

TEXAS DEMOCRATIC PARTY, et. al	§	IN THE DISTRICT COURT
	§	
	§	
<i>Plaintiffs,</i>	§	
	§	
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
	§	
	§	
<i>Intervenor-Plaintiffs,</i>	§	
	§	
v.	§	
	§	
DANA DEBEAUVOIR	§	
	§	
<i>Defendant,</i>	§	
	§	
and	§	
	§	
STATE OF TEXAS	§	
	§	
<i>Intervenor-Defendant.</i>	§	201st JUDICIAL DISTRICT

APPLICATION FOR TEMPORARY INJUNCTION

On April 1, 2020, Zachary Price, League of Women Voters of Texas (“LWVTX”), League of Women Voters Austin Area (“LWV-AA”), MOVE Texas Action Fund (“MOVE”), and Workers Defense Action Fund (“WDAF”) (collectively “Intervenor-Plaintiffs”) intervened in the instant action. Intervenor-Plaintiffs include an individual who is a Texas resident and organizations with individual members who are Texas residents and registered voters, and organizations with voter education and engagement missions. With a number of elections on the

horizon, Intervenor-Plaintiffs seek a temporary injunction to ensure that no Texan is forced to choose between their health and/or criminal prosecution and their right to vote while this case is ongoing.

Texas is holding a Primary Runoff Election and a Special Election on July 14, 2020 and there are local elections currently scheduled between today's date and July 14, 2020 (collectively, "Upcoming Elections"). As set forth more fully below, due to the ongoing, unprecedented public health crisis resulting from the COVID-19 pandemic, Intervenor-Plaintiffs face imminent and irreparable harm as a result of Defendants' failure to correctly interpret and apply Texas's vote-by-mail laws to extend the option to vote by mail to all registered voters in Texas for, at the very least, these Upcoming Elections. Accordingly, Intervenor-Plaintiffs seek a temporary injunction that: (1) enjoins Defendant Travis County 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 all elections affected by the COVID-19 pandemic, including, at a minimum, the Upcoming Elections; (2) enjoins Defendant Travis County 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 COVID-19 pandemic, including, at a minimum, the Upcoming Elections; (3) enjoins Defendant Travis County and Intervenor-Defendant Texas 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 COVID-19 pandemic, including, at a minimum, the Upcoming Elections; (4) enjoins Defendant Travis County and Intervenor-Defendant Texas from issuing guidance or otherwise taking actions during all elections affected by the COVID-19 pandemic,

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

CAUSES OF ACTION AND GROUNDS FOR TEMPORARY INJUNCTION

1. Intervenor-Plaintiffs seek declaratory relief pursuant to the Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE Section 37.004(a): “[a] person whose rights, status, or other legal relationships are affected by a statute . . . can seek a declaratory judgment to determine any question of construction or validity arising under the statute . . . and obtain a declaration of rights, status, or other legal relationships.”
2. Intervenor-Plaintiffs further seek permanent and temporary injunctive relief under TEX. CIV. PRAC. & REM. CODE Section 65.011 (“A writ of injunction may be granted if the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant”) and TEX. ELEC. CODE Section 273.081 (“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.”).

PROBABLE RIGHT OF FINAL RELIEF

3. It is probable that Intervenor-Plaintiffs will be entitled to relief from Defendants after a trial on the merits of their declaratory and injunctive claims. Under a proper interpretation of the Texas Election Code, all registered voters are eligible to use the “disability” category of vote-by-mail eligibility to vote by mail during the ongoing public health crisis in Texas caused by

the COVID-19 pandemic. As discussed further below, this interpretation is supported by the plain text of the Texas Election Code’s vote-by-mail provisions, administrative guidance from the Attorney General, and state law interpretations of similar language. Any other interpretation would, moreover, force the vast majority of Texas voters to choose between their health or their right to vote and the risk of criminal liability. The legislature clearly did not intend such an untenable choice.

4. Intervenor-Plaintiffs need declaratory and injunctive relief explicitly stating this interpretation and ordering the acceptance of all mail ballots by any registered voter during the ongoing COVID-19 public health crisis so that they may vote by mail and inform and assist their members to do the same, without the risk of being disenfranchised and/or prosecuted. A mail ballot application must legally contain “an indication of the ground of eligibility for early voting.” TEX. ELEC. CODE § 84.002. Mail ballots that are not submitted according to statutory standards are subject to being invalidated and not counted. *Tiller v. Martinez*, 974 S.W.2d 769, 775 (Tex. App.-San Antonio 1998, pet. Dism’d w.o.j.). In addition, a person commits an offense if they “knowingly provide[] false information on an application for ballot by mail.” TEX. ELEC. CODE § 84.0041.
5. Despite the need for clarity on this subject, Texas officials refuse to provide usable guidance. On March 17, 2020, Intervenor-Plaintiffs MOVE, WDAF, and LWVTX sent a letter to the Texas Secretary of State urging her to issue guidance to Texas counties to clarify that all registered voters are eligible to cast mail ballots using the “disability” category in the Upcoming Elections during the ongoing pandemic based on the legal theory outlined above. The Secretary of State has not responded to this letter. However, the advisory the Secretary of State issued, which purported to offer guidance to counties on how to conduct elections during

the COVID-19 pandemic and under the necessary social distancing practices that accompany it, provided effectively no guidance regarding who is eligible for a mail ballot during the COVID-19 pandemic; it instead merely repeated word-for-word the statutory language from the Election Code with no additional explanation or interpretation.

