No. D-1-GN-20-001610

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

STATE OF TEXAS'S PLEA TO THE JURISDICTION

By this action, the Texas Democratic Party and its Chairman ("TDP") along with Joseph Daniel Cascino and Shanda Marie Sansing[1] seek an advisory opinion with the potential to create radical uncertainty surrounding 2020 elections in Texas. The State of Texas, by and through its Attorney General, intervened to protect the State's strong interest in the uniform, consistent application of its election laws.

[1] Zachary Price (together with Cascino and Sansing, "Individual Plaintiffs"), as well as the League of Women Voters of Texas, League of Women Voters of Austin-Area, MOVE Texas Action Fund, and Workers Defense Action Fund ("Plaintiff Organizations," and with Price, "Plaintiff-Intervenors") intervened as Plaintiffs. Unless otherwise noted, "Plaintiffs" shall refer to Plaintiffs and Plaintiff-Intervenors.

Before reaching the merits, the Court should dismiss the case for three independent jurisdictional reasons.

- *First*, no Plaintiff has standing to sue. The Individual Plaintiffs' vague, generalized allegations fail to state a particularized injury-in-fact. TDP and the Plaintiff Organizations lack standing in their own right and fail to identify any member on whose behalf they can maintain this case.

- *Second*, Plaintiffs raise claims that are not yet ripe and seek an advisory opinion. Plaintiffs seek relief in connection with elections that will occur (at the earliest) in July. The current public health crisis is rapidly evolving. As a result, the relief Plaintiffs seek depends on hypothetical facts and contingencies that may never come to pass.

- *Third*, this case is barred by immunity. Neither Election Code § 272.081 nor the UDJA confers jurisdiction here. To the extent that § 272.081 could be construed to waive immunity, it provides for relief only where a violation of the Election Code is alleged, and Plaintiffs allege no such conduct. And the UDJA does not enlarge the Court's jurisdiction.

BACKGROUND

I. Voting by Mail in Texas

Texas law allows voting by mail for registered voters who meet one of the qualifications stated in the Election Code. *See* TEX. ELEC. CODE Ch. 82. A voter is qualified to vote by mail if he (1) anticipates being absent from his county of residence on election day; (2) has an illness or other physical condition that disables him from appearing at the polling place; (3) is 65 or older; or (4) is confined in jail. TEX. ELEC. CODE §§ 82.001–.004. Only the second ground—disability—is at issue in this lawsuit.

The Texas Legislature defines "disability" for the purposes of the Election Code to allow a qualified voter to vote by mail if the "voter *has* a sickness or physical condition that prevents the voter from appearing at the polling place *on election day* without a likelihood of needing personal assistance or of injuring the voter's health."

Id. § 82.002(a) (emphasis added). The disability need not be permanent to meet this definition so long as it exists on election day. For example, the Legislature expressly includes "expected or likely confinement for childbirth" in defining disability for purposes of ballot-by-mail eligibility. *Id.* § 82.002(b)

The early-voting clerk is responsible for conducting early voting and must "review each application for a ballot to be voted by mail." *Id.* § 86.001(a). For most state- and county-wide elections, the county clerk or elections administrator is the early-voting clerk,[2] while "[t]he city secretary is the early voting clerk for an election ordered by an authority of a city." *Id.* § 83.005. Each early-voting clerk is responsible for determining whether an application to vote by mail complies with all requirements, providing notice and cure instructions to a voter who submits a noncompliant application, and "provid[ing] an official ballot envelope and carrier envelope with each ballot provided to a voter" who properly completes an application. *Id.* §§ 86.001(a), .008, .009, .002(a). After a voter marks their mail-in ballot, they must return it to the early-voting clerk in the official carrier envelope. *Id.* § 86.006(a). These provisions, though handled by local officials, apply uniformly throughout Texas.

II. The 2020 Election and the Coronavirus

These procedures were used for the March 3, 2020 primary election without apparent incident. Because some races did not yield a conclusive result,[3] a runoff was

[2] TEX. ELEC. CODE § 83.002; *but see id.* §§ 83.003 (identifying early-voting clerk in less-than-countywide election held at county expense), .004 (identifying early-voting clerk in county-ordered election not held at county expense); 31.043 (county elections administrator performs duties of county clerk). *See also Election Duties*, TEXAS SECRETARY OF STATE, *available at* https://www.sos.state.tx.us/elections/voter/county.shtml (listing early-voting clerks).

