around and says that was an
9 incorrect use of the disability category, that they will
10 be prosecuted.

11 At no point in this hearing have you heard
12 the State disavow prosecuting these individuals, and
13 they also fear that their ballot will not be counted.
14 And, again, at no point in the State's hearing have you
15 heard the State disavow the fact that individuals who
16 apply to vote by mail under the disability category now
17 will have their ballots not counted. That is sufficient
18 to give these individuals and the Intervenor
19 organizations standing.

20 The State's position appears to be that
21 these individuals simply have some subjective fear of
22 going to the polling place in July, but we would submit
23 that the evidence submitted to the Court and the
24 testimony shows that that fear is anything but
25 subjective. Public health officials, the TDP,

02: 19PM 1 Dr. Troisi have all told this Court that the coronavirus
02: 19PM 2 is a uniquely deadly virus, and it can affect everybody,
02: 20PM 3 and that polling places in particular are dangerous
02: 20PM 4 places where the coronavirus can spread.

02: 20PM 5 Young, healthy individuals are going to the
02: 20PM 6 hospital due to COVID-19. So the notion that this is
02: 20PM 7 some subjective fear, rather than a reasonable and good
02: 20PM 8 faith belief that's backed by the experts, backed by
02: 20PM 9 public health experts, is simply not true.

02: 20PM 10 With regards to ripeness, Your Honor, just
02: 20PM 11 a few quick points. The State asserts that the evidence
02: 20PM 12 today shows that no one knows what July is going to look
02: 20PM 13 like. No one knows what November is going to look like.
02: 20PM 14 That's not what the evidence showed today, Your Honor.
02: 20PM 15 What the evidence showed today from Dr. Troisi is that
02: 20PM 16 we know in July and November there will not be a
02: 20PM 17 vaccine. The evidence showed today that there will not
02: 20PM 18 be herd immunity, that the vast majority of individuals
02: 20PM 19 will still not be immune to the virus.

02: 20PM 20 And we also know from Dr. Troisi that it's
02: 20PM 21 extremely unlikely that COVID-19 is aseasonal. Further,
02: 21PM 22 Dr. Troisi testified that, in her expert opinion as an
02: 21PM 23 epidemiologist, she believes that the virus will be
02: 21PM 24 circulating through communities in Texas come July and
02: 21PM 25 come November. That's what the evidence has shown. And

02: 21PM 1 so the question of, well, it's just a contingency,
02: 21PM 2 that's not correct. The only evidence here has shown
02: 21PM 3 that this is distinctly ripe right now.

02: 21PM 4 And the second point I would like to make,
02: 21PM 5 Your Honor, is that the State's other argument for
02: 21PM 6 ripeness is that the Governor might do something in the
02: 21PM 7 future at a date that's unknown, and what might be done
02: 21PM 8 is unknown, but might do something that would then cause
02: 21PM 9 this dispute to no longer be ripe.

02: 21PM 10 But the State can't use unspecific
02: 21PM 11 allegations or insinuations of something that might be
02: 22PM 12 done in the future to manufacture a ripeness dispute.
02: 22PM 13 What's known right now is that COVID-19 is devastating
02: 22PM 14 Texas. It's known right now that polling places are
02: 22PM 15 particularly dangerous and that individuals have a right
02: 22PM 16 to apply for a mail-in ballot application right now.
02: 22PM 17 That is sufficient for a ripe dispute before this Court
02: 22PM 18 and making insinuations about what the Governor might do
02: 22PM 19 later is not sufficient to render it unripe.

02: 22PM 20 Finally, Your Honor, on the question of
02: 22PM 21 physical condition, there's a fundamental disagreement
02: 22PM 22 between the State and the Intervenor-Plaintiffs on this
02: 22PM 23 issue. The State really focuses on the definition of
02: 22PM 24 sickness coming out of the disability statute, but
02: 22PM 25 that's not what it fully says. What the statute says is

02: 22PM 1 that a qualified voter is eligible for early voting by
02: 22PM 2 mail if the voter has a sickness or a physical condition
02: 22PM 3 that prevents the voter from appearing at the polling
02: 22PM 4 place on election day without a likelihood of injuring
02: 23PM 5 the voters's health.

02: 23PM 6 What Dr. Troisi told you today, Your Honor,
02: 23PM 7 told all of us, is that every single individual has that
02: 23PM 8 physical condition because what COVID-19 does is it
02: 23PM 9 attacks our lungs, throats, respiratory pathways, and
02: 23PM 10 all of those are susceptible to the virus.

02: 23PM 11 Dr. Troisi testified that, although some
02: 23PM 12 groups are more vulnerable, that the virus attacks
02: 23PM 13 young, healthy people, that I believe she said two in
02: 23PM 14 five of those going to the hospital are between the ages
02: 23PM 15 of 20 and 44. And, therefore, all individuals have this
02: 23PM 16 physical condition, and that is why the statutory
02: 23PM 17 definition is met there. And I'll reserve the rest of
02: 23PM 18 argument for closing, Your Honor.

02: 23PM 19 THE COURT: Thank you.

02: 23PM 20 MR. GRIGG: Your Honor, you asked --

02: 23PM 21 THE COURT: Any other -- Mr. Grigg, yes,
02: 23PM 22 sir.

02: 23PM 23 MR. GRIGG: Your Honor, to quote that great
02: 23PM 24 legal scholar Broadus Spivey, "When you've hit a home
02: 24PM 25 run, you don't run the bases twice," and Mr. Dunn has

02: 24PM 1 hit a home run, Your Honor, so I will be silent.

02: 24PM 2 THE COURT: But you weren't silent,

02: 24PM 3 Mr. Grigg. You need to take that up with Mr. Spivey and

02: 24PM 4 see if he thinks that amounted to silence or not.

02: 24PM 5 MR. GRIGG: I will, Your Honor.

02: 24PM 6 (Laughter.)

02: 24PM 7 THE COURT: Thank you. See what you tells

02: 24PM 8 you. All right. And so, then, am I to hear from

02: 24PM 9 Mr. Saldivar or anyone else on this?

02: 24PM 10 MR. SALDIVAR: No, Your Honor.

02: 24PM 11 Mr. Buser-Clancy has spoken for the

02: 24PM 12 Plaintiff-Intervenors.

02: 24PM 13 THE COURT: Oh, all right. Okay. So we

02: 24PM 14 started out by taking up the matters of the Plaintiff's

02: 25PM 15 requests for temporary injunction. We then proceeded

02: 25PM 16 through to hear the Defendant/Counter-Petitioner's

02: 25PM 17 request for relief. And we have now just heard the

02: 25PM 18 Intervenor-Defendant's plea to the jurisdiction.

02: 25PM 19 Is that the totality of the dispute that

02: 25PM 20 you-all had anticipated being heard on this afternoon

02: 25PM 21 and this morning?

02: 25PM 22 MR. DUNN: From TDP Plaintiffs, yes, Your

02: 25PM 23 Honor, other than closing argument.

02: 25PM 24 MR. BUSER-CLANCY: The same for

02: 26PM 25 Intervenor-Plaintiffs, Your Honor.

02: 25PM 1 THE COURT: I'm sorry, I didn't hear what
02: 25PM 2 you said.

02: 25PM 3 MR. BUSER-CLANCY: The same with
02: 26PM 4 Intervenor-Plaintiffs. Yes, Your Honor.

02: 26PM 5 THE COURT: Thank you. All right. Let me
02: 26PM 6 talk to you just in a hypothetical context for a moment
02: 26PM 7 here.

02: 26PM 8 This is a temporary injunction hearing,
02: 26PM 9 among other things, and, again, hypothetically, if a
02: 26PM 10 temporary injunction is granted, what do you foresee
02: 26PM 11 with regard to a permanent injunction? What do you
02: 26PM 12 foresee in a way of a timing for a hearing? What do you
02: 26PM 13 foresee in the way of a scope of the requested relief?
02: 26PM 14 If there is to be something that would be of a temporary
02: 26PM 15 nature, what would be the duration of that period? Have
02: 26PM 16 you-all thought about that at all and have any
02: 27PM 17 commentary?

02: 27PM 18 MR. BUSER-CLANCY: Your Honor, we have.
02: 27PM 19 One thing that we would just point out is that in the
02: 27PM 20 proposed order that we had submitted to the Court, what
02: 27PM 21 that contemplates is that there's a status conference
02: 27PM 22 90 days from today roughly after July, at which point it
02: 27PM 23 would be possible to see if the situation has changed or
02: 27PM 24 anything has evolved. As we set forth, we think the
02: 27PM 25 evidence shows right now that the temporary injunction

02: 27PM 1 should issue, but that is one marker that we've noted in
02: 27PM 2 our proposed order.

02: 27PM 3 THE COURT: You know, I don't think I've
02: 27PM 4 seen the proposed or, and that, I'm sure, is a failure
02: 27PM 5 on my part. Was it something that was filed with the
02: 27PM 6 clerk? Was it something that was transmitted through my
02: 27PM 7 executive assistant, or was it done in some other way?

02: 27PM 8 MR. DUNN: Your Honor, my office filed that
02: 27PM 9 yesterday early afternoon with the clerk, so it was
02: 28PM 10 after you got your binders.

02: 28PM 11 THE COURT: Okay. Well, then, I'll have to
02: 28PM 12 look for that because that's always a concern to me as
02: 28PM 13 to the language that is being proposed and whether or
02: 28PM 14 not it meets with my approval and it is consistent with
02: 28PM 15 the findings, so I'll have to take time to take a look
02: 28PM 16 at your proposed order.

02: 28PM 17 But what you are telling me -- what,
02: 28PM 18 Mr. Clancy, you're telling me is that there is a
02: 28PM 19 suggestion or a proposal that sometime in a roughly
02: 28PM 20 90-day period, there would be a reconvening or a
02: 28PM 21 convening of a hearing on a permanent injunction as
02: 28PM 22 opposed to a temporary? Is that what I'm understanding
02: 28PM 23 you to say?

02: 28PM 24 MR. BUSER-CLANCY: Yes, Your Honor, that's
02: 28PM 25 correct, and if Mr. Dunn wants to add anything on that.

02: 29PM 1 THE COURT: Okay.

02: 29PM 2 MR. DUNN: No. We agree. I think we've
02: 29PM 3 attempted to address what I gather is Your Honor's
02: 29PM 4 question in the order, both in terms of timing and
02: 29PM 5 revisiting precise language and then what can be done
02: 29PM 6 thereafter, so I would call the Court's attention to
02: 29PM 7 that. We can obviously discuss it further.

02: 29PM 8 THE COURT: Okay. Thank you. And so are
02: 29PM 9 there lawyers for other parties that have any commentary
02: 29PM 10 for me about, if there were to be a temporary
02: 29PM 11 injunction, the duration of it, the convening of the
02: 29PM 12 permanent injunction posture? It's all, of course,
02: 29PM 13 recognizing that this has to go upstairs before it comes
02: 29PM 14 back downstairs. Anything else?

02: 29PM 15 (No response.)

02: 29PM 16 THE COURT: All right. Well, I mean, I can
02: 29PM 17 certainly allow you-all to make closing arguments, but I
02: 30PM 18 kind of feel like you've made closing arguments from the
02: 30PM 19 opening arguments, and so I'm inclined to give you the
02: 30PM 20 view of the bench here as to all of the matters that
02: 30PM 21 were argued here. But, as I said, I have not seen the
02: 30PM 22 proposed order that has been submitted by the Plaintiff
02: 30PM 23 or the Plaintiff-Intervenors, and I don't recall seeing
02: 30PM 24 a proposed order on the plea to the jurisdiction, but I
02: 30PM 25 assume that the State's order would simply say, "heard

02: 30PM 1 and denied. "

02: 30PM 2 I did see the proposed order from the
02: 30PM 3 Counter-Petitioner about the alignment of the dates.
02: 31PM 4 And so let me come back to the issue of the proposed
02: 31PM 5 temporary injunction and the argument made by the State
02: 31PM 6 about what the petition requested in its breadth and its
02: 31PM 7 scope, and I have to comment that it is not at all
02: 31PM 8 unheard of that those who bring actions for injunctive
02: 31PM 9 relief often try to have perhaps their grasp exceed
02: 31PM 10 their reach, or maybe I've got that adage the wrong way,
02: 31PM 11 but it's not at all unusual for a party to come in and
02: 31PM 12 say, "I want it all," and then not be entitled to it
02: 31PM 13 once the dust settles.

02: 31PM 14 So my commentary kind of falls into these
02: 32PM 15 categories. You-all are good lawyers. You-all have
02: 32PM 16 prepared very well. You have presented your positions
02: 32PM 17 very well, and you have shown scholarship and
02: 32PM 18 professionalism in the process. That always makes it
02: 32PM 19 hard for me.

02: 32PM 20 The situation, though, from a more global
02: 32PM 21 viewpoint kind of lends itself to either something of a
02: 32PM 22 Hobson's choice or something of a Morton's fork. The
02: 32PM 23 latter term I had to learn just in the context of this
02: 32PM 24 case. A Hobson's choice, as I understand it, is really
02: 32PM 25 no choice at all. It's kind of a take-it-or-leave-it

1 deal. A Morton's fork is a choice between two bad
2 options, and this case seems to fall into either of
3 those categories.

4 The voters who are bringing this action,
5 the potential voters and the party and the Intervenor
6 are kind of faced with that choice of do I go vote in
7 person with all the risks, which include, among other
8 things, death or prosecution, or do I risk it and hope
9 that it comes out okay.

10 And I am cognizant of separation of powers.
11 I respect the separation of powers. And so we've got
12 kind of a choice here between arguments from that
13 perspective, as well as arguments from something that is
14 seminal, fundamental, individual constitutional right,
15 and that is that of free people making full choices and
16 having full access to make choices about their
17 governments.

18 I recognize the body of law that there is
19 judicial reticence to get involved in election actions
20 in close proximity to elections, especially if they
21 would result in delays; but I also see, on the other
22 hand, the jurisprudential objective try to resolve, and
23 frankly, avoid conflict where possible. And what is
24 potentially at stake here is that, in the current
25 posture, there could be a number of challenges to

02: 35PM 1 voters' requests that would come through the courts and
02: 35PM 2 conceivably come through the courts in 254 counties in
02: 35PM 3 the State. There are a number of election contests that
02: 35PM 4 could come before the courts where the unsuccessful
02: 35PM 5 candidate in the primary or the unsuccessful candidate
02: 35PM 6 in the open election for the unexpired term could come
02: 35PM 7 into court and file challenges.

02: 35PM 8 And, of course, there's a prospect that
02: 35PM 9 there could be some criminal prosecutions as well if
02: 35PM 10 there is a view that some of the voters have done
02: 35PM 11 something that is untruthful, inconsistent with the law,
02: 36PM 12 or a combination thereof. All of that could -- well,
02: 36PM 13 maybe not all of that -- but some of that could lead to
02: 36PM 14 the unstable, unsettled, uncertain situation about who
02: 36PM 15 are our elected representatives.

02: 36PM 16 If they're tied up in litigation with all
02: 36PM 17 the associated expense and time, and especially now that
02: 36PM 18 we are in this disaster or emergency scenario where we
02: 36PM 19 don't have courts running as efficiently as they had
02: 36PM 20 been previously, it could result in some very serious
02: 36PM 21 governance issues, very serious jurisprudential issues,
02: 36PM 22 and all of those things weigh into the balance for me as
02: 36PM 23 well.

02: 37PM 24 The commentary was made that officials at
02: 37PM 25 all levels are responding in realtime; and I take that

02: 37PM 1 at face value, but I am one of those officials. And I
02: 37PM 2 am responding in realtime. I am responding in realtime
02: 37PM 3 to the evidence that has been presented and the
02: 37PM 4 arguments that have been made and trying to follow the
02: 37PM 5 precedence that have been established by higher courts.

02: 37PM 6 As you-all know, lawyers, practitioners,
02: 37PM 7 Officers of the Court, courts make decisions based on
02: 37PM 8 evidence and balancing or weighing of those facts and
02: 37PM 9 those circumstances. We are dealing with, from my
02: 37PM 10 perspective, current and real situations. And while
02: 38PM 11 there is uncertainty, and while there are contingencies
02: 38PM 12 and while there are hypotheticals that are unknown and
02: 38PM 13 will always be unknown, that's true in almost every
02: 38PM 14 aspect of life, so I don't view this as speculative or
02: 38PM 15 hypothetical or contingent in a sense that deprives the
02: 38PM 16 courts and the litigants to the opportunity to have this
02: 38PM 17 determined, and it's something of a difference of
02: 38PM 18 perspectives I guess, which, again, is not unusual in a
02: 38PM 19 courtroom.

02: 38PM 20 On one hand, it's sort of a bleak scenario
02: 38PM 21 versus a rosy scenario. The bleak scenario being along
02: 38PM 22 the lines of this virus is going to be with us for a
02: 38PM 23 long time, it's going to be dangerous, it's going to be
02: 38PM 24 fatal, it's going to be awful. The more rosy scenario
02: 39PM 25 is it may get better very quickly. We may find

02: 39PM 1 mechanisms to flatten the curve. We may find medicines
02: 39PM 2 and therapies to reduce its seriousness, and so the
02: 39PM 3 Court is sitting with the idea of, well, what does the
02: 39PM 4 evidence support.

02: 39PM 5 And so the evidence that I heard today
02: 39PM 6 leads me to believe that there is a probable right of
02: 39PM 7 recovery by the Plaintiffs from the irreparable,
02: 39PM 8 imminent, irreversible harm that could befall them if an
02: 39PM 9 injunction is not issued. The temporary nature of it is
02: 39PM 10 such that I am looking at the prospect of saying
02: 40PM 11 something that you-all may or may not give me some
02: 40PM 12 pushback on, and that is whether we would have a
02: 40PM 13 temporary injunction that would have an expiration date
02: 40PM 14 after the November elections.

02: 40PM 15 Obviously, a permanent injunction hearing
02: 40PM 16 could be held before that time if circumstances warrant
02: 40PM 17 it or if it is desired, but that's a possible view of
02: 40PM 18 how we might get through this next 60- or 90-day
02: 40PM 19 election period window and not have something
02: 40PM 20 permanently imposed statewide when we need to respect
02: 40PM 21 the authority of the legislature to exercise its
02: 40PM 22 prerogative in setting reasonable standards and
02: 40PM 23 procedures for elections going forward.

02: 40PM 24 There does seem to be -- I'm convinced
02: 41PM 25 there does seem to be a vagueness or an ambiguity or

02: 41PM 1 uncertainty in the language of the Election Code with
02: 41PM 2 regard to the term "disability." It strikes me as
02: 41PM 3 almost being left to being self-determined. Disability
02: 41PM 4 means disability. And so I think that there is the
02: 41PM 5 understandable need for some kind of clarity, some kind
02: 41PM 6 of uniformity in order to try to accomplish the ultimate
02: 41PM 7 objective of full and fair participation of all eligible
02: 41PM 8 voters in all elections at which they choose to vote.

02: 41PM 9 And so, in that respect, I am inclined to
02: 41PM 10 grant the temporary injunction. I am inclined to grant
02: 42PM 11 the alignment relief requested by the clerk, especially
02: 42PM 12 in light of the statutory language that talks about the
02: 42PM 13 earliest practical date. And I am obviously, by saying
02: 42PM 14 those things, of the perspective to deny the plea to the
02: 42PM 15 jurisdiction.

02: 42PM 16 Having now spoken longer than I probably
02: 42PM 17 should have and gone deeper into mental processes than
02: 42PM 18 I'm comfortable doing most of the time, I'll open it up
02: 42PM 19 for commentary about how or why those are impractical,
02: 42PM 20 unworkable, confusing, or otherwise, just downright
02: 42PM 21 wrong, although the latter I think I can fully
02: 43PM 22 understand that the non-prevailing party is going to say
02: 43PM 23 you just got that wrong, Judge.

02: 43PM 24 So what would you-all say to me with regard
02: 43PM 25 to having heard that soliloquy? Plaintiffs.

02: 43PM 1 MR. DUNN: Chad Dunn for the Texas
02: 43PM 2 Democratic Party Plaintiffs. Your Honor, we don't have
02: 43PM 3 anything to add. We obviously respect the difficult
02: 43PM 4 position you as a jurist and others are in weighing such
02: 43PM 5 an important matter. We appreciate the attention you
02: 43PM 6 gave to it. Hopefully our proposed order helps you in
02: 43PM 7 crafting an appropriate order, but we also stand ready
02: 43PM 8 to assist with that if necessary.

02: 43PM 9 THE COURT: Plaintiff-Intervenors, anything
02: 43PM 10 in the way of commentary?

02: 43PM 11 MR. BUSER-CLANCY: No commentary from the
02: 43PM 12 Plaintiff-Intervenors, Your Honor. We think your
02: 43PM 13 proposed solution and the proposed order are sufficient.

02: 43PM 14 THE COURT: Anything from the
02: 43PM 15 Counter-Petitioner/Defendant?

02: 44PM 16 MS. DIPPEL: Nothing further. Only to
02: 44PM 17 offer that I have the signed version of that draft order
02: 44PM 18 by the Bastrop County DA. If you would find that
02: 44PM 19 helpful, I can forward it.

02: 44PM 20 THE COURT: I have an unsigned copy of the
02: 44PM 21 order, a hard copy here in the notebooks that were
02: 44PM 22 delivered earlier in the week. But, certainly, it would
02: 44PM 23 need to have that signature in order for my signature to
02: 44PM 24 be affixed and filed.

02: 44PM 25 So if you want to send that -- the signed

02: 44PM 1 version, if you wanted to send that through the
02: 44PM 2 submission process that we currently have in place, that
02: 44PM 3 would accomplish that.

02: 44PM 4 MS. DIPPEL: Yes, Your Honor.

02: 44PM 5 THE COURT: Anything from the Defendants?

02: 44PM 6 MS. MACKIN: Thank you, Your Honor. Just
02: 44PM 7 that we would request an order reflecting the Court's
02: 44PM 8 ruling on the plea as well as the other issues.

02: 45PM 9 THE COURT: And I would appreciate if you
02: 45PM 10 would -- if someone, not necessarily you, because I
02: 45PM 11 ruled against you, but if someone would kindly prepare
02: 45PM 12 and send to me an order on the plea to the jurisdiction.
02: 45PM 13 As I said at the outset, my staff is less than full at
02: 45PM 14 the moment, and so the drafting would be appreciated if
02: 45PM 15 Plaintiff or Plaintiff-Intervenors were to draft and
02: 45PM 16 submit a brief order that says the plea to the
02: 45PM 17 jurisdiction was denied.

02: 45PM 18 I'll take a look at the proposed
02: 45PM 19 injunction, and I may need to have commentary with
02: 45PM 20 you-all about the language, the breadth, the scope, the
02: 45PM 21 duration. I'm assuming, without having seen it, that it
02: 46PM 22 contains something in the nature of the requisite
02: 46PM 23 statements about findings and the requisite orders. I
02: 46PM 24 don't see any need for a bond in this situation.

02: 46PM 25 Again, I'll entertain suggestions or

02: 46PM 1 requests in that regard, but my inclination is to say
02: 46PM 2 best wishes to all of you as you go before the three
02: 46PM 3 wise men or three wise women or a combination thereof
02: 46PM 4 and ultimately onto the supreme beings. So I will look
02: 46PM 5 at that proposed order, and I will probably have
02: 46PM 6 something in the way of commentary for you that says, "I
02: 46PM 7 need this modification or that modification."

02: 46PM 8 And I would welcome, obviously, that same
02: 46PM 9 kind of input from those who did not draft it, who did
02: 47PM 10 not prepare it, but who would be affected by it. So if
02: 47PM 11 all of you can take that as a fairly urgent kind of
02: 47PM 12 request of action on your part, it would be great if we
02: 47PM 13 could get this one, like I said, off of my desk and on
02: 47PM 14 upstairs to the desk of those who collaborate and think
02: 47PM 15 in much deeper ways.

02: 47PM 16 Is there anything else that any of you need
02: 47PM 17 or want to say before we end this Zoom hearing?

02: 47PM 18 MR. DUNN: Your Honor, I would just add
02: 47PM 19 that the proposed order, and we can send it to Ms. Seger
02: 47PM 20 after this, if that's appropriate, addresses the plea to
02: 47PM 21 the jurisdiction.

02: 47PM 22 THE COURT: Yes, I would appreciate it if
02: 47PM 23 you would send it through the submission protocols.
02: 47PM 24 That will facilitate my review.

02: 47PM 25 MR. DUNN: That's all from us, Your Honor.

02: 48PM 1 THE COURT: All right. Well, again, I do
02: 48PM 2 thank you. It is a pleasure always to have well versed
02: 48PM 3 lawyers present arguments on interesting, complex, and
02: 48PM 4 important matters, and this has been all of that. So I
02: 48PM 5 hope all of you stay well and healthy, and I look
02: 48PM 6 forward to the opportunities to interact with you at
02: 48PM 7 some future point here.

02: 48PM 8 Otherwise, we will close this meeting at
02: 48PM 9 this time and look to the future. Thank you.

10 (Court adjourned.)

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1 THE STATE OF TEXAS)

2 COUNTY OF TRAVIS)

3
4
5 I, RACHELLE PRIMEAUX, Official Court Reporter
6 in and for the 353rd District Court, Travis County,
7 State of Texas, do hereby certify that the above and
8 foregoing contains a true and correct transcription of
9 all portions of evidence and other proceedings requested
10 in writing by counsel for the parties to be included in
11 this volume of the Reporter's Record, in the
12 above-styled and numbered cause, all of which occurred
13 remotely via videoconference and were reported by me.

14
15 WITNESS MY OFFICIAL HAND this 20th day of
16 April, 2020.

17
18 /s/Rachelle Primeaux

19 RACHELLE PRIMEAUX, CSR NO. 4073
20 Expiration Date: 4/30/21
21 Official Court Reporter
22 353rd District Court
23 Travis County, Texas
24 P.O. Box 1748
25 Austin, Texas 78767
(512)854-9356

Exhibit N

Exhibit N

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

TEXAS DEMOCRATIC PARTY,)
GILBERTO HINOJOSA, Chair of the)
Texas Democratic Party, JOSEPH DANIEL)
CASCINO, SHANDA MARIE SANSING,)
BRENDA LI GARCIA,)

Plaintiffs,)

v.)

GREG ABBOTT, Governor of Texas,)
KEN PAXTON, Texas Attorney General,)
RUTH HUGHS, Texas Secretary of State,)
DANA DeBEAUVOIR, Travis County Clerk,)
JACQUELYN F. CALLANEN, Bexar County)
Elections Administrator,)

Defendants.)

No. 5:20-cv-00438-FB

San Antonio, Texas
May 15, 2020

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE FRED BIERY
UNITED STATES DISTRICT JUDGE

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Proceedings reported by stenotype, transcript produced by
computer-aided transcription.

1 (8:59 a.m.)

2 THE COURT: Good morning, ladies and gentlemen, those
3 of you who are here in person, those of you who are here by
4 video conferencing and those of you from the public and press
5 who may have called in through the audio live stream lead.

6 We're here this morning for the record in case number
7 20-CV-438; Texas Democratic Party, et al, versus Greg Abbott,
8 Governor of Texas, et al.

9 Before I call for announcements from counsel, let me
10 introduce the court staff, especially for those new lawyers who
11 have not appeared before this Court before, and the
12 responsibilities of those court staff members.

13 Mr. Sandoval, who gave the court cry, is our court security
14 officer. He is retired from the State of Texas Department of
15 Public Safety. And he, along with his colleagues and the
16 United States Marshal Service, provide security for the Court
17 and those members of the juries and public who are here
18 practicing law and so forth.

19 Ms. Herndon, seated directly in front of me, is our
20 courtroom deputy. She's the chief administrator of this court.
21 She brings 30 years of law enforcement experience to us before
22 she moved over into court administration a few months ago.

23 Mr. Poage, seated to her right, is our court reporter.
24 Until Ms. Herndon joined us recently, Mr. Poage was the rookie
25 of our court family. He's only been with us for 25 years.

1 Whereas, Mr. Rodriguez, our judicial assistant and I have been
2 together 42 years.

3 And Ms. Sullivan, whom I'm introducing now, is one of the
4 court lawyers. She and her colleague, Ms. Christmas, and I
5 have been working together from the state system and then over
6 here for -- this is our 30th year together.

7 Ms. Wise, over here, is a student intern. She is doing a
8 degree program involving Johns Hopkins and Harvard Law School.

9 So with that, if I might first call for announcements by
10 lead counsel for the Texas Democratic Party.

11 MR. DUNN: Good morning, Your Honor. This is Chad
12 Dunn, appearing remotely by video. Would you like me to
13 announce the telephone participants as well?

14 THE COURT: Yes, please.

15 MR. DUNN: Also representing the plaintiffs are Scott
16 Brazil, Dicky Grigg, Marty Golando and Rob Meyerhoff.

17 THE COURT: Okay. All right. And then for the State
18 of Texas defendants, Greg Abbott, Governor of Texas, et al.
19 And, by the way, Mr. Abrams, you can use the lecturn. When we
20 first started talking about using the handheld mikes, it was
21 because I thought we were going to have lawyers back and forth.
22 But I don't think that's going to happen. So you can use
23 either one, but the lectern usually is a better quality
24 microphone.

25 MR. ABRAMS: Thank you, Your Honor. Michael Abrams,

1 Anna Mackin and Cory Scanlon for the State defendants.

2 THE COURT: All right. Very well. Thank you.

3 MR. ABRAMS: Thank you.

4 THE COURT: Now, for the Bexar County defendant.

5 MR. GREEN: Good morning, Your Honor. I'm Robert
6 Green here for Bexar County and our elections administrator,
7 Jacquelyn Callanen.

8 THE COURT: All right. And for the Travis County
9 party?

10 MS. VEIDT: My name is Cynthia Veidt, and I'm
11 representing Travis County Clerk Dana DeBeauvoir.

12 THE COURT: All right. Very well.

13 Just for the record, are there any other either telephonic,
14 video or in-court announcements, to make sure we have everyone
15 on the record?

16 (No response)

17 THE COURT: There being none, then, Mr. Dunn, I
18 have -- Ms. Sullivan has shown me the exhibits that you all are
19 proposing to admit. Have you and Mr. Abrams consulted about
20 whether those can be admitted by agreement, or do we need to --
21 they're voluminous. It would take quite a while to do that.
22 I'm inclined to admit whatever either side wishes to put into
23 the record, and then we'll sort through it after that.

24 But what is the plaintiffs' proposal as far as evidence?

25 MR. DUNN: In the state court proceeding, Your Honor,

1 the parties agreed to submit evidence in this nature, and it
2 could be admitted, and the weight of it and any objections they
3 have to it, the Court could consider as it considered the
4 exhibits. But I haven't had a chance to confer with Mr. Abrams
5 about the exhibits here today in this proceeding.

6 THE COURT: Okay. Mr. Abrams, were you counsel in the
7 state court matter, also?

8 MR. ABRAMS: Yes, Your Honor. My co-counsel, Anna
9 Mackin, and I were counsel.

10 THE COURT: And, by the way, you can leave your mask
11 off since you'll be getting up and down. And Mr. Green, also.

12 MR. GREEN: Thank you, Your Honor.

13 MR. ABRAMS: Thank you, Your Honor.

14 THE COURT: So at this point, subject to raising
15 objections in the future, do you have any objections to what
16 the plaintiffs are submitting today?

17 MR. ABRAMS: We have a few quick objections on hearsay
18 grounds to a couple of the newspaper articles that they've
19 proposed to admit. But those are -- those are a few of the
20 exhibits. So I think we can --

21 THE COURT: All right. And when you use that --
22 either of those mikes, but speak into it. There you go.

23 All right. Well, with reference to any of the exhibits
24 which might be inadmissible, the Court will invoke the rule
25 that in a non-jury setting, the judge is presumed to know what

1 is admissible and what is not. And so, therefore, all of the
2 plaintiffs' exhibits which have been submitted are admitted.

3 (Plaintiffs' exhibits admitted)

4 THE COURT: Now, Mr. Abrams, of course, the same rule
5 will apply to you all. You all have submitted some exhibits,
6 also?

7 MR. ABRAMS: That's correct, Your Honor.

8 THE COURT: All right. Mr. Dunn, do you have any
9 objection to the Court invoking the same rule and admitting the
10 defendants' exhibits, subject to future objections?

11 MR. DUNN: No, Your Honor. But can I just ask
12 Mr. Abrams to speak closer to the microphone? We could hear
13 Mr. Green, but we haven't been able to hear him so far.

14 THE COURT: Okay. All right. Very well.

15 All right. So the exhibits are admitted.

16 (Defendants' exhibits admitted)

17 THE COURT: And then we'll proceed with the argument
18 of counsel. And for those not familiar with the Court's prior
19 orders, the schedule we will follow will be, Mr. Dunn will have
20 30 minutes to open. Mr. Abrams and/or Ms. Mackin, if you all
21 choose to split it, will have 45 minutes to respond. Mr. Dunn
22 will then have 15 minutes to reply. Mr. Green and Ms. Veidt
23 will each have 15 minutes to submit their comments.

24 So, Mr. Dunn -- and, by the way, for those of you behind
25 the bar, the audience, can you all hear from the video people?

1 Okay. All right. Mr. Dunn, you may proceed.

2 MR. DUNN: Thank you, Your Honor. May it please the
3 Court. Chad Dunn on behalf of the plaintiffs in this case, the
4 Texas Democratic Party; it's chair, Gilberto Hinojosa; and
5 three individual members of the Texas Democratic Party and
6 eligible Texas voters, Joseph Cascino, Shanda Sansing and
7 Brenda Garcia.

8 We are here before the Court in solemn times. Few of us
9 have lived through what we are living through at this moment, a
10 global pandemic that, as of yesterday, the greatest death toll
11 in the state's history so far, we have reached. Everything
12 that we know has been affected by this pandemic, and elections
13 and voting are no different.

14 Early on in this process the Democratic Party became
15 concerned at the extent to which the pandemic would affect the
16 electoral process in Texas. I want to talk about a bit of that
17 background today. And then once I discuss the background, I
18 intend to get into the specific claims that have been
19 presented, and then address some of the State's defenses, which
20 include standing, redressability, abstention. And then,
21 finally, I'll conclude with what we call the *Purcell* issues, a
22 document from the U.S. Supreme Court about when it is
23 appropriate for the federal district courts to intervene in
24 election-related matters.

25 So I'll start with a bit of background. The Texas

1 Democratic Party is one of the largest two democratic -- or
2 excuse me -- two political parties in the state. And it held a
3 primary election in early March and resolved a number of its
4 nominations, including its nomination, at least for the -- in
5 Texas, for President of the United States. A number of
6 federal, state and county officers were on that ballot.

7 During that election -- and the Court can see testimony of
8 this from the Texas Democratic Party's election director, Glen
9 Maxey, which is at Exhibit 7. And his testimony in the trial
10 court was at -- is at Exhibit 24. And he's amended that
11 testimony for new events at Exhibit 29.

12 Mr. Maxey testified that during the primary election --
13 and, incidentally, Travis County's election administrator, Dana
14 DeBeauvoir, gave similar testimony -- that a number of election
15 officials would not work the election polls that day because of
16 their fear of contracting COVID-19. So even in the earlier
17 election, we had already seen that staffing of in-person voting
18 was a challenge.

19 Once that election concluded, we immediately attempted to
20 consult with the Secretary of State to get some resolution on
21 how mail-in voting would work moving forward in this pandemic.
22 Mr. Maxey testified about a number of conference calls we held,
23 some of which even I participated in, where we tried to obtain
24 guidance from the Secretary of State's office, and ultimately
25 received none.

1 Also, the Governor gave a press conference or a town hall
2 at the beginning of these pandemic events in Texas and, during
3 those comments, suggested that the political parties were
4 talking and working on an agreement on how to handle their
5 primary election.

6 We had not been included in discussions about how the
7 primary election would have been held. Instead, the limited
8 discussions that were held related to convention processes. So
9 we reached out to the Governor's office and said, This is a
10 great idea. Let's proceed with some conversations about how
11 the elections ought to proceed. Unfortunately, those were met
12 with no response. We continued to ask local officials and
13 other state officials how the election process would occur, and
14 we never got an answer.

15 So once the State at large issued a pandemic state
16 disaster, we went into state district court in Travis County,
17 Texas, and asked the Court to clarify what existing state law
18 provides for in terms of eligibility of citizens to vote by
19 mail.

20 A hearing was held on April 15th. Your Honor has before it
21 all of the record from that proceeding; the written testimony
22 in the form of declarations; the oral testimony that was
23 presented live at the hearing, remotely, such as this
24 proceeding; and then ultimately the Court's comments at the --
25 at the conclusion of that proceeding and the written order it

1 issued two days later.

2 During that process, the Court heard a number of bits of
3 testimony from election officials, much like Your Honor has now
4 heard from, and heard testimony from voters, as Your Honor has
5 now heard from, and the uniform concern was that the pandemic
6 circumstances are drastically changing the electoral process
7 and that it is absolutely critical -- just as it is to reduce
8 the demand on hospital beds, ventilators and other medical
9 equipment, it is critical that the demand for in-person voting,
10 the curve for that demand be reduced in some way, not as a
11 matter of policy, although we think state law provides for
12 that, but because of necessity.

13 In response to the district court -- or the district court
14 listened to this testimony. And in response, on April 15th at
15 approximately 2:30, it announced in open court that it was
16 inclined to enter injunctive relief, and found that the
17 election administrators -- immediate resolution; that the
18 voters were being harmed by these conditions; and that, in the
19 district court's opinion, existing state law allows for people
20 who have a physical injury or condition, that have a likelihood
21 of injuring themselves if they vote in person, are allowed to
22 vote by mail; and that the possibility of contracting COVID-19
23 qualified under that state law exception.

24 Immediately, as the state district judge was announcing his
25 expected ruling in that case, the State's Attorney General

1 issued a letter publicly and throughout the press essentially
2 arguing the very arguments that were rejected by the state
3 district judge, and that state law prohibited voting under
4 these circumstances by mail and, in fact, went the further step
5 to claim that people who encourage citizens or assist citizens
6 in availing themselves of this right could be investigated and
7 criminally prosecuted.

8 Two days later, on April the 17th, the state district court
9 issued a written order. And, again, the Attorney General's
10 office responded with comments to the effect -- inapposite to
11 the judge's order. The State immediately filed an appeal.
12 They claim in the notice of appeal that it automatically
13 supersedes the injunction. Whether or not that is true, the
14 Court of Appeals -- the state Court of Appeals in Texas now has
15 disagreed on. Two judges found that the injunction, in fact,
16 should lie. One judge found that the State has the right to
17 automatically supersede and stay an injunction of an *ultra*
18 *vires* action, finding that executive officials are not
19 complying with state law. Whether or not that -- how that
20 issue is resolved, Travis County continued to be bound by the
21 injunction.

22 In the meantime, every other county, all 253 others in the
23 state, had to try to make it through this thicket and figure
24 out, are they to comply with the state district court order
25 that Travis County is obligated to comply with, or are they

1 required, instead, to comply with the Attorney General's policy
2 statements, of what he viewed were the rights of vote by mail?

3 Meanwhile, the State did not move to otherwise expedite or
4 seek relief from the Court of Appeals. It did file an
5 expedited appeal under the Texas Rules of Appellate Procedure,
6 but no motion was filed with the Court of Appeals to expedite
7 their review.

8 Over the last month -- it was exactly one month ago the
9 state court judge held the district court hearing. Over that
10 next month, counties around the state, one by one, began to
11 informally or formally comply with Judge Sulak's ruling. At
12 this point I'm aware of no county that has stated that it will
13 not comply with the injunction. And there's no evidence in the
14 record that anybody who has availed themselves of Judge Sulak's
15 ruling has had their ballot application rejected.

16 So that was the -- that was the status until Friday of last
17 week. And Friday of last week, the Attorney General issued yet
18 another memo, this time directed to county officials. And it
19 again threatened county officials for wrongfully complying with
20 Judge Sulak's ruling and suggested that they and people like
21 the Democratic Party and others could be subject to criminal
22 investigation and prosecution for complying with the state
23 district judge's order.

24 Early this week, the parties to -- the state Democratic
25 Party and the other plaintiff intervenors in the state district

1 court case filed a motion for the Houston Court of Appeals,
2 asking them to clarify that the injunction was in place. A
3 order was issued, asking for a response. A panel of judges was
4 appointed and made available to the parties. The State
5 responded.

6 And then, on Thursday of this week -- excuse me --
7 Wednesday of this week, before the Houston Court of Appeals had
8 ruled on the matter, the State of Texas filed a petition for
9 writ of mandamus against five counties in Texas with the Texas
10 Supreme Court: Harris, Dallas, Travis, Cameron and El Paso
11 County. Why those counties and not others? I can't explain.

12 In that case the State of Texas did not include the
13 Democratic Party or any of the voters here or any of the
14 parties in the state action as real parties in interest.
15 Instead, they were excluded from the proceeding.

16 Then, yesterday morning, the Houston Court of Appeals
17 issued its order. Both the State and our -- and our side have
18 filed before Your Honor the order and the dissent in that case.
19 Contrary to how the State describes it in the advisory it filed
20 yesterday, it is not a difference of opinion at the Houston
21 Court of Appeals about whether or not the disability provision
22 permits people to vote under these circumstances. In fact, the
23 dissent doesn't even speak to that question.

24 Instead, the dissent argues that the stay was, in fact,
25 automatic. It leaves open the question of whether or not

1 relief should be granted under a different rule. The majority,
2 the other two judges, voted to uphold the injunction and hold
3 it in place, at least until the merits appeal proceeds.

4 Now we've been advised by the State that it intends, any
5 moment today, to file a second petition of writ of mandamus
6 with the Texas Supreme Court, this time presumably seeking a
7 mandamus against the Court of Appeals judges and the district
8 court, to dissolve their injunction.

9 Now, as Your Honor knows, in the federal system -- and it's
10 similar in the state system -- in order to be entitled to a
11 petition for writ of mandamus, the law has to be clear and the
12 officer to whom you want the mandamus has to have no discretion
13 whatsoever.

14 So in the State's opinion, in its brief before the Texas
15 Supreme Court, it believes this matter is clear and it is, in
16 fact, entitled to relief, ordering state officials to no longer
17 allow people under the age of 65 to vote by mail as they have
18 been able to do for at least the last month. That is the
19 condition that we are at in this moment before this Court.

20 Now, while these state court events were taking place, an
21 election also occurred in the state of Wisconsin. There was a
22 great deal of both state and federal court litigation there.
23 Ultimately, on the evening before election day, the
24 United States Supreme Court issued an opinion in a case, the
25 RNC versus the DNC. And in that case the U.S. Supreme Court

1 said that it passed no judgment on the advisability of how
2 Wisconsin was holding its election. But it concluded that
3 because the matter reached the Court too late -- it reached the
4 federal courts too late, that it was exercising its discretion
5 to not weigh in. This is commonly referred to as the *Purcell*
6 principle, based on a U.S. -- another U.S. Supreme Court
7 decision by that name. The very next day, from that decision,
8 this lawsuit was filed. And in it, we referenced the critical
9 nature of getting relief in time for the election.

10 Now, the State's positions throughout this litigation have
11 attempted to take both sides on nearly every issue. On the one
12 hand, the case is not ripe enough for the state court, they
13 argue. On the other hand, it's also not ripe enough for this
14 Court to argue. But on the thirdhand, they tell the Texas
15 Supreme Court that this is an urgent matter requiring immediate
16 and urgent attention.

17 On another matter that the State seems to have both ways,
18 in the trial court proceeding -- and Your Honor has this
19 pleading as part of the exhibits -- the State took the position
20 that who receives a vote by mail ballot is a matter of local
21 official concern. Now, with the Texas Supreme Court petition
22 against these counties, the State argues that the counties
23 ought to be subject to a mandamus to comply with the executive
24 branch's interpretation of state law.

25 Ultimately, the State's position is that it will win in the

1 trial court. And what that world will look like, we aren't
2 completely sure. But we do know that it will mean that people
3 under the age of 65 are either completely prohibited from
4 voting by mail or have some unconstitutional burdens to do so.

5 Essentially, the events that I have described involve an
6 executive branch of a state agency acting as chaos agents with
7 respect to the State's elections. And at each of these
8 steps -- and you've seen it in the testimony offered by the
9 individual counties before the Court -- have confused and
10 complicated this process.

11 If the State is correct that it will prevail ultimately at
12 the Texas Supreme Court, then it also cannot be true that this
13 Court should abstain and no longer move forward with these
14 important federal questions. The State may not have it both
15 ways. It believes state law doesn't cover this. It's moving
16 heaven and earth to try to make that so. And if that is the
17 case, then this United States District Court's jurisdiction has
18 been properly invoked.

19 Now I'd like to move on and talk about the various claims
20 that have been brought in this preliminary injunction
21 proceeding. And it might be helpful for the Court, because I
22 know there's a lot of materials here, to start at what is not
23 at issue today. Included in plaintiffs' complaint are a number
24 of race-based claims, including Section 2 of the Voting Rights
25 Act and equal protection and constitutional claims based on

1 race discrimination.

2 Those issues are not before the Court today in this
3 preliminary injunction. -- the Court to grant relief and this
4 matter to go up on appeal, we would be asking the Court to
5 allow us to develop that record and ensure that the Court has a
6 full record on the race-based claims before they are
7 adjudicated.

8 But the case -- the claims that are before the Court at
9 this moment are what I would refer to as the non-race
10 constitutional claims and statutory claims. And they are
11 these:

12 First, that the State's executive branch's regime of how
13 vote by mail would work in this election violates the 26th
14 Amendment; that it violates the 14th Amendment Equal Protection
15 Clause. And some people consider the right to vote part of a
16 14th Amendment claim. Others argue, it's part of the First
17 Amendment. Regardless, an equal protection claim, and that
18 people under the age of 65 and over the age of 65 are treated
19 differently, but also a right to vote claim; and that people's
20 right to vote is unduly burdened and unconstitutionally
21 burdened.

22 There's also a First Amendment claim that political actors,
23 such as the voters in this case and the Democratic Party, who's
24 attempting to administer their own nomination election, have
25 been quelched from engaging in political speech. I'll show the

1 Court some exhibits to support this in a moment.

2 And then, finally, presented in the preliminary injunction
3 motion is a claim under the Voting Rights Act for voter
4 intimidation. There's no question in our mind that the events
5 that I've described to you, that are supported in this
6 evidence, in fact support a claim under the Voting Rights Act
7 of voter intimidation. And, indeed, there's no evidence that
8 at some point a court ruling will be complied with by the
9 State's executive branch.

10 But at this point we think it advisable for the Court to
11 resolve these other claims issues and reserve the voter
12 intimidation claim until such time as the State's executive
13 branch were to disregard a valid court order again, moving
14 forward.

15 Now, before I get to the 26th Amendment claim, I'd like to
16 talk about the individual interests of these plaintiffs that
17 you have before you. The Texas Democratic Party, as I
18 mentioned, is attempting to resolve its nominations for the
19 states and other -- excuse me -- for federal offices and other
20 state and local offices. It's doing so in runoff elections
21 that the Governor has moved to July 14th.

22 Now, there are weighty constitutional issues about whether
23 or not the State can tell a political party -- nominate its
24 candidates. But setting those aside for the moment, the State
25 purports to tell the Democratic Party who can participate and

1 how they can participate in its nomination process. That is an
2 issue to which it absolutely has legal standing to come to the
3 federal courts and get a resolution.

4 But even were that not true, the Fifth Circuit in a binding
5 case, the State doesn't even mention in their findings of fact
6 and conclusions of law, *The Texas Democratic Party v. Benkiser*,
7 a 2006 case, specifically found that the Texas Democratic
8 Party, both on its own and on an associational basis, has the
9 right to go into federal court and determine what the rules
10 will be governing the general election. Their interests are
11 even higher for their own election. So there is binding
12 precedent that the Democratic Party has standing.

13 With respect to the other individuals who are plaintiffs,
14 they are all voters, eligible in the state, as proven by their
15 declarations. Each of them are members of the Democratic
16 Party, having voted in the March primary. And each of them
17 desire to vote in the runoff election. But because of the
18 executive -- the state executive branch officials' conduct,
19 they fear that seeking a vote by mail ballot will subject them
20 to civil or criminal penalty.

21 Additionally, each of them is under the age of 65. Some
22 have some preexisting conditions that, under the State's
23 definition, may or may not be acceptable. Others have none at
24 all. Some have people who cohabitate with them, that are
25 highly susceptible to the most negative outcomes of COVID-19.

1 Each of these individuals clearly has standing, and they
2 have an injury that is not only expected, it is ongoing. Each
3 day that goes by, these plaintiffs are prohibited from
4 selecting and requesting their mail ballot. Mail ballots have
5 been able to be requested as of January 1st, the year of the
6 election. They have been, as Harris County points out in their
7 evidence, on the uptick in terms of requests. And these
8 plaintiffs are unable to request those ballots without fear
9 that they will be prosecuted. And they have a reasonable
10 suspicion of such, since the State's Attorney General has sent
11 out no less than two written rulings suggesting that criminal
12 prosecution is exactly what they can expect.

13 Now, again, one other condition that's worthy of the
14 Court's consideration is, the state executive branch officials
15 have been trying to, throughout this process, essentially break
16 vote by mail. But they have yet to describe what that
17 alternative universe will look like. The State Attorney
18 General, as we mention in our briefing, prior to this pandemic
19 had issued two Attorney General's opinions, finding that:
20 Number one, the definition of "disability" is up to the voter;
21 number two, that there's -- election officials locally make the
22 determination, and they can't look outside of the four corners
23 of the application, and even ruled that somebody under the age
24 of 65 who have been deemed a sexual deviant, and have been
25 essentially instructed to engage in social distancing from

1 members of the community, was permitted to vote at home because
2 their sexual deviancy was a mental condition that qualified
3 them to do so.

4 In other words, until this pandemic, the position has been
5 that local counties receive the application. If "disability"
6 is checked, they pass -- they send a mail ballot. And the
7 Attorney General has supported that throughout the way.

8 Now, there have been election contests where people have
9 gone into election contests -- we cite this in our briefing.
10 And the rule on election contests is, so long as the voter
11 casts a vote -- was an eligible voter that's entitled to vote,
12 then the method of how they voted cannot be a basis to
13 challenge their vote in an election contest. That has been the
14 condition.

15 Instead, the executive branch now would impose some
16 alternative condition. But what does it look like? Are there
17 boards of inquiry and concern in local counties; people hauled
18 before an inquisitor and asked what their conditions are? If
19 somebody had hypertension ten years ago but had a bypass and
20 it's over now, does that qualify? What if they had asthma as a
21 child, and they no longer do? Will that qualify as a
22 disability? How is it these people will be -- how is it that
23 local officials are to weigh this evidence? What sort of
24 evidence has to be offered? Are doctors' notes required?

25 What will happen with all of the people for this last month

1 that have been checking "disability" and mailing in their
2 ballot requests, relying on Judge Sulak's ruling? What happens
3 with their ballots? Are they presented an opportunity to offer
4 additional evidence? None of these eventualities, certainties
5 have been explained by the State. There's no answer for where
6 we go from here with their solution.

7 And then I'll say, on the policy point, the State argues
8 forcefully that this is the state policy, and it shouldn't be
9 disturbed with the federal district courts. It's a familiar
10 argument they made, to no success, in the voter ID case. But
11 in that case you actually did have a legislative enactment that
12 was signed by the Governor, that said, This is what citizens
13 have to do. Here, you have no such statement from the
14 legislature.

15 To the extent there's a statement from the legislature,
16 it's allow people to vote when it's dangerous to do so. They
17 even include, as an example, the legislature, in the statute, a
18 woman who's pregnant. Now, that's not a disability. But the
19 State wants to use the title of "disability" to somehow
20 restrict it today.

21 So that turns me to the claims. The 26th Amendment to the
22 U.S. Constitution was passed and ratified in the 1970s. And it
23 did so to ensure that people age 18 and over had the right to
24 vote. But it didn't just say that. The language in the
25 Constitution isn't limited to that. In fact, it copied the

1 reconstruction amendment language, saying that the right to
2 vote may not be abridged on the basis of age.

3 There hasn't been much recent litigation on the 26th
4 Amendment. But, as is typical, right after enactment, there
5 was quite a bit of litigation. And in Texas, in the ongoing
6 saga in Waller County -- the Waller County officials routinely
7 try to prevent largely African American students at Prairie
8 View A&M from voting -- the United States Department of Justice
9 brought a case. It was assigned to a three-judge court. And
10 one of the claims the Department of Justice brought was under
11 the 26th Amendment.

12 What had happened there is local election officials had
13 tried to make the students at Prairie View A&M essentially
14 provide evidence and answer questionnaires to justify that they
15 were actually residents of Waller County instead of the county
16 that their parents lived and where they were raised.

17 This was struck down by the three-judge court under a
18 number of claims. But the Court analyzes the 26th Amendment
19 over the course of several pages. And it surveys a number of
20 other federal court opinions, and it surveys state Supreme
21 Court opinions. And it ultimately comes to the conclusion that
22 the 26th Amendment is to be adjudicated under strict scrutiny.
23 The government must provide a compelling basis in order to --
24 in order to support the regulation that there are different
25 voting rules based on age.

1 That case was appealed to the United States Supreme Court.
2 Because it was a three-judge court decision, the U.S. Supreme
3 Court did not have discretion on deciding it. It was
4 ultimately summarily affirmed in *United States v. Symm*. It was
5 an 8-to-1 opinion. And the only dissent in the case, from
6 Chief Justice Rehnquist, focused on whether or not three-judge
7 courts have jurisdiction in these cases. Justice Rehnquist
8 didn't, himself, quarrel with the analysis of the lower court.

9 Those cases of summary affirmances, both the Circuit and
10 U.S. Supreme Court have said, are binding unless there is a
11 more specific U.S. Supreme Court case that comes later that
12 discusses it in detail. We view that case, at least at this
13 level, binding on this Court.

14 But even the State says in their papers that the 26th
15 Amendment ought to be handled under the *Anderson/Burdick*
16 framework. The *Anderson/Burdick* framework developed under 14th
17 Amendment litigation, but it essentially says that the Court
18 should determine the weight -- or the degree of the harm or the
19 demand of the statute and weigh it with the specific government
20 interests that the government asserts to impose that demand.
21 The higher the -- the higher the demand or the higher the
22 burden, we often say, then the more precisely the state's
23 interests have to intersect with that burden. Here, the burden
24 is absolute. If you're under the age of 65, you are prohibited
25 from voting by mail. So even under the *Anderson/Burdick*

1 framework, we assert that strict scrutiny applies.

2 But it's interesting that the State's argument is, is that
3 the 26th Amendment is essentially superfluous; that the 14th
4 Amendment already provided under the Equal Protection Clause
5 that you couldn't discriminate on the basis of age; and that
6 essentially Congress and three-quarters of the states adopted
7 the 26th Amendment in the 1970s to put an exclamation point on
8 that existing right.

9 We reject as a matter of law that argument. The 26th
10 Amendment provided a heightened amount of scrutiny for age
11 discrimination cases. But however you look at it, from the
12 State's *Anderson/Burdick* test or the *United States v. Symm*
13 test, the Court should provide strict scrutiny.

14 So what are the State's interests that are -- that they
15 offer here? The State essentially argues, one, that this is
16 state policy. I've already explained that there is no clear
17 statement of policy from the policymakers in the state. And to
18 the extent there is, it's to provide this type of voting.

19 The next analysis they offer, and really the only -- they
20 offer is fraud. Now, the State has helpfully offered the Court
21 evidence on fraud. It provided to Your Honor the testimony
22 that it dug up from the trial six years ago in the voter ID
23 case, where 40-, 50-year experienced man, Buck Wood provided
24 both an expert report and testimony in voter ID. And he
25 testified that there is significant voter fraud in vote by

1 mail.

2 And I suggest, Your Honor, to give some careful attention
3 to that testimony, especially around Pages 201 to 205, because
4 what the State highlights only tells part of the story. The
5 testimony that Mr. Wood provides is that the vote by mail
6 provisions in Texas, at least back in 2014, were subjected to
7 significant amounts of fraud among the older community. And,
8 in fact, he testifies that of the cases he's familiar with,
9 it's where people over the age of 65, who are perhaps not at --
10 who are perhaps losing some of their mental faculties, have
11 been taken advantage of by organized vote by mail harvesters.
12 There is no testimony that such a -- such a consideration
13 exists among voters under the age of 65.

14 But the fraud question begs another question. What is it
15 that makes the votes of people over the age of 65 so valuable
16 that we have to tolerate the fraud that that process
17 introduces, the fraud that the State claims introduces into the
18 electoral process, but we can't tolerate apparently a lesser
19 amount of fraud that would happen from the younger community?
20 The point is, is that the State is valuing votes differently
21 based on age. And to the extent there's any evidence of fraud,
22 the category of individuals the State's allowing to vote by
23 mail is the category that is most susceptible to the fraud.

24 But, ultimately, the legislature recently has passed a
25 number of changes to the state law to make it -- to reign in

1 the fraud that the legislature was concerned occurred. So we
2 don't even know, given these recent enactments, the extent to
3 which they will be ineffective at cutting down on the fraud.

4 But the point is, is that the balancing of interests
5 between the State, what it advances as its interests, and the
6 burden placed on it by the executive branch's interpretation of
7 if state law violates the 26th Amendment. As I've mentioned,
8 if it's true the *Anderson/Burdick* test applies, then it is also
9 true, under the 14th Amendment equal protection claim, that the
10 State's interests do not match with the high burden that the
11 executive branch's interpretation would apply. That would lead
12 to unequal protection violation based on age.

13 But the right to vote claim is slightly different. The
14 right to vote claim doesn't rely upon the State's placing an
15 arbitrary age threshold of age 65. Instead, it focuses on
16 whether or not the right to vote at large has been unduly
17 burdened by the State under the election conditions that exist.

18 As we mention in our papers, we have filed facial
19 challenges on some of these claims. But for the purposes
20 today, the as-applied right to vote, Fourteenth and First
21 Amendment challenge says that the pandemic circumstances unduly
22 burden the right to vote, such that individuals should be
23 entitled to vote by mail. That claim would exist whether or
24 not the State provided any vote by mail for anyone.

25 Then, finally, but importantly, the First Amendment rights

1 of the Texas Democratic Party, these individual plaintiffs and
2 others are at issue in this case because they have been, by
3 the -- by the executive branch's actions, prevented from
4 engaging in critically important political speech.

5 And, Your Honor, I may ask leave to share my screen with
6 you, to share an exhibit, if I may.

7 Your Honor, are you able to see an exhibit that says -- a
8 text from Kathaleen Wall?

9 THE COURT: Yes.

10 MR. DUNN: All right. This is Exhibit 35 that has
11 been admitted. And as you can see, it is dated. It's an
12 electronic message dated April 15th at 6:06 p.m. That's a
13 critical time. Because at 6:06 p.m. -- about four hours, three
14 and a half hours after Judge Sulak had issued his ruling and
15 several hours after it had been made public throughout the
16 media.

17 Ms. Wall is a republican candidate for a congressional
18 district in the southeast corner of the Houston area, around
19 Fort Bend County. And she says here, Earlier today or tomorrow
20 you'll receive from my campaign vote by mail documents.

21 And she says, quote, In consultation with the Texas
22 Attorney General, who has endorsed my run for Congressional
23 District 22, we've gotten clarification that you have the virus
24 -- that you have to have the virus in order to qualify.
25 Therefore, if you meet the criteria to vote by mail, don't

1 hesitate.

2 And she puts a link to Attorney General Paxton's public
3 announcement that he was not complying with Judge Sulak's
4 ruling and disagreed with it.

5 But then this vote by mail piece goes out. And it says,
6 Important, vote by mail update. Quote, "You have the green
7 light to vote by mail. Look for your application in the mail
8 soon."

9 And elsewhere in the document, it says here on Page 3,
10 Recently, the Texas Secretary of State ruled that voters'
11 concerns over contracting or spreading the COVID-19 virus and
12 endangering their health by visiting a public polling place
13 meet the election law requirements to be deemed eligible to
14 vote absentee.

15 In other words, a republican candidate has been able to
16 send out a mailer to her supporters, asking any of them to vote
17 by mail. She says the Secretary of State ruled as such. That
18 is news, at least, to the Attorney General's office. Your
19 Honor may want to review Exhibit 1, which is the singular
20 advisory issued by the Secretary of State about voting through
21 disability. And it was widely perceived by many to be a green
22 light to voting by mail during disability, except it was
23 followed up with actions by the Attorney General's office who
24 argued otherwise.

25 In this mailing, Ms. Wall includes a preprinted application

1 form, and it already has the "disability" box checked.

2 So what is -- what are the conditions here in terms of
3 First Amendment public discourse? A republican candidate,
4 operating largely in Fort Bend County, is sending out mailings,
5 apparently with cooperation of the State Attorney General's
6 office, and the State is attempting to mandamus county
7 officials but, importantly, not Fort Bend County, where it
8 knows that a candidate has already mailed out a mail ballot
9 application.

10 Meanwhile, the Democratic Party, both statewide and local,
11 and its candidates and associated organizations and supporting
12 organizations, are on standstill, are frozen in terms of the
13 communications it can make because it has no way to know
14 whether or not the threats of criminal investigation and
15 prosecution will be applied to it, even though it hasn't been
16 applied, at least thus far, to republican candidates.

17 That type of stifling of political speech, especially as it
18 relates to elections, nominations and the core of our political
19 process, is absolutely prohibited under the First Amendment.

20 THE COURT: Mr. Dunn, you have about two minutes left
21 on your first 30 minutes.

22 MR. DUNN: Thank you, Your Honor.

23 So I'll just deal, finally, with the defensive issues.
24 I've talked about standing. There is standing.

25 On redressability, the State is trying to argue a recent

1 Eleventh Circuit opinion that says every county in the state,
2 in Florida anyway, has to be sued. But the Fifth Circuit, in
3 the *OCA* opinion, just a few years ago, explicitly rejects the
4 *Jacobson* analysis and says that because Texas law provides the
5 Secretary of State must enforce uniformity, that's at Texas
6 Election Code 31.003, that, in Texas, suing the Secretary of
7 State is sufficient for statewide relief on election-related
8 matters.

9 Now, finally, I'd like to talk about abstention and this
10 Wisconsin study. There is a study that you're going to, I'm
11 sure, hear about in Wisconsin. It's not peer reviewed. It
12 hasn't been published. And it essentially finds that there was
13 a steady increase in cases in Wisconsin after it had its
14 disastrous election.

15 It is important to note, though, that Wisconsin allows
16 no-excuse vote by mail, which was widely used by a number of
17 citizens. On the issue of abstention, the Court -- the State's
18 position to this Court is that it will win at the Texas Supreme
19 Court, that state law is clear that people cannot do this, and
20 that alone is enough for this Court to proceed under the
21 abstention doctrine.

22 But as a practical matter, we've provided Your Honor a
23 number of exhibits, testimony, evidence, argument today.
24 Presumably it will need time to process those. And by the time
25 it has been able to review the evidence, it ought to be able to

1 be in a position to make a decision if the State is right and
2 the state Supreme Court will upset the process.

3 And that's my final point. The *Purcell* principle says, we
4 do not interrupt election processes underway. And although
5 it's unclear when that benchmark is reached, for the last month
6 people in Texas have been following the Sulak ruling. The
7 counties have been following the Sulak ruling. There's no
8 evidence before Your Honor that anybody hasn't. Indeed, a
9 republican candidate has sent out prebilled vote by mail cards.

10 It is the State that wants to violate *Purcell*. And if the
11 state Supreme Court ends up doing so at its request, this Court
12 should be ready to immediately enjoin such action, in violation
13 of *Purcell*.

14 Thank you, Your Honor. I look forward to addressing the
15 State's arguments on rebuttal.

16 THE COURT: All right. Can you remove that exhibit to
17 get back to the full screen, Mr. Dunn?

18 MR. DUNN: Yes, sir.

19 THE COURT: There we go.

20 All right. Mr. Abrams, we went over a little bit. So you
21 have 50 minutes, if you -- if you want it.

22 MR. ABRAMS: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MR. ABRAMS: Mr. Dunn, can you hear me? Just want to
25 be sure I'm --

1 MR. DUNN: Yes, sir. Thank you.

2 MR. ABRAMS: Okay. Great.

3 I want to start with the clarification that Mr. Dunn
4 offered on some of his claims. In their preliminary injunction
5 motion, they asserted race discrimination claims and voter
6 intimidation claims under Section 1985. As I understood
7 Mr. Dunn's presentation, those claims are no longer before the
8 Court.

9 THE COURT: Correct.

10 MR. ABRAMS: And so we are left with the First
11 Amendment claim and then the various voting claims. That's my
12 understanding.

13 THE COURT: Right. Twenty-sixth, Fourteenth, First,
14 voter rights. I'm sorry. Voter rights is being held in
15 abeyance, also. But go ahead.

16 MR. ABRAMS: That's right.

17 THE COURT: It's basically federal constitutional
18 claims.

19 MR. ABRAMS: Right.

20 And I'd like to start where Mr. Dunn ended his
21 presentation, on the issue of abstention, which I think is our
22 primary argument and the main reason that the Court should not
23 resolve plaintiffs' preliminary injunction claims at this
24 juncture.

25 You actually heard Mr. Dunn speak at length, for about ten

1 minutes, about what has happened in the state court
2 proceedings. And I think, if anything, that demonstrates why
3 this Court should wait until those proceedings have run their
4 course.

5 So after I address *Pullman* abstention, I'll turn to the
6 record evidence regarding COVID-19 and the careful steps that
7 Texas election officials have taken to ensure that elections
8 can be safely held.

9 I'll also discuss some of the jurisdictional arguments that
10 we raise in our brief, followed by the merits of plaintiffs'
11 First, Fourteenth and Twenty-sixth Amendment claims. And,
12 finally, we'll address the public interest factors that counsel
13 against the issuance of the extraordinarily broad injunction
14 that the plaintiffs request, which would request the narrow
15 exceptions for allowing mail-in voting with a mandate that all
16 eligible voters can vote by mail in this context.

17 Forty-five years ago, in *Harris County Commissioners Court*
18 *v. Moore* -- and that's at 420 U.S. 77, a case that arose out of
19 Texas -- the Supreme Court reiterated the *Pullman* abstention
20 doctrine; that where the challenged statute is part of an
21 integrated scheme of related constitutional provisions,
22 statutes and regulations, and where the scheme as a whole calls
23 for clarifying interpretation by the state courts, we have
24 regularly required the district courts to abstain.

25 That doctrine applies with full force to plaintiffs' claims

1 because there is a significant unresolved issue of state law
2 that will have a significant impact on this legislation,
3 whichever way the Texas courts ultimately rule.

4 The crux of plaintiffs' claims is that, in light of
5 COVID-19, all voters should be allowed to apply to vote by
6 mail. But what's critical is that they have sought and
7 preliminarily obtained that exact remedy in state court
8 already. They do not do so through a constitutional attack,
9 although they easily could have brought such a claim in the
10 state court proceedings, but through a declaratory judgment
11 action, seeking to construe the meaning of Section 82.002(a) in
12 the Texas Election Code.

13 And the Travis County district court agreed with the
14 plaintiffs that "sickness" or "physical condition" as used in
15 the statute would cover any voter without established immunity
16 to COVID-19. The State of Texas disagreed with that opinion
17 and has filed an appeal. And, as Mr. Dunn discussed, there are
18 multiple proceedings in the appellate courts, including the
19 recent mandamus petition that Texas filed. And it's very
20 likely that in short order the Texas Supreme Court will resolve
21 that issue one way or the other.

22 THE COURT: By the way, I had a curiosity question.
23 The trial case was in Travis County?

24 MR. ABRAMS: That's correct, Your Honor.

25 THE COURT: The appellate is over in the Fourteenth.

1 How did that happen?

2 MR. ABRAMS: There was -- it was filed in the Third --
3 the appeal was filed in the Third Court of Appeal. And, by
4 order of the Texas Supreme Court, it was transferred to the
5 Fourteenth Court of Appeal. I believe it had something to do
6 with redistribution of dockets and caseload.

7 THE COURT: All right.

8 MR. ABRAMS: So I want to just provide an illustration
9 of why *Pullman* abstention is appropriate here. And it goes to
10 how the Court would have to analyze plaintiffs' claims in order
11 to grant them the relief that they request.

12 To grant the injunction and find a constitutional
13 violation, the Court would have to conclude implicitly, if not
14 expressly, that the definition of "sickness" or "physical
15 condition" in the Texas Election Code does not cover fear of
16 contracting COVID-19. This is because, if the Court were to
17 agree with the Travis County district court, plaintiffs would
18 not have any as-applied claims. So, in other words, if the
19 Court agrees that the Texas Election Code covers those who have
20 a fear of contracting COVID, the Court would essentially be
21 treading the exact same ground that the Travis County court
22 already did.

23 So it is out of concern of respect for federalism and the
24 ability of state courts to interpret state law in the first
25 instance that compel the conclusion that those claims should be

1 resolved in state court first. It is also the most efficient
2 course that closely protects the rule of law and will provide
3 the most clarity to local election officials throughout Texas.

4 The response that I heard from plaintiffs' presentation is
5 that the State believes it will win, and so abstention is not
6 appropriate. But I'm not aware of any case law, and I don't
7 believe the plaintiff cited any, that the party's belief about
8 the merits of their claims or the merits of the underlying
9 state court issue govern the abstention doctrine.

10 By its nature, the abstention doctrine is for complex,
11 nuanced issues. And so, of course, every side thinks that
12 they're going to win their appeal. And, obviously, one side
13 wins, and one side loses. But that would eviscerate the
14 abstention doctrine, if just because one side believes that
15 they will win, the Court, you know, all of the sudden can just
16 take that at its word and not abstain, when the principle of
17 abstention is respecting federalism principles and the ability
18 of state courts to interpret uniquely state law issues first.

19 So if the Court finds that abstention is appropriate, the
20 proper course would be to dismiss the case without prejudice
21 under *Moore*.

22 But even if the Court finds that *Pullman* abstention is not
23 warranted here, the Court can still hold the injunction motion
24 in a pause proceeding -- or in a stay posture pending the Texas
25 court's resolution of currently unsettled Texas law. As *Wright*

1 & *Miller* has noted, there is no problem if the federal court
2 merely postpones decision for a time to await an opinion of the
3 state court in an action already pending.

4 So one way that that could look, for example, would be to
5 set a status conference in several weeks, after the Texas
6 Supreme Court has resolved this issue, and determine what
7 remains of the parties' claims. So it's important to note, I
8 mean, no matter how the Texas courts ultimately resolve this
9 issue, it will significantly impact the litigation. If the
10 Texas Supreme Court agrees with the State, that will impact the
11 voter intimidation claims, the claims against General Paxton,
12 the First Amendment claims, and it will probably impact the
13 character and nature of their voting claims.

14 And if the Texas Supreme Court ultimately agrees with the
15 plaintiffs, then it's unclear that they would have any
16 as-applied constitutional claims because the State of Texas law
17 would be to allow voters who have a fear of contracting COVID
18 to vote by mail.

19 So the Texas courts are, by plaintiffs' own design, the
20 ones handling that claim. And it's there that this issue
21 should be resolved before the federal courts step in to resolve
22 constitutional concerns that may or may not arise and in any
23 event will likely be significantly altered depending on what
24 the state courts do.

25 Your Honor, I'd like to turn to the evidence that the

1 parties have submitted regarding COVID-19, its impact on Texas
2 and the upcoming elections, because that evidence is critical
3 to defendants' arguments about the merits of plaintiffs'
4 constitutional claims.

5 Defendants submitted a declaration from Dr. Jeffrey
6 Klausner, a medical doctor who is also an epidemiologist. And
7 that's Exhibit C to our response to the motion for preliminary
8 injunction.

9 THE COURT: Right. I have it here.

10 MR. ABRAMS: Okay. Thank you, Your Honor.

11 He has been focused on epidemiology and infectious diseases
12 for his entire career. And he's also a treating physician to
13 patients with COVID-19. As he explains and as we all know,
14 COVID-19 is a respiratory virus that is spread via respiratory
15 droplets. There have been well-documented outbreaks of
16 COVID-19 in large -- in areas like cruise ships, nursing homes,
17 medical facilities and other places that are associated with
18 prolonged exposure, crowding and contaminated surfaces.
19 Outdoor events, on the other hand, have rarely been associated
20 with outbreaks.

21 Dr. Klausner testified that those who are elderly or who
22 have chronic diseases are particularly vulnerable to severe
23 disease from COVID-19, requiring hospitalization. Younger
24 persons, under 65 years of age, and those who are otherwise
25 healthy are at a comparatively low risk of hospitalization and

1 death. And according to Dr. Klausner, that applies especially
2 so with those who are healthy and under age 44.

3 And, indeed, plaintiffs' own medical expert, Dr. Arthur
4 Reingold, noted in his report, which is at Plaintiffs' Exhibit
5 28, paragraph 8, that those over 65 are at the greatest risk of
6 serious illness from COVID-19.

7 Now, as Dr. Klausner explains, every epidemic is local. So
8 differences in personal behavior, climate, crowding, household
9 density and public transportation use can contribute to
10 important differences in the frequency and distribution of
11 cases. And based -- in Dr. Klausner's opinion, based on the
12 absence of epidemic spread in urban areas, the relatively
13 modest number in new cases in Texas in March and April of 2020
14 and the current availability of testing and awareness, in
15 addition to methods like contact tracing the State is currently
16 employing, the State should be able to limit community spread
17 across Texas.

18 All of this matters tremendously in terms of the
19 plaintiffs' claims about the safety of conducting elections in
20 Texas. Evidence-based measures that focus on social
21 distancing, decontamination, reduction of possible transmission
22 and monitoring to assess the impact of those measures can all
23 reduce the spread of COVID-19. And it was our expert's
24 testimony that, with reasonable measures in place, Texas could
25 hold elections safely in the summer and fall of 2020.

1 And I also want to address for the Court our Exhibit D,
2 which was the declaration of Bruce Sherbet --

3 THE COURT: Right.

4 MR. ABRAMS: -- who was the Collin County elections
5 administrator. And he testified to the remarkable lengths that
6 Collin County is already going to ensure that voters can safely
7 exercise the franchise.

8 And so some of those measures include: Thoroughly training
9 election workers on best practices, providing a table-mounted
10 plexiglass protective shield at each voter check-in station,
11 providing protective masks for all election workers, providing
12 sanitizing wipes and hand sanitizer, practicing social
13 distancing, offering cotton swabs to touch the ballot machine
14 instead of actually having to press it, you know, with your
15 hand, placing additional election workers in polling places,
16 preparing for increased curbside voting traffic and conducting
17 a thorough analysis of how those measures worked and what can
18 be done to improve them in subsequent elections.

19 The State supports those efforts. And what Mr. Dunn didn't
20 mention is the steps that the State has already taken to ensure
21 voter safety. So just this Monday, for example, Governor
22 Abbott issued a proclamation that expanded early voting days
23 for the July 14th election. And that's Exhibit A to our motion
24 for preliminary injunction -- or to our response, rather.
25 Early voting will now start on June 29th and run through July

1 10th, thus providing more opportunities for voters to vote and
2 preventing overcrowding at polling places.

3 And it's worth noting, Your Honor, the broader context in
4 which these claims are arising. As we noted in a footnote in
5 our brief, the Texas Democratic Party has filed at least seven
6 different lawsuits challenging different provisions of the
7 Texas Election Code. And in one of those lawsuits they
8 challenge what they allege to be Texas' restrictions on early
9 voting places through a bill known -- called HB1888. And so
10 what Texas has just done, at least for this July election, is
11 expand early voting, exactly like the Democrats are -- the
12 Texas Democratic Party is requesting in that case.

13 Moreover, the Secretary of State will soon provide detailed
14 recommendations for protecting the health and safety of voters
15 and election workers at the polls and will work closely with
16 election officials to ensure that our elections are conducted
17 with the utmost safety and security. And that's at Exhibit B
18 to -- that's the mass email to the counties at Exhibit B to our
19 preliminary injunction response.

20 And so all of that is hugely important in the context of
21 analyzing plaintiffs' claims. It is the state officials'
22 responsibility to ensure the safety of Texans and that our
23 elections can run smoothly. And the evidence in the record
24 shows that state officials are discharging that duty with the
25 utmost sense of responsibility and purpose.

1 THE COURT: While you're taking a breath, let me ask
2 you a question. On footnote 6 of Dr. Klausner's statement, I
3 believe it is -- yes, footnote 6 -- he refers to the Wisconsin
4 election that --

5 I think, Mr. Dunn, you referred to that as well, correct?

6 MR. DUNN: Yes, sir.

7 THE COURT: All right. And so I interpret --
8 Dr. Klausner says the absence of a substantial outbreak in that
9 Wisconsin situation. So he thinks that example enures to the
10 State's benefit. Mr. Dunn, I think, if I understood you
11 correctly, that your side is saying that there was an increase
12 of cases of people who went to vote in person?

13 MR. DUNN: There were. And Wisconsin allows people
14 without excuse to vote by mail.

15 THE COURT: Okay. All right. Well, so that's -- all
16 right.

17 MR. ABRAMS: Yeah. Well, and, Your Honor, a couple of
18 points to that. I believe that there were -- and Dr. Klausner
19 mentions this in his report. There were approximately 440,000
20 in-person voters. That's a substantial number. And some of
21 the reports that I had seen were that there were about 50 or 60
22 case. And no one is diminishing the importance of that. But
23 from a statistical perspective, you know, Dr. Klausner's
24 opinion was that that shows that, you know, these elections can
25 be held safely.

1 And what's also important is that Wisconsin is obviously
2 different from Texas. And Texas is -- you know, as we learn
3 more about the virus and ways to protect the health and safety
4 of voters, I think county election officials in the state can
5 proceed with taking whatever steps are necessary to do that.
6 And so that's why, you know, the Secretary of State will be
7 providing detailed guidance on that issue.

8 So the Secretary of State and state election officials are
9 certainly not just leaving it, you know, to just luck or
10 anything like that, that people can vote safely. I mean, we
11 are actively planning and providing detailed guidance on how to
12 do this safely in light of the situation.

13 THE COURT: All right. Let me go back to something
14 else you said. Your position, the State's position is that if
15 some healthy 40-year-old has a mental anxiety or fear, that
16 they don't qualify under the statute for an absentee ballot,
17 correct?

18 MR. ABRAMS: Yes, Your Honor. The position that we
19 took in the state court proceedings is that a fear of
20 contracting COVID-19 does not meet the definition of "sickness"
21 or "physical disability."

22 THE COURT: All right. So now let's go the next step.
23 Suppose that otherwise healthy 40-year-old has an underlying
24 condition that is not in the classical definition of a
25 disability but is an underlying condition that could lead that

1 person to have more chance of getting the COVID-19? Does
2 that -- does that person qualify for an absentee ballot?

3 MR. ABRAMS: Our position would be that you have to
4 look at the text of the statute. So it talks about a physical
5 condition that provides a risk of health to the voter. And so
6 that particular fact pattern isn't before the Court, but I
7 think that that would be certainly a closer call.

8 And, Your Honor, if I could just address one thing that
9 goes to your question, which is that, the fact that we're
10 discussing that issue, you know, what does state law mean, is
11 exactly why this Court should abstain in the first place,
12 because that is a question that can and probably should be
13 raised in the -- in the state court proceedings. But that's
14 not really relevant to the plaintiffs' constitutional claims
15 here. So that's an issue for the state court to resolve.

16 THE COURT: All right. Go ahead.

17 MR. ABRAMS: Thank you, Your Honor.

18 And so for all of these reasons, the Court should defer to
19 the judgment of the state actors and the elected
20 representatives who administer the state's laws.

21 I'd like to turn to the plaintiffs' arguments about
22 standing -- or our arguments about standing. The plaintiffs
23 have not demonstrated an injury in fact because they have not
24 shown that they are unable to vote by mail for other reasons,
25 for example, if they will be outside their county of residence

1 or perhaps if they might have a disability. Mr. Dunn mentioned
2 that some of the plaintiffs have physical conditions that might
3 subject them to worse circumstances because of COVID-19. I
4 don't recall where that is in the record, but I think that that
5 would go -- that would certainly be an issue as to their
6 standing.

7 THE COURT: So any voter -- let's take the
8 hypothetical voter who -- going to your no standing, any voter
9 who, Well, I don't -- I'm not really afraid of contracting
10 COVID-19, but I don't want to have to go be around all those
11 people just in case. So like the Republican ballot thing, I'm
12 just going to go ahead and check the "disabled" box, or, I'm
13 going to check the I'll be -- I'll be across the county line on
14 election day, and so I'll be absent.

15 So if that's true, anybody can -- because I gather that the
16 Secretary of State and the local election officials, when they
17 get this, they don't call up the voter and say, Well, now,
18 exactly where are you going to be on election day? Correct?

19 MR. ABRAMS: That's correct. I mean, the Secretary of
20 State -- and we'll be providing more guidance to the counties
21 in this regard especially. So to go to that example, Your
22 Honor, if someone on the ballot didn't check any of those four
23 boxes, which are, you know, being in jail, disability, over age
24 65 or out of the county, but instead checked "other" or
25 something like that and then said "COVID," you know, the county

1 could properly reject that because, as the State has
2 articulated, a fear of contracting COVID does not subject a
3 voter -- or does not allow a voter to vote based on a
4 disability.

5 But to the extent a voter marks something on the ballot,
6 they're -- now, there are potential criminal laws that deal
7 with intentionally falsifying an election document, which would
8 include a ballot -- application ballot. So if someone
9 knowingly checks that they will be outside of the county and
10 they knew that they will be inside of the county, there are
11 potential criminal consequences there. But that's a separate
12 issue from what the county does with the ballot.

13 THE COURT: Right. Okay.

14 MR. ABRAMS: Finally, Your Honor, I was going to
15 address the plaintiffs' standing with respect to their race
16 discrimination claims, but it sounds like at this point they
17 aren't pursuing those claims anymore.

18 THE COURT: Right.

19 MR. ABRAMS: But it is important to note, the
20 plaintiffs, Texas Democratic Party and Gilberto Hinojosa, are
21 claiming a standing based on an uncertainty in the law. But
22 the federal courts cannot issue advisory opinions. And so it
23 cannot be the case that they have standing just because they
24 are not sure how the law will be applied to them. If that were
25 the case, the federal courts would be inundated with plaintiffs

1 who don't understand how something might be applied. And
2 that's why, in the criminal context, it requires a threat --
3 reasonable threat of enforcement.

4 And so the plaintiffs don't have standing to pursue their
5 claims. But if they did, the Court -- and the Court determines
6 not to abstain and to reach the merits of plaintiffs'
7 constitutional claims, their motion for preliminary injunction
8 should still be denied.

9 As Mr. Dunn notes, courts do typically apply the *Anderson/*
10 *Burdick* framework to voting rights cases. And so in examining
11 challenges to a state's voting laws, courts weigh the character
12 and magnitude of the asserted injury to the rights protected by
13 the Constitution that the plaintiff seeks to vindicate against
14 the precise interest put forward by the State as justifications
15 for burdens imposed by the rule, taking into account the extent
16 to which those interests make it necessary to burden the
17 plaintiffs' rights. And that's a standard that I know the
18 Court is well familiar with.

19 The plaintiffs didn't mention what the state defendants
20 view as the most directly applicable precedent. And that is
21 the *McDonald v. Board of Election Commissioners of Chicago*
22 case, which we cited extensively in our brief. It does precede
23 the *Anderson/Burdick* analysis being developed by the
24 United States Supreme Court, but it is particularly salient
25 with regard to the lack of a specific constitutional right to

1 absentee or, as we've been calling it here in Texas, with
2 respect to mail-in voting.

3 In *McDonald*, the Supreme Court recognized that there is a
4 clear distinction between the right to register to vote and
5 cast a ballot and the ability to utilize a state's absentee
6 ballot machinery. The Court explained that absentee statutes,
7 which are designed to make voting more available to some groups
8 who cannot easily get to the polls, do not themselves deny
9 appellants the exercise of the franchise.

10 And so that the plaintiffs in *McDonald*, who were in jail
11 and couldn't vote by mail, were unable to take advantage of the
12 voting by mail opportunities, did not implicate the right to
13 vote because it did not preclude the plaintiffs from voting via
14 other methods. So the Court noted that in that case it was not
15 the right to vote that is at stake here, but a claimed right to
16 receive absentee ballots.

17 And so for that reason the plaintiffs' claims are not
18 subject to the strict scrutiny that Mr. Dunn argues because we
19 are not dealing with what would -- the Courts have recognized
20 as a fundamental right to vote, but the right to an absentee
21 ballot, which *McDonald* dispels.

22 But even if the Court were to assume that there is a
23 constitutionally and protected interest here, the State has
24 multiple interests in preserving its system of primarily
25 in-person voting, while allowing some voters to vote early by

1 mail.

2 The first of those is that the State has a significant
3 interest in enforcing its enacted laws. Mr. Dunn dismissed
4 this as just, the State wants to pursue its wrong-headed
5 policy. But these are the laws that were enacted by the Texas
6 legislature as voted on -- as they were voted in by members of
7 the public. And multiple courts in numerous contexts have
8 recognized that states have a significant interest in
9 enforcement of their laws.

10 Texas does also have a significant and important interest
11 in preserving the integrity of its elections, in preventing
12 voter fraud and in ensuring that voters are confident in the
13 fairness and stability of Texas' elections.

14 As the Supreme Court noted in *Crawford v. Marion County*
15 *Election Board*, there's no question about the legitimacy or
16 importance of the state's interest in counting only those votes
17 of eligible voters. Moreover, the interest in orderly
18 administration and accurate recordkeeping provides a sufficient
19 justification for carefully identifying all voters
20 participating in the election process.

21 THE COURT: So if a concern is about vote harvesting
22 or fraud, then why would you allow people over 65? They should
23 not be allowed to vote by mail either because they can -- I
24 think Mr. Dunn alluded to this, but -- and there have been
25 instances of nursing home voter fraud, so forth. So I guess

1 that would take an act of the legislature. But if -- but if
2 that's the State's interest, then over 65 shouldn't be voting
3 by mail.

4 But, on the other hand, as it stands now, if you're 65
5 years and one day, you can vote by mail. But if you're 64
6 years and 360 days old, you can't, right?

7 MR. ABRAMS: Yes. Let me try to take several
8 approaches to that question.

9 THE COURT: So what's the rational basis between 65
10 and one day and one day less than 65?

11 MR. ABRAMS: Your Honor, I think that there is -- if
12 we're looking at this under rational basis, the interest --
13 the, sort of, where we draw the line doesn't have to be so
14 precise that, you know, you can point to at 64 years of age and
15 200 days is when statistically more people are likely to have
16 certain issues. I mean, I think the question is just, did the
17 legislature have a rational basis for drawing the line where it
18 did?

19 And so we have evidence, for example, that those over 65
20 are more likely to be in extended care facilities and nursing
21 homes. With respect to COVID, the plaintiffs' own expert drew
22 the line at 65. And so I think that there is an interest, if
23 not a more compelling interest in the context of COVID, for
24 those over 65 to be able to vote by mail. And so I think that
25 that's where, you know, the State has decided to draw the line.

1 And with respect to fraud, I think the concern with respect
2 to expanding mail-in voting to -- what the plaintiffs' expert
3 testified to in the voter ID trial was that when voting was
4 expanded to essentially no-excuse voting for those over 65,
5 that's where there was an increase in fraud. Before, it was
6 just, you have to have a doctor's note or something like that.
7 And then it was expanded to all voters over --

8 THE COURT: Was that -- are there studies that show
9 those are the problems in Utah and Oregon and others that have,
10 I think, exclusive vote by mail?

11 MR. ABRAMS: I'm not aware of what other studies have
12 shown. And I don't believe the plaintiffs have put forward any
13 evidence of that, either. Although, there were a lot of
14 exhibits yesterday, so I might have missed something. But I'm
15 not aware that there's that evidence before the Court.

16 THE COURT: Okay.

17 MR. ABRAMS: But I think the issue is that if we were
18 to all of a sudden, in the middle of a difficult situation
19 where counties are already under a lot of stress, dealing with
20 all the issues that arise from COVID-19 -- if we were to all of
21 the sudden expand vote by mail that significantly, the State
22 has a significant concern that there would be an increase in
23 voter fraud. And that is an interest that the United States
24 Supreme Court has recognized in multiple cases; that a valid
25 concern for an increase in voter fraud is a legitimate state

1 interest in a restriction or a voting regime.

2 And finally, Your Honor, I think that once we look at what
3 the State's interests are, we also have to look at the evidence
4 that the plaintiffs have put forward of what their burdens will
5 be to go in and vote in person. And what I think is
6 essentially before the Court is a battle of experts. The State
7 has put forward a very credible expert who's an expert in
8 epidemiology, who has testified to the reasonable ways that
9 Texas can hold elections safely. And the plaintiffs have
10 offered other experts, including those from the state court
11 proceedings, who have a different take.

12 Obviously, we assert that our expert is more credible and
13 the Court should follow his report. But it's difficult to see
14 on this record, where the plaintiffs have a burden of showing a
15 substantial likelihood of success on the merits, that with this
16 conflicting evidence and the inherent uncertainty of how things
17 will develop over the coming months and what counties will do,
18 that the plaintiffs have met their burden of showing it will be
19 an unconstitutional infringement on the franchise for them to
20 have to appear in person.

21 I don't believe Mr. Dunn mentioned this, but the plaintiffs
22 have a void for vagueness claim in their motion for preliminary
23 injunction, where they argue that the Texas definition of
24 "disability" is unconstitutionally vague. But the plaintiffs
25 do not truly meet their burden under that standard, which is

1 that a civil statute must be so vague and indefinite as really
2 to be no rule at all.

3 What the plaintiffs disagree with and what they've made
4 clear that they disagree with is what they believe is an
5 incorrect interpretation of the law by the Texas Attorney
6 General. And for the reasons that I've already discussed
7 earlier today, the Court should abstain from resolving that
8 question. And we'll soon have clarity from the Texas courts on
9 what "sickness" or "physical condition" means in the Election
10 Code.

11 So the fact that the plaintiffs disagree with the plain
12 meaning of the statute, as the Texas Attorney General has
13 interpreted it, does not give them rise to a void for vagueness
14 claim, and they certainly cannot succeed with a void for
15 vagueness claim solely because of what a Texas appellate court
16 might ultimately do with this issue.

17 Your Honor, at this point I'd like to circle back a little
18 bit to some of the state court proceedings and what has
19 unfolded and how the Attorney General has acted appropriately
20 in all circumstances with regards to the state court's rulings.

21 The plaintiffs' claims that the -- the plaintiffs claim now
22 that the Attorney General is violating their free speech rights
23 by opining and giving guidance on matters of Texas state law.
24 That cannot be the case.

25 So first, under Texas law, the State had the automatic

1 right to supersede, that is, to stay the injunction that the
2 Travis County court issued, without posting a bond. And that
3 is exactly what Attorney General Paxton did. And when he did
4 so, the injunction was stayed. And the two-to-one vote from
5 the Fourteenth Court of Appeals inherently recognized that by
6 issuing temporary orders to enforce the injunction.

7 And so General Paxton has abided and followed the
8 appropriate Texas procedures to undo, you know, decisions that
9 he disagrees with, including filing a potential mandamus action
10 in the Texas Supreme Court.

11 THE COURT: All right. Help me understand.

12 MR. ABRAMS: Yes.

13 THE COURT: So what is the status of the state court
14 order?

15 MR. ABRAMS: So as of yesterday, the state court --
16 the appellate court has said that Judge Sulak's order shall
17 remain in effect pending disposition of the appeal. And Judge
18 Sulak's order was that those who lack immunity from COVID-19
19 are eligible to vote by mail under Texas law.

20 And, Your Honor, that goes exactly -- why abstention is
21 appropriate here. I mean, as of this moment, the plaintiffs
22 have the relief that they are requesting. I mean, that ruling
23 is in effect. Now, the State can, and it will in short order,
24 appeal that to the Texas Supreme Court, which shows that this
25 issue is still in flux, which also shows why abstention is

1 necessary.

2 THE COURT: But then you said something about General
3 Paxton doing what he did stayed the order?

4 MR. ABRAMS: Yes. So on April 17th, the district
5 court issued its written order -- signed and entered its
6 written order. Within 30 minutes, the State, through Attorney
7 General Paxton, filed its notice of appeal. Under Texas law,
8 that automatically stayed the injunction. Now --

9 THE COURT: Okay.

10 MR. ABRAMS: -- the Fourteenth --

11 THE COURT: Not his public statements, but the filing
12 of the stay?

13 MR. ABRAMS: The filing of the stay, exactly.

14 THE COURT: All right. Well, I misunderstood then.

15 MR. ABRAMS: No. Thank you. Thank you, Your Honor.

16 THE COURT: Go ahead.

17 MR. ABRAMS: So that's what's happened. The State has
18 done nothing nefarious. These cases were brought to the
19 State's doorstep. The plaintiffs are the ones who filed them.
20 And the Texas -- well, at least the state court case -- not the
21 mandamus petition that the State just filed, but the Texas
22 Democratic Party's case and this case are cases that have been
23 filed by plaintiffs, and that Texas intervened to defend, as
24 was its right -- intervened in the case to defend the
25 uniformity of the Texas Election Code.

1 So essentially the plaintiffs disagree with the way that
2 the State has acted as a litigant, but the State is entitled to
3 defend its rights in court as it sees fit, just as the
4 plaintiffs are entitled to do. And those proceedings are still
5 ongoing.

6 Last year, this Court rejected a very similar challenge to
7 an allegedly threatening press release that Attorney General
8 Paxton issued. And this was in the voter roll cases. And the
9 Court noted that, you know, public officials have the right to
10 speak out on matters of public import. And I think that that's
11 especially important here, because the injunction that
12 plaintiffs are essentially seeking would be to enjoin a state
13 official from discussing matters of state law. And there will
14 be serious federalism and First Amendment concerns with
15 enjoining an elected state official from opining on matters of
16 state law.

17 I'd like to turn to the public interest factors that the
18 plaintiffs have to meet to show that they are entitled to an
19 injunction. First, the plaintiffs have not shown that they
20 will suffer an irreparable injury because they have not proven
21 that they will be deprived of the safe exercise of the
22 franchise in the state's upcoming elections. Moreover, the
23 inability for a state to enforce its duly enacted laws clearly
24 inflicts irreparable harm on the state.

25 Finally, the plaintiffs have not demonstrated that an

1 injunction will serve the public interest. It is in the
2 interest of the public for the Governor and the elected
3 officials to exercise their lawful constitutional authority to
4 respond to a public health crisis and to find ways to balance
5 the operation of the Texas Election Code with the need to
6 protect the health and safety of voters. That is how our
7 system works, and it's working effectively.

8 And recall the significant evidence that the Secretary, the
9 Governor and the counties are doing to ensure the safety of
10 Texans. It shows that the appropriate steps are being taken.
11 That work continues and will continue on a day-to-day basis.
12 And plaintiffs have not demonstrated that the Court should stop
13 that work in its tracks.

14 As the Court has already intimated, the July election cycle
15 is already well underway. And it is too late for a federal
16 court to enjoin state processes in that election. This is all
17 driven by the State's -- or by the plaintiffs' litigation
18 strategy. They sought relief in state court and then weren't
19 happy with the procedures that govern state appellate
20 proceedings. And so they filed this case in federal court.

21 That was their litigation strategy, as is their right. But
22 it does not require this Court to disregard and discard long-
23 standing and foundational abstention doctrines. The *Pullman*
24 abstention doctrine applies with full force to a case like
25 this, where there is a difficult and unsettled issue of state

1 law that the state court should speak to first.

2 The state court -- the State defendants request that the
3 Court deny plaintiffs' motion for preliminary injunction or, in
4 the alternative, hold the plaintiffs' motion in abeyance or
5 stay the plaintiffs' motion until Texas courts have ruled, and
6 then, after the Texas courts have ruled, holding a status
7 conference with the parties to determine what the next steps in
8 this case would be.

9 THE COURT: Okay. Well, by that time the horse will
10 be out of the barn, probably, time-wise.

11 MR. ABRAMS: Well, I mean, we already argue that it
12 already is too late. And I think the Court's order spoke to
13 that. So I think that's -- but that's where, you know, the
14 timing -- the timing led us.

15 THE COURT: So are you saying from a law school
16 what-if example, if the plaintiffs had filed the federal suit
17 only, then abstention would not be an issue?

18 MR. ABRAMS: Well, that's an interesting question,
19 Your Honor. I think it goes -- it depends on how they would
20 have pleaded it. I think that abstention would likely have
21 been an issue in any event because of the uncertain nature of
22 state law. So there might have been a situation where a
23 federal judge might have wanted to say, This claim really
24 hinges on how to interpret state law, and so I should abstain
25 from ruling on it until the Texas courts have. That's one

1 possibility.

2 THE COURT: Okay. Hold on just a moment.

3 And I think I heard Mr. Dunn say, or perhaps Mr. Abrams,
4 that a woman who is expecting a child can check the box. I
5 mean, there's not a pregnancy box, but they can still get an
6 absentee ballot if they're pregnant?

7 MR. ABRAMS: Your Honor, Section 82.002(b) of the
8 Election Code specifically provides that pregnancy would meet
9 the definition of "disability" under the Election Code.

10 THE COURT: Okay. I see. Yes. All right.

11 All right. Anything else for right now?

12 MR. ABRAMS: No, Your Honor. Thank you for your time.

13 THE COURT: All right. We'll take a ten-minute
14 recess. Then we'll hear from Mr. Dunn, Ms. Veidt and
15 Mr. Green. Thank you.

16 (Recess at 10:24 a.m. until 10:35 a.m.)

17 THE COURT: You may be seated. Thank you.

18 All right. Mr. Dunn, it's your turn to reply for 15
19 minutes.

20 MR. DUNN: Thank you, Your Honor. Chad Dunn again on
21 behalf of plaintiffs.

22 THE COURT: And can you -- I don't know. Can you turn
23 your volume up a little for me, at least, and the -- and the
24 spectators, also?

25 MR. DUNN: How about that, Your Honor?

1 THE COURT: Is that better?

2 MR. DUNN: Is that working?

3 THE COURT: Yes. Thank you.

4 MR. DUNN: Very well. If I may again have leave to
5 share my screen, Your Honor.

6 THE COURT: Okay.

7 MR. DUNN: I'd like to start off -- Mr. Abrams, I
8 think -- it's a large record. He made a misstatement of what
9 the record reflects. And I'm sure it was just a mistake, but I
10 want to clarify it for the Court. Your Honor asked a question
11 about individual voters and the choices -- that they're in
12 their -- sitting in their living room, their kitchen and
13 bedrooms at this moment trying to decide, Can I vote by mail?
14 Can I not? What are my conditions? What qualifies?

15 And the State's argument, I thought I heard, to you was,
16 that's not presented in this case. And I'll have to
17 respectfully but strongly disagree. I'd like to direct the
18 Court to Plaintiffs' Exhibit 10. This is the declaration of
19 one of the named plaintiffs, Joseph Cascino. And he says here
20 in the -- in the first full paragraph of Page 2 of his
21 declaration that he's an asthmatic. He's particularly
22 concerned about that -- about the virus and how it may affect
23 his asthmatic condition. He's under the age of 65. In fact,
24 he's in his twenties. And he's trying to find out whether or
25 not he can vote by mail -- count. So this just isn't some sort

1 of academic concern.

2 Another plaintiff, this is Plaintiffs' Exhibit 9, Shanda
3 Sansing, she testifies here that both her husband and her
4 daughter, here on, again, Page 2, the second full paragraph --
5 "My husband and my daughter are both asthmatics and have
6 comprised respiratory systems." And she's concerned about
7 going and voting in person and bringing that back home. And,
8 presumably, her husband struggles as well in terms of whether
9 he goes and votes in person.

10 So the issue is squarely before this Court. What do people
11 do with something that isn't, you know, what Ken Paxton would
12 describe as a disability? Of course, nobody knows that can
13 predict because nobody's been provided any direction in that
14 regard. But what do they do if they don't have that? How do
15 they know if they don't? And, you know, at the end of the day
16 the State says, Just trust us. We got a plan. We'll tell you
17 about it when we get ready.

18 The problem is, is that the election apparatus has been
19 underway for at least a month. As I've mentioned, Judge
20 Sulak's ruling has been complied by the counties, and as far as
21 I know, every voter who's asked for -- has received their
22 ballot.

23 What is the alternative universe the State wants to operate
24 in and how does it work? The constitutional rights of American
25 citizens are not dependent on the benevolence of an emperor or

1 on the whims of executive state officials when they get around
2 to deciding it. The right to vote is sacred, the U.S. Supreme
3 Court has said time and again. Our state Supreme Court has
4 said this time and again.

5 The determination is being made now, five minutes ago, five
6 minutes from now. Citizens are at home trying to determine
7 whether they can send in a vote by mail ballot. Some are doing
8 so. Some are holding off on it. County officials are
9 receiving these applications. And as far as we know, they're
10 granting them under Judge Sulak's ruling.

11 The idea that the State wants to present is somehow it's
12 too early now to get a decision, and later, it'll be too late.
13 It has been the State's consistent position on this one thing,
14 both in state court and here in the federal court, and that is
15 that the judiciary, both state and federal, should have no role
16 to play. It should exercise no jurisdiction whatsoever and,
17 instead, leave it up to executive officials -- not the
18 legislature or the policy branches, but leave it up to
19 executive branch officials to literally make it up as they go.

20 I heard from Mr. Abrams about the Texas Democratic Party's
21 lawsuit against HB1888. And it is true, the legislature
22 recently told election administrators, against their -- against
23 the vast majority of their opinion, that they could no longer
24 provide mobile polling locations. That's a case pending before
25 Judge Yeakel in the Austin Division of the Western District.

1 It is news to me that the State is now taking the position
2 that they're allowing counties to do mobile voting in this
3 upcoming election. It would be a positive step if they have.
4 But that doesn't address the harm here.

5 And as long as we're talking about the State's position
6 that, Look, people can vote. They might have additional
7 burdens, but they can vote, essentially is advocating a
8 survival-of-the-fittest election. Those who are willing and
9 able to take the most risk will have their votes secured and
10 counted. And those who have preexisting conditions, concerns
11 about being prosecuted or cohabitate with others that are in
12 danger are left out of the electoral process.

13 That's not what our Constitution provides. And it
14 ultimately is the job of federal district courts to ensure that
15 state executive officials can't play fast and loose with
16 constitutional rights, like as existing here.

17 And then, secondly, on this notion that because somebody
18 actually theoretically has some ability to go vote, it doesn't
19 matter how we've limited it, number one, is against the
20 authorities. But it's also been specifically rejected in a
21 binding decision on this Court in the voter ID case. The
22 *Veasey v. Abbott* Fifth Circuit en banc decision explicitly
23 discusses the State's arguments, that if voters are provided
24 one method of voting, that cures any restrictions that they
25 face on another method of voting.

1 So at least as a matter in this Circuit, until the Supreme
2 Court or the Fifth Circuit en banc overrules that ruling, it is
3 the law that simply providing one method to vote is not -- does
4 not justify the burdens that the State would put on another
5 right to vote.

6 Now I'll turn to the -- medical evidence. I think that the
7 State has somewhat misdescribed the state of the evidence
8 before this Court. It is true that there's an epidemiologist
9 who testifies on behalf of the State that in-person voting can
10 be made safe, and suggests some measures.

11 We don't disagree with the proposition that there are a
12 number of measures to make in-person voting safe. But there's
13 a reason that the State has orders in place that no more than
14 ten people should be in one location together. It's because
15 they and their experts, and along with the other 49 states and
16 the federal government and the CDC, have concluded that having
17 a number of people together is dangerous for them, and it helps
18 spread the pandemic. So I don't see where there's a legitimate
19 question here that having a bunch of people in in-person voting
20 can be safe and isn't a danger for the pandemic.

21 But even were that the case or the testimony of their
22 epidemiologist, you have also the testimony of two other
23 epidemiologists and their declarations, Dr. Catherine Troisi,
24 who testified in the state court proceeding. You can find that
25 testimony at Exhibit 25. She has also entered a declaration at

1 Exhibit 21. There was also a Ph.D. public health modeling
2 expert affidavit or declaration submitted in the state district
3 court. And then, here today, in this proceeding, is another
4 epidemiologist's opinion, at Exhibit 28, Dr. Arthur Reingold.

5 The evidence is clear, not just by the testimony in this
6 court but the actions by nearly every official in the country
7 over the last two months, we have got to reduce the number of
8 people exposed to one another in the same location.

9 Now, whether or not that you can -- the State is taking
10 reasonable steps to protect people who vote in person still
11 doesn't answer the question whether or not people, based solely
12 on their age, ought to be excluded from one version of voting
13 or another.

14 And on that point the State suggests to the Court that the
15 *McDonald* decision is controlling, and faults us for not
16 discussing it. And we don't discuss the *McDonald* opinion in
17 the same way we don't discuss *Marbury v. Madison*. They're
18 technically relevant, but they're outside the central issue in
19 this case. And there's more recent opinions that are directly
20 on point.

21 The most important for Your Honor's purposes is
22 *United States v. Symm*, summary affirmance of the U.S. Supreme
23 Court by the three-judge court in Waller County that says that
24 you apply a strict scrutiny analysis. There are other cases
25 that specifically talk about age restrictions, that Your Honor

1 can find in the briefing. Those are the cases that control
2 here.

3 But I think it is unnecessary to get down in the weeds of
4 what the standard here is. The State says it's *Anderson/*
5 *Burdick*. We think it's strict scrutiny. The State says it's
6 rational basis. We think it's a compelling interest. The
7 point is, they can't --. As Your Honor's question points out,
8 there is simply no rational basis for a 64-year-old grandmother
9 to have to go down and vote in person right now, when her
10 68-year-old husband and grandfather can vote by mail.

11 The pandemic circumstances in our -- well, and let me back
12 up. From our standpoint, that's not constitutional on the
13 facial matter. But at least now, in the pandemic, as applies
14 today, that is not a constitutional -- or a condition.

15 Now, there is discussion -- the State speculates that if
16 the counties have to comply with Judge Sulak's ruling, that
17 there'll be stress on the system. Their fear -- the State
18 faults us for fear and then argues in defense that they have a
19 fear counties aren't up to the job.

20 The counties who filed briefing before this Court tell you
21 they're up to the job. But you don't have to just rely on
22 that. The last month has proven they are up to the job. The
23 individual counties in this state are complying with the
24 ruling. That's why the State -- file a petition for writ of
25 mandamus with the Texas Supreme Court. Again, the counties

1 have been able to do so without incident.

2 But whether or not some executive branch officials think
3 that the counties can do this is not the point. The point is,
4 what does state law provide and what does the U.S. Constitution
5 mandate?

6 This is not simply a case of what is -- the uncertainty or
7 asking for an advisory opinion. There are real live plaintiffs
8 before this Court that are suffering harm now. They want to
9 mail in a ballot application request now, and they don't know
10 if they can.

11 The Texas Democratic Party receives daily, through various
12 communications in their hotline, questions from real voters
13 about how they're supposed to vote. They're calling the
14 Secretary of State's office and are getting the same answer
15 Your Honor got from Mr. Abrams: We'll get to that at some
16 point. We'll give you an explanation about these individual
17 circumstances at some point.

18 Once General Paxton issued his two letters that threatened
19 criminal investigation and prosecution, the state Democratic
20 Party, its candidates have essentially had their political
21 speech stopped. When people call and ask about what and -- how
22 can they vote, we have to simply say, Judge Sulak's ruling says
23 that you can. The State takes the position that, through some
24 rule of appellate procedure, that's been stayed. You should
25 check with your local county.

1 That's not vigorous political debate. That's not First
2 Amendment protected electoral activity at its best. Instead,
3 it's stifled communications, and it's even been done so in such
4 a way that it's more harmful in the Democratic Party than the
5 Republican, because apparently a republican candidate can send
6 out direct mail, asking people to vote by mail without
7 consequence, but the Democratic Party and its candidates have
8 to worry about themselves.

9 Now, I would like to talk about the proposed order. The
10 statement that the State -- or the argument that I heard from
11 the State is that the proposed order is too broad. It
12 orders -- executive branch officials. It violates their
13 rights. The amended order that was filed yesterday is concise.
14 It's limited to the issue of who can vote and how the State has
15 to administer that -- further proceedings.

16 And ultimately, assuming the State complies with that
17 ruling, that's all the relief that should be needed for now in
18 this case. So it is simply incorrect that the proposed order
19 that the plaintiffs have offered would order General Paxton to
20 stop talking about matters of public concern.

21 Instead, it is the Democratic Party that has effectively
22 been, through criminal threat, forestalled from talking about
23 the rights of voters and communicating with their own voters
24 and party members about how they can participate in the party's
25 nomination process.

1 The individuals in this case have standing. There is
2 redressability because the harm is ongoing.

3 And then, finally, I'll address *Purcell*. The State's
4 position, as I keep saying, is it's either too early or it's
5 too late. And ultimately, as Your Honor referenced in your
6 question -- is that if they're successful at convincing the
7 Texas Supreme Court to undo what the two lower courts have
8 done, they want you to set some status conference days off from
9 now, where I guarantee you their argument to this Court will
10 be, Oph, it's too late. You've run out of jurisdiction.
11 Because even though the system was in place and operating fine
12 for a month, we've managed to get a court to upset it for a few
13 days. And now that's it. Pause, tag, you're it.

14 That is not how constitutional rights in this country ought
15 to be adjudicated. And at least with respect to the *Purcell*
16 principle on abstention, the U.S. Supreme Court has not yet
17 issued clarifying rulings on where abstention meets the *Purcell*
18 principle. If it is true that there is some imaginary line
19 where it's too late for federal courts to get involved, then it
20 also has to be true that abstention cannot be used to hold the
21 federal court's jurisdiction in abeyance, such that it can
22 never effectively rule on electoral rights in time.

23 We are -- what the State wants to do is obtain a ruling
24 quickly from the Texas Supreme Court and then force us --
25 freeze us in a twilight zone, a twilight zone where some people

1 can vote by mail under 65, some can't, nobody knows how, and
2 none of the counties know how to enforce it, and then come
3 argue to this Court that it's too late for the Court to do
4 something. That simply is an unacceptable outcome.

5 Now, finally, I'll say, Your Honor, we don't want to be
6 here. I know there's a lot of fights in this state. I've been
7 a part of them for 20 plus years, over electoral rights and who
8 gets to vote. I've never experienced, of course, anything like
9 this pandemic. It shakes all of us to the core about
10 everything that we thought was right in life. Everything that
11 we used to do three months ago is different.

12 You would think, in this given moment we could have gotten
13 together and gotten to a solution that all of us can live with.
14 But we haven't. I know you -- I presume you don't want to be
15 here either. But the United States District Court is the
16 harbor of last resort for constitutional rights, and all too
17 often, it's had to be used in this state. We ask you to
18 exercise the jurisdiction you've been granted by the
19 Constitution, the United States Congress, and enforce the U.S.
20 Constitution for voters in the state of Texas.

21 THE COURT: All right. And, indeed, on your last
22 point -- or alluding to the last point, it's my understanding
23 that the Secretary of State in Georgia, on its own, either
24 expanded or allowed much more free and open vote by mail
25 because of the same concerns. But it was done either by

1 agreement or -- but, certainly, without a court order, correct?
2 Or do you know?

3 MR. DUNN: That's my understanding, Your Honor. Yes.

4 THE COURT: Okay.

5 MR. DUNN: That the parties worked together and the
6 Secretary of State issued an order. And, incidentally, I think
7 people are unhappy with parts of that. But at least there was
8 a collaborative way to get to vote by mail.

9 THE COURT: All right. One of the things that has
10 been raised as a fear on the other side is this matter of vote
11 harvesting. To the extent that that happens already in the
12 older age group, what is -- what is the response? That it's a
13 matter of law enforcement; that it's a *de minimis* number of
14 people that do that, that don't have any substantial effect on
15 elections, or is there a way to prevent it, so forth?

16 MR. DUNN: Your Honor, a few responses. First, there
17 is a expert report on this issue from George Korbel at Exhibit
18 31 and also an earlier report from him in the state court
19 proceeding, that I can't -- as Exhibit 8, where he categorizes
20 the number of prosecutions for vote by mail, the vast majority
21 of which have resulted in plea deals for something short of
22 voter fraud or vote by mail fraud. It appears that, you know,
23 what the State does find, it's able to prosecute and stop,
24 using its statutes.

25 But it's important to point out that just very recently the

1 legislature took up this issue and passed a statute that added
2 a bunch of additional measures to protect against vote by mail.
3 And the State sort of alludes in its papers that, Well, okay.
4 If we've got to allow everybody that's eligible over the age of
5 18 to vote by mail, then there should be no voting by mail.

6 Well, the cases that -- and U.S. Supreme Court cases we
7 cite in our papers say, you don't go to nullification. That's
8 not typically the relief you offer. Instead, if there is
9 discriminatory policy, then you open it up to everybody instead
10 of the age. But if the State wants that, they should tell you
11 that now. That should be the requested relief that they
12 want --

13 THE COURT: Okay. All right. Ms. Veidt, would you
14 care to weigh in on the Travis County position?

15 And could we get the screen back to the full position? I
16 think, Ms. Herndon -- yeah. You're seeing what I'm seeing.

17 THE CLERK: Yes, sir.

18 THE COURT: What is happening with our technology
19 here?

20 THE CLERK: Someone's sending someone a message there.
21 They need to delete that. There we go.

22 THE COURT: All right. Ms. Veidt, you may proceed.

23 MS. VEIDT: Thank you, Your Honor. I'm trying to get
24 my own screen back. For some reason, it's gone away.

25 My name is Cynthia Veidt. I'm an assistant Travis County

1 attorney who represents Dana DeBeauvoir, who has been sued in
2 her official capacity as the Travis County Clerk.

3 Ms. DeBeauvoir's statutory duties include the
4 administration of all elections within Travis County, which she
5 has done for the past 33 years. Ms. DeBeauvoir's goal is and
6 has always been to run an election that is efficient, compliant
7 with the law and accessible to as many voters as possible.

8 In light of the current pandemic, she is employing
9 mitigation strategies to decrease the risk of transmitting
10 COVID-19 when voting, and supports any ruling that reduces the
11 spread of the virus to both poll workers and voters.

12 Like most of the other parties in both the state court case
13 and this case, Ms. DeBeauvoir looks forward to an expedited
14 ruling because the statutory deadlines for the upcoming
15 election are either here or are approaching very soon, and she
16 will need time to comply with any orders. Clarity on the
17 issues will allow her to make preparations toward her primary
18 goal of ensuring an open, fair and safe election in July and
19 for any other elections that may occur during this pandemic.
20 An expedited ruling will also help minimize confusion for both
21 elected officials and voters.

22 Thank you for your time, Your Honor.

23 THE COURT: All right. Now, Mr. Green, before I hear
24 from you, I have a question. And, of course, those in the
25 audience, I don't think, can see -- well, perhaps they can.

1 But those listening in on audio cannot see that I'm having to
2 look at this screen with these three young people compared to
3 me.

4 And so my question, Mr. Green, is how -- in Bexar County
5 how do we old people get this vote by mail ballot?

6 MR. GREEN: Thank you, Your Honor. That's a very good
7 question, and you actually have anticipated one of the --
8 couple of points that I wanted to make this morning.

9 THE COURT: All right. And move to one side so you
10 speak into one microphone or the other. It'll pick up better.

11 MR. GREEN: Is that better, Your Honor?

12 THE COURT: There you go.

13 MR. GREEN: Yeah. So in order to obtain a ballot to
14 vote by mail, there's an application form that has been
15 developed by the Secretary of State. That's available on the
16 Bexar County election administrator's website.

17 THE COURT: So it's not sent to old people
18 automatically?

19 MR. GREEN: It is -- no. It's my understanding that
20 you -- that a voter needs to complete an application and then
21 submit it to their county clerk or elections administrator in
22 order to receive the ballot that they would then use to vote by
23 mail.

24 THE COURT: Okay. Go ahead.

25 MR. GREEN: Your Honor, I just briefly want to make a

1 couple of points that are specific to Bexar County's role in
2 all of this. I want to say at the outset that Bexar County is
3 not here to take a position on the State's arguments about
4 abstention. We're not here to take a position on the merit or
5 the lack of merit of the claims that plaintiffs are making
6 against the State defendants.

7 What I do want to make clear is that plaintiffs, as I think
8 you've heard today, are challenging an interpretation of state
9 law that has been made by state officials. They are not
10 alleging that Bexar County or that any Bexar County official,
11 including our elections administrator, Ms. Callanen, have done
12 anything that they think is improper. And I think that's
13 important for the relief that you are going to consider
14 granting after this hearing today.

15 As I'm sure everyone knows, in order to get a preliminary
16 injunction against a party, the plaintiff who is seeking it has
17 an obligation to show that they're likely to prevail on the
18 merits of a claim against that party, to be bound by the
19 injunction. And I think it's quite clear from what you've
20 heard today, as well as from the pleadings, that the plaintiffs
21 here don't have a claim against Bexar County. They're not
22 disputing anything that we've done. You heard from plaintiffs
23 today that it's their understanding that no county has been
24 rejecting applications to receive a ballot to vote by mail.
25 That is also my understanding.

1 So in light of that fact, I think it's clear at the outset
2 that whatever injunction that ultimately may be entered in this
3 case does not need to include Bexar County. And even if an
4 injunction does not include Bexar County or other local
5 elections officials throughout the state, as plaintiffs have
6 also noted to you today, it still provides relief effectively
7 on a statewide basis because the injunction -- any injunction
8 that may be entered by this Court nonetheless can be binding on
9 the Secretary of State.

10 And state law is clear, and I believe the plaintiffs agree
11 with this, that it is the obligation of the Secretary of State
12 to create -- to obtain uniformity in the interpretation of the
13 Elections Code. And that, of course, includes Section 82.002.

14 The Attorney General has also rendered an opinion on this
15 point. Attorney General opinion KP-009, which dates back to
16 2015, indicates that the Attorney General agrees that "the
17 Texas Secretary of State is the entity tasked with
18 administering and applying Section 82.002." And, of course,
19 that's the section that describes who is eligible to vote by
20 mail on the basis of a disability.

21 So first off, again, there's not a claim against Bexar
22 County here. So injunctive relief need not include Bexar
23 County. And if it does not, it nonetheless can be effective to
24 provide relief on a statewide basis.

25 The final point that I want to make, Your Honor, relates to

1 the nature in which local elections officials receive and
2 process applications to vote by mail. I believe that you have
3 a copy of the application form submitted as one of plaintiffs'
4 exhibits. I believe it's Plaintiffs' Exhibit Number 35. And
5 you can see on the application form that a voter who believes
6 that they are eligible under Section 82.002 is permitted to
7 indicate that solely by checking a box that is marked
8 "disability." The form, which is developed by the Secretary of
9 State, does not allow the voter a way to indicate what
10 qualifying disability they believe they have.

11 So from a local perspective, if an elections administrator
12 receives one of these applications, you know, if a Court were
13 to order or if the Secretary of State were to issue guidance
14 that local officials should reject certain disability
15 applications if they are premised on some COVID-related fear or
16 lack of immunity, it's not clear at all that local officials
17 would even be able to do that, because the application does not
18 allow voters to represent to a local elections administrator
19 why they believe they have a qualifying disability.

20 And so I think that also relates back, as a practical
21 matter, to how injunctive relief, if the Court decides to enter
22 any, should be structured in order to be effective. I think
23 what really is ultimately going to be the issue here is what
24 officials, both state officials and local officials, are
25 broadcasting to the public about who is eligible to apply.

1 Because once the application is submitted, it's really not
2 clear at all that there's any way to administer some
3 distinction between voters who have a qualifying disability and
4 those who arguably, at least according to the State, don't have
5 a qualifying disability because Section 82.002 isn't broad
6 enough to encompass a lack of immunity.

7 The County has submitted a response to plaintiffs'
8 preliminary injunction motion to the Court. And one of the
9 things that's noted in that response is that the District
10 Attorney's office was asked by the Bexar County Commissioners
11 Court to render an opinion regarding the state law issues that
12 are also raised in this case.

13 And it was the opinion of the District Attorney's office
14 that, in the absence of guidance from the Secretary of State on
15 this question, that as a matter of just applying the text of
16 Section 82.002, lack of immunity to COVID-19 is a physical
17 condition, and that a voter lacking that immunity is endangered
18 by in-person voting. I think that that's kind of an
19 inescapable reality.

20 But I also want to make clear to the Court that it is the
21 understanding of Bexar County and the District Attorney's
22 office that, ultimately, it's up to the Secretary of State to
23 issue guidance to local elections administrators about how
24 Section 82.002 applies. And then, ultimately, of course, it's
25 up to the judiciary to tell all of us what the law is,

1 including the Texas Elections Code.

2 As the State indicated in its presentation, local elections
3 officials are doing a lot to make in-person voting as safe as
4 it can be made. I think we all have the understanding that
5 regardless of how Section 82.002 is interpreted ultimately by
6 this Court or the Texas Supreme Court, some voters will choose
7 to vote in person. In-person voting will happen. And it's an
8 obligation that we have on the county level to make sure that
9 we administer those elections in accordance with state law and
10 that we make them as safe as we possibly can for the voters in
11 our county.

12 We've got a very experienced elections administrator who
13 has decades of experience and is undertaking really
14 extraordinary efforts to make in-person voting as safe as it
15 can be. That said, I think we also have a concern on a local
16 level that all of the safety measures that we can possibly take
17 will not be enough to eliminate the danger to voters that may
18 be presented by in-person voting during a pandemic.

19 And so, you know, I think that's kind of a matter of
20 commonsense. If you're going to Walmart or HEB, there's a lot
21 of things that we're doing now, that we didn't used to do, to
22 make that as safe as possible. But, fundamentally, it's still
23 safer to just not go if you don't have to. And I think a
24 similar analysis can be applied to in-person voting.

25 So, Your Honor, just to close, again, there's not really a

1 claim against Bexar County here. I don't think Bexar County
2 needs to be included in any injunctive relief that's rendered
3 by this Court. And beyond that -- and really because there's
4 not a claim against Bexar County, we're not really here to take
5 a position one way or the other.

6 Thank you, Your Honor.

7 THE COURT: All right. Yes. You talked about what we
8 do, that we didn't used to do with masks and so forth. And I
9 understand now that there's some reason to believe that not
10 only can la corona enter the body through the nose and the
11 mouth, but through the eyes. So now we're going to, I guess --
12 and, of course, we see the medical personnel wearing the eye
13 shades and shields as well. So yes, there's no perfect
14 solution until this thing goes away, which is not going away.

15 MR. GREEN: Yeah. I think that's right, Your Honor.
16 Thank you.

17 THE COURT: All right. Thank you, sir.

18 Let me thank counsel and, again, thank the court staff and
19 the IT staff for putting all of this together.

20 For those of you not privy to all of the things being
21 filed, we have, oh, I guess, upwards of about 10,000 pages of
22 exhibits, pleadings, documents and so forth that have been
23 filed by the parties.

24 But also, Ms. Sullivan, we have how many amicus? Five?

25 THE LAW CLERK: I believe four. I believe four.

1 THE COURT: Four. We have four amicus briefs filed by
2 people supporting both sides. So the bottom line is, for those
3 of you who are interested in when a decision will be
4 forthcoming, all I can tell you is, it will be forthcoming, but
5 no guarantee as to when because, obviously, we have to think
6 about this and then craft an opinion and so forth.

7 And, by the way, Mr. Dunn, you all have submitted your
8 proposed findings and conclusions?

9 MR. DUNN: Yes, Your Honor.

10 THE COURT: And, Mr. Abrams, you all, also?

11 MR. ABRAMS: Yes, Your Honor.

12 THE COURT: Okay. All right. Anything else,
13 Mr. Dunn, around the horn? Anything for plaintiffs?

14 MR. DUNN: May I address just a little bit of what the
15 county said, Your Honor, because --

16 THE COURT: Yes.

17 MR. DUNN: -- it could end up being an important
18 issue?

19 So I'll try to be brief. But there's a brand new decision
20 out of the Eleventh Circuit last week called *Jacobson*. And in
21 it, the Eleventh Circuit concludes with respect to Florida that
22 you can't just sue the Florida Secretary of State to get an
23 order. You got to sue the individual counties, all 67 of them.
24 And that's because, evidently, in Florida they don't -- in my
25 view they don't have as robust of statutes as we do, that the

1 Secretary of State has to keep things uniform.

2 The State's relying on that here in Texas. They're now
3 saying *Jacobson* should be the law here. Our briefing says the
4 Fifth Circuit decided this in a case called *OCA*. But I wanted
5 you to understand why the counties are being asked to be
6 ordered as well. And it's because the State's argument is, is
7 that this is up to the counties. And in order to get relief
8 for these individual plaintiffs, their county election people
9 have to be ordered. So I just wanted to explain that to you.

10 THE COURT: Well, that was -- that was the position a
11 year or so ago in the other case that involved who was on first
12 and what's on second as far as the Secretary of State and the
13 counties, if I remember correctly.

14 MR. DUNN: Yes, sir. You do.

15 THE COURT: And, of course, Mr. Green, I don't think,
16 was involved in that one. And Ms. Veidt, I don't remember.

17 All right. Mr. Abrams, anything further?

18 MR. ABRAMS: Nothing, Your Honor.

19 THE COURT: All right. Ms. Veidt?

20 MS. VEIDT: No, Your Honor.

21 THE COURT: Mr. Green?

22 MR. GREEN: No. Thank you, Your Honor.

23 THE COURT: Okay. All right. Thank you very much.

24 We're in recess.

25 (11:08 a.m.)

-oOo-

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

Date: 5/16/2020 /s/ Chris Poage
United States Court Reporter
655 East Cesar E. Chavez Blvd., Rm. G-65
San Antonio, TX 78206
Telephone: (210) 244-5036

Exhibit O

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Texas Democratic Party, Gilbert Hinojosa, §
Chair of the Texas Democratic Party, §
Joseph Daniel Cascino, Shanda Marie §
Sansing, and Brenda Li Garcia, §
Plaintiffs, §

V.

Civil Action No. 5:20-CV-00438-FB

Greg Abbott, Governor of Texas; Ruth
Hughes, Texas Secretary of State, Dana
Debeauvoir, Travis County Clerk, and
Jacquelyn F. Callanen, Bexar County
Elections Administrator,
Defendants.

DECLARATION OF BRUCE SHERBET

1. My name is Bruce Sherbet. I currently serve as the Elections Administrator for Collin County, Texas, and have been serving in this capacity since December 2015.

2. I previously served as Elections Administrator in Dallas County for 24 years, and spent another two years doing the same work for Ellis County before being appointed as the Elections Administrator for Collin County. I have been involved in election-related work for over 35 years.

3. Collin County will be holding a primary runoff election on July 14, 2020. In light of the COVID-19 pandemic, Collin County will be taking precautionary measures to ensure the safety of voters and poll workers.

4. At this time, the safety measures that Collin County plans on implementing include the following:

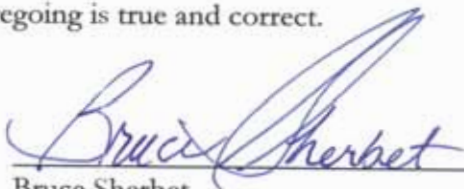
- Thoroughly training election workers on best practices for setting up polling locations for social distancing, including determining maximum capacity inside the voting areas.

- Providing a table-mounted Plexiglas protective shield at each voter check-in station.
Poll workers will be stationed behind the protective shield as they are processing the voters.
 - Providing protective masks for all election workers. A new mask will be provided for each day of Early Voting and on Election Day.
 - Providing sanitizing wipes and hand sanitizer to each location in sufficient quantities as to accommodate voter turnout and equipment sanitation needs. Election workers will be trained on proper procedures for sanitizing the items touched by voters.
 - Providing social distancing floor decals to polling places to ensure safety recommendations are practiced inside and outside the location.
 - Offering cotton swabs to voters to use as a disposable stylus for marking their ballot selections on the touch screen ballot marking device.
 - Placing additional election workers in polling places to assist with changes relating to implementation of the safety measures.
 - Preparing for increased curbside voting traffic at polling places.
 - Conducting a thorough post-election analysis of the safety measures used in the July 14, 2020 Primary Runoff Election including seeking input from voters and election workers, and making any necessary adjustments to the safety measures in preparations for the November 3, 2020 General Election.
5. Collin County may modify or expand these measures as necessary to protect the health and safety of voters and poll workers.

6. Based on my personal conversations with other election officials in Texas, I understand that other counties in Texas will be implementing similar measures for the July elections.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 8, 2020.



Bruce Sherbet
Elections Administrator
Collin County, Texas

Exhibit **P**

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

TEXAS DEMOCRATIC PARTY, GILBERTO §
HINOJOSA, Chair of the Texas Democratic §
Party, JOSEPH DANIEL CASCINO, §
SHANDA MARIE SANSING, and §
BRENDA LI GARCIA §
Plaintiff, §

v. §

GREG ABBOTT, Governor of Texas; RUTH §
HUGHS, Texas Secretary of State, DANA §
DEBEAUVOIR, Travis County Clerk, and §
JACQUELYN F. CALLANEN, Bexar County §
Elections Administrator §
Defendants. §

CIVIL ACTION NO.
5: 20-CV-00438-FB

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TO THE HONORABLE JUDGE FRED BIERY:

The Rule of Law has broken down in the State of Texas, and it has become clear that the federal courts will have to ensure basic constitutional protections for the U.S. Citizens within. On April 15, 2020, some of these plaintiffs appeared before a state district court seeking an interpretation of the state law that provides that voters with a physical condition that could cause them injury were they to vote in person entitles them to vote by mail. After an evidentiary hearing in which the State participated and cross-examined witnesses, the court (state district judge Tim Sulak) announced from the bench its finding that state law permits vote by mail to every eligible voter, amid the COVID-19 pandemic. As that ruling was announced in an

extraordinary display of disrespect for orders of the state judiciary, Attorney General Paxton¹ issued an advice letter threatening to prosecute people and groups who complied with the state court ruling. After the written order was entered on April 17, the state appealed but it appears in no hurry to reverse the trial Court, having taken no steps to expedite its appeal.

In the days since the state Court ruling, counties around the state have begun to comply. Many counties have posted notice of their websites that they are accepting vote by mail applications in compliance with Judge Sulak's ruling. City and school district elections going forward in early May, are accepting vote by mail applications in compliance with Judge Sulak's ruling. After waiting well more than a week watching the state election apparatus turn to comply with the state court order and after watching tens of thousands of Texans submit vote by mail applications, Defendants appear willing to allow the circumstances where the state's judicial branch has so far reached one view of the law while, at least part of, the executive branch of state government threatens prosecution for complying with the Court order.

Texas citizens can no longer have confidence that the Executive branch of the state will comply with the Rule of Law. Now, even if the state is never successful in overturning the state court order, the Attorney General has shown he will not comply with orders of his state's judiciary. Furthermore, Texans will continue to reasonably fear that the executive branch will not comply with state court rulings and/or that they could be subjected to criminal prosecution for attempting to vote by mail. Under these circumstances, the State is no longer functioning to protect the federal rights of U.S. citizens, and even if it to begin to do so, voters can have no confidence their rights will be preserved. Moreover, the behavior of the executive branch of Texas government threatens to upset the state's election apparatus which is largely complying

¹ Herein known as Attorney General Paxton, General Paxton, or AG Paxton.

with the state court order and where the state is successful in strong arming local officials to defy the state court order, election procedures throughout the state will be administered non-uniformly. Because election deadlines are swiftly approaching, this Court should schedule proceedings to request appropriate preliminary injunctive relief such that a ruling can be complete by May 15, 2020.

I. Facts

Millions of Texas voters under the age of 65 face a stark choice in the coming elections. Either they risk infection from a dangerous, often deadly disease by voting in person, or they vote by mail utilizing the disability excuse provided for under state law, or they are disfranchised. One level of the judicial branch of state government has ruled that these voters can vote utilizing the disability excuse while at least one member of the state's executive branch has openly defied this ruling and threatened criminal prosecution for voters who rely on this provision to vote and political actors for engaging in political speech concerning vote by mail.

The plaintiffs rely on the following exhibits to this motion as well as the testimony and documentary evidence submitted at evidentiary hearing:

Exhibit # - Description	Summary
Exhibit 1 – State Court Hearing Record	Transcript of T.I. Hearing
Exhibit 2 – OAG Press Release and Opinion Letter	Press Release from the Attorney General April 15, 2020
Exhibit 3 – State of Texas's Plea to the Jurisdiction	State of Texas's Plea to the Jurisdiction
Exhibit 4 – Court Order on T.I.	Judge Tim Sulak's Court Order on Temporary Injunction and Plea to the Jurisdiction

A. COVID-19 is an Immediate Danger to all Texans

COVID-19 infection is caused by the SARS-CoV-2 virus and is spread by passing through mucous membranes. Reported illnesses have ranged from mild symptoms to severe illness and death. *Id.* Anyone can be infected with the novel coronavirus. *Id.* Certain groups, such

as those over 60 years of age and those with certain underlying medical conditions, are at higher risk of serious illness and death should they be infected. However, data to date in Texas demonstrates higher than expected infection rates in younger persons. Some infected persons do not appear to have any symptoms although they may still be able to infect others. Meanwhile, other people with no pre-existing conditions are dying of stroke without ever displaying the typical COVID-19 symptoms.

Coronavirus is spread through droplet transmission. These droplets are produced through coughing, sneezing, and talking. The virus can be spread when an infected person transmits these droplets to a surface like a polling machine screen. Any place where people gather and cannot maintain physical distancing, such as a polling place, represent a heightened danger for transmission of COVID-19 disease. *Id.* Crowding and exposure to a range of surfaces at the polls make polling places likely transmission sites for the virus. *Id.* It is highly likely that COVID-19 will be a threat to the public both in July and through November. *See general* Ex. 1, Testimony and Declarations of Dr. Carroll and Troisi.

COVID-19 is highly contagious and is quickly becoming one of the leading causes of death in the United States.² Texas has many cases of the virus. As of April 25, 2020, the highest number of reported cases of COVID-19 in Texas are among 50-59-year-olds and 40-49-year-olds, with 599 reported cases and 572 reported cases, respectively.³ 20-29-year-olds represent 426 cases, while those aged 65-74 make up 354 reported cases in Texas. *Id.* As of April 25, the State has seen 623 deaths from the virus. *Id.*

² Dan Keating and Chiqui Esteban, *Covid-19 is Rapidly Becoming America's Leading Cause of Death*, WASHINGTON POST (April 16, 2020), <https://www.washingtonpost.com/outlook/2020/04/16/coronavirus-leading-cause-death/?arc404=true>.

³ TEXAS DEPARTMENT OF STATE HEALTH SERVICES, <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83> (last visited April 25, 2020).

Neither vaccines nor “Herd Immunity” will reduce the threat of COVID-19 transmission anytime soon. No vaccine will be widely, if at all, available for at least 12-18 months. *See general* Ex. 1, Testimony and Declarations of Dr. Carroll and Troisi. Herd Immunity occurs when a high percentage of people in a community become immune to an infectious disease. *Id.* at ¶ 15. This can happen through natural infection or through vaccination. *Id.* In most cases, 80-95% of the population needs to be immune for herd immunity to take place. *Id.* This population requirement makes herd immunity to COVID-19 unlikely to happen before a vaccine is available. *Id.*

B. Voting by mail is Safe with No Risk of COVID-19 Transmission

There is no evidence the virus can be spread by paper, including mail. *Id.* at ¶ 17. Voting by mail would virus transmission between voters standing in line, signing in, and casting votes as well as eliminate viral transmission through environmental surfaces like voting machines. *Id.* Due to the pandemic, voting by mail is much safer for the public than voting in person. *Id.*

C. Voting by Mail in Texas

Texas law allows voting by mail for registered voters who meet one of the qualifications stated in the Election Code. *See* Tex. Elec. Code Ch. 82. A voter is qualified to vote by mail if he (1) anticipates being absent from his county of residence on election day; (2) has an illness or other physical condition that disables him from appearing at the polling place; (3) is 65 or older; or (4) is confined in jail. Tex. Elec. Code §§ 82.001-4. Voters apply to vote by mail with a mail ballot application sent to the early voting clerk. The early voting clerk is responsible for conducting early voting and must “review each application for a ballot to be voted by mail.” Tex. Elec. Code § 86.001(a). An early voting ballot application must include the applicant's name and the address at which the applicant is registered to vote and an indication of the grounds

for eligibility for voting by mail. Tex. Elec. Code § 84.002. Mail ballot applications are certified by the applicant that “the information given in this application is true, and I understand that giving false information in this application is a crime.” Tex. Elec. Code § 84.011. It is a crime to “knowingly provide false information on an application for ballot by mail.” Tex. Elec. Code § 84.0041.

If the clerk determines the applicant is entitled to vote by mail, the clerk shall provide the voter a ballot by mail. Tex. Elec. Code § 86.001. If the voter is not entitled to vote by mail, the clerk shall reject the application and give notice to the applicant. *Id.* A rejected applicant is not entitled to vote by mail. *Id.* July 3 is the deadline for an early voting clerk to receive an application to vote by mail for the upcoming July 14, 2020 Democratic Party Run off. Tex. Elec. Code § 84.007 (c). Mail ballots are expected to start being sent to voters in response to their request, on May 24, 2020. Thousands of vote by mail applications are pouring in now.

D. The Parties

The Texas Democratic Party (“TDP” or “the Party”) is a political party formed under the Texas Election Code. The TDP is the canvassing authority for many of the imminent run-off elections to be held on July 14, 2020. The election of July 14 is, in part, to determine runoff elections and therefore award the Democratic Party Nominations to those who prevail. TDP is the political home to millions of Texas voters and thousands of Texas’ elected officials. The TDP expends resources to try to help its eligible voters vote by mail. TDP is injured by the uncertainty of the laws associated with voting by mail because of the expenditure of financial resources used to help its members vote by mail, and the potential disfranchisement of its members. TDP is harmed by the state forcing it to award its nominations in an un-democratic process.

Gilberto Hinojosa is the elected Chair of the TDP. He is one of the administrators of the upcoming run-off elections for the Texas Democratic Party. He is the head of the canvassing authority for the July run-off elections and is the leader of the Party by and through his statutory and rule-based powers. Chair Hinojosa is also a registered voter in Texas. Chair Hinojosa is injured by the Defendants, because of the uncertainty of Texas law's regarding qualifications to vote by mail.

Joseph Daniel Cascino is a Travis County voter, who voted in Democratic primary election on March 3, 2020. He intends to vote by mail in the upcoming run-off elections and general elections. He is not 65 years of age. He intends to be in Travis County during the early vote period and Election Day. He has not been deemed physically disabled by any authority. He wishes to vote by mail because of the risk of transmission by COVID-19 at polling places.

Shanda Marie Sansing is a Travis County voter, who has voted in Democratic primary, run-off elections and general elections in the past. She intends to vote by mail in the upcoming run-off elections and general elections. She is not 65 years of age. She intends to be in Travis County during the early vote period and Election Day. She has not been deemed disabled by any authority. She wishes to vote by mail because of the risk of transmission by COVID-19 at polling places.

Brenda Li Garcia is a Bexar County voter, who has voted in Democratic primary, run-off elections and general elections in the past. She intends to vote by mail in the upcoming run-off elections and general elections. She is not 65 years of age or older. She intends to be in Bexar County during the early vote period and Election Day. She has not been deemed disabled by any authority. She wishes to vote by mail because of the risk of transmission by COVID-19 at polling places.

The Honorable Gregg Abbott is the Governor of Texas and a defendant in this case. He is the chief executive officer in this State. Tex. Const. Art. IV § 1. Gov. Abbott has injured the plaintiffs by acting with discriminatory intent to make it much less likely that the plaintiffs will cast a vote in the upcoming elections during this pandemic.

The Honorable Ruth Hughs is the Secretary of State of Texas and its chief election officer. Tex. Elec. Code § 31.001. Secretary Hughes has injured the plaintiffs by creating a lack of clarity and probable lack of uniformity in application of the election laws relating to mail ballot eligibility throughout the State.

The Honorable Ken Paxton is the Attorney General of Texas and its chief legal officer. Tex. Const. Art. IV § 22. The Attorney General of Texas may investigate and assist local jurisdictions in prosecuting election-related crimes. Tex. Elec. Code §§ 273.001 (d); 273.002. Recently, General Paxton has issued a letter threatening “third parties [who] advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code.” General Paxton has created a lack of clarity and probable lack of uniformity in application of the election laws relating to mail ballot eligibility throughout the State. *Id.* General Paxton’s letter also threatens U.S. citizens for exercising their Right to Vote.

The Honorable Dana DeBeauvoir is the Travis County Clerk. She is the early voting clerk for the upcoming run-off and general elections. Pursuant to the advice issued by General Abbott in his April 14, 2020 letter, Clerk DeBeauvoir may not issue mail ballots to voters seeking a mail ballot because of the physical risk of COVID-19. However, Clerk DeBeauvoir has also been ordered by a Texas district court to issue voters like the plaintiffs a mail ballot for this reason.

Ms. Jacquelyn Callanen is the elections administrator for Bexar County. She is the administrator of the run-off and general elections in Bexar County. She is the early voting clerk that will grant or deny mail ballots to applicants in the coming elections.

E. Election Officials Need Clarity to Prepare for Imminent Elections

Governor Abbot has set both the date of the special election for Senate District 14 in Bastrop and Travis County and the Democratic Primary Run-Off election in all 254 Counties on July 14, 2020. During the primary or for the November General Election state election law requires all ballot information be complete by 74 days before the election. During that time, clerks must do all of the following:

- proof ballot submissions, order races appropriately, merge with many jurisdictions appearing on the ballot;
- work with ballot companies to lay out for printing multiple ballot styles;
- program ballot scanners, controllers, and related technology;
- prepare ballot carriers for vote by mail applications and returned ballots for the use of signature verification committees and ballot boards;
- hire election workers for polling locations, early voting locations, and central counting;
- train all workers;
- determine polling locations for election day and early voting, negotiate contracts with locations;
- manage payroll issues of dozens to thousands of temporary workers; and,
- manage delivering and picking up equipment while keeping it secure and free from tampering before, during and after the polling locations open and close.

Id. Most election clerks and election administrators will need at least 74 days to complete these tasks. 74 days from July 14, 2020 is May 1, 2020.

F. Sequence of Events Since the Outbreak in Texas

By mid-March, Texas had more than 30 confirmed cases of COVID-19 located in multiple counties. On March 13, 2020, Governor Abbott declared that COVID-19 poses an imminent threat of disaster. On March 19, 2020, Dr. John W. Hellerstadt, Commissioner of the Department of State Health Services declared a state of public health disaster. The disaster demanded that people not gather in groups larger than 10 members and limit social contact with others by social distancing or staying six feet apart. On March 19, 2020, the Governor closed schools temporarily. He also closed bars and restaurants, food courts, gyms and massage parlors. On April 27, 2020, Governor Abbott issued a new order that purports to open the state's business affairs, in "phases." The Governor has indicated that case testing will be monitored and that if and when cases begin to increase, the opening will be slowed and/or reversed. Dr. Deborah Leah Birx, the Coronavirus Response Coordinator for the White House Coronavirus Task Force, has stated that "social distancing will be with us through the summer to really ensure that we protect one another as we move through these phases."⁴

While addressing the pandemic, the state orders referenced above made no effort to protect the votes of millions of Texans during this pandemic. An advisory issued by the Secretary of State's Office instructed counties to begin preparing for larger than normal vote by mail while also giving guidance to local officials to seek court orders, as appropriate, to adjust election procedures. In order to seek clarity of the requirements of state law, some of these Plaintiffs sought declaratory and injunctive relief in Texas district court in Travis County. *Texas*

⁴ https://www.washingtonpost.com/politics/social-distancing-could-last-months-white-house-coronavirus-coordinator-says/2020/04/26/ad8d2f84-87de-11ea-8ac1-bfb250876b7a_story.html

Democratic Party, et al. v. DeBeauvoir, et al., No. D-1-GN-20-001610 (201st Dist. Ct., Travis Cnty., Tex. filed March 20, 2020).⁵ Texas intervened and asserted a plea to the jurisdiction based on standing, ripeness, and sovereign immunity. Ironically, Texas argued in its Plea to the Jurisdiction that vote by mail administration is a county level decision.⁶ On April 15, the state court heard the plaintiffs’ temporary injunction motion and Texas’ plea to the jurisdiction. The state court verbally announced the denial of the plea to the jurisdiction and the granting of the temporary injunction.

In response to the order, the Attorney General made public a letter he had sent to the Chair of the House Committee on Elections of the Texas House of Representatives. In the letter, General Paxton gave a non-official, advisory opinion regarding whether or not the risk of transmission of COVID-19 would entitle Texas voters to cast a mail-in ballot. “We conclude that, based on the plain language of the relevant statutory text, fear of contracting COVID-19 unaccompanied by a qualifying sickness or physical condition does not constitute a disability under the Election Code for purposes of receiving a ballot by mail.” It did so, literally in defiance of a judicial order being announced.

Making it clear that Texas would not be bound by the state district court’s ruling, General Paxton stated:

“I am disappointed that the district court ignored the plain text of the Texas Election Code to allow perfectly healthy voters *to take advantage of special protections made available to Texans with actual illness or disabilities*. This unlawful expansion of mail-in voting will only serve to undermine the security and integrity of our elections and to facilitate fraud. Mail ballots based on disability are specifically reserved for those who are legitimately ill and cannot vote in-person without needing assistance or jeopardizing their health. Fear of contracting

⁵ Initially, the State of Texas was also sued. After being sued, Texas made it clear that it believed that the state court did not have jurisdiction to consider the filed claims against the State. Responding to Texas’ belief, the plaintiffs non-suited their claims against Texas on March 25, 2020.

⁶ Exhibit 15.

COVID-19 does not amount to a sickness or physical condition as required by state law.”

This statement and the actions of the State have added to the terrible uncertainty that voters and early voting clerks face in administering upcoming elections. As of April 25, 2020, Texas has 23,773 reported cases of COVID-19.⁷

To make matters worse, Attorney General Paxton threatened political speech by TDP and other political actors in the state. “To the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041.” The public statements and actions of the Attorney General reveal that voters should have a reasonable fear that they will be prosecuted. Given the public statements by General Paxton and his track record, a voter would reasonably fear that he or she would face criminal sanction if he or she checks the disability box on a mail ballot application because of the need to avoid the potential contraction of the virus. *Id.*

G. Texas is a Large, Diverse State Whose Voters Need Protection

As of July 1, 2019, there are 28,995,881 Texans.. People over the age of 65 are 12.6% of the population or about 3,653,481 people. Children below the age of 18 are 25.8% of the population or 7,480,937 people. Texans between age of 18 and 65 are 61.6% of the population or 17,861,463 people. On January 23, 2020, the Secretary of State announced that Texas had set a new state record of registered voters with 16,106,984 registered voters. *Id.*

⁷ TEXAS DEPARTMENT OF STATE HEALTH SERVICES, <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83> (last visited April 25, 2020).

Texas is a racially diverse state. U.S. Census data show that Anglos make up 41.5% of the population. These demographic trends are shown in the following tables.

Table 1 – Texas Racial Demographic Totals & Percentages

Demographic	Percentage	Number
Anglo	41.5%	12,033,290
Latino	39.6%	11,482,368
African American	12.8%	3,711,472
Asian American	5.2%	1,507,785

Table 2 – Number of Texans by Age & Race (July 1, 2018)

Age	Total	Anglo	Latino	African American	Asian American	Other
Children (under 18)	7,350,017	2,298,822	3,618,258	859,927	315,789	257,221
Voting Age (18 - 65)	17,714,919	7,419,262	6,829,660	2,200,787	936,019	329,191
Elderly (65 or older)	3,637,307	2,290,219	840,003	334,258	130,091	42,736
Totals	28,702,243	12,008,303	11,287,921	3,394,972	1,381,899	629,148

62.9% of Texans who are 65 years of age or older are Anglos. The average age of all Texas Anglos is 41.5 years old. Anglos are only 41.8% of Texans 18 to 65 years of age. Elderly Anglos outnumber elderly Latinos nearly 3 to 1. Elderly Anglos outnumber elderly African Americans nearly 7 to 1.

Election regulations and prosecutions that have the effect of burdening the right to vote based on the voter's age, necessarily has a racially discriminatory impact.

Elections in Texas are racially polarized in all or nearly all levels of state elections. The Anglo majority statewide votes as a bloc against the minority preferred candidate. Minority voters vote as a bloc for their preferred candidates. Anglos vote in sufficiently large numbers and in concert to defeat the minority-preferred candidate most of the time. Texas campaigns have

been typified by racial appeals and minority-preferred candidates are rarely, if ever, successful. Socio-economic disparities exist in Texas that impact the ability of the minority community to influence state officials, state elections and state policy. Elected officials are not responsive to the needs of the minority community. Finally, Texas has long and despicable history of disfranchisement and racial discrimination..

II. Preliminary Injunction

In order to secure a preliminary injunction, a plaintiff must establish the following four elements: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009).

Plaintiff has Established a Likelihood of Success on the Merits

The Plaintiff seeks a preliminary injunction pursuant to its as-applied claims relating to: (1) the 26th Amendment of the U.S. Constitution; (2) vagueness in violation of the “Due Process” clause of the 5th and 14th Amendment; (3) voter intimidation in violation of 52 U.S.C. § 10307(b); and (4) the First Amendment of the U.S. Constitution.

A. Plaintiffs will Succeed on their 26th Amendment Claim⁸

Plaintiffs are likely to prevail on their claim that the Attorney General’s interpretation of state election law discriminates against young voters on account of age, in violation of the

⁸ Plaintiffs seek a preliminary injunction on the as-applied 26th Amendment claim. To the extent that the state is purporting, in these pandemic circumstances, to apply different voting burdens based on the voter’s age, that condition does not comply with the 26th Amendment. Plaintiffs also claim that the 26th Amendment prohibits limiting vote by mail by age, even when not under pandemic circumstances but such a claim is preserved for a final trial on the merits.

Twenty-Sixth Amendment. The Twenty-Sixth Amendment forbids abridging or denying the voting rights of young voters by singling them out for disparate treatment. *See Jolicoeur v. Mihaly*, 5 Cal.3d 565, 575 (1971); *see also Ownby v. Dies*, 337 F. Supp. 38, 39 (E.D. Tex. 1971) (holding Twenty-Sixth Amendment violated by statute that required heightened standard for individuals under 21 to establish residency for voting); *U.S. v. Texas*, 445 F. Supp. 1245, 1257 (S.D. Tex. 1978). The Twenty-Sixth Amendment tracks language of the Fifteenth, which forbids intentional efforts to deny or abridge the right to vote on account of race. *Compare* U.S. Const. Amend. XXVI, with U.S. Const. Amend. XV.

i. Paxton’s interpretation of Tex. Elec. Code § 82.003 Fails Strict Scrutiny

Claims under the Twenty-Sixth Amendment must be evaluated by this court under strict scrutiny, and Tex. Elec. Code §§ 82.003 is *prima facie* discriminatory. *See U.S. v. State of Tex.*, 445 F. Supp. 1245, 126 (S.D. Tex. 1978), *aff’d sub nom. Symm v. United States*, 439 U.S. 1105 (1979) (When determining whether the Whatley registrar violated the Twenty-Six Amendment, the Court found that “before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.”) It is precedent of the Supreme Court to apply strict scrutiny to a statute or practice that is “patently discriminatory on its face.” *Lynch v. Donnelly*, 465 U.S. 668, 687 n. 13 (1984). Under strict scrutiny analysis, the burden is on the State to justify that its policy, statute, or decision is narrowly tailored to serve a compelling state interest. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 475 (2006).

Texas’ election law cannot meet this standard. Texas’ law discriminates on its face against younger voters by creating two classes of voters: those 65 or older and are able to access absentee ballots and those under 65, who generally cannot. While the state Court has ruled that

under age 65 voters can use the disability exemption to vote absentee, the Attorney General has threatened to prosecute those who engage in this activity. Texas is unable to present a compelling state interest in this discrimination; there is no compelling interest in imposing arbitrary obstacles on voters on account of their age especially when the enacted state law does not clearly demand this result during this pandemic.

All voters are able to contract, spread, and die from the virus, not just the elderly and disabled. If Texas has any compelling state interest here, it is to allow all voters to use mail ballots to avoid the possibility of transmission of COVID-19.

A healthy 64-year-old and a healthy 65-year-old are both equally capable of going to the polls and being dangerously infected with the virus, but only one voter is able to use an absentee ballot because they are simply a year older. There is no discernable difference between these voters besides this one-year age difference.

Further, voters under the age of 65 represent a majority of the COVID-19 cases in Texas. As of April 25, 2020, the highest number of reported cases of COVID-19 in Texas are among 50-59-year-olds and 40-49-year-olds with 599 reported cases and 572 reported cases respectively. Exhibit 3.⁹ There are more reported cases of COVID-19 in Texas among 20-29-year-olds than those of 65-75 years of age. *Id.* 20-29-year-olds comprise 426 cases, while those aged 65-74 make up only 354 reported cases in Texas. *Id.*

ii. Alternatively, Paxton's Interpretation is Unconstitutional Using the Test in *Arlington Heights*

Alternatively, some federal courts have chosen to use the *Arlington Heights* framework to access Twenty-Six Amendment claims. *See e.g. One Wis. Inst., Inc. v. Thomsen*, 198 F.Supp.3d

⁹ TEXAS DEPARTMENT OF STATE HEALTH SERVICES, <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83> (last visited April 25, 2020).

896, 926 (W.D. Wis. 2016) (Finding that the Twenty-Sixth Amendment's text is "patterned on the Fifteenth Amendment ... suggest[ing] that Arlington Heights provides the appropriate framework."); *Lee v. Va. State Bd. of Election*, 188 F. Supp.3d 577, 609 (E.D. Va. 2016), *aff'd*, Lee 843 F. 3d 592 (4th Cir. 2016); *League of Women Voters of Fla. v. Detzner*, 314 F. Supp.3d 1205, 1221 (N.D. Fla 2018). The *Arlington Heights* framework is well-settled law, evaluating: (1) the impact of the official action and whether it bears more heavily on one group than another; (2) the historical background of the decision; (3) the specific sequences of events leading up to the decision challenged in the case, including departures from normal procedures in making decisions and substantive departure; and (4) contemporary statements made by the governmental body who created the official action. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

Here the challenged action is two-fold. First, Paxton's interpretation of the law related to mail ballot eligibility in Texas is discriminatory to every voter under the age of 65 and untenable given the COVID-19 pandemic. Second, the official decision by the Attorney General to threaten to enforce that law in the most disenfranchising and severe manner possible, through criminal sanction, is strong evidence of invidious discrimination. All voters face significant risk of transmission of the novel coronavirus at polling locations. Texas' law has a disparate effect on younger voters because they will be unable to access mail ballots and are, therefore, forced to risk their lives, the lives of their loved ones, and the lives of the public at-large in order to vote. This risk is imminent and tangible. As seen in Wisconsin, several cases of COVID-19 have been directly linked to in-person voting.¹⁰ During the COVID-19 pandemic, Texas's refusal to extend

¹⁰ Veronica Stracqualursi and Abby Phillip, *19 Coronavirus Cases Connected to Wisconsin Primary Election, State Health Official Says*, CNN (April 22, 2020), <https://www.cnn.com/2020/04/22/politics/wisconsin-april-7-election-coronavirus-cases/index.html>.

access to mail ballots to younger voters would affirmatively disenfranchise hundreds of thousands of Texas voters simply because of their age. Of course, voters over the age of 65 will not face these same burdens on the right to vote; they are able to avoid crowded polling locations and cast their ballot from the safety of their homes. The application of the law in this manner absolutely “bears more heavily on one group” —an age group—“than another.” *Arlington Heights* at 266.

There have also been significant departures from normal procedures resolving the meaning of state election law. In order to alleviate this discriminatory effect, some of the above plaintiffs brought suit against an election authority and obtained temporary relief from a state court, which held that all Texas voters are entitled to obtain a mail-in ballot because of the health risk involved in voting in person. Directly after voters were granted this relief, and in response to this relief, Attorney General Paxton issued an advisory, non-official opinion threatening to prosecute people and groups who complied with the state court ruling. He called the ruling an “unlawful expansion of mail-in voting.” Further, he opined that to help or advise a voter to seek a mail-in ballot pursuant to this provision of the Election Code was a crime. Despite these opinions, he has taken no urgency in obtaining such a ruling from a higher court and instead, he threatens the public with criminal prosecution. These are abnormal departures from normal legal or policy procedure for multiple reasons. First, the Attorney General has no authority to offer an “informal letter of legal advice offered for the purpose of general guidance.” The Attorney General rarely, if ever, “opine[s] through the formal opinion process on questions ... that are the subject of pending litigation.”. Second, it is uncommon that a modern Attorney General would threaten voters and voting groups explicitly for working to help lawful voters cast ballots in the safest manner possible. Finally, General Paxton circumvented the entire Texas judicial process

by announcing as the Court was ruling, that he would criminally prosecute voters in defiance of the emerging court order. The only legitimate course of action for the Attorney General to void a Texas court order is to allow the trial court to issue its order, appeal the order for a stay, and then proceed expeditiously on appeal to make the best case for the order to be overturned. Even if it is true that the state court order was automatically stayed by General Paxton's appeal, the order remained in effect for Travis County and other counties, cities, and school districts which are following it. General Paxton has followed no legal channel to curb this election activity. Instead, he disrespected the judicial process in order to chill voter's ability to access the ballot. These significant departures from normalcy were all in service of preventing legal, registered voters from casting ballots without exposing themselves to a deadly virus.

General Paxton offered a bizarre and unfounded rationale for this abnormal behavior, which only bolsters the notion that he intended his actions to disenfranchise voters. He stated that allowing Texans to vote by mail because of the risk of transmission of COVID-19 "will only serve to undermine the security and integrity of our elections and to facilitate fraud." These explanations are internally contradictory and irrational. Either mail-in balloting offers special protections for the aged and infirm or it is a vector for election fraud. It cannot be both.

Under the pandemic circumstances, Texas' age-based classification system for mail ballot eligibility bears more heavily on voters younger than 65 years of age. Even in this age of pandemic, Texas is undeterred in its aggressive intention to police mail ballot eligibility in the strictest possible way, with highest discriminatory effect. The state executive branch has shown no interest in complying with the rulings of its state judiciary and does not even bother to expeditiously overturn a ruling that at least part of the executive branch, evidently disagrees. As a result, hundreds of thousands if not millions of Texans must face the risk of possible criminal

prosecution or submit to face life or death burdens because of the risk of transmission of COVID-19 at polling locations.

When in-person voting becomes physically dangerous, age-based restrictions on mail ballot eligibility become constitutionally unsound. “If a unanimous Senate, near-unanimous House of Representatives, and 38 ratifying states intended the Twenty-Sixth Amendment to have any teeth, then the Amendment must protect those blatant and ‘unnecessary burdens and barriers’ on young voters' rights.” *League of Women Voters of Fl, Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1223 (N.D. Fl July 24, 2018), *quoting Worden v. Mercer Cty. Bd. of Elections*, 61 N.J. 325, 345 (1972). Here, the discrimination is a blatant and unnecessary barrier to younger voters, enforced simply because the State does not want these voters to access mail voting during a deadly pandemic. As such, the plaintiffs will prevail on their Twenty-Sixth Amendment claim.

B. The Plaintiffs Will Succeed on Their Denial of Free Speech Claim

Paxton’s letter opinion is presently harming core political speech. Indeed, the very letter he issued, threatens political speech with criminal prosecution. TDP, as well as other political actors, would be engaging in communications with voters concerning who is eligible to and how to vote by mail. Paxton has outwardly threatened to prosecute these communications but he has made no real effort to expeditiously settle the state law legal question of his interpretation of the state law. Even if he did, given the state’s division of criminal and civil jurisdictions between its courts, it is unclear if a higher ruling in a civil case would give meaningful relief to people fearful of prosecution. At the same time, Paxton has argued that the vote by mail statutes are up to the county election administrators. These conditions are designed to prevent political speech and they have been effective at doing so.

Voters also enjoy a “Right to Vote” as a form of political speech. This political speech is also harmed by Paxton’s interpretation of Tex. Elec. Code §§ 82.001–4. It is widely recognized that political speech, including the right to vote, is strongly protected as a “core First Amendment activity.” *League of Women Voters of Fl.*, 863 F. Supp.2d at 1158. When determining whether there has been a violation of this right, the court inquires as to (1) what sort of speech is at issue, and (2) how severe of a burden has been placed upon the speech. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Strict scrutiny is applied if the law “places a severe burden on fully protected speech and associational freedoms.” *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002).

First, the speech at issue here is the highest form of political expression, casting a vote. While the Supreme Court has applied a rational basis review to state laws prohibiting write-in voting, *Burdick*, 504 U.S. 428 (1992), the burden at issue in the present case is on the ability to cast a ballot at all. “[V]oting is of the most fundamental significance under our constitutional structure,” meaning the speech at issue is undeniably fully protected First Amendment activity. *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). Second, the burden on this speech is heavy. Voters are, off and on, ordered to stay at home to avoid transmission of COVID-19. To go to the polls is to risk exposure and transmission of the deadly virus. Especially given the visibility of the fallout from the Wisconsin primary election, voters are deeply discouraged from emerging from their homes to participate in democracy. As voters face the choice between casting their ballot and paying the ultimate price, there can be no doubt that their political speech is heavily burdened. Because the speech at issue is fully protected First Amendment activity and the burden on this speech is heavy, the court should apply strict scrutiny. For the reasons stated under (A)(i) and (F)(i) of this Section, Tex. Elec. Code §§

82.003–4 fails strict scrutiny; it is not narrowly tailored to serve compelling government interests. As such, plaintiffs are likely to succeed on their First Amendment claim.

C. The Plaintiffs Will Succeed on their Void for Vagueness Claim

TDP and some of these plaintiffs maintained in the state court proceeding that state law clearly allows all voters, regardless of age, to vote by mail because they have a disability based on the risk of transmission of COVID-19. A state court agreed that a plain reading of Texas election law. General Paxton evidently holds a different interpretation. These factual conditions result in an environment where the public cannot reasonably determine what state law allows. The consequences to this indeterminacy are dire. If voters seek a mail-in ballot, then General Paxton threatens prosecution. If they do not, they risk the spread of the virus in order to vote in person.

Texas law allows voters to vote by mail on account of a disability. Tex. Elec. Code § 82.002(a). Disability is defined as a physical condition that prevents the voter from appearing at the polling place on Election Day without a likelihood of injuring the voter's health. *Id.* According to Judge Sulak, this definition includes people who are social distancing because of COVID-19. Prior to the pandemic, General Paxton has advised that no specific definition of disability is required to be met in order to qualify to vote by mail. Op. Tex. Att’y Gen. No. KP-0009 (2015). General Paxton has also previously opined that a court-ruled sexual deviant under the age of 65 meets the definition of “disabled” under this statute. Op. Tex. Att’y Gen. No. KP-0149 (2017).

It is a basic principle of due process that a statutory provision ought to be voided for vagueness if its prohibitions are not clearly defined. Specifically, a statute is unconstitutionally vague under the Fourteenth Amendment if its terms “(1) ‘fail to provide people of ordinary

intelligence a reasonable opportunity to understand what conduct it prohibits’ or (2) ‘authorize or even encourage arbitrary and discriminatory enforcement.’” *Grayned v. City of Rockford*, 408 U.S. 104, 108–09, (1972); *Johnson v. United States*, 576 U.S. ___, 135 S.Ct. 2551, 2556–58, 192 L.Ed.2d 569 (2015); *Papachristou v. Jacksonville*, 405 U. S. 156, 162 (1972); *Kolender v. Lawson*, 461 U. S. 352, 357– 358 (1983). Importantly, when a vague statute infringes upon basic First Amendment freedoms, as does Tex. Elec. Code §§ 82.003–4, “a more stringent vagueness test should apply.” *Grayned*, 408 U.S. at 246. While civil enactments, as opposed to criminal ones, are subject to less strict vagueness standards, General Paxton has suggested that advocating for an expanded definition of disability in relation to obtaining a mail-in ballot “could subject ... parties to criminal sanctions.” Exh. 7; *See e.g. Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 498–499 (1982). If criminal prosecution hinges on the definition of disability in the Election Code, that weighs in favor of a higher vagueness standard because “the consequences of imprecision are ... severe.” *Hoffman* at 498-499.

Paxton’s interpretation leaves Tex. Elec. Code § 82.001–4 as vague because it is not clear which voters qualify to vote by mail under its provisions. According to these statutes, a voter is qualified to vote by mail if he (1) anticipates being absent from his county of residence on election day; (2) has an illness or other physical condition that disables him from appearing at the polling place; (3) is 65 or older; or (4) is confined in jail. Tex. Elec. Code §§ 82.001–4. More specifically, condition (2) is met when “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.” Tex. Elec. Code § 82.002(a). There are two operative parts to this definition. First, the voter must have “a sickness or physical condition.” Second, this condition requires the voter to determine whether voting in person has a

likelihood of injuring the voter's health. Both parts are impermissibly vague. A voter might reasonably consider susceptibility to a deadly virus as a "physical condition" and contraction of that virus has a likelihood an injury to their health.

General Paxton interpreted the statute differently. For instance, he chooses to define "condition" as "an illness or other medical problem". (citing the New Oxford Am. Dictionary 1341(3d ed. 2010)). The Legislature cannot have intended to define condition as "a sickness or medical problem" because that would be duplicative of other parts of the statute (i.e., "sickness" would appear twice).¹¹ General Paxton also stated that "mental or emotional condition[s]" do not qualify a voter to vote by mail. This would preclude voters suffering from severe post-traumatic stress disorder or agoraphobia (fear of being in public and/or crowds) from qualifying for a mail-in ballot. (This new interpretation also undermines that entire rationale Paxton gave in his official AG Opinion finding that sexual deviants can vote because of their mental condition.) General Paxton's construction of the statute is implausible both because it results in surplus language in the statute and because it is hardly consistent with its plain meaning. Yet these multiple constructions (coupled with Paxton's threat of prosecution) lend substantial vagueness as to what voters qualify to vote by mail under its provisions.

Even the statute under which General Paxton proclaimed voters and third parties might be prosecuted is impermissibly vague. General Paxton threatened these parties with prosecution under Tex. Elec. Code § 84.0041. Tex. Elec. Code § 84.0041 provides that a person commits an offense if the person "(1) knowingly provides false information on an application for ballot by mail;" or "(2) intentionally causes false information to be provided on an application for ballot

¹¹ It also would mean that "likely confinement for childbirth" would have been considered "a sickness or medical problem" by the Legislature. See Tex. Elec. Code § 82.002 (b). Pregnancy is neither a sickness nor medical problem, so it cannot be that the statute was meant to only authorize voters suffering from some physical malady to access mail voting.

by mail.” § 84.0041(a)(1)–(2). Given the conflicting orders from the state court and the Attorney General, it is simply impossible to know what qualifies as “false information” under the statute. The breakdown of the Rule of Law in Texas has generated two opposing legal schemes: one in which voters who fear COVID-19 qualify to vote by mail by order of the state judiciary, and one in which the executive branch subjects them to criminal prosecution for doing so. Voters cannot know which reality is their own. General Paxton unhelpfully advised: “whether specific activity constitutes an offense under these provisions will depend upon the facts and circumstances of each individual case.” Not only would any voter find this proclamation vague, but it encourages arbitrary enforcement.

These statutory provisions are impermissibly vague on their face and General Paxton’s communication with the public has lent substantial murkiness as to what voters and enforcement officials are permitted to do. This lack of clarity has the effect of leading “citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.’” *Grayned v. City of Rockford*, 408 U.S. at 109. It will also create uneven prosecution of voters and third parties between jurisdictions throughout the State. This provision is especially troublesome because it infringes upon core First Amendment activity. Thus, Plaintiffs have a likelihood of success on the merits of their void for vagueness claim.

D. Voter Intimidation

General Paxton has made the extraordinary choice to upend the rule of law, disturb the state judiciary from fulfilling its mission, and to outwardly intimidate rightful voters and the third parties who assist voters in elections. “[T]o the extent third parties advise voters to apply for a mail-in ballot based solely on fear of contracting COVID-19, such activity could subject those third parties to criminal sanctions imposed by Election Code section 84.0041.” This

advisory opinion was made just as a state court ruled that Texas voters are entitled to a mail-in ballot because of the risk of transmission of COVID-19. Hours later, General Paxton stated that expanding mail ballot eligibility to all Texans “will only serve to undermine the security and integrity of our elections.” These statements operate to discourage voters from seeking mail-in ballots because of their fear of criminal sanction or victimization by fraud.

“Title 42 U.S.C. § 1985, part of the Civil Rights Act of 1871, creates a private civil remedy for three prohibited forms of conspiracy to interfere with civil rights under that section.” *Montoya v. FedEx Ground Package Sys., Inc.*, 614 F.3d 145, 149 (5th Cir. 2010). Plaintiff must prove the following elements for a claim under § 1985(3): (1) a conspiracy of two or more persons; (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or property, or deprives her of a right or privilege of a United States citizen. *See Hilliard v. Ferguson*, 30 F.3d 649, 652–53 (5th Cir. 1994); *Deubert v. Gulf Fed. Sav. Bank*, 820 F.2d 754, 757 (5th Cir. 1987).

General Paxton has worked in concert with employees, including the signatory to the letter in question and others, in issuing his threats. These statements have the intention and the effect of depriving legal voters their franchise. It goes without saying that “[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote.” 52 U.S.C. § 10307 (b). Making a threat is an act in furtherance of this conspiracy to deprive access to the franchise from legal, rightful voters. An injury is caused when a state official acting in concert with others prevents legal voters from

casting a ballot free from fear of risk of transmission of a deadly illness or criminal retribution. General Paxton must be enjoined from threatening voters with criminal prosecution and spreading misinformation about access to mail-in ballots.

E. The Defendants Violated the Equal Protection Clause of the 14th Amendment

The Defendants, who are state actors and/or acting under color of law as administrators of elections, have violated the Fourteenth Amendment Equal Protection Clause because the state is treating similarly situated voters differently from one another. The Equal Protection Clause “is essentially a mandate that all persons similarly situated must be treated alike.” *Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996). When a “challenged government action classifies or distinguishes between two or more relevant groups,” courts must conduct an equal protection inquiry to determine the validity of the classifications. *Qutb v. Strauss*, 11 F.3d 488, 491 (5th Cir. 1993). Texas’ has violated the equal protection clause in two ways: 1) it has created an unconstitutional burden on the fundamental right to vote; and 2) this burden is also racially discriminatory.

i. Unconstitutional Burden on the Right to Vote under *Anderson-Burdick*

In *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966) the Court held that voting is a fundamental right. As such, state election laws or enactments that place a burden on the right to vote will be evaluated under the *Anderson-Burdick* analysis, in which a court weighs “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by the rule.” *Burdick v. Takushi*, 504 U.S. at 434. If the burden on the right to vote is severe, a court will apply strict scrutiny; if the burden is minimal, a court will weigh the burden against the state’s interest under rational

basis review. *Id.* To survive strict scrutiny, a classification created by the state must promote a compelling governmental interest, and it must be narrowly tailored to achieve this interest. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). “However slight [the] burden may appear . . . it must be justified by relevant and legitimate state interests ‘sufficiently weight to justify the limitation.’” *Crawford v. Marion Ct. Election Bd.*, 553 U.S. 181, 191 (2008).

The burden placed on the voting rights of Texas voters is both disproportionate across all voters and extremely severe. First, it is only voters under the age of 65 that are burdened by Paxton’s interpretation of Tex. Elec. Code § 82.003. These voters also comprise more COVID-19 cases than voters over the age of 65 in Texas. The *Crawford* Court determined that [disparate impact] “‘matters’ in the *Anderson-Burdick* analysis ... whether the effects of a facially neutral and nondiscriminatory law are unevenly distributed across identifiable groups.” *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1216 (N.D. Fla. 2018). It is clear that the effects of the law are unevenly distributed to voters under the age of 65. Since the magnitude of the injury is severe and disproportionate across all voters, these voters are entitled to strict scrutiny.

Under strict scrutiny, Texas is unable to supply any legitimate or reasonable interest to justify such a restriction. To deny mail ballots to Texas voters during a pandemic is to force voters to choose between risking their lives and participating in their democracy. Texas has no interest in denying rightful voters the franchise. Quite the opposite, it is a Texas principle that “[a]ll statutes tending to limit the citizen in his exercise of this right should be liberally construed in [the voter’s] favor.” *Owens v. State ex rel. Jennett*, 64 Tex. 500, 502 (1885). General Paxton, however, proffers two interests in order to deny millions of Texans a mail-in ballot: (1) mail-in

ballots are a special protection for the aged or disabled and (2) mail ballots enable election fraud. These justifications are hypocritical, contradictory, baseless and non-compelling.

First, the special protections afforded the aged or disabled are also afforded to other voters, including those voters who will be out of the County during Election Day and the early vote period. Tex. Elec. Code § 82.001. It also includes those voters confined in jail. Tex. Elec. Code § 82.004. It includes those voters who have been civilly committed for sexual violence. Op. Tex. Att’y Gen. No. KP-0149 (2017). It applies to those confined for childbirth. Tex. Elec. Code § 82.002(b). To begin with, these categories of mail ballot eligibility are not narrowly tailored to avoid constitutional scrutiny. If offering mail-in voting to sexually violent offenders does not invalidly extend the “special protections made available to Texans with actual illness or disabilities,” then how might allowing voters at risk of COVID-19 infection invalidly extend those purportedly special protections? Second, these concerns contradict each other. If mail-ballots are a source of rampant vote fraud, then how do they offer “special protections made available to Texans with actual illness or disabilities?” There are built-in protections to ensure the security of Texas mail ballots, including many criminal penalties. If these protections are good enough to offer special protections to some voters, then they are sound enough for all Texas voters. There are no compelling reasons offered by the State to overcome the strict scrutiny required by the Fourteenth Amendment.

Even if this court finds that this statute should only receive a lesser scrutiny, it cannot be found that there is any rational state interest offered by Texas. A state’s interest must be to protect its citizens’ public health and safety. By forcing voters to visit the polls in-person during a global pandemic, Texas ensures that citizens’ health will be put in jeopardy. Nor does Texas have a rational state interest in fencing out from the franchise a sector of the population because

the way they may vote. “‘The exercise of rights so vital to the maintenance of democratic institutions’ . . . cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.” *U. S. v. State of Tex.*, 445 F. Supp. 1245, 1260 (S.D. Tex. 1978), *aff’d sub nom. Symm v. United States*, 439 U.S. 1105, 99 S. Ct. 1006, 59 L. Ed. 2d 66 (1979).

ii. Racial Discrimination

The Fourteenth Amendment to the U.S. Constitution prohibits states from treating U.S. citizens differently based on their race. As applied in this instance, Texas mail-ballot eligibility law functions to create classifications that are invidiously discriminatory. Most mail ballots are provided to Texas’s seniors who are 65 years of age or older. Texas’ population of voters older than 65 is overwhelmingly Anglo, creating a disparate impact on mail ballot eligibility. In the pandemic circumstances, General Paxton’s interpretation of vote by mail statutes results in racially discriminatory effects on racial minority’s right to vote by decreasing turnout of racial minorities and increasing the percentage of the electorate that is Anglo.

Plaintiffs are Irreparably Injured and Outweighs any Harm to the Defendants

Voting is a constitutional right for those that are eligible. The violation of constitutional rights for even a minimal period of time constitutes irreparable injury justifying the grant of a preliminary injunction. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B. Nov. 1981) (citing, e.g., *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *DeLeon v. Perry*, 975 F. Supp. 2d 632, 663 (W.D. Tex. 2014), *aff’d sub nom. DeLeon v. Abbott*, 791 F.3d 619 (5th Cir. 2015) (“Federal courts at all levels have recognized that violation of constitutional rights constitutes irreparable harm as a matter of law.”); *see also Mitchell v. Cuomo*, 748 F.2d

804, 806 (2d Cir. 1984) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”). In addition, forcing voters to unnecessarily risk their lives in order to practice their constitutional rights while allowing other voters a preferred status so they do not have to face this same burden, is also irreparable injury. There is no harm to the State allowing registered, legal voters the right to vote in the safest way possible. The State has no interest in forcing voters to choose between their wellbeing and their votes. Furthermore, the state has no interest in allowing a situation where the Attorney General can sow confusion, un-even election administration and threaten criminal prosecutions on these circumstances.

Public Interest

The public is best served by both preserving the public health of Texans and by fervent and competitive races for public office. It is the public policy of the State of Texas to construe any constitutional or statutory provision which restricts the right to vote liberally. There is no justification nor public interest in denying the ballot to eligible voters. This cannot be put more plainly.

Furthermore, it is “always” in the public interest to prevent violations of individuals’ constitutional rights. *Deerfield Med. Ctr.*, 661 F.2d at 338-39. It is also in the public interest not to prevent the State from violating the requirements of federal law. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013). The government has no interest in enforcing an unconstitutional law. *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). Protecting the right to vote is of particular public importance because it is “preservative of all rights.” *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (citing *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)). Plaintiff clearly meets all the requirements necessary for a preliminary injunction.

III. Abstention

Abstention here is not warranted because resolution by the State court will not render this case moot nor materially alter the constitutional questions presented. Plaintiffs allege injury of their Federal constitutional rights in addition to injuries arising from the ambiguity of state law. A Texas state court has already interpreted the ambiguity of Texas' election code and many counties are complying. Yet, General Paxton's letter ruling is preventing meaningful political speech, confuses mail ballot applicants and leaves these voters having to risk criminal prosecution if they seek to protect their health by voting by mail. Meanwhile, the state lollygags its appeal of Judge Sulak's order while thousands of vote by mail applications are being submitted daily and many counties, cities, and school districts are complying with Judge Sulak's ruling. Under these circumstances, abstaining from exercising federal court jurisdiction is not warranted.

Anyway, "[t]he abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers." *Baggett v. Bullitt*, 377 U.S. 360, 375, 84 S.Ct. 1316, 1324, 12 L.Ed.2d 377 (1964). In fact, the stay of federal decision is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188, 79 S.Ct. 1060, 1062, 3 L.Ed.2d 1163 (1959) (quoted in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976)). As such, "abstention is the exception rather than the rule..." *Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir. 1981).

Pullman abstention must be "narrow and tightly circumscribed" and is "to be exercised only in *special* or '*exceptional*' circumstances." *Duke v. James*, 713 F.2d 1506, 1510 (11th Cir.

1983). But “voting rights cases are particularly inappropriate for abstention,” *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000), because in voting rights cases plaintiffs allege “impairment of [their] fundamental civil rights,” *Harman v. Forssenius*, 380 U.S. 528, 537 (1965). Abstention is even more inappropriate where the inevitable delay it will cause could preclude resolution of the case before the upcoming elections. *Detzner*, 354 F. Supp. 3d at 1284 (citing *Harman*, 380 U.S. at 537).

In this case, time is of the essence—the runoff election is mere weeks away, and the 2020 general election comes not long after. There is no guarantee that state court proceedings will be completed in time and given the Attorney General’s defiance of the state district court ruling, a final state court ruling would not fully vindicate Plaintiffs’ *federal* constitutional rights.

Even if Defendants’ reading of Tex. Elec. Code § 82.003 was plausible, it is not the sole, mandatory reading of the text, and the constitutional avoidance canon requires that it be rejected. “[W]hen one interpretation of a law raises serious constitutional problems, courts will construe the law to avoid those problems so long as the reading is not plainly contrary to legislative intent.” *Pine v. City of W. Palm Beach, Fla.*, 762 F.3d 1262, 1270 (11th Cir. 2014).

Resolution of the state court case, is neither “dispositive of the case” before this Court, nor would its resolution “materially alter the constitutional questions presented” by Plaintiffs’ claims. *Siegel*, 234 F.3d at 1174.

Even if the Texas Supreme Court upholds the lower court’s reading of Tex. Elec. Code §§ 82.001–4, and even if the Executive branch of the Texas government complies with this reading, this does not properly counsel for abstention. To find otherwise is to depend upon a series of questionable “mights.” *See Wollschlaeger v. Gov. of Fla.*, 848 F.3d 1293, 1322 (11th Cir. 2017) (relying on *U.S. v. Stevens*, 559 U.S. 469, 480 (2010), for the proposition that courts

should not decline to enforce constitutional rights in reliance on the “benevolence” of enforcing officials). And even if this long series of “mights” come to pass, that would not change the constitutional questions presented in this case. Plaintiffs allege that Texas’ election code is prima facie discriminatory in violation of the constitution. Only this Court can resolve this matter.

Abstention would take considerable time and meanwhile, these Plaintiffs’ constitutional speech, right to assemble as a political party and to vote, are all harmed. As it stands, this Court faces a tight schedule for adjudicating this case. Abstention is inappropriate in this case, for the same reason that it is “particularly inappropriate” in voting cases. *See Siegel*, 234 F.3d at 1174. Constitutional “deprivations may not be justified by some remote administrative benefit to the State.” *Harman*, 380 U.S. at 542. Therefore, Plaintiffs’ injuries are redressable by this Court and abstention is not appropriate.

IV. Conclusion & Prayer

For the foregoing reasons, Plaintiff respectfully requests that Defendants be cited to appear and answer and that the Court take the following actions and grant the following relief:

- A. Appropriate preliminary injunctive relief to allow the plaintiffs and voters like the plaintiffs to be eligible to receive a mail ballot, to cast that ballot, and to have that ballot counted by the appropriate authority; and,
- B. To enjoin General Paxton and Defendants from threatening voters or voter groups with criminal or civil sanction for voting by mail or communicating with or assisting voters in the process of vote by mail.

DATED: April 29, 2020

Respectfully submitted,

TEXAS DEMOCRATIC PARTY

By: /s/ Chad W. Dunn

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CERTIFICATE OF SERVICE

I certify that, on April 29, 2020, I filed the foregoing Plaintiffs' Motion for Preliminary Injunction *via* the Court's ECF/CM system, which will serve a copy on all counsel of record.

/s/Chad W. Dunn
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