6. Accordingly, absent declaratory and injunctive relief from this Court, Intervenor-Plaintiffs and many Texans generally face the threat of disenfranchisement and criminal prosecution, if they register to vote by mail and/or encourage others to do so. Thus, Intervenor-Plaintiffs demonstrate a probable right to relief on their stated causes of action; additionally, given that Upcoming Elections are fast approaching, the harm they face is imminent and irreparable and warrants a temporary injunction to ensure no Texan is forced to choose between their health and/or criminal prosecution and the right to vote while this case is ongoing.

A. Intervenor-Plaintiffs

7. Intervenor-Plaintiff Price is currently practicing social distancing measures as recommended—and mandated—by local, state, and federal authorities. Mr. Price wishes to vote in the 2020 Primary Election Runoff and the July 14 Special Election. Mr. Price does not want to vote in person because he does not want to risk catching COVID-19 or inadvertently infecting others if, unbeknownst to himself, he is an asymptomatic carrier. Mr. Price reasonably believes that during this ongoing COVID-19 outbreak he, along with everyone else, has a physical condition that prevents him from appearing at the polling place on Election Day without a likelihood of injuring his health.
8. Since its inception, Intervenor-Plaintiff MOVE has worked to expand voter registration and equal access to voting. MOVE actively works to register eligible young people to vote and ensure that they cast a ballot that is actually counted. MOVE informs voters statewide about

their ability to cast a mail ballot, explains the rules and deadlines related to mail ballots, and encourages eligible voters to utilize mail ballots if they cannot vote in-person. MOVE encourages and advises young voters in applying for mail ballots when appropriate and follows up with them to ensure they have mailed their ballots in a timely manner. Because MOVE frequently works with college students, encouraging voting by mail is one of MOVE's core activities. Many of the young voters whom MOVE would have encouraged to vote by mail because they were outside of their home county while attending school are now residing in their home counties due to COVID-19 school closures; however, they will still be unable to safely vote in person due to the widespread pandemic conditions. MOVE would engage these potential voters through direct outreach and social media and encourage them to apply for mail ballots if there were legal clarity indicating that it would be permissible for them to vote by mail due to the widespread pandemic conditions and that their votes will be counted if they vote by mail. Further, MOVE faces potential criminal liability if it encourages these voters to vote by mail and later these voters are found to not qualify for vote by mail. *See* TEX. ELEC. CODE § 276.013(a)(3)(B). The requested relief from this Court is necessary for MOVE so that it can plan, prepare, and execute its get-out-the-vote efforts that form part of its core mission.

9. Intervenor-Plaintiff WDAF engages in get-out-the-vote efforts. WDAF's normal get-out-the-vote efforts are not feasible under present conditions where person-to-person contact is not possible. WDAF would encourage these potential voters to apply for mail ballots if there were legal clarity indicating that it would be permissible for them to vote by mail due to the widespread pandemic conditions and that their votes will be counted if they vote by mail. Further, WDAF faces potential criminal liability if it encourages these voters to vote by mail

and later these voters are found to not qualify for vote by mail. The requested relief is necessary for WDAF so that it can plan, prepare, and execute a get-out-the-vote strategy.

10. Intervenor-Plaintiff LWVTX informs voters statewide about their ability to cast a mail ballot and explains the rules and deadlines related to mail ballots. LWV would engage these potential voters and encourage them to apply for mail ballots if there were legal clarity indicating that it would be permissible for them to vote by mail due to the widespread pandemic conditions and that their votes will be counted if they vote by mail. LWVTX faces potential criminal liability if it encourages these voters to vote by mail and later these voters are found to not qualify for vote by mail. *See* TEX. ELEC. CODE § 276.013(a)(3)(B). The requested relief is necessary for LWVTX so that it can plan, prepare, and execute a voter education strategy that includes advising registered voters that they can vote by mail during the ongoing public health crisis caused by the COVID-19 pandemic.

11. Intervenor-Plaintiff LWV-AA engages in numerous voter engagement and education activities, which include educating Austin-area voters about their ability to cast a mail ballot and explaining the rules and deadlines related to mail ballots. LWV-AA would engage these potential voters and encourage them to apply for mail ballots if there were legal clarity indicating that it would be permissible for them to vote by mail due to the widespread pandemic conditions and that their votes will be counted if they vote by mail. LWV-AA faces potential criminal liability if it encourages these voters to vote by mail and later these voters are found to not qualify for vote by mail. The requested relief is necessary for LWV-AA so that it can plan, prepare, and execute a voter education strategy that includes advising registered voters that they can vote by mail during the ongoing COVID-19 public health crisis.

B. Texans are eligible to vote by mail pursuant to TEX. ELEC. CODE § 82.002

12. TEX. ELEC. CODE § 82.002, which defines what constitutes “disability” for purposes of eligibility to vote by mail, provides in full:

- (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).

Under this law, any qualified voter is eligible to vote by mail if the voter has a “physical condition” that renders the voter unable to appear in person at the polls “without a likelihood of . . . injuring the voter’s health.” In other words, the Texas Legislature saw fit to provide the option to vote by mail to registered voters who risk injuring their physical well-being if they appear at the polling place. Under the current circumstances, this applies to all registered voters.

13. The ongoing COVID-19 pandemic risks injuring the physical health of all voters who appear in-person at a polling place in Texas—a fact that is particularly true if the vast majority of Texas voters have no alternative means of voting.¹ COVID-19 is a highly contagious virus that spreads mainly from person-to-person through close contact with one another and through respiratory droplets when an infected person coughs or sneezes.² Medical experts are learning more every day about the ease with which the COVID-19 spreads, including even just through

¹ Intervenor-Plaintiffs seek relief clarifying only that all registered voters *may* vote by mail and ensuring that their ballots will be counted during the ongoing public health crisis caused by COVID-19. Although not the subject of this lawsuit, it is imperative that in-person voting options remain for those who are unable to vote by mail. Making polling places safe environments during this time is a herculean task—especially so if, as has been historically the case, the vast majority of Texans vote in person. If more voters can vote by mail—without fear of disenfranchisement and/or criminal liability—in upcoming elections, the polls themselves will be far less crowded, substantially easing the burden on local jurisdictions of ensuring that the polls are safe and fully functional for those voters for whom voting in person remains the best—or only—option.

² *How COVID-19 Spreads*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited April 6, 2020).

breathing or talking.³ Studies on the pattern of illness indicate that people infected with the virus may be contagious even if they do not have any symptoms.⁴ COVID-19 can result in severe disease, including hospitalization, admission to an intensive care unit, and death.⁵ Top scientists in the Trump Administration recently estimated that COVID-19 could kill between 100,000 and 240,000 Americans and that this number would be much higher if Americans do not follow the strict social distancing guidelines.⁶

14. Although certain individuals may be more vulnerable to the effects of COVID-19, all evidence indicates COVID-19 is a highly virulent pathogen that threatens to infect any member of the public. Between February 1 and March 16, 2020, there were reported cases of COVID-19 in all age ranges in the United States, with 55% of reported cases between the ages of 20-64.⁷ Texas, too, has reported cases in all age ranges—even at least one patient under the age of one.⁸ Among the Texas cases for which demographic information was provided, over three quarters were between the ages of 20-64.⁹ The World Health Organization has warned that they “are seeing more and more younger individuals who are experiencing severe disease” due

³ Elizabeth Cohen, *Experts tell White House coronavirus can spread through talking or even just breathing*, CNN, Apr. 02, 2020, <https://www.cnn.com/2020/04/02/health/aerosol-coronavirus-spread-white-house-letter/index.html>.

⁴ See, e.g., *How COVID-19 Spreads*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited April 6, 2020).

⁵ CDC COVID-19 Response Team, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States, February 12 – March 16, 2020*, CDC.gov (last updated Mar. 26, 2020) <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm>.

⁶ See, e.g., Kiah Collier, Perla Trevizo and Vianna Davila, *Despite coronavirus risks, some Texas religious groups are worshipping in person – with the governor’s blessing*, The Texas Trib. (Apr. 2, 2020), <https://www.texastribune.org/2020/04/02/texas-churches-coronavirus-stay-open/>.

⁷ CDC COVID-19 Response Team, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States, February 12 – March 16, 2020*, CDC.gov (last updated Mar. 26, 2020) <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm>.

⁸ *Texas Case Counts: COVID-19: Demographics*, Texas Dep’t of Health & Human Servs., <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83> (last visited April 6, 2020).

⁹ *Texas Case Counts: COVID-19: Demographics*, Texas Dep’t of Health & Human Servs., <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83> (last visited April 6, 2020).

to COVID-19.¹⁰ Similarly, the CDC has noted that “clinicians who care for adults should be aware that COVID-19 can result in severe disease among persons of all ages.”¹¹ As of March 16, 20 percent of those hospitalized due to COVID-19 in the United States were between the ages of 20 and 44.¹² This is because COVID-19 attacks physical conditions that are common to all individuals, including respiratory pathways and lungs that are susceptible to the virus.

15. Elected officials and government agencies from local school boards to the CDC have recognized the extraordinary nature of this pandemic and taken extreme measures to try to mitigate the spread of COVID-19. Based on virtually unanimous recommendations from public health experts, government agencies and officials at all levels are imposing social distancing measures in order to “flatten the curve” of the COVID-19 outbreak. The intended effect of this is to spread the infection rate of the virus out over time so that our medical system is not overwhelmed by severely sick individuals. Although this strategy is necessary to vastly improve health outcomes and reduce deaths and serious illnesses, it necessarily means that individuals must adhere to strict social distancing measures for an extended length of time. These measures are expected to be in place for the foreseeable future.

16. Social distancing measures include, at a minimum, not being in groups of ten or more and remaining at least six feet away from all other individuals.

17. Toward this end, the CDC has issued national guidance telling the public to avoid public gatherings until at least May 15, 2020. Guidance from the Trump Administration, which was

¹⁰ *‘More and more’ young people are in ICU or dying from coronavirus, World Health Organisation warns*, Australian Broadcast Corporation (April 3, 2020), <https://www.abc.net.au/news/2020-04-04/more-younger-people-dying-and-in-icu-from-coronavirus-covid-19/12121772>.

¹¹ CDC COVID-19 Response Team, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States, February 12 – March 16, 2020*, CDC.gov (last updated Mar. 26, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm>.

¹² *Id.*

recently extended until April 30, 2020, advises against unnecessary travel and gatherings of over 10 people.

18. In Texas, Governor Abbott has declared a state of emergency and suspended numerous state statutes. On March 31, the Governor issued an executive order stating in relevant part, “every person in Texas shall, except where necessary to provide or obtain essential services, minimize social gatherings and minimize in-person contact with people who are not in the same household.” Subsequently, the Governor made clear that this is in fact a stay-at-home order.¹³ This order continues in operation until April 30, 2020, and keeps schools closed until May 4, 2020. All major Texas cities and counties are on lockdown. School districts statewide have canceled classes indefinitely. At least 18 Texas counties, including Travis County, which are home to roughly 60 percent of the state’s population, have instituted some form of mandatory lockdown requiring individuals to stay at home. Some level of social distancing is expected to be necessary for months to come—for instance, the Texas Department of Health and Human Service Tuberculosis and Hansen’s Disease Branch has canceled its conference, which was to be held June 23-26, 2020.¹⁴
19. Texas has lagged behind other states when it comes to COVID-19 testing, and the full scope of the outbreak in Texas is not known.¹⁵ What is known is that the COVID-19 outbreak in Texas is not slowing down. The number of confirmed COVID-19 cases in Texas, and in Austin specifically, is growing exponentially. Over the last six days, the number of reported COVID-

¹³ Gov. Greg Abbott, Executive Order GA-14 (Mar. 31, 2020).

¹⁴ COVID-19 Office Closures and Service Changes, Texas Department of Health and Human Services, <https://dshs.texas.gov/closures/covid19.aspx> (last visited April 6, 2020).

¹⁵ See Mike Hixenbaugh, *Houston hasn't reported a surge of coronavirus cases. But its hospitals tell a different story*, NBC News, (April 3, 2020) <https://www.nbcnews.com/news/us-news/houston-hasn-t-reported-surge-coronavirus-cases-its-hospitals-tell-n1175291?fbclid=IwAR0AA9aT1WD8exHyCEzjltt1UHPsUIpQ9I4CrB3ucAEtLBfH7aiL3PP73jA> (noting that the number of officially reported COVID-19 cases is likely lower than the actual number of cases based on data from Houston hospitals).

19 cases has more than doubled. As of the date of filing, there are at least 7,276 confirmed cases of COVID-19 in Texas¹⁶; just six days ago there were only 3,266 reported cases, which itself was an increase of 450% over the cases reported the prior week. Public health officials expect these numbers to continue to grow. Numerous reports suggest that Texas COVID-19 cases will not begin to peak until May at the earliest and that a sustained outbreak in Texas will continue into the summer, if not longer.

20. The vast majority of Texans traditionally vote in person at a polling place. For instance, in the 2018 General Election, only 6.7% of Texans voted by mail.¹⁷ As long as the COVID-19 pandemic persists in Texas, elections cannot proceed as safely as normal. Thousands of individuals cannot line up at polling places (sometimes for hours), touch the same equipment, have face-to-face interactions with poll workers, and more without threatening their own health and the health of others. During the recent Primary Election, many polling places, including the University of Texas Campus polling places in Travis County, saw hours-long lines with hundreds of voters in close proximity to one another. This poses a risk of infection not only to the voters but to election officials and other people who are present at the polling site. Indeed, in Florida, which recently conducted in-person voting, multiple poll workers have been found to have contracted COVID-19.¹⁸

21. The CDC has recognized the danger that polling places might create for the spread of COVID-19 and has issued interim guidance concerning Election Polling Locations. As part of that

¹⁶ *Texas Case Counts: COVID-19*, Texas Dep't of Health & Human Servs., <https://txdshs.maps.arcgis.com/apps/opsdashboard/index.html#/ed483ecd702b4298ab01e8b9cafc8b83> (last visited April 6, 2020).

¹⁷ *2018 Election Administration and Voting Survey Report 30*, United States Election Assistance Commission (Jun. 2019).

¹⁸ David Smiley & Bianca Padra Ocasio, *Florida Held its Primary despite Coronavirus. Two Broward Poll Workers Tested Positive*, MiamiHerald.com (Mar. 26, 2020) <https://www.miamiherald.com/news/politics-government/article241539451.html>.

guidance, it recommends “[e]ncourag[ing] voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations.” The first voting method the CDC endorses to minimize such direct contact is “encourag[ing] mail-in methods of voting.”¹⁹

22. Given the virulent, widespread nature of the COVID-19 pandemic, which poses a risk of severe disease for all individuals and for which there is yet no vaccine or known immunity, all Texans have 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,” TEX. ELEC. CODE § 82.002, and the plain text of the statute permits all registered voters to cast a mail ballot.
23. This interpretation is consistent with the State Attorney General’s opinion that the term disability as used in the Election Code may be broader than and should not be constrained by other, more limiting definitions of disability. Per a prior Texas Attorney General Opinion, “[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.” Ken Paxton, Attorney General Opinion No. KP-0009 (Mar. 9, 2015) (internal citations omitted).
24. Further, other usages of the phrase “physical condition” make clear that the phrase is not limited to only unhealthy physical conditions. Rather, the phrase expansively refers to physical states or attributes, common or uncommon, health or unhealthy. For instance, in setting forth the mechanism to obtain a court order for a physical examination, the Texas Rules of Civil Procedure specify “physical condition” includes attributes such as the blood group of a party. Tex. R. Civ. P. 204.1(c)(1) (noting that court may issue an order for examination “when the . .

¹⁹ *Recommendations for Election Polling Locations*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last visited April 5, 2020).

. physical condition (including the blood group) of a party . . . is in controversy”). In the context of life insurance, physical condition is also used expansively. *Life Ins. Co. of Sw. v. Nims*, 512 S.W.2d 712, 716 (Tex. Civ. App.—San Antonio 1974, no writ) (“The general plan of accepting and underwriting risks used by most companies . . . is that points are assigned to the physical condition of an applicant. Few persons are in perfect physical condition; and, therefore, certain standards have been established for every conceivable physical condition.”). The definition of “bodily injury” in the Texas Penal Code similarly uses the phrase “physical condition” broadly. “‘Bodily injury’ means physical pain, illness, or any impairment of physical condition.” TEX. PEN. CODE § 1.07 (a)(8). Under this usage, physical condition does not mean an unhealthy condition, rather it refers to a condition that can then be impaired by an injury. *See e.g. Reyes v. State*, 03-15-00233-CR, 2017 WL 1130373, at *7 (Tex. App.—Austin Mar. 23, 2017, no pet.) (“Problems breathing, hearing, seeing, or eating constitute ‘any impairment of physical condition’ included in the definition of ‘bodily injury’”); *In re M.V., Jr.*, 13-08-00059-CV, 2009 WL 3163522, at *3 (Tex. App.—Corpus Christi Oct. 1, 2009, no pet.) (“In this case, the evidence established that Gregory's physical condition was impaired when he experienced profuse sweating, severe dizziness, weakness, faintness, lower-than-normal blood pressure, and low oxygen concentration in his blood.”).

25. Furthermore, the requirements of stay-home orders and social distancing demand a level of “expected or likely confinement” on Election Day that is sufficient cause to entitle a voter to vote by mail. The Election statute explicitly considers expected or likely confinement on Election Day for medical reasons to satisfy the standard for a mail ballot. Tex. Elec. Code § 82.002(b) (providing that “[e]xpected or likely confinement for childbirth on election day is sufficient cause to entitle a voter to vote under Subsection (a)”). The Attorney General has

opined that subsection (b) is “a clarifying but non-limiting example of a condition that satisfies the expressed standard” in subsection (a). Ken Paxton, Attorney General Opinion No. KP-0009 (Mar. 9, 2015) (internal citations omitted).²⁰ Thus, the plain language of section 82.002 makes room for individuals whose confinements arise from medical necessity that renders access to the polls in person risky or medically dangerous, and the ongoing COVID-19 pandemic does precisely that for the vast majority of voters.

26. Recognizing the health risks posed by the COVID-19 outbreak to voters (and the public) if large numbers of voters must appear in person to vote at polling locations in order to cast a ballot, several of the remaining minority of states that require an excuse to vote by mail have agreed with Intervenor-Plaintiffs and interpreted their disability or illness basis for vote-by-mail eligibility to cover all voters during this ongoing pandemic—at least for elections taking place over the next few months.

27. In Alabama, for example, “any qualified voter who determines it is impossible or unreasonable to vote at their polling place” as a result of COVID-19 can vote by mail for the July 14 Primary Runoff Election using the state’s existing reason that the voter has “a physical illness or infirmity which prevents [the voter’s] attendance at the polls.”²¹

28. Similarly, in West Virginia, the state has issued emergency rules permitting all registered voters to vote during this pandemic under the existing basis of “Illness, injury, or other medical reason which keeps me confined,” defining “medical condition” as “any threat to a person’s health posed by an epidemic, pandemic, outbreak, disease, virus, or other emergency, which

²⁰ See also Ken Paxton, Attorney General Opinion No. KP-0149 (May 18, 2017) (opining that individuals who are civilly committed as sexually violent predators likely qualify to vote under Section 82.002 in part because their commitment renders them unable to “appear at the polling place on election day”).

²¹ Press Release, Alabama Secretary of State, 100 Days Left to Apply for Absentee Ballot for the Primary Runoff Election (Mar. 31, 2020), <https://www.sos.alabama.gov/newsroom/100-days-left-apply-absentee-ballot-primary-runoff-election>; see also Ala. Code § 17-11-3(a)(2).

creates potential harm to the public interest, peace, health, safety, or welfare of citizens or voters” and “confined” as “a person who is restricted to a specific location for reasons beyond that person’s control, including a recommendation by state or federal authorities for the person to self-quarantine, avoid public places or close contact with other persons.” W. Va. Code R. §§ 153-53-1-153-53-3. It further notes that this action “does not violate or alter clear statutory requirements” but rather, simply construes existing state law “in favor of enfranchisement, not disenfranchisement.” W. Va. Code R. § 153-53-1.

29. Virginia, Delaware and Massachusetts have likewise clarified that all registered voters in their respective states can use existing reasons related to illness and physical disability to vote by mail in the Upcoming Elections.²²
30. Registered voters, including Intervenor-Plaintiff Price, seek to avail themselves of the option to vote by mail ballot. Similarly, MOVE, WDAF, LWVTX, and LWV-AA seek to encourage their members and the individuals whom they educate about their ability to still participate in the up-coming elections through mail ballots without fear of prosecution or that their ballots will be discarded. Further, MOVE, WDAF, LWVTX, and LWV-AA need this injunctive relief and legal clarity to protect themselves against potential criminal liability.

PROBABLE, IMMINENT, AND IRREPARABLE HARM

²² See Absentee Voting, Virginia Department of Elections, <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/> (last visited April 5, 2020) (Virginia Department of Elections statement clarifying that “Voters may choose reason ‘2A My disability or illness’” to vote in upcoming elections due to COVID-19); John Carney, Governor of Delaware, Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat (Mar. 24, 2020), <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Sixth-Modification-to-State-of-Emergency-03242020.pdf> (Delaware executive order providing that for upcoming primary and special elections “the qualification of ‘sick or physically disabled’ [in Delaware vote-by-mail provisions] shall apply to and include any such voter who is asymptomatic of COVID-19, and who herself or himself freely chooses to use such qualification to vote by absentee ballot); An Act Granting Authority to Postpone 2020 Municipal Elections in the Commonwealth and Increase Voting Option in Response to the Declaration of Emergency to Respond to COVID-19, chap. 45 (2020), <https://malegislature.gov/Bills/191/S2608> (new Massachusetts law clarifying that that “any person taking precaution related to COVID-19 in response to a declared state of emergency or guidance from a medical professional, local or state health official, or any civil authority shall be deemed unable by reason of physical disability to cast their vote in person,” one of the reasons set for in the state constitution that permits a Massachusetts voter to vote by mail).

31. COVID-19 is wreaking havoc on public and private life across Texas and will upend Texas' Upcoming Elections without action from this Court.
32. If Intervenor-Plaintiffs' application is not granted, harm is probable and imminent because (a) organizational Intervenor-Plaintiffs will not be able to conduct their critical missions of voter education and engagement for these Upcoming Elections; (b) organizational Intervenor-Plaintiffs will not be able to advise their members of the option to vote by mail during the COVID-19 pandemic; (c) individual Intervenor-Plaintiff Zachary Price, and individual members of Intervenor-Plaintiff organizations will not be able apply for a mail ballot in a timely fashion without risking disenfranchisement and/or criminal prosecution.
33. The voter education and engagement efforts of Intervenor-Plaintiffs MOVE, WDAF, LWVTX, and LWV-AA take many weeks and months to plan. Each day is precious to these organizations because each day represents more potential voters that these organizations could be engaging—through direct contact or indirect mass communication—and each day missed equates to countless voters who will not be engaged. Organizational Intervenor-Plaintiffs would be promoting vote-by-mail right now if there were an temporary injunction in place ensuring that all registered voters could apply to vote by mail in the Upcoming Elections and that those ballots would be counted and that voters would not face potential criminal prosecution if the basis for their voting by mail is risk of harm to health due to COVID-19. Therefore, organizational Intervenor-Plaintiffs' injuries are not only probable and imminent, they are currently ongoing.
34. Mr. Price wishes to vote by mail and to send in his application as soon as possible but cannot find any official guidance to clarify that he qualifies to vote by mail under present circumstances. Mr. Price is not sure whether his ballot will be accepted and counted if he

attempts to vote by mail. Mr. Price faces potential disenfranchisement and/or criminal liability if it were found that he applied for a mail ballot despite knowingly not meeting the statutory guidelines for eligibility.

35. Injunctive relief ensuring that Mr. Price's ballot will not be rejected or not counted solely because he applied vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic is needed so that Mr. Price can apply for a mail ballot as soon as possible. Mr. Price wants to apply for a ballot soon to ensure that he receives his ballot in a timely fashion, that he has enough time to track his mail application and ballot, has enough time to contact and follow up with the County if his ballot does not arrive or is not received by the County, and has enough time to take whatever additional steps might be necessary to ensure his ballot is counted.

36. A core part of WDAF's mission is civic engagement. This includes encouraging its members to vote in every election and endorsing candidates based on mission-driven criteria. WDAF wants all of its members who are registered voters to be able to vote in all Upcoming Elections. WDAF has members who would not be eligible to vote by mail outside the circumstance of the COVID-19 pandemic. To ensure its members' health and safety during the ongoing public health emergency caused by the COVID-19, WDAF plans to advise and encourage its members to apply for mail ballots for Upcoming Elections and to do so early to ensure they arrive on time or can be re-sent if they do not. WDAF cannot currently advise all of its members (many of whom would not be eligible to vote by mail outside of the COVID-19 pandemic circumstances) to apply for mail ballots due to the lack of legal clarity indicating that it would be permissible for them to vote by mail due to the widespread pandemic conditions. WDAF does not want to encourage its members to vote by mail if their ballots will

not be accepted and tabulated. WDAF cannot risk exposing itself, its staff or its members to potential criminal liability by encouraging members to apply for mail ballots if they are in fact not eligible to do so. Therefore, WDAF needs immediate injunctive relief to ensure its members' mail ballots will be counted and will not be rejected if they apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic in the fast-approaching Upcoming Elections.

37. LWVTX has 33 chapters covering 39 Texas counties, including Travis County, with approximately 3000 individual members all across the state. LWVTX members statewide are observing social distancing guidelines. Many LWVTX members who are registered voters will not be able to vote in person in Upcoming Elections due to the present COVID-19 circumstances without risking their health and safety. This includes not being able to vote in the Upcoming Elections. LWVTX membership includes individuals in Travis County and throughout the state who would not be eligible to vote by mail outside of current pandemic circumstances. LWVTX cannot currently advise all of its members to apply for mail ballots without legal clarity indicating that it would be permissible for them to vote by mail due to the widespread pandemic conditions. LWVTX does not want to encourage its members to vote by mail if their ballots will not be accepted and tabulated. LWVTX cannot risk exposing itself or its members to potential criminal liability by encouraging members to apply for mail ballots if it is later determined they are in fact not eligible to do so. LWVTX seeks to be able to advise its members that they can apply to vote by mail so that they are able to safely vote in all Upcoming Elections during this public health crisis. Therefore, LWVTX needs immediate injunctive relief to ensure its members' mail ballots will be counted and will not be rejected if

they apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic in the fast-approaching Upcoming Elections.

38. Intervenor-Plaintiff LWV-AA is a membership organization whose members reside in the greater Austin area. Many LWV-AA members who are registered voters will not be able to vote in person in Upcoming Elections due to the present COVID-19 circumstances without risking their health and safety. LWV-AA has members who are not otherwise eligible to vote by mail outside of unique circumstances such as a statewide pandemic. LWV-AA cannot currently advise all of its members to apply for mail ballots due to the lack of legal clarity indicating that it would be permissible for them to vote by mail due to the widespread pandemic conditions. LWV-AA does not want to encourage its members to vote by mail if their ballots will not be accepted and tabulated. LWV-AA cannot risk exposing itself or its members to potential criminal liability by encouraging members to apply for mail ballots if they are in fact not eligible to do so. LWV-AA seeks to be able to advise its members that they can apply to vote by mail so that they are able to safely vote in all Upcoming Elections during this public health crisis. Therefore, LWV-AA needs immediate injunctive relief to ensure its members' mail ballots will be counted and will not be rejected if they apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic in the fast-approaching Upcoming Elections..

39. Similarly, MOVE cannot continue its education and get out the vote efforts with respect to vote by mail if it is possible that either MOVE or individuals whom it educates could be prosecuted for voting by mail or that those individuals' ballots may not be counted. MOVE therefore needs immediate injunctive relief to ensure that Texans' mail ballots will be counted

and will not be rejected if they apply to vote by mail based on the disability category of eligibility as a result of the COVID-19 pandemic in the fast-approaching Upcoming Elections..

40. It is necessary for Intervenor-Plaintiff Price and individual members of organizational Intervenor-Plaintiffs to be able to submit their ballot applications as soon as possible to ensure that the County has time and resources to properly process their applications and ballots in the Upcoming Elections. To be able to cope with an influx of mail ballots, counties need to begin processing applications now. Counties, including Travis, have the capacity to scale up to accommodate a significant increase in mail ballot applications, but only if they begin preparing now. As Defendant DeBeauvoir has publicly stated regarding the County's capacity to handle an influx of mail ballots, "[w]e don't have enough high-capacity scanners to do the processing, and we estimate we would have to roughly triple the counting crew. . . . [Nevertheless], anything's possible with sufficient resources."²³ As a preliminary matter, the County needs to know how many mail ballots to order its vendor to print and prepare. This process is often begun months in advance. Additionally, the County needs to plan the staff allocations for processing applications as they come in and ensuring that mail ballots are sent out in a timely fashion. The County must also ensure that there are enough workers to accept and count the ballots, which may require substantial advanced planning particularly given the heightened risks presented by the current health crisis. The County will only be able to adequately meet voters' needs if it knows with enough time how many mail ballots are likely to be requested. If the vast majority of Texas voters are not sure that they may properly apply for mail ballots during this pandemic until the last minute, the County is likely to get slammed with last minute requests that will overwhelm its administrative capacity. However, if voters know in advance

²³ Michael King, *Increased Pressure for Vote-By-Mail*, Austin Chronicle (Mar. 20, 2020) <https://www.austinchronicle.com/news/2020-03-20/increased-pressure-for-vote-by-mail>.

that they can apply for a ballot, they can begin applying now, which will allow the county to properly prepare for tracking, sorting, and counting all of the ballots, as well as notifying voters of their ability to vote by mail.

41. In other words, it is no answer to say “let’s wait and see what it looks like in July” before allowing individuals to submit votes by mail. Such an approach does not account for individuals, like Intervenor-Plaintiff Price, who wish to apply to vote by mail now, as they are entitled under law. It leaves those individuals fundamentally unsure of whether their ballots would be counted or if they would be exposed to potential criminal prosecution. Moreover, forestalling this decision by months severely risks disenfranchising an untold number of Texans and throwing the election into chaos because counties must start preparing now for the increase of mail ballots.
42. Intervenor-Plaintiff Price and individual members of organizational Intervenor-Plaintiffs therefore cannot wait months for the full course of litigation to run before being able to apply for a ballot by mail, and MOVE and the other voter engagement organizations cannot wait months to begin their education efforts. Intervenor-Plaintiffs therefore face a probable, imminent injury if a temporary injunction is not granted.
43. The harm that will result if the temporary injunction is not issued is irreparable and has no adequate remedy at law because it “cannot be adequately compensated in damages.” *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (citing *Canteen Corp. v. Republic of Tex. Props., Inc.*, 773 S.W.2d 398, 401 (Tex.App.–Dallas 1989, no writ) (“An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard.”); *Texas Health & Human Servs. Comm’n v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 629 (Tex.App.–Austin 2013)

(internal citations omitted) (“For purposes of a temporary injunction, an injury is irreparable if the injured party cannot be adequately compensated in damages . . .”).

44. Intervenor-Plaintiff Price and individual members of organizational Plaintiffs face irreparable harm from the looming burden on their fundamental right to vote. Constitutional rights, including the fundamental right to vote, are quintessentially non-compensable. *See, e.g., Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (citing 11A Federal Practice and Procedure § 2948.1 (2d ed. 1995)) (“[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”). Intervenor-Plaintiff Price and individual members of organizational Intervenor-Plaintiffs face disenfranchisement if they cannot timely cast a mail ballot application and be able to follow-up if the County does not process their application or subsequent ballot in a timely manner.

45. Additionally, as set forth in Plaintiffs’ Original Petition, organizational Intervenor-Plaintiffs are all non-profit entities with voter education and engagement efforts that specifically include educating voters about voting by mail and encouraging voters to vote by mail when possible. *See id.* at ¶¶ 2-5. There is no way to compensate them for the lost opportunities to engage and educate potential Texas voters between now and a full trial on the merits, and the organizational mission-frustration that occurs when they cannot answer their members’ or the public’s questions about vote-by-mail in Upcoming Elections. This could hold true even if organizations were for-profit entities, but definitely holds true in this case because they are non-profit civic engagement entities. *Cf. SBI Investments, LLC v. Quantum Materials Corp.*, No. 03-17-00863-CV, 2018 WL 1191854, at *6 (Tex. App.–Austin Mar. 8, 2018) (quoting *Occidental Chem. Corp. v. ETC NGL Transp., LLC*, 425 S.W.3d 354, 364 (Tex. App.–Houston

[1st Dist.] 2011, pet. Dism'd) (“Texas courts have recognized that ‘business disruptions’ may result in irreparable harm for which a temporary injunction is appropriate.”). Intervenor-Plaintiffs LWVTX and LWV-AA are all-volunteer, membership organizations, and members of WDAF are not compensated for their participation in organizational activities, which simply underscores the already irreparable nature of the harm to organizational Intervenor-Plaintiffs.

WILLINGNESS TO POST BOND

46. Intervenor-Plaintiffs are ready, willing, and able to post bond pursuant to Tex. R. Civ. P. 684.

PRAYER

For the foregoing reasons, Intervenor-Plaintiffs asks the Court to set a hearing on their application for temporary injunction to be conducted simultaneous with the hearing on Plaintiff Texas Democratic Party et al.’s Application for a Temporary Injunction²⁴; and to issue a temporary injunction against defendant to (1) enjoin Defendant Travis County 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 all elections affected by the COVID-19 pandemic, including, at a minimum, the Upcoming Elections; (2) enjoin Defendant Travis County 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 COVID-19 pandemic, including, at a minimum, the Upcoming Elections; (3) enjoin Defendant Travis County and Intervenor-Defendant Texas 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-

²⁴ On April 2, 2020, all parties to this action met and conferred concerning dates for a hearing on the request for temporary injunctive relief and jointly submitted these dates to the Court. The Court has subsequently set April 15, 2020 for the hearing date.

19 pandemic for all elections affected by the COVID-19 pandemic, including, at a minimum, the Upcoming Elections; (4) enjoin Defendant Travis County and Intervenor-Defendant Texas from issuing guidance or otherwise taking actions during all elections affected by the COVID-19 pandemic, including, at a minimum, the Upcoming Elections, 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) order Intervenor-Defendant Texas, acting through the appropriate state agency, to publish a copy of this Court's Order on the appropriate agency website and to circulate a copy of this Court's Order to the election official(s) in every Texas County.

Respectfully submitted,

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** Pro hac vice application forthcoming

***ATTORNEYS FOR INTERVENOR-
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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2020, a true and correct copy of the foregoing *Petition in Intervention* was served upon Sherine Thomas and Leslie Dippel, attorneys for Defendant Dana DeBeauvoir via email at sherine.thomas@traviscountytx.gov and leslie.dippel@traviscountytx.gov; upon Chad Dunn, attorney for Plaintiffs, via email at chad@brazilanddunn.com; and upon Anna Mackin, attorney for Intervenor-Defendant, via email at anna.mackin@oag.texas.gov in accordance with TEX. R. CIV. P. 21(a).

/s/ Joaquin Gonzalez