[3] *See, e.g.*, TEX. ELEC. CODE §§ 172.003 ("Except as otherwise provided by this code, to receive a political party's nomination, a candidate in a primary election must receive a majority of the total number of

scheduled. In the ordinary course, that runoff would have been held on May 26, 2020. The ordinary course was interrupted by the arrival of the novel coronavirus, commonly known as COVID-19.

On March 13, 2020, Governor Greg Abbott exercised his authority under the Texas Disaster Act of 1975, TEX. GOV'T CODE § 418.001, *et seq.*, and declared a state of disaster in all of Texas's 254 counties, including Travis County (the "County"). Proclamation (Mar. 13, 2020 11:20 a.m.); *see also Salmon v. Lamb*, 616 S.W.2d 296, 298 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ.) (discussing Governor's emergency authority in the election context).[4] At the time, there were thirty confirmed cases of COVID-19 in Texas and fifty individuals awaiting testing. *Id.*

Since the disaster declaration, State officials have continued to monitor the situation and adopt appropriate measures to protect, among numerous other things, the uniformity and integrity of elections during the ongoing effort to slow the spread of COVID-19. To date, the Governor has:

- Postponed the May 10, 2020 special election for Senate District 14 to July 14, 2020, stating that holding the election as scheduled "would prevent, hinder, or delay necessary action in coping with the declared disaster by placing the public's health at risk and threatening to worsen the ongoing public health crisis." Tex. Gov. Proclamation (Mar. 16, 2020 7:30 p.m.);[5]

- Allowed political subdivisions to postpone elections scheduled for May 2, 2020 to November 3, 2020. Tex. Gov. Proclamation (Mar. 18, 2020 10:00 a.m.);[6]

votes received by all the candidates for the nomination."); .004(a) ("If no candidate for nomination to a particular office receives the vote required for nomination in the general primary election, a runoff primary election shall be held to determine the nomination.").

[4] *Available at* https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/proc03132020.pdf.

[5] *Available at* https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/proc03162020.pdf.

[6] *Available at* https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/proc03182020.pdf.

- Postponed the May 26, 2020 primary runoff to July 14, 2020. Tex. Gov. Proclamation (Mar. 20, 2020 6:35 p.m.);[7] and

- Allowed the Fort Worth Crime Control and Prevention District to postpone a special election scheduled for May 2, 2020 to July 14, 2020. Tex. Gov. Proclamation (Apr. 2, 2020 4:00 p.m.).[8]

The Secretary of State has also issued an advisory providing guidance to local election officials on postponing elections scheduled for May 20, 2020.[9] The Secretary has further emphasized the importance of local election officials' exercising their authority to postpone elections scheduled for May 20, 2020 pursuant to the Governor's March 18, 2020 proclamation.[10]

There is no reason to believe that Texas officials will not continue to take any additional steps necessary to allow Texans to exercise their fundamental right to vote in a safe, secure, and timely fashion. And Plaintiffs make no allegations to the contrary. Instead, they ask this Court to ignore the actions of the Executive Branch, to disregard the language adopted by the Legislature when it defined "disability" for purposes of voting by mail, and to declare that all or nearly all Texans are disabled by a fear that they may get sick three to seven months from now.

III. This Lawsuit

On March 20, 2020, Plaintiffs filed their Original Petition and Application for Temporary Injunction, Permanent Injunction, and Declaratory Judgment ("Pet."),

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[7] *Available at* https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/proc03202020.pdf.
[8] *Available at* https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/proc04022020.pdf.
[9] Texas Secretary of State, *Election Advisory No. 2020-12 Actions for May 2, 2020 Uniform Election Date* (March 18, 2020), *available at* https://www.sos.state.tx.us/elections/laws/advisory2020-12.shtml.
[10] *See* Exhibit 1, Apr. 2, 2020 Email from Texas Secretary of State Elections Division to Local Election Officials.

asserting jurisdiction under the UDJA (Civil Practice and Remedies Code § 37.003) and Election Code § 271.081. Without limiting their request to COVID-19, Plaintiffs request a sweeping declaration that Election Code § 82.002 "allows any eligible voter, regardless of age and physical condition, to request, receive and have counted, a mail-in ballot, if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease." Pet. ¶ 22(a). Plaintiffs further seek to permanently enjoin the Travis County Clerk, in her official capacity, "to accept and tabulate any mail-in ballots received from voters in an upcoming election who believe that they should practice social distancing in order to hinder the known or unknown spread of a virus or disease." Pet. ¶ 22(b).

Texas timely intervened in this case on March 27, 2020, to preserve its strong interest in the consistent application of its election laws across the State and to protect and defend the laws adopted by the Legislature. *See* TEX. R. CIV. P. 60.

Plaintiff-Intervenors filed their petition in intervention on April 1, 2020. Individual Plaintiff Zachary Price claims that he "seek[s] to avail [him]sel[f] of the option to vote by mail ballot." P-Inter'v Pet. ¶ 46. The Intervenor Organizations allege that they "seek to encourage their members and the individuals whom they educate about their ability to still participate in the up-coming elections through mail ballots without fear of prosecution or that their ballots will be discarded," and further claim to "need this legal clarity to protect themselves against potential criminal liability." P-Inter'v Pet. ¶ 46.

Plaintiff-Intervenors seek declaratory relief that "the definition of 'disability' laid out in TEX. ELEC. CODE [§] 82.002(a) currently encompasses all registered voters because, as a result of the current COVID-19 public health crisis, all individuals have a physical condition that prevents them from appearing at a polling place on election day without a likelihood of injuring the voters' health." P-Inter'v Pet. ¶ 48. They further request an order "enjoining Defendants [*sic*] from refusing to accept and tabulate any mail ballots received from voters in an upcoming election who apply to vote by mail based on the disability category of eligibility as a result of the coronavirus pandemic c [*sic*] and enjoining Defendants [*sic*] from interpreting or applying section 82.002 of the Election Code in a way that prevents registered voters from voting by mail in light of the pandemic." P-Inter'v Pet. ¶ 49. [11]

LEGAL STANDARD

"A plea to the jurisdiction challenges the trial court's authority to determine the subject matter of a specific cause of action." *Rea v. State*, 297 S.W.3d 379, 383 (Tex. App.—Austin 2009, no pet.) (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000)). Subject-matter jurisdiction is essential to a court's power to decide a case and can be neither presumed nor waived. *Cont'l Coffee Prods. Co. v.*

[11] Plaintiff-Intervenors' references to multiple "Defendants" are in error. Plaintiffs initially named Ruth R. Hughs, in her official capacity as Texas Secretary of State, as a defendant in this lawsuit but nonsuited their claims against her two days later, leaving claims against only the Travis County Clerk. Texas and its Attorney General, who are immune, did not intervene as Defendants but to defend its law and to explain why the Court lacks jurisdiction to consider this suit. *See Texas v. Naylor*, 466 S.W.3d 783, 788 (Tex. 2015) (noting that Texas courts recognize an "expansive" intervention doctrine in which a plea in intervention may be untimely only if it is "filed after judgment"); *accord Interest of R.M.*, No. 05-18-01127-CV, 2019 WL 2266388, at *6–7 (Tex. App.—Dallas May 24, 2019, pet. denied) (mem. op.) (affirming intervenor's plea to the jurisdiction); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 681 (Tex. App.—Dallas 2010, orig. proceeding) (reversing trial court's denial of State's motion to intervene and reversing order denying State's plea to the jurisdiction).

Cazarez, 937 S.W.2d 444, 448 n.2 (Tex. 1996). "A court's subject-matter jurisdiction traditionally consists of a power, conferred by constitutional or statutory authority, to decide the type of claim alleged in the plaintiff's petition and to award an authorized form of relief." *Save Our Springs Alliance, Inc. v. City of Kyle*, 382 S.W.3d 540, 544 (Tex. App.—Austin 2012, no pet.) (citations omitted).

The plaintiff bears the burden of demonstrating that his claims fall within the Court's jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Andrade v. Venable*, 372 S.W.3d 134, 138 (Tex. 2012) (per curiam). "Whether a court has subject-matter jurisdiction and whether a plaintiff has alleged facts that affirmatively demonstrate subject-matter jurisdiction are questions of law[.]" *Rea*, 297 S.W.3d at 383 (citing *Tex. Dep't. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004)). Although courts construe a plaintiff's factual allegations in the plaintiff's favor when ruling on a plea to the jurisdiction, courts are *not* bound by the legal conclusions asserted. *Salazar v. Morales*, 900 S.W.2d 929, 932 n. 6 (Tex. App.—Austin 1995, no writ). When the pleadings affirmatively demonstrate an incurable jurisdictional defect, a plea to the jurisdiction must be granted, and the suit must be dismissed. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446.

ARGUMENT AND AUTHORITY

I. Plaintiffs Lack Standing to Maintain this Case.

"Standing is a constitutional prerequisite to filing suit," *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007), and "a component of subject matter jurisdiction," *Tex. Ass'n of Bus.,* 852 S.W.2d at 446. Standing is therefore properly

raised in a plea to the jurisdiction. *Id.* at 444. "A court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012). Standing "require[s] an actual, not merely hypothetical or generalized grievance." *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001). Indeed, the Texas Constitution's separation of powers "prohibit[s] courts from issuing advisory opinions because such is the function of the executive rather than judicial department." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

To have standing, a plaintiff must meet three elements. *Heckman*, 369 S.W.3d at 150. *First*, the plaintiff must have suffered an injury-in-fact—that is, an invasion of a legally protected or cognizable interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Id.* at 155. *Second*, the injury must be caused by the conduct complained of and traceable to the defendant. *Id. Third*, it must be likely, and not merely speculative, that the injury will be redressed by a favorable decision. *Id.* Standing ensures the parties have a real controversy that will be resolved by the relief sought. *Tex. Ass'n of Bus.*, 852 S.W.2d at 443–44. As such, the standing requirements recognize that "other branches of government may more appropriately decide abstract questions of wide public significance, particularly when judicial intervention is unnecessary to protect individual rights." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 7 (Tex. 2011) (citation and quotation marks omitted).

Neither the Individual Plaintiffs nor the Plaintiff Organizations can meet this standard. The Individual Plaintiffs' claims fail at the first step because they assert a fear of contagion that is inherently speculative today—three months in advance of

the July 2020 election—and that is shared by the public at large. TDP and Plaintiff Organizations similarly fail to identify any member who has suffered a justiciable injury in light of the continually evolving situation.

A. The Individual Plaintiffs have not alleged individualized harm sufficient to support standing.

The Individual Plaintiffs lack standing because they do not point to any physical illness or condition that will prevent them from voting in person in July. They instead premise their case on an apprehension of future risk of contagion common to the general public. The Governor may determine that additional steps are necessary to protect the ability of all Texans—including the Individual Plaintiffs—to cast a ballot safely before the rescheduled election date in July. But it is settled that to establish standing to seek redress for injury, "a plaintiff must be personally aggrieved." *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008) (citing *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996)). In addition, "his alleged injury must be concrete and particularized, actual or imminent, not hypothetical." *Id.* at 304–05 (citing *Raines v. Byrd*, 521 U.S. 811, 819 (1997)); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992); *Brown v. Todd*, 53 S.W.3d at 305; *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

Even in voting cases, the Supreme Court's "decisions have always required a plaintiff to allege some injury distinct from that sustained by the public at large." *Andrade*, 345 S.W.3d at 8 (quoting *Brown v. Todd*, 53 S.W.3d at 302). This requirement "ensures that 'there is a real need to exercise the power of judicial review' in a particular case, and it helps guarantee that courts fashion remedies 'no

broader than required by the precise facts to which the court's ruling would be applied.'" *Id.* (quoting *Lance v. Coffman*, 549 U.S. 437, 441 (2007)) (additional citations omitted). Plaintiffs offer no more than speculative allegations, which are insufficient to state injury-in-fact.

Andrade illustrates this principle. That case involved the requirement that the Secretary of State certify all voting systems used in Texas. *Id.* at 4. The plaintiffs challenged the Secretary's certification of eSlate, an electronic voting system used in Travis County, under a handful of legal theories. *See id.* The Supreme Court held that those plaintiffs who were Travis County voters had standing to maintain an equal-protection challenge that was separate from the generalized concern that all legally cast votes should be counted because "[t]hey assert that it is less probable that their votes will be counted than will the votes of residents of other Texas counties" not using eSlate. *Id.* