

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-Defendant.

201st JUDICIAL DISTRICT

**MEMORANDUM IN SUPPORT OF APPLICATION FOR TEMPORARY INJUNCTION
AND RESPONSE TO THE STATE OF TEXAS' PLEA TO THE JURISDICTION**

Table of Contents

I.	INTRODUCTION	2
II.	BACKGROUND	4
A.	Texas is in the Midst of a Public Health Crisis Caused by the COVID-19 Pandemic.....	4
B.	Voting in the Time of COVID-19	9
C.	Voting By Mail in Texas	11
D.	Plaintiffs	16
E.	Procedural History.....	21
III.	ARGUMENT	23
A.	Intervenor-Plaintiffs Have Pled Valid Causes of Action Against Defendants.....	23
B.	Intervenor-Plaintiffs Demonstrate a Probable Right of Relief.....	24
1.	Intervenor-Plaintiffs Have Standing To Assert Their Claims	24
2.	Intervenor-Plaintiffs Have a Probable Right To The Relief Based on the Merits of their Claims.....	31
C.	Probable, Imminent, and Irreparable Harm.....	37
D.	This Case is Ripe.....	41
E.	The State’s Immunity Arguments Fail.....	46
1.	Section 273.081 of the Election Code	46
2.	UDJA	47

I. INTRODUCTION

The COVID-19 pandemic is wreaking havoc on civil life in Texas and across the globe. Individuals are contracting the devastating illness at alarming rates and the death toll continues to increase. On April 1, 2020, Texas reported 3,266 cases of COVID-19. On April 7, 2020—less than a week later—Texas reported 7,276 cases. Now, six days later, Texas is reporting 13,484 cases. To date, over 270 Texans have died from COVID-19.¹ In response, and to help secure the populace’s health and safety, federal, state and local officials have issued orders to prohibit or discourage individuals from gathering in groups large or small or otherwise unnecessarily getting too close to other individuals. The devastation of the virus and the social distancing response to it is incompatible with proceeding with elections as normal, where thousands of people line up next to each other, touch the same voting equipment and interact with poll workers in close proximity.

Fortunately, Texas law provides a mechanism for conducting elections in a manner that protects the safety and health of our voters and election workers during this time. Specifically, the Texas Legislature saw fit to allow individuals to vote by mail when they 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. In these unique and extreme times, every Texan qualifies under this standard. *Unfortunately*, the State of Texas and counties, including Travis County, have refused to make clear that individuals can vote by mail pursuant to the statute without fear of having their ballots rejected or not counted, or being prosecuted. In addition, the State tells this Court that it must wait until much closer to July to determine whether individuals may invoke the disability basis to vote by mail. The State’s position is wrong on the

¹ Declaration of Dr. Sheryl A. McCurdy (McCurdy Dec.) at ¶ 8.

law and threatens to disenfranchise countless Texans. It would force voters and counties to wait until it was too late to adequately ramp up for a significant increase in vote by mail and thereby undermine the orderly administration of the election. No Texan should have to choose between protecting their health and exercising their fundamental right to vote. Although the Texas Legislature recognized this fundamental principle, Defendants have failed to correctly interpret and apply it. Accordingly, with the Primary Runoff Election and a Special Election on July 14, 2020 (collectively, “Upcoming Elections”) fast approaching, 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”) now need immediate relief to ensure that they and their members are not disenfranchised and/or subject to criminal prosecution due to Defendants’ refusal to apply the law.

Specifically, 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 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 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 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 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.

II. **BACKGROUND**

A. Texas is in the Midst of a Public Health Crisis Caused by the COVID-19 Pandemic.

Severe Acute Respiratory Syndrome coronavirus 2 (“SARS-CoV-2”), the novel coronavirus responsible for causing Coronavirus Disease 2019 (“COVID-19”), is a highly contagious virus that spreads mainly from person-to-person through close contact with one another and through respiratory droplets, such as when an infected person coughs or sneezes.² See Ex. 6, Declaration of Catherine L. Troisi (“Troisi Dec.”) at ¶¶ 10-11 ; Ex. 7, Declaration of Sheryl A. McCurdy (“McCurdy Dec.”) at ¶ 7. Transmission of the virus may also occur through contaminated surfaces or objects with subsequent contact with the eyes, nose, or mouth.³ Troisi

² Ex. 9, Declaration of Katya Ehresman (Ehresman Dec.) at ¶ 3 & Atch. 1 (*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)).

³ Ex. 9, Ehresman Dec. at ¶22 & Atch. 19 (*Coronavirus Disease (COVID-19): A primer for emergency physicians* [https://www.ajemjournal.com/article/S0735-6757\(20\)30178-9/pdf](https://www.ajemjournal.com/article/S0735-6757(20)30178-9/pdf) (last visited April 8, 2020)).

Dec. at ¶ 10; McCurdy Dec. at ¶ 7. 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 Troisi Dec. at ¶¶ 8, 11.

COVID-19 can result in severe disease with symptoms similar to other viral upper respiratory illnesses that may result in hospitalization, admission to an intensive care unit, and death.⁵ Troisi Dec. at ¶ 8; McCurdy Dec. at ¶ 7. COVID-19 is a highly virulent pathogen that threatens to infect any member of the public. Troisi Dec. at ¶¶ 8, 11; McCurdy Dec. at ¶ 7. This is because COVID-19 transmits through physical pathways common to all individuals, including droplet transmission that then is absorbed through the mucous membranes of the eyes, nose, and mouth. McCurdy Dec. at ¶ 7; Troisi Dec. at ¶ 8. The virus then attacks physical conditions that are common to all individuals, including having throats, respiratory pathways and lungs that are susceptible to the virus. McCurdy Dec. at ¶ 7.

Texas has reported COVID-19 cases in all age ranges—even at least one patient under the age of one.⁶ Among the Texas cases for which demographic information was provided, at least 78% were between the ages of 20-64.⁷ Although certain individuals may be more vulnerable to the effects of COVID-19, anyone can be infected and suffer serious outcomes. Troisi Dec. at ¶ 8.

⁴ See, e.g., Ehresman Dec. at ¶ 3 & Atch. 1 (*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 Ex. 9, Ehresman Dec. at ¶ 5 & Atch. 3 (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 Ex. 9, Ehresman Dec. at ¶ 7 & Atch. 5 (*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)).

⁷ Ex. 9, Ehresman Dec. at ¶ 5 & Atch. 3 (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>).

Further, the World Health Organization has warned that they “are seeing more and more younger individuals who are experiencing severe disease” due to COVID-19.⁸ 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.”⁹ In a CDC survey of across 99 counties and 14 states between March 1 through March 30, 2020, 24.7 percent of those hospitalized due to COVID-19 in the United States were between the ages of 18 and 49, and 31.1 percent were between 50 and 64.¹⁰ *See also* McCurdy Dec. at ¶ 7 (“COVID-19 is sending even young, previously healthy people to the intensive care unit.”).

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. Social distancing measures include, at a minimum, avoiding large and small gatherings and remaining at least six feet away from all other individuals.¹¹ *See* Troisi Dec. at ¶ 10; Ex. 8, Declaration of Lauren Ancel Meyers (“Meyers Dec.”)

⁸ Ex. 9, Ehresman Dec. at ¶ 8 & Atch. 6 (*‘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>).

⁹ Ex. 9, Ehresman Dec. at ¶ 5 & Atch. 3 (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>).

¹⁰ Ex. 9, Ehresman Dec. at ¶23 & Atch. 21 (CDC COVID-19 Response Team, *Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019 — COVID-NET, 14 States, March 1–30, 2020*, CDC.gov, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm>).

¹¹ Ex. 9, Ehresman Dec. at ¶24 & Atch. 22 (CDC, *Social Distancing, Quarantine, and Isolation*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>).

at ¶ 10. The intended function of this is to slow transmission by preventing infected people from coming into contact with susceptible people and to spread the infection rate of the virus out over time so that our medical system is not overwhelmed by severely sick individuals. Meyers Dec. at ¶¶ 9, 10. 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. *See* Meyers Dec. at ¶¶ 11-13.

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 which acts to close down the state, save essential services.¹² This order continues in operation until April 30, 2020, and keeps schools closed until May 4, 2020.¹³ All major Texas cities and counties are on lockdown.¹⁴ 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.¹⁵ *See* DeBeauvoir Counter-Petition (“Counter-Petition”) at 6-7. Some level of social distancing is expected to be necessary for months to come. *Id.* at 6 (“It appears increasingly likely that these

¹² Ex. 9, Ehresman Dec. at ¶ 9 & Atch. 7 (Gov. Greg Abbott, Executive Order GA-14 (Mar. 31, 2020)).

¹³ *Id.*

¹⁴ Ex. 9, Ehresman Dec. at ¶ 25 & Atch. 23 (Elizabeth Findell, *Texas’ Coronavirus Response Is Keep It Local, as More States Move to Lockdowns*, WallStreetJournal.com (Mar. 25, 2020) <https://www.wsj.com/articles/texas-coronavirus-response-is-keep-it-local-as-more-states-move-to-lockdowns-11585148279>).

¹⁵ *Id.*

orders will extend beyond their current period for weeks, if not months.”); *see also* Meyers Dec. ¶¶ 10-13. 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, 2020.¹⁶

Texas has lagged far behind other states when it comes to COVID-19 testing, with the second-worst rate of COVID-19 testing per capita (332 tests per 100,000) in the United States, and thus the full scope of the outbreak in Texas is not known.¹⁷ Troisi Dec. at ¶ 9; McCurdy Dec. at ¶ 8. What is known is that the COVID-19 outbreak in Texas is not slowing down. The number of confirmed COVID-19 cases in Texas is growing exponentially.¹⁸ Over the last 12 days, the number of reported COVID-19 cases has more than quadrupled. As of the date of filing, there are at least 13,484 confirmed cases of COVID-19 in Texas.¹⁹ Just 12 days ago there were only 3,266 reported cases, which itself was an increase of 450 percent over the cases reported the prior week.

¹⁶ Ex. 9, Ehresman Dec. at ¶ 10 & Atch. 8 (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)).

¹⁷ Ex. 9, Ehresman Dec. at ¶ 11 & Atch. 9 (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); *id.* at ¶26 & Atch. 24 (Jenny Deam et al., *How Many Missed? Texas is Second-Worst in the Nation for COVID-19 Testing*, HoustonChronicle.com (Apr. 11 2020) <https://www.houstonchronicle.com/news/investigations/article/How-many-missed-Texas-is-second-worst-in-the-15193258.php>).

¹⁸ Ex. 9, Ehresman Dec. at ¶ 27 & Atch. 25 (*Coronavirus in Texas: Map and Case Count*, NY Times, <https://www.nytimes.com/interactive/2020/us/texas-coronavirus-cases.html> (last visited April 13, 2020)).

¹⁹ Ex. 9, Ehresman Dec. at ¶ 7 & Atch. 5 (*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 12, 2020)).

Based on Texas’ current level of social distancing it is more likely than not that the COVID-19 outbreak will persist in Texas through the summer, including July. Meyers Dec. at ¶ 9; Troisi Dec. at ¶ 12, 14. This is because Texas’ socially distancing efforts appear to have been at least partially successful in suppressing virus transmission, preventing a surge that would have overwhelmed hospitals. Meyers Dec. at ¶ 13. The necessary consequence of these measures though, is that the COVID-19 transmissions continue for a longer period of time—including through the summer. Meyers Dec. at ¶ 9, 15; Troisi Dec. at ¶ 12. The model of Professor Lauren A. Meyers specifically takes into account possible levels of efficacy for social distancing in Texas and concludes that “the risk of COVID-19 transmission is likely to persist through the end of July.” Meyers Dec. at ¶ 13. This is reinforced by the fact that there is a reasonable likelihood that COVID-19 is not seasonal in nature. Troisi Dec. at ¶ 14, 17. Further, it is virtually certain that there will be neither a COVID-19 vaccine nor herd immunity to COVID-19 by July, meaning that the virus will still pose a significant threat to voters’ health. Troisi Dec. at ¶ 14; Meyers Dec. ¶ 9, 13; McCurdy Dec ¶ 8. Given these factors, even if some aspects of social distancing are eased, large public gatherings, like those at polling places, will still pose a threat to public health. Troisi Dec. at ¶ 14.

B. Voting in the Time of COVID-19

Like other locations and events where many people may congregate in confined spaces, polling places can be a particularly ripe environment for infection for at least three reasons: (1) voters may be forced into close proximity with each other, (2) voters will be in close proximity to poll workers who are interacting with numerous other voters throughout the day, and (3) voters will be coming into contact with machines that have been used by other voters. Troisi Dec. at ¶ 11. The risk is compounded because COVID-19 has a long incubation period and some carriers may be asymptomatic, so individuals may unknowingly spread the disease. *Id.*; Meyers Dec. at ¶

9. Recognizing this danger, the CDC recommends “[e]ncourag[ing] voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations.”²⁰ The first voting method the CDC endorses to minimize such direct contact is “encourag[ing] mail-in methods of voting.”²¹ In contrast, there has been no evidence that COVID-19 can be spread through the mail. Troisi Dec. at ¶ 18. Voting by mail will minimize the risk to individual voters, election workers, and the public at large. *Id.*; McCurdy Dec. at ¶ 8-9.

Acknowledging that voting by mail may be the safest way for voters to vote during the COVID-19 pandemic, states across the nation have taken numerous steps to ensure access to vote by mail for their voters. In fact, several states that do not already offer mail voting to all registered voters have done so, at least for elections over the next few months, including Alabama, Arkansas, Delaware, Indiana, Massachusetts, New York, Virginia, and West Virginia.

As long as the COVID-19 pandemic persists, Texas too must make necessary adjustments to protect voters, election workers, and the public health. The vast majority of Texans traditionally vote in person at a polling place, with typically 10% or less of all voters voting by mail.²² But 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. Troisi Dec. at ¶ 11; McCurdy Dec. ¶ 8. During the recent Primary Election, many polling places, including the University of Texas Campus polling places

²⁰ Ex. 9, Ehresman Dec. at ¶ 14 & Atch. 12 (*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)).

²¹ *Id.*

²² Ex. 9, Ehresman Dec. at ¶ 12 & Atch. 10 (2018 Election Administration and Voting Survey Report 30, United States Election Assistance Commission (Jun. 2019)); Ex. 9, Ehresman Dec. at ¶ 40 & Atch. 38 (The Election Administration and Voting Survey Report, 2016 Comprehensive Report, United States Election Assistance Commission (Jun. 2017)).

in Travis County, saw hours-long lines with hundreds of voters in close proximity to one another.²³ 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. Troisi Dec. at ¶ 11; McCurdy Dec. ¶ 8.

Defendant DeBeauvoir acknowledges as much, admitting that for the Upcoming Elections, “the typical arrangements for polling locations will need to be substantially modified in order to provide reasonable access to voters while complying with public health and safety requirements and recommendations.” Counter-Petition at 4. She further observes that “people infected with COVID-19 may infect others prior to the onset of symptoms, and a single asymptomatic voter, election clerk, or poll worker could infect hundreds of others.” *Id.* at 6. Indeed, in Florida, which recently conducted in-person voting, multiple poll workers have been found to have contracted COVID-19.²⁴ In Texas, the risk of infection undoubtedly will be compounded by anticipated poll worker shortages and reductions in polling locations, *see* Counter-Petition at 7-8, which in turn will result in crowding and longer lines. Wisconsin, which as is expected in Texas, had poll worker shortages due to COVID-19 and thus fewer polling locations and longer wait times, recently held its primary election despite extremely unsafe in-person voting conditions due to COVID-19, with some dubbing it “the most dangerous election ever.”²⁵

C. Voting By Mail in Texas

²³ Ex. 9, Ehresman Dec. at ¶ 28 & Atch. 26 (Erum Salam, *California and Texas Voters Faced Hours-Long Lines on Super Tuesday*, TheGuardian.com (Mar. 4, 2020), <https://www.theguardian.com/us-news/2020/mar/04/california-and-texas-voters-faced-hours-long-lines-on-super-tuesday>).

²⁴ Ex. 9, Ehresman Dec. at ¶ 13 & Atch. 11 (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>).

²⁵ Ex. 9, Ehresman Dec. at ¶ 29 & Atch. 27 (Natasha Korecki, *Wisconsin is holding the most dangerous election ever. Here’s why.*, Politico (Apr. 7, 2020) <https://www.politico.com/news/2020/04/07/wisconsin-election-coronavirus-primary-171216>).

Texas, and a minority of other states, requires voters to have an excuse to vote by mail in an election. In Texas, those excuses are: (1) expected absence from the voter's county of residence; (2) "disability"; (3) being over the age of 65; or (4) confinement in jail. Tex. Elec. Code § 82.001-.004. Section 82.002 of the Texas Election Code defines what constitutes "disability" as follows:

(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).

To vote a mail ballot, a voter must first obtain a mail ballot application. If the voter does not have a printer and cannot or is unwilling to venture to the county registrar's office to obtain an application form (if the office is even open to the public), the voter must request that an application be mailed to them. Once received, the voter must then send their county the mail ballot application via mail, fax (if available), or e-mail (to be followed up with mailing the hard copy). Tex. Elec. Code § 84.007. The application must be received 11 days before Election Day. *Id.* at (c), (d) ("An application is considered to be submitted at the time of its receipt by the clerk."). As such, voters must request and submit their applications, at the latest, well before that 11-day cutoff to ensure that it is timely received by the clerk and there is sufficient time to request and return a new ballot application before the deadline in the event that there are any problems with the initial application. A mail ballot "shall be mailed to a voter entitled to vote by mail not later than the seventh calendar day after the later of the date the clerk accepts the voter's application for a ballot to be voted by mail or the date the ballots become available for mailing, except that if that mailing date is earlier than the 37th day before election day, the balloting materials shall be mailed not later than the 30th

day before election day.” Tex. Elec. Code § 86.004. To be counted, the ballot must be received by the day after Election Day if postmarked by Election Day. Tex. Elec. Code § 86.007.

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. Anyone who “knowingly or intentionally makes any effort to . . . cause any intentionally misleading statement, representation, or information to be provided . . . on an application for ballot by mail, carrier envelope, or any other official election-related form or document” also commits an offense. Tex. Elec. Code § 276.013(a)(3)(B).

Historically, only a very small portion of the Texas electorate has voted by mail. For example, in the 2018 General Election, only 6.7% of Texans voted by mail and only 5.9% did so during the 2016 General Election.²⁶ If all registered voters have the option vote by mail in Upcoming Elections, the number of Texans voting by mail will undoubtedly skyrocket. Declaration of Glen Maxey (attached to Plaintiff Texas Democratic Party’s Brief in Support of TI) (“Maxey Dec.”) Dec. at ¶ 5. Wisconsin, for example, saw record-breaking numbers of absentee ballot applications for its recent primary.²⁷ 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. Maxey Dec. at ¶¶ 2-4. As Defendant DeBeauvoir has publicly stated regarding the

²⁶ Ex. 9, Ehresman Dec. at ¶¶ 12 & 40, & Atch. 10 & 38.

²⁷ Ex. 9, Ehresman Dec. at ¶ 30 & Atch.28 (Nathaniel Rakich, *Here’s What Voters Told Us About Voting in Wisconsin’s Primary*, FiveThirtyEight (Apr. 8, 2020) <https://fivethirtyeight.com/features/voters-experiences-in-wisconsin-amid-the-coronavirus/>).

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."²⁸

Counties need to know *now* how many mail ballots to order its vendor to print and prepare. This process is often begun months in advance, and the ballots themselves must be finalized 74 days before the election. Maxey Dec. at ¶¶ 2-4. Additionally, counties need to plan the staff allocations for processing applications as they come in and ensuring that mail ballots are sent out in a timely fashion. *Id.* Counties 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. *Id.* at ¶¶ 2-8. Counties will only be able to adequately meet voters' needs if they know with enough time how many mail ballots are likely to be requested.

The recent primary held in Wisconsin is a cautionary tale for what conducting an election during the COVID-19 pandemic without appropriate preparation looks like: there were massive poll closures due to COVID-19 related election worker shortages, with Milwaukee, the epicenter of Wisconsin's COVID-19 outbreak, reducing its polling locations from 180 to 5,²⁹ with inadequate time for mail ballots to be returned (almost half of mail ballots requested had not been

²⁸ Ex. 9, Ehresman Dec. at ¶ 20 & Atch. 18 (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>).

²⁹ Ex. 9, Ehresman Dec. at ¶ 31 & Atch. 29 (*Milwaukee IDs 5 in-person voting centers for election day, expands weekend drive-up hours*, FOX6 News (Apr. 3, 2020) <https://fox6now.com/2020/04/03/milwaukee-ids-5-in-person-voting-centers-for-election-day-expands-weekend-drive-up-hours/>.); Ehresman Dec. at ¶ 32 & Atch. 30 (*Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty*, New York Times (Apr. 7, 2020) <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html>).

returned the morning before Election Day)³⁰, and with people lined up for hours in hazardous, COVID-19-created conditions.³¹ In addition to injuring voters' health, attempting to force voters to vote in person in spite of COVID-19 will undoubtedly lead to lower turnout, as some voters will make the decision that the health risks involved with voting in person are simply too high. McCurdy Dec. at ¶ 9. Initial reports of turnout from the recent Wisconsin primaries, where some voters were unexpectedly forced last minute to vote in person, indicate that turnout is down despite record numbers of absentee ballots cast.³² And historical data suggests as much: An investigation into the 1918 influenza pandemic attributes fewer people voting in the election due to fear of contagion and illness. Recent research found that influenza fears in the United States and Finland, as well as tuberculosis in Ukraine, led to lower voting. McCurdy Dec. at ¶ 9.

Despite the urgent need for clarity on this subject for voters and for elections officials, Texas officials have refused 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.³³ Shortly thereafter, the Secretary of State issued an advisory, which purported to offer guidance to counties

³⁰ Ex. 9, Ehresman Dec. at ¶ 33 & Atch. 31 (Eric Bradner, Kate Sullivan, and Ariane de Vogue, *Wisconsin Primary set to go ahead Tuesday after court blocks attempts to delay voting due to coronavirus*, CNN.com (Apr. 6, 2020) <https://www.cnn.com/2020/04/06/politics/wisconsin-primary-election/index.html>).

³¹ Ex. 9, Ehresman Dec. at ¶ 34 & Atch. 32 (Eric Bradner, *'This is ridiculous': Wisconsin holds its primary election in the middle of a pandemic*, CNN.com (Apr. 7, 2020) <https://www.cnn.com/2020/04/07/politics/wisconsin-primary-coronavirus/index.html>).

³² Ex. 9, Ehresman Dec. at ¶ 35 & Atch. 33 (Jaymes Langrehr, *Initial numbers show voter turnout down nearly 16% in Madison*, Channel3000 (Apr. 8, 2020) <https://www.channel3000.com/initial-numbers-show-voter-turnout-down-nearly-16-in-madison/>).

³³ Ex. 9, Ehresman Dec. at ¶ 41 & Atch. 39 (Letter to Texas Secretary of State Ruth Hughs (Mar. 17, 2020) <https://texascivilrightsproject.org/wp-content/uploads/2020/03/Letter-to-SOS-re-Coronavirus.pdf>).

on how to conduct elections during the COVID-19 pandemic. However, that advisory 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.³⁴ This lack of clarity has already led to confusion with local election officials who are holding May 2 elections agreeing with Intervenor-Plaintiffs' interpretation of the relevant Election Code provisions, prompting other public figures to raise the threat of criminal prosecution.³⁵

D. Plaintiffs

Zachary Price

Intervenor-Plaintiff Zachary Price is a resident of Austin, Texas, a student at the University of Texas at Austin, and a registered voter in Travis County, Texas. Ex. 1, Declaration of Zachary Price ("Price Dec.") at ¶ 2-3. Because of the ongoing COVID-19 public health crisis, he is currently practicing social distancing measures. *Id.* at ¶ 5. This includes not leaving his house unless absolutely necessary, avoiding gatherings of more than ten people at all times, and keeping six feet or more away from people when he must be in public. *Id.* Price wants to vote in the Upcoming Elections, but does not want to vote in person because he does not want to risk catching COVID-19 or inadvertently infecting others if, unbeknownst to him, he is an asymptomatic carrier. *Id.* at ¶ 6. He understands that all individuals, including him, can contract COVID-19, and that the effects can be devastating, even deadly. *Id.* He understands that gathering in large crowds is an unsafe

³⁴ Ex. 9, Ehresman Dec. at ¶ 42 & Atch. 40 (Ruth Hughs, *Election Advisory No. 2020-14*, (Apr. 2, 2020) <https://www.documentcloud.org/documents/6824368-ADV2020-14-COVID-19-Coronavirus-Voting-and.html>).

³⁵ Ex. 9, Ehresman Dec. at ¶ 36 & Atch. 34 (Matt Hollis, *State Reps Slam BH, MB Use of Mail-in Ballots*, BaytownSun.com (Apr. 11, 2020) http://baytownsun.com/news/article_f67cc43a-7b9e-11ea-bdde-dbd8bceb963.html).

practice that creates a risk of contracting COVID-19 and believes that during this ongoing pandemic 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. *Id.*

Price wants to apply to vote by mail as soon as possible but cannot find any official guidance to clarify that he qualifies to vote by mail under the present circumstances. *Id.* at ¶ 7. But for the COVID-19 public health crisis, Price would not be eligible to vote by mail as he is not 65 or older; will be in Travis County (county of residence) during the relevant voting period; is not incarcerated in jail, and does not have a disability other than his susceptibility to COVID-19. *Id.* at ¶ 4. If he were to attempt to vote by mail, Price is not sure whether his ballot will be accepted and counted and understands that he faces potential criminal liability if it were found that he applied for a mail ballot despite knowingly not meeting the statutory guidelines for eligibility. *Id.* at ¶ 7. Because he is not willing to face criminal prosecution or risk his health, Price will likely be disenfranchised if he cannot vote by mail in the Upcoming Elections. *Id.* If Price has authoritative guidance clarifying that he is able to legally apply for a mail ballot under the current circumstances, he will do apply now so that he (1) can ensure he receives his ballot in a timely fashion, (2) has enough time to track his mail application and ballot, (3) 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 (4) has enough time to take whatever additional steps might be necessary to ensure his ballot is counted, including canceling and re-ordering a ballot if necessary. *Id.* at ¶ 8.

Price has attempted to vote by mail before, when he was out of the county for the entirety of the voting period, and found it extremely difficult to obtain his ballot in a timely manner. *Id.* at ¶ 9. The whole process of applying for a ballot and voting by mail has numerous steps, and he found that he did not receive his ballot until substantially after he turned in his application. He

does not know what caused the delay in receiving his ballot; however, this was under normal circumstances. *Id.* Thus, he knows that all of the follow-up work described in the preceding paragraph is likely to be necessary, and wants to have plenty of time to follow through to make sure his ballot is cast and counted properly. *Id.* If there are many people applying to vote by mail at the last minute, Price is extremely worried that ballots (including his if he is forced to wait until the last minute) will not arrive in time to be counted. *Id.*

Organizational Intervenor-Plaintiffs

All of the Organizational Intervenor-Plaintiffs are non-profits with voter education and engagement at the core of their work. LWVTX and LWV-AA are non-profit, non-partisan, volunteer-based organizations. Ex. 2, Declaration of Grace Chimene (“Chimene Dec.”) at ¶ 2; Ex 3, Declaration of Joyce LeBombard (“LeBombard Dec.”) at ¶ 2. WDAF and MOVE are Texas nonprofit corporations, organized under section 501(c)(4) of the Internal Revenue Code. Ex. 4, Declaration of Emily Timm (“Timm Dec.”) at ¶ 2; Ex. 5, Declaration of Drew Galloway (“Galloway Dec.”) at ¶ 2. LWVTX, LWV-AA, and WDAF have their principal offices in Austin, Texas. Chimene Dec. at ¶ 2; LeBombard Dec. at ¶ 2; Timm Dec. at ¶ 2. MOVE’s principal place of business is San Antonio, and it conducts significant mission-driven activities in Travis County. Galloway Dec. at ¶ 2.

LWVTX and LWV-AA’s mission includes empowering voters, defending democracy and envisioning a democracy where every person has the desire, the right, the knowledge and the confidence to participate. Chimene Dec. at ¶ 2; LeBombard Dec. at ¶ 2. WDAF advocates for local, state and federal policies that protect workers, educates voters about their rights, and engages historically under-represented voters in efforts to elect representatives that prioritize the needs of working families. *Id.* Since its founding in 2013, WDAF has engaged thousands of low-wage

workers and voters in Texas in electoral and legislative campaigns. *Id.* WDAF also engages in get-out-the-vote efforts. Timm Dec. at ¶ 3. MOVE empowers underrepresented youth communities to build a better democracy through civic engagement, leadership development, and issue advocacy. Galloway Dec. at ¶ 2. Since its inception, MOVE has worked to expand voter registration and equal access to voting. *Id.* at ¶ 3.

LWVTX, LWV-AA, and WDAF are all membership organizations with members who are registered voters, including in Travis County. Chimene Dec. at ¶ 2; LeBombard Dec. at ¶ 2; Timm Dec. at ¶¶ 9-10. There are members of each organization, including LWVTX's President Grace Chimene, LWV-AA's President Joyce LeBombard, and WDAF's co-executive director Emily Timm, who want to vote in the Upcoming Elections, but for the same reasons as Intervenor-Plaintiff Price, would not otherwise be eligible to vote by mail but for the COVID-19 pandemic. Chimene Dec. at ¶¶ 10, 15-17; LeBombard Dec. at ¶¶ 9, 14; Timm Dec. at ¶10. For example, in order to ensure that her vote would be counted, Ms. Chimene would apply for a mail ballot now if she had clear guidance making clear that doing so was lawful, because of the many steps involved in the process and the potential delays due to the ongoing public health crisis. Chimene Dec. at ¶ 18; *see also* Timm Dec. at ¶ 18.

However, the lack of authoritative guidance on whether they are able to vote by mail under the present circumstances leaves many LWVTX, LWV-AA, and WDAF members with no realistic opportunity to exercise their fundamental right to vote in the Upcoming Elections. Chimene Dec. at ¶¶ 11-12; LeBombard Dec. at ¶¶ 10-11; Timm Dec. at ¶12. Without the option to vote by mail, many of these members will be faced with the untenable choice of disenfranchisement or risking their health and safety and the health and safety of their loved ones on the one hand or risking that

their ballot will not be counted and/or criminal liability on the other. Chimene Dec. at ¶¶ 11-13; LeBombard Dec. at ¶¶ 10-11; Timm Dec. at ¶12.

LWVTX, LWV-AA, and WDAF cannot currently advise all of its members and the public to apply for mail ballots without authoritative guidance indicating that it would be permissible for them to vote by mail due to the widespread pandemic conditions. Chimene Dec. at ¶ 13; LeBombard Dec. at ¶ 12; Timm Dec. at ¶13. The membership organizations cannot encourage its members to vote by mail if their ballots will not be accepted and tabulated. Chimene Dec. at ¶ 13; LeBombard Dec. at ¶ 12; Timm Dec. at ¶13. Nor can they risk exposing 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. Chimene Dec. at ¶ 13; LeBombard Dec. at ¶ 12; Timm Dec. at ¶13. LWVTX, LWV-AA, and WDAF seek 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. Chimene Dec. at ¶ 13; LeBombard Dec. at ¶ 12; Timm Dec. at ¶13. Without authoritative guidance that says all registered voters can use the disability category of eligibility to vote by mail during the COVID-19 pandemic, LWVTX, LWV-AA, and WDAF are not able to do so. Chimene Dec. at ¶ 13; LeBombard Dec. at ¶ 12; Timm Dec. at ¶13.

All of the organizational Intervenor-Plaintiffs have additionally had their mission frustrated by the lack of clarity as to whether individuals may vote by mail. All of the organizational plaintiffs are aware that many individuals to whom they would normally target educational and outreach efforts would not otherwise be able to vote but for the COVID-19 pandemic. Chimene Dec. at ¶ 4-5; LeBombard Dec. at ¶ 4; Timm Dec. at ¶ 3; Galloway Dec. at ¶ 4. If there were authoritative guidance indicating that it would be permissible for them to do so, these are precisely the voters

the organizations would proactively engage and encourage to vote by mail. Chimene Dec. at ¶ 5; LeBombard Dec. at ¶ 5; Timm Dec. at ¶ 4; Galloway Dec. at ¶ 5.

LWVTX and LWV-AA specifically have received numerous communications from the public stating that, due to the COVID-19 public health crisis, they believe that without the ability to vote by mail they will be unable to exercise their fundamental right to vote in the upcoming elections without risking their health. Chimene Dec. at ¶ 8; LeBombard Dec. at ¶ 7. However, the Organizational Intervenor-Plaintiffs cannot risk exposing their members or their staff to potential criminal liability if they encourage voters to vote by mail and later these voters are found to not qualify for vote by mail. Chimene Dec. at ¶¶ 8, 12; LeBombard Dec. at ¶¶ 8, 12; Timm at ¶ 13; Galloway Dec. at ¶¶ 6-7. And WDAF's July voter outreach efforts have been frustrated because they cannot provide clear guidance as to whether individuals may vote by mail in the July elections.

It takes significant time and effort for the Organizational Intervenor-Plaintiffs to plan and execute an educational campaign, including one that would inform voters about their ability to vote by mail. *See, e.g.* LeBombard Dec. at ¶ 13 (noting LWV-AA needs 6-8 weeks at a minimum to change/update public education materials and circulate to members and the public to get the word out and work with voters to make sure they are able to cast a ballot that counts); Timm Dec. at ¶ 5 (noting it generally takes WDAF 4-6 months to properly plan, prepare, and execute a successful voter education strategy). Accordingly, in order to properly educate individuals about their ability to vote by mail, the Organizational Intervenor-Plaintiffs must begin now.

E. Procedural History

On March 20, 2020, plaintiffs, including the Texas Democratic Party, sued Defendant DeBeauvoir, in her official capacity as the Travis County Clerk and Election Administrator, and the Texas Secretary of State, seeking a declaratory judgment, a temporary injunction, and a

permanent injunction. The plaintiff subsequently non-suited without prejudice Defendant Secretary of State because she alleged she was an improper party on March 23, 2020.

On March 27, 2020, Intervenor-Defendant State of Texas then filed a petition in intervention in this case. The State of Texas thus became a party to this lawsuit, and if it is not struck or does not withdraw, it is bound by the judgment herein. *In re E.C.*, 431 S.W.3d 812, 815 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (“Upon filing of the petition, an intervenor becomes a party to the suit for all purposes.”) (citing *In the Interest of D.D.M.*, 116 S.W.3d 224, 231 (Tex.App.-Tyler 2003, no pet.); *Schwartz v. Taheny*, 846 S.W.2d 621, 622 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (“An intervenor is bound by a final judgment unless he has been dismissed, severed, or he has withdrawn. Therefore, appellant is bound by this final judgment if he is an intervenor, and if he has not been severed or dismissed or has not withdrawn from the case.”) (citing *Ray v. Chisum*, 260 S.W.2d 118, 124 (Tex.Civ.App.—Texarkana 1953, writ ref’d, n.r.e.)).³⁶

On April 1, 2020, Intervenor-Plaintiffs intervened in the instant action. On April 7, 2020, Intervenor-Plaintiffs filed their application for a Temporary Injunction, and Intervenor-Defendant

³⁶ The cases cited by the State in their Plea to the Jurisdiction are not to the contrary. *State v. Naylor*, 466 S.W.3d 783, 788 (Tex. 2015), stands only for the proposition that where a party’s intervention is not timely, that party may not appeal the judgment. *Interest of R.M.*, 05-18-01127-CV, 2019 WL 2266388, (Tex. App.—Dallas May 24, 2019, pet. denied), affirmed an intervenor’s plea to the jurisdiction on numerous procedural grounds, including a failure to preserve an objection, *id.* at *6, but is inapposite to the question of whether the State has become a party through its intervention. *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas 2010, orig. proceeding), held that it was error for a court to *sua sponte* strike the State’s intervention without a motion from any party—but that is not at issue here. Further, the court there explicitly referred to the State of Texas as a party. *Id.* at 664 (referring to the “parties contentions” and including the State).

filed a Plea to the Jurisdiction challenging Plaintiffs’ and Intervenor-Plaintiffs’ standing and pleading that the instant case is not ripe and is barred by governmental immunity.

III. ARGUMENT

“To obtain a temporary injunction, the applicant must ordinarily plead and prove three specific elements: (1) a cause of action against the defendant, (2) a probable right to the relief sought, and (3) a probable, imminent, and irreparable injury in the interim.” *Texas Health & Human Services Com’n v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 629 (Tex. App.—Austin 2013, no pet.). Intervenor-Plaintiffs have clearly met these standards. Additionally, Intervenor-Defendant Texas’s Plea to the Jurisdiction fails because Intervenor-Plaintiffs have standing to bring their claims, their claims are ripe, and clear precedent demonstrates that governmental immunity does not bar their requested relief.

A. Intervenor-Plaintiffs Have Pled Valid Causes of Action Against Defendants

Intervenor-Plaintiffs seek declaratory relief pursuant to the Uniform Declaratory Judgments Act (“UDJA”), 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.” 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.”).

B. Intervenor-Plaintiffs Demonstrate a Probable Right of Relief

“To establish a probable right to recovery, an applicant need not prove that she will ultimately prevail in the litigation; rather, the applicant must show she has a cause of action for which relief may be granted.” *Topheavy Studios, Inc. v. Doe*, No. 03-05-00022-CV, 2005 WL 1940159, at *2-3 (Tex. App.—Austin Aug. 11, 2005, no pet.) (citing *Universal Health Servs. v. Thompson*, 24 S.W.3d 570, 576 (Tex.App.—Austin 2000, no pet.)); *see also Butnaru*, 84 S.W.3d at 211 (quoting *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968)). Intervenor-Plaintiffs satisfy this standard because they have standing to seek their requested relief and demonstrate a probable right to recover on such relief.

1. Intervenor-Plaintiffs Have Standing To Assert Their Claims

“Because the voters seek only declaratory and injunctive relief, and because each voter seeks the same relief, only one plaintiff with standing is required.” *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 6 (Tex. 2011). “The general test for standing in Texas requires that there (a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.” *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Intervenor-Plaintiffs seek injunctive relief and a declaratory judgment under the UDJA. Where, as here, Intervenor-Plaintiffs have demonstrated “‘a particularized, legally protected interest that is actually or imminently affected by the alleged harm,’” they have established standing under the UDJA. *Texas Dep’t of Pub. Safety v. Salazar*, 304 S.W.3d 896, 906 (Tex. App.—Austin 2009, no pet.) (internal citation omitted).

A membership organization “has standing to sue on behalf of its members when ‘(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief

requested requires the participation of individual members in the lawsuit.” *Texas Ass'n of Bus.*, 852 S.W.2d at 447 (quoting *Hunt v. Wa. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Organizations also have standing where they have suffered direct injury. *See, e.g., City of San Antonio v. Headwaters Coal., Inc.*, 381 S.W.3d 543, 549 (Tex. App.—San Antonio 2012, pet. denied) (finding organization had standing where it had suffered direct injury).

a) Intervenor-Plaintiff Price and Membership Intervenor-Plaintiffs have standing

Here, there is a direct controversy between the parties, and Intervenor-Plaintiffs face direct and concrete injuries to themselves and their members. Intervenor-Plaintiff Price and multiple members of Intervenor-Plaintiff organizations have standing because they specifically wish to vote by mail in the Upcoming Elections, as they believe that it is the only realistic way for them to vote given the risk of becoming infected and potentially spreading COVID-19 were they to vote in person at the polls. *See supra*, Section II. C; Price Dec. at ¶¶ 6-7; Chimene Dec. at ¶¶ 14, 18; Timm Dec. at ¶ 16; LeBombard Dec. at ¶¶ 10-11.³⁷ Outside of the exigencies of the COVID-19 pandemic, they would not otherwise meet the statutory requirements to vote by mail. Price Dec. at ¶ 4; Chimene Dec. at ¶¶ 10, 15-17; LeBombard Dec. at ¶¶ 9, 14; Timm Dec. at ¶10. Therefore, both Intervenor-Plaintiff Price and the members of Intervenor-Plaintiff organizations are faced with the concrete injury of either being disenfranchised because there is no legal and safe way for

³⁷ The State’s Plea to the Jurisdiction is based solely on the Plaintiffs’ Complaint and the Intervenor-Plaintiffs’ Intervention. However, it is appropriate for this Court to review evidence pertaining to what the State claims are jurisdictional defects. *Texas Dep’t of Criminal Justice v. Cooke*, 149 S.W.3d 700, 703 (Tex. App.—Austin 2004, no pet.) (“[A] court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised.”) (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000)).

them to vote in the Upcoming Elections or applying for a mail ballot and risking having their application be rejected, their ballot not counted, and being criminally prosecuted.

These injuries are direct and concrete and sufficient for standing.³⁸ The risk of disenfranchisement resulting from an unlawful barrier that prevents a voter from voting (here an overly-cramped understanding of “disability”) is clearly a concrete injury. *See, e.g., Andrade*, 345 S.W.3d at 10 (“a plain, direct and adequate interest in maintaining the effectiveness of their votes” is sufficient to demonstrate standing); *Veasey v. Perry*, 71 F. Supp. 3d 627, 667, 679 (S.D. Tex. 2014), *aff’d in part, vacated in part, reversed in part on other grounds sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (concluding individual plaintiffs who lacked qualifying photo ID had standing to challenge Texas’ photo ID law); *cf. Fin. Comm’n of Texas v. Norwood*, 418 S.W.3d 566, 584 (Tex. 2013) (noting that “voting rights present a special situation” requiring a less substantial injury than in other contexts). So too the risk of disenfranchisement from having one’s ballot not counted or rejected. *See, e.g., Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (finding organization had standing where its members had risk of having their ballot rejected); *Black v. McGuffage*, 209 F. Supp. 2d 889, 894 (N.D. Ill. 2002) (probabilistic injury of having vote not counted is sufficient for standing); *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1316 (N.D. Ga. 2018), *aff’d in part, appeal dismissed in part sub nom. Curling v. Sec’y of Georgia*, 761 Fed. Appx. 927 (11th Cir. 2019) (likelihood of miscounted ballot is sufficient to show standing).

³⁸ These allegations thus distinguish the case from *City of Green Bay v. Bostelmann*, 20-C-479, 2020 WL 1492975 (E.D. Wis. Mar. 27, 2020), where the plaintiffs were seeking to suspend the election and delay the date for absentee ballots; there the court found that the individual plaintiff, the Mayor, had not alleged and could not plausibly allege that he would not be able to submit an absentee ballot on time.

Further, in similar contexts, courts have found standing where individuals faced a credible threat of prosecution. *See, e.g., Speaks v. Kruse*, 445 F.3d 396, 399 (5th Cir. 2006) (citing *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)) (finding standing where there is “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there [must be] a credible threat of prosecution thereunder”). Here, where the Attorney General has an entire unit devoted to prosecuting supposed voter fraud, posts the number of prosecutions on his website as on a scoreboard,³⁹ and has intervened in this litigation, there is a sufficiently credible threat of prosecution for standing purposes.

In arguing that Intervenor-Plaintiff Price and the organizational Intervenor-Plaintiffs (through their members)⁴⁰ do not have standing, the State relies heavily on *Andrade v. NAACP of Austin*, but *Andrade* supports Intervenor-Plaintiffs’ standing here. *See* Plea to the Jurisdiction (“PTJ”) at 10-13. In *Andrade*, the Court considered a challenge to the certification of an electronic voting machine without a requirement that the machine provide electronic paper records. *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 6 (Tex. 2011).

In evaluating plaintiffs’ standing, the *Andrade* Court noted that in the context of a challenge to a statutory law, the standing inquiry serves to separate “generalized grievance[s]” from those tied to a specific injury. *Id.* at 7. The Court reasoned that the proper inquiry was whether “the plaintiffs sue solely as citizens who insist that the government follow the law,” as opposed to individuals who have suffered or are threatened with concrete injury. *Id.* at 8.

³⁹ Ex. 9, Ehresman Dec. at ¶ 37 & Atch. 35 (Ken Paxton, Attorney General of Texas, “Election Integrity,” <https://www.texasattorneygeneral.gov/initiatives/election-integrity>).

⁴⁰ All organizational Intervenor-Plaintiffs are membership organizations that assert membership and direct organizational standing, except MOVE, which asserts only direct organizational standing.

Here, as discussed above, Intervenor-Plaintiffs have shown specific and concrete injuries to themselves and their members. The State makes much of the fact that Intervenor-Plaintiffs argue that they and all other Texan voters are eligible to vote by mail during the COVID-19 pandemic, but, as *Andrade* made clear in finding that plaintiffs had standing to bring their equal protection claim, standing “is based not on the number of people affected—a grievance is not generalized merely because it is suffered by large numbers of people.” 345 S.W.3d at 7. Here, Intervenor-Plaintiffs have shown that they specifically (either Price or members of the organizations) wish to vote by mail, and, outside of the extreme circumstances presented by COVID-19 would otherwise be ineligible, and therefore they individually and specifically will suffer injury; accordingly, Intervenor-Plaintiffs have satisfied the standing requirement.

The State also alleges that the organizational Plaintiff-Intervenors have failed to identify any members who they allege to have suffered harm. However, in declarations to this Court, the Intervenor-Plaintiffs have each identified at least one member—the declarant—and made specific allegations about others suffering the concrete harm identified here. Chimene Dec. at ¶¶ 10-13, 14-18; Timm Dec. at ¶¶ 8, 13; LeBombard Dec. at ¶¶ 6, 8. This satisfies any supposed requirement that “plaintiff-organizations . . . make specific allegations establishing that at least one identified member had suffered or would suffer harm.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009).

Finally, the State’s argument that Intervenor-Plaintiffs’ injury is caused by their own decision not to vote a late ballot fundamentally misunderstands Intervenor-Plaintiffs’ argument. Intervenor-Plaintiffs argue that due to the nature of COVID-19, they are entitled to vote by mail now because they **currently** have a physical condition that prevents them from entering the polling place without a likelihood of injuring their health—*e.g.*, a throat, lungs, and respiratory pathways

that are susceptible to COVID-19. McCurdy Dec. at ¶ 7; Troisi Dec. at ¶ 8. But the provision the State points to requires that the sickness or physical condition “originate **on or after the day before the last day** of submitting an application for a ballot to be voted by mail.” TEX. ELEC. CODE § 102.001(a). Accordingly, this provision is inapplicable.

For these reasons, Intervenor-Price has individual standing, and there are individual members of the membership Intervenor-Plaintiffs who would have standing to sue in their own right. Additionally, membership Intervenor-Plaintiffs meet the remaining requirements for associational standing, and Defendants do not contend otherwise. “[T]he interests [each organization] seeks to protect are germane to the organization’s purpose.” *Texas Ass’n of Bus.*, 852 S.W.2d at 447 (internal quotations omitted). Each organization has a purpose to increase civic engagement, including by ensuring its own members and the public at large can participate safely in every election. Chimene Dec. at ¶ 2; LeBombard Dec. at ¶ 3; Galloway Dec. at ¶¶ 3–4; Timm Dec. at ¶ 9. And lastly, “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Texas Ass’n of Bus.*, 852 S.W.2d at 447 (internal citations omitted). As the Texas Supreme Court clarified, “[i]f in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.” *Id.* at 448. These conditions hold true here where the sought-for declaratory and injunctive relief will directly inure to the benefit of those members of Intervenor-Plaintiff organizations that are actually injured.

b) Organizational Intervenor-Plaintiffs have direct standing

The organizations additionally suffer direct injury because they are unable to carry out their educational mission and have been and will be forced to divert resources accordingly. *OCA-*

Greater Houston v. Texas, 867 F.3d 604, 612 (5th Cir. 2017) (finding organizational standing where voting rights organization diverted resources to counteract State’s alleged unlawful voter-interpreter restriction); Chimene Dec. at ¶¶ 4-8; Timm Dec. at ¶¶ 8, 13; LeBombard Dec. at ¶¶ 6, 12; Galloway Dec. at ¶¶ 7, 12.

The State relies on *Texas Department of Family and Protective Services v. Grassroots Leadership*, No. 03-18-00261-CV, 2018 WL 6187433, at *5 (Tex. App.—Austin Nov. 28, 2018, no pet.) (mem. op.), to argue that expenditure of resources with respect to an advocacy mission is not sufficient for an organization to claim direct standing. However, that case is inapposite. There, the expenditure of resources at issue was in advocacy to oppose a particular rule, which the Court found too attenuated. Here, the organizations are forced to divert resources directly on educating voters and responding to the lack of clarity. Chimene Dec. at ¶¶ 4-8; Timm Dec. at ¶¶ 8, 13; LeBombard Dec. at ¶¶ 6, 12; Galloway Dec. at ¶¶ 7, 12.

Further, *Grassroots Leadership*’s attempt to distinguish *Havens* as a case limited to the Fair Housing Act, and the State’s attempt to cast *Haven*’s as not being broadly applicable, PTJ at 18, are belied by the broad adoption of *Havens* in a variety of contexts, including in the voting rights context. *Ass’n of Cmty. Organizations for Reform Now v. Fowler*, 178 F.3d 350, 360 (5th Cir. 1999) (applying *Havens* diversion of resources analysis to voting rights organization, but finding standard not met); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (finding that the NAACP had standing to challenge voter ID law “[b]ecause it will divert resources from its regular activities to educate voters about the requirement of a photo identification and assist voters in obtaining free identification cards”); *Common Cause Indiana v. Lawson*, 937 F.3d 944, 954 (7th Cir. 2019) (finding that voting rights organization had standing under *Havens* diversion of resources analysis).

2. Intervenor-Plaintiffs Have a Probable Right To The Relief Based on the Merits of their Claims.

All registered Texans are eligible to vote by mail during the public health crisis caused by the COVID-19 pandemic. This conclusion 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 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.

Section 82.002 of the Texas Election Code defines “disability” for purposes of eligibility to vote by mail as:

- (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 provision, 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 . . . 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.

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.⁴¹ Troisi Dec. at ¶ 11; McCurdy Dec. at ¶¶ 8-9.

⁴¹ 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 attacks numerous aspects of the human body—the lungs, the respiratory pathways, and the throat. McCurdy Dec. at ¶ 7. All human beings—and all Texans—have the physical condition of having lungs, respiratory pathways, and throats that are susceptible to COVID-19 infection. McCurdy Dec. at ¶ 7; Troisi Dec. at ¶ 8. And given the virulent, widespread nature of the COVID-19 pandemic, which poses a risk of severe disease for all individuals, so long as the virus is circulating while there is no vaccine or herd immunity, that physical condition “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. Accordingly, the plain text of the statute permits all registered voters to cast a mail ballot during the ongoing COVID-19 public health crisis.

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).

Further, other usages of the phrase “physical condition” make clear that the phrase is not limited to only already 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

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.

Procedure specify “physical condition” includes attributes such as the blood group of a party. Tex. R. Civ. P. 204.1(c)(1) (noting that a court may issue an order for examination “when the . . . 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.”).

Furthermore, the requirements of 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).⁴² 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.

The ongoing COVID-19 pandemic does precisely that for the vast majority of voters. As set forth above, all of Texas is currently under orders to "minimize social gatherings and minimize in-person contact with people who are not in the same household."⁴³ Even if social distancing requirements are eased, it is expected that some measures will still need to be in place to protect public health well into the summer, including July, including prohibitions against attending large public gatherings. Troisi at ¶ 14; Meyers at ¶ 9; McCurdy at ¶ 8.

In their plea to the jurisdiction, Intervenor-Defendant, the State of Texas, argues that there is no constitutional right to vote by mail specifically and, therefore, vote by mail is subject to the specific text of the legislative requirement. PTJ at 27. However, Intervenor-Plaintiffs' argument is precisely that the specific text of the legislative requirement entitles them to vote by mail, and is not based on the state or federal constitution.

The State asserts that "Election Code § 82.002 does not permit voting by mail based on an unspecified fear of contracting a disease—whether it be COVID-19 or the seasonal flu." *Id.* at 27.

⁴² 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").

⁴³ Ex. 9, Ehresman Dec. at ¶ 9 & Atch. 7 (Gov. Greg Abbott, Executive Order GA-14 (Mar. 31, 2020)).

Leaving aside the State’s false and dangerous conflation between COVID-19 and the flu, *see* Troisi Dec. at ¶¶ 15-16 (noting that unlike the flu there is no vaccine and no herd immunity for COVID-19), Intervenor-Plaintiffs’ argument is not based on an “unspecified fear” of contracting COVID-19. Rather, Intervenor-Plaintiffs’ argument is based on the likelihood of voters being unable to appear at the polling place without risking injury to their health. Intervenor-Plaintiffs have established that all individuals are susceptible to COVID-19, that COVID-19 is deadly, that there is no vaccine, and that both public health experts and government officials, therefore, recommend that individuals engage in social distancing, and that running a “business as usual” election is not compatible with social distancing. Troisi Dec. at ¶ 18; McCurdy Dec. at ¶¶ 8-9; Meyers Dec. at ¶ 15. Further, Intervenor-Plaintiffs have established that it is objectively likely that the novel coronavirus will still be circulating at the time of the July elections. Troisi Dec. at ¶¶ 12, 14; Meyers Dec. at ¶ 13. This is sufficient to satisfy the plain language of § 82.002.

The State also asserts that the COVID-19 outbreak does not justify individuals voting by mail because individuals do not have an illness that “*prevents* them from voting in person.” PTJ at 27 (emphasis in original). However, this argument both misreads the statute and misconstrues Intervenor-Plaintiffs’ argument. The statute does not require that an individual have an illness that prevents them from voting in person. The statute requires that individuals have an illness *or physical condition* that prevents them from voting in person *without a likelihood of injuring the voter’s health*. Here, Intervenor-Plaintiffs do not assert that they have a present illness that would qualify them under section 82.002; instead, they assert that they have a physical condition—throats, lungs and respiratory pathways susceptible to COVID-19—that prevents them from appearing at the polling place on election day without a likelihood of injuring their health because of the virulent transmission of COVID-19.

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. 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.”⁴⁴ Similarly, West Virginia, has permitted 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 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. Virginia,⁴⁵ Delaware and

⁴⁴ Ex. 9, Ehresman Dec. at ¶ 16 & Atch. 14 (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)).

⁴⁵ Governor Northam of Virginia has since announced that he has signed into law a bill providing for no-excuse absentee voting for all voters. Ex. 9, Ehresman Dec. at ¶ 38 & Atch. 36 (Andrew Cain, *Northam signs sweeping measures on environment, voting, and criminal justice* (Apr. 12,

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 approaching elections.⁴⁶

As such, under the plain text of the statute, registered voters, including Intervenor-Price and members of LWVTX, LWV-AA, and WDAF, are eligible to vote by mail.

C. Probable, Imminent, and Irreparable Harm

COVID-19 will upend Texas' Upcoming Elections and disenfranchise untold numbers of Texans, including Intervenor-Plaintiff Price and members of Intervenor-Plaintiffs organizations, without immediate action from this Court.

As discussed above, the ongoing public health crisis and related need for social distancing and other safety precautions has rendered in-person voting an unrealistic option for many Texas

2020), https://www.richmond.com/news/local/government-politics/update-northam-signs-election-reforms-proposes-amendment-to-marijuana-decriminalization-bill/article_766a937c-4d8d-5ea6-bf8b-bde92674c0f5.html).

⁴⁶ See Ex. 9, Ehresman Dec. at ¶ 17 & Atch. 15 (Absentee Voting, 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)); *id.* at ¶ 18 & Atch. 16 (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)); *id.* at ¶ 19 & Atch. 17 (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)).

voters. *See supra* at Section II, A-B. Even Defendant DeBeauvoir agrees that the ongoing COVID-19 public health crisis will create severe difficulties with in-person voting for the Upcoming Elections. Counter-Petition at 4 (noting that Defendant “anticipates that there will be a shortage of election judges and poll workers available for the early voting periods associated with these July 14, 2020 elections, and that the typical arrangements for polling locations will need to be substantially modified in order to provide reasonable access to voters while complying with public health and safety requirements and recommendations.”).

Voting by mail is thus the only meaningful way for some voters, like Intervenor-Plaintiff Price and several members of Intervenor-Plaintiffs organizations, to be able to participate in the Upcoming Elections. Thus, without a temporary injunction ensuring that all mail ballots cast by individuals using the “disability” category due to the health risks posed by COVID-19 will be counted, Intervenor-Plaintiff Price and individual members of organizational Intervenor-Plaintiffs face disenfranchisement, which is a quintessentially irreparable harm, because there can be no “do-over” on the lost right and opportunity to vote. *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) (“Because there can be no “do-over” or redress of a denial of the right to vote after an election, denial of that right weighs heavily in determining whether plaintiffs would be irreparably harmed absent an injunction.”); *N. Carolina State Conference of NAACP v. Cooper*, 1:18CV1034, 2019 WL 7372980, at *24 (M.D.N.C. Dec. 31, 2019) (“By their very nature, laws impacting the right to vote create the potential for irreparable harm; once an election occurs, ‘there can be no do-over and no redress.’”). Further, infringements on the right to vote are irreparable because the right to vote is fundamental. *See Andrade*, 345 S.W.3d at 12 (“The right to vote is fundamental, as it preserves all other rights.”) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); *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.”).

This harm is also imminent. Individuals may apply for a mail ballot at any point during the year before an election, and, on the basis of disability, even may apply for a mail ballot for all elections during the entire year. Tex. Elec. Code § 84.007(c) (“[A]n application may be submitted at any time in the year of the election for which a ballot is requested.”); Tex. Elec. Code § 86.0015. Given the many steps involved in casting a mail ballot – requesting a mail ballot application, waiting to receive and then returning that application, waiting to receive and then returning the ballot application so that it is received by the deadline to be counted--Intervenor-Plaintiff Price and the members of Intervenor-Plaintiffs wish to apply for mail in ballots for the Upcoming Elections *now*. Price Dec. at ¶ 8; Chimene Dec. at ¶ 18; Timm Dec. at ¶ 18; LeBombard Dec. at ¶ 18. As Intervenor-Plaintiff Price states, moreover, beginning the process of applying for a mail ballot now is critical to ensuring that there is enough time to track his mail application and ballot, contact and follow up with the County if his application or ballot does not arrive or is not received by the County, and take whatever additional steps might be necessary to ensure his ballot is counted. Price Dec. at ¶¶ 8-9. In the time of COVID-19, each of these steps in process will take longer, relying as they do on an increasingly burdened U.S. postal service and county elections officials who are facing a virtually certain surge in mail in ballot requests and applications. Beginning the mail ballot request process immediately is thus not only prudent but also imperative to avoid disenfranchisement under the current circumstances. This is underscored by the experience of the thousands of voters in Wisconsin, where mail ballots were requested at record-

breaking rates, whose mail ballots were never sent or who did not otherwise receive their mail ballots in time.⁴⁷

As discussed above, however, absent the requested temporary injunction, Intervenor-Plaintiffs cannot apply for a mail ballot on the basis of COVID-19 without having their applications rejected, their ballots not tabulated, and/or being criminally prosecuted.

Immediate action from this court is also necessary because 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, counties will get slammed with last minute requests that will overwhelm its administrative capacity. Maxey Dec. at ¶ 14, 19. However, if voters know in advance 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.

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. 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.

Further, the voter education and engagement efforts of Intervenor-Plaintiffs MOVE, WDAF, LWVTX, and LWV-AA take many weeks and months to plan. Chimene Dec. at ¶ 6; LeBombard Dec. at ¶ 13; Galloway Dec. at ¶¶ 3–5, 7; Timm Dec. at ¶ 5. 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

⁴⁷ Ex. 9, Ehresman Dec. at ¶ 39 & Atch. 37 (*Wisconsin Watch Wisconsin Watch, Returned To Sender: Postal Officials Investigating Wisconsin Absentee Ballots That Were Never Delivered*, Wisconsin Public Radio (Apr. 9, 2020) <https://www.wpr.org/returned-sender-postal-officials-investigating-wisconsin-absentee-ballots-were-never-delivered>).

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. Chimene Dec. at ¶ 5; LeBombard Dec. at ¶ 5; Galloway Dec. at ¶¶ 6–7; Timm Dec. at ¶ 3.

There is no way to compensate these organizations 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, no pet.) (quoting *Occidental Chem. Corp. v. ETC NGL Transp., LLC*, 425 S.W.3d 354, 364 (Tex. App.—Houston [1st Dist.] 2011, pet. dismissed) (“Texas courts have recognized that ‘business disruptions’ may result in irreparable harm for which a temporary injunction is appropriate.”)). Therefore, organizational Intervenor-Plaintiffs’ injuries are not only probable and imminent, they are currently ongoing.

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.

D. This Case is Ripe

For many of the same reasons that Intervenor-Plaintiffs need immediate relief, this case is also ripe. Intervenor-Plaintiff Price and members of Intervenor-Plaintiff organizations wish to apply for a mail ballot immediately because they believe it is imperative to act now to ensure that they are able to cast ballots that are counted. Price Dec. at ¶ 8; Chimene Decl. at ¶ 18; LeBombard Dec. ¶ 18; Timm at ¶ 18. As discussed above, while Intervenor-Plaintiffs could, if eligible, apply for a mail ballot now, if the State or the County decide that Intervenor-Plaintiffs are not eligible, they reasonably believe they will be prosecuted, their application or mail ballot will be rejected, or, if they do not submit a mail ballot, they will be unable to vote. The State has not disavowed such prosecution, and some elected officials have even alluded to the prospect of prosecution for individuals who vote by mail due to COVID-19 during the May 2 local elections.⁴⁸ This dispute is, thus, ripe.⁴⁹

The threat of prosecution is also sufficient to render a dispute ripe. *Diamond v. Charles*, 476 U.S. 54, 64 (1986) (“The conflict between state officials empowered to enforce a law and private parties subject to prosecution under that law is a classic ‘case’ or ‘controversy’ within the meaning of Art. III.”); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (a private party need not “first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights”); *Big Hart Ministries Ass’n Inc. v. City of*

⁴⁸ Ex. 9, Ehresman Dec. at ¶ 36 & Atch. 34 (Matt Hollis, State Reps Slam BH, MB Use of Mail-in Ballots, BaytownSun.com (Apr. 11, 2020), http://baytownsun.com/news/article_f67cc43a-7b9e-11ea-bdde-dbd8bceb963.html).

⁴⁹ Individuals need not be forced to submit mail ballots and have them rejected in order for a dispute to become ripe. *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1164 (11th Cir. 2008) (“The hardship to would-be voters is that if we require them to wait until after their applications have been rejected to challenge Subsection 6, there may not be enough time to reach a decision on the merits before the actual election.”). Similarly here, if voters were required to apply to vote by mail, have their application rejected or ballot not counted, and only then challenge that rejection, there may not be time to reach a decision on the merits before the Upcoming Elections.

Dallas, 3:07-CV-0216-P, 2011 WL 5346109, at *3 (N.D. Tex. Nov. 4, 2011) (similar); *Grant v. Meyer*, 828 F.2d 1446, 1449 (10th Cir. 1987), *aff'd*, 486 U.S. 414 (1988) (finding that a dispute was ripe “despite the absence of a pending criminal prosecution against any of the plaintiffs,” where the plaintiffs were parties subject to the criminal penalty provision, the State had not disavowed prosecution, and the State had sought to uphold the statute in litigation).

The State’s claim that this dispute is not ripe boils down to an unjustifiable, speculative, and prejudicial request that we all just wait and see. But here is what the record evidence before this Court demonstrates: There will not be herd immunity to COVID-19 in July; there will not be a vaccine for COVID-19 in July; COVID-19 will not be seasonal and go away in the summer; COVID-19 will not be gone come July. Troisi Dec. at ¶¶ 12, 14; Meyers Dec. at ¶ 13. Despite the State’s atextual claim that Intervenor-Plaintiffs’ claims are not yet ripe because “disability under the Election Code is time-specific,” PTJ at 20, individuals are in fact permitted to apply to vote by mail now, including on the basis of “disability.” As made clear by the explicit provision for expected confinements and the ability to apply to vote by mail any time during the year, Tex. Elec. Code Ann. § 84.007(c), the disability provision hinges on whether the individual can reasonably believe that in the future on election day they will face a likelihood of injury to their health. The question before this Court is thus whether it is reasonable for them to believe at this moment that there is a likelihood of injuring their health if they go to vote in person at a polling place in July. The answer to that question is unequivocally yes. Intervenor-Plaintiffs have offered substantial evidence that based on current knowledge of possible outcomes there is a continuing threat of COVID-19 infection if they were to appear in person at a polling place in July. Troisi Dec. ¶¶ 14, 18; McCurdy Dec. ¶ 8; Meyers Dec. ¶ 13.

The State's Plea to the Jurisdiction does not account for this evidence. Instead, the State refers to an IHME model, which the State asserts shows that nobody in Texas will be hospitalized with COVID-19 in July. PTJ at 23. This is not a tenable assertion. The IHME model relies on numerous faulty presumptions including that social distancing will halt in its entirety the spread of COVID-19, and that there is no way for COVID-19 to be reintroduced from another State or Country. Meyers Decl. at ¶ 14; Troisi at ¶ 13. The model further explicitly does not consider the possibility of multiple waves of COVID-19. Troisi at ¶ 13. As such, this model is not reliable, and is certainly less reliable than models that take into account both the degree of social distancing and its efficacy in Texas. Meyers Dec. at ¶ 13; Troisi Dec. at ¶¶ 12-13.

Unable to counter the weight of Intervenor-Plaintiffs' evidence, the State goes on to make the unsupported suggestion that this claim is not ripe because the COVID-19 pandemic conditions might nevertheless change and the State might take unknown actions in the future that could somehow change the threats to Intervenor-Plaintiffs' health were they to appear at the polls in July. PTJ at 20 (“[t]he science of COVID-19 treatment and prevention is rapidly developing, and policy decisions are evolving with it,”); PTJ at 20-21 (“claims that any individual or group of individuals will be unable to vote more than three months from now are not yet ripe”) PTJ at 22 (“Plaintiffs identify no reason to infer that further accommodations will not be made if necessary to protect public safety.”). But the State should not be able to invoke unknown contingencies to manufacture a ripeness dispute. *See, e.g., League of Women Voters of Tennessee v. Hargett*, 400 F. Supp. 3d 706, 718-19 (M.D. Tenn 2019) (rejecting defendants' claim that plaintiffs' challenge was premature where defendants offered “non-binding statements” about potential future regulations and enforcement decision “offered in the context of trying to escape judicial review”). Based on the facts that are known now, this case is ripe and relief warranted. If those facts do change, the

State may petition this Court for relief from the temporary injunction. *Jackson v. Cox*, No. 03-17-00846-CV, 2018 WL 3677888, at *2 (Tex. App.—Austin Aug. 3, 2018, no pet.).

Lastly, in order for counties to account for the increase in mail ballots they must begin preparing now. Maxey Dec. at ¶¶ 2-4, 19. Waiting until just before the election to determine whether individuals may use the mail ballot exception is simply too late and will irreparably harm Intervenor-Plaintiffs. As Defendant DeBeauvoir makes clear, counties are already planning for the Upcoming Elections and doing so with the understanding that the COVID-19 outbreak will still persist. Counter-Petition at 6 (“Under these extraordinary circumstances, DeBeauvoir must conduct these three elections on July 14, 2020, including conducting early voting for all three elections, while taking steps to ensure the safety of poll workers and voters by complying with “social distancing” and other precautions.”). That election administrators must begin preparing for the increase in mail ballots now is yet an additional reason this issue is ripe for decision. *Browning*, 522 F.3d at 1164 (“Waiting until rejections flow in en masse also imposes hardships on the Secretary. If a court enjoins enforcement of Subsection 6 weeks or days before the November election, it may be severely burdensome for the state to reconstitute its registration lists in time.”).

Further, the State’s position puts Intervenor-Plaintiffs in the untenable position of being forced to wait to seek relief and then later potentially being told that it’s too late. Indeed, in *Veasey v. Perry*, 769 F.3d 890, 892–94 (5th Cir. 2014), the State of Texas, Intervenor-Defendant here, argued that the timing of the district court’s order enjoining Texas’s Voter ID law made it extremely difficult to train its poll workers about the new requirements, reprint election manuals and otherwise implement the injunction (the Order was issued on October 11, 2014, in advance of the November 4, 2014 midterm). The Fifth Circuit agreed and stayed the district court’s injunction, relying on the fact that the “election machinery” was already in progress. *Id.* at 893 (citing

Reynolds v. Sims, 377 U.S. 533, 585 (1964)). More recently, the U.S. Supreme Court stayed a district court’s injunction in Wisconsin, issued 5 days before the election, that would have allowed mail ballots to be cast for six days after the election date due to COVID-19. In issuing the stay, the Court noted that “[t]his Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.” *Republican Nat’l Committee v. Democratic Nat’l Committee*, 589 U.S. – (April 6, 2020) (per curiam). These and similar cases further demonstrate that immediate relief is warranted.

E. The State’s Immunity Arguments Fail

The State attempts to reassert its standing and ripeness arguments under the guise of a governmental immunity argument on behalf of Defendant DeBeauvoir; however, its governmental immunity arguments fail for the same reasons its standing and ripeness arguments fail.

1. Section 273.081 of the Election Code

Section 273.081 of the Election Code states that “[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.” This section clearly permits suits for injunctive relief against those administering the Election Code, *e.g.* the State and counties. Any other reading would render the provision meaningless.

The State offers no case law to the contrary. Again, the State relies primarily on *Andrade*, but the section relied on by the State did not concern immunity, but rather standing. In fact, in *Andrade*, a suit against the Secretary of State, the Court recognized that Section 273.081 authorizes injunctive relief and abrogates sovereign immunity when a viable claim is stated. *Id.* at 11 (“We turn then to the merits of the voters’ equal protection challenge, cognizant that the Secretary retains immunity from suit *unless the voters have pleaded a viable claim.*”) (emphasis added); see also *In*

re Gamble, 71 S.W.3d 313, 317 (Tex.2002) (“As is evident, the Legislature has specifically called upon the courts [under section 273.081] to exercise their equitable powers to resolve election code violations.”); *Taylor v. Margo*, 508 S.W.3d 12, 19–20 (Tex. App.--El Paso 2015) (quoting *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex.2009), in the Election Code context for the holding that “[s]uits to require state official to comply with statutory or constitutional provisions are not prohibited by sovereign immunity.”). For all the reasons discussed above, Plaintiffs have standing and a probable right of relief, and therefore injunctive relief against Defendants is authorized.

The State’s other arguments for why injunctive relief is not authorized here against governmental entities are not arguments about immunity, but rather the State’s disagreement on the merits, PTJ at 27, which have been addressed above. Intervenor-Plaintiffs have been harmed and are in danger of being harmed by a violation of Section 82.002 of the Election Code; accordingly, injunctive relief is authorized.

2. UDJA

With respect to the UDJA, the State’s governmental immunity argument consists solely of the unremarkable propositions that the UDJA does not create subject matter jurisdiction where there is none and does not in itself abrogate sovereign immunity when there is no subject matter jurisdiction.. PTJ at 29-30. However; the State does not—and cannot—deny the well-established case law that sovereign immunity does not protect against the threat of ultra vires acts by government officials from either declaratory or injunctive actions. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) (“[I]t is clear that suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity.”); *Freshour v. Van Boven*, No. 03-18-00817-CV, 2020 WL 101943, at *4 (Tex. App.—Austin Jan. 9, 2020, no pet. h.) (“Under what is often referred to as the “ultra vires exception” to sovereign immunity, a

claimant may file suit to compel a government official “to comply with statutory or constitutional provisions” through prospective injunctive or declaratory relief”); *Holt v. Texas Dep’t of Ins.-Div. of Workers’ Comp.*, No. 03-17-00758-CV, 2018 WL 6695725, at *1 (Tex. App.—Austin Dec. 20, 2018, pet. denied) (“the [UDJA] expressly waives sovereign immunity when a person whose rights, status, or other legal relations are affected by a statute sues under the UDJA to have a trial court determine ‘any question of construction or validity arising under’ the statute”).

Intervenor-Plaintiffs’ underlying causes of action are precisely about the threat of an ultra vires action—namely the threat of their applications being rejected, their ballots going uncounted (either due to rejection or untimely processing) or being voided after the election, and potential prosecution—all and any which would be in violation of Section 82.002 of the Texas Election Code, which permits them to vote by mail. It is axiomatic that a government official acts ultra vires when they do not have legal authority for their action. *See Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154 (Tex. 2016) (holding that a claim for prospective injunctive relief against municipal drainage ordinance was a properly plead ultra vires action); *Texas Nat. Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002) (“Private parties may seek declaratory relief against state officials who allegedly act without legal or statutory authority.”). A government official rejecting Intervenor-Plaintiffs applications or mail ballots or not timely processing and counting the ballots, or subjecting them to prosecution for voting by mail, would be without authority because Intervenor-Plaintiffs fall under the plain language of the Election Code's disability provision as a result of the current pandemic. Thus, so long as Intervenor-

Plaintiffs have standing and their claims are ripe—which, as established above, they do and they are—their claims are also not barred by governmental immunity.

The State’s cases offer them no support. *Texas Dept. of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011), in relevant part, stands for the proposition that while a State agency may retain sovereign immunity, the properly named state official likely does not. “We necessarily concluded that the UDJA does not waive the state's sovereign immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law. *Very likely, the same claim could be brought against the appropriate state official under the ultra vires exception*, but the state agency remains immune.” *Id.* at 621 (emphasis added). Here, Plaintiffs and Intervenor-Plaintiffs have asserted claims against Defendant Debeauvoir in her official capacity as the Travis County Clerk, clearly satisfying *Sefzik*’s edict.⁵⁰

In *Texas Parks & Wildlife Dept. v. Sawyer Tr.*, 354 S.W.3d 384 (Tex. 2011), the Court ruled that a UDJA suit was barred where the ruling would establish a right to relief equivalent to a form of relief for which sovereign immunity had not been waived. *Id.* at 388 (“[S]overeign immunity will bar an otherwise proper DJA claim that has the effect of establishing a right to relief

⁵⁰ The State’s plea to the jurisdiction is supposedly only with respect to the Defendant DeBeauvoir. To the extent the State claims that they are also immune from either declaratory relief or injunctive relief, the Court should reject that claim. Plaintiffs in this case originally named the Secretary of State as a party; however the Secretary claimed that she was an improper party and therefore was nonsuited without prejudice. The State then intervened purportedly to ensure the “the consistent application of its election laws across counties so that all of those Texans have the opportunity to elect their representative in the State Senate on equal terms.” State’s Intervention at 6. The State has further argued Texas Civil Practice and Remedies Code § 37.006(b) requires that they be entitled to intervene; the statute upon which the State relies has been found to be a waiver of immunity. *Tarrant County v. Lerner*, No. 02-19-00330-CV, 2020 WL 98143, at *2 (Tex. App.—Fort Worth Jan. 9, 2020, no pet.) (noting that “the UDJA contains a limited and inapplicable waiver of immunity for challenges to the validity of an ordinance or statute). The State has invoked this Court’s jurisdiction and specifically relies on a provision of the UDJA that waives immunity; as such, any argument that the State itself is immune from suit should be rejected. Regardless, for many of the same arguments expressed above, the State is not immune.

against the State for which the Legislature has not waived sovereign immunity.”). That is not at issue here; Intervenor-Plaintiffs’ requested declaratory and injunctive relief will not create a right to money damages from the State or any other equivalent remedy barred by sovereign immunity.

Finally, with respect to jurisdiction, the State quotes *Texas Logos, L.P. v. Texas Dept. of Transp.*, 241 S.W.3d 105 (Tex. App.—Austin 2007, no pet.) for the proposition that “[t]he UDJA does not create or augment a trial court’s subject-matter jurisdiction—it merely provides a remedy where subject-matter jurisdiction already exists.” *Id.* at 114. However, the State fails to quote the remainder of the paragraph, which provides that “while the UDJA cannot confer subject-matter jurisdiction in the absence of a cause of action within the court’s jurisdiction, ‘[a] suit under the UDJA is not confined to cases in which the parties have a cause of action apart from the Act itself.’” *Id.* (citing *Texas Dep’t of Pub. Safety v. Moore*, 985 S.W.2d 149, 153 (Tex.App.-Austin 1998, no pet.)). Accordingly, the Court held that “a UDJA action will lie within the subject-matter jurisdiction of the district courts when there is (1) a justiciable controversy as to the rights and status of parties actually before the court for adjudication; and (2) that will be actually resolved by the declaration sought.” *Id.* Here, there (1) is a justiciable controversy concerning the rights of Intervenor-Plaintiffs and their members to vote by mail, and (2) the declaratory and injunctive relief sought will resolve that controversy.⁵¹

⁵¹ The State’s other case are inapposite. The State relies on *City of Richardson v. Gordon*, 316 S.W.3d 758 (Tex. App.—Dallas 2010, no pet.), but that case turned on a determination that the declaratory relief sought was moot. *Id.* at 761. In *Waldrop v. Waldrop*, 552 S.W.3d 396, 411 n.9 (Tex. App.—Fort Worth 2018, no pet.), the court declined to opine on whether certain contingent events would authorize it to terminate a maintenance obligation under family law where such events had not occurred. For the reasons previously discussed, the controversy before this Court is ripe and not contingent.

PRAYER

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.

For the foregoing reasons, Intervenor-Plaintiffs ask the Court to issue a temporary injunction against defendants 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 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 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-19 pandemic for all elections affected by the 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 on file

***ATTORNEYS FOR INTERVENOR-
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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2020, a true and correct copy of the foregoing *Memorandum in Support of Application for Temporary Injunction Injunction and Response to Plea to the Jurisdiction* was served upon Sherine Thomas and Leslie Dippel, attorneys for Defendant Dana DeBeauvoir via email at sherine.thomas@traviscountytexas.gov and leslie.dippel@traviscountytexas.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).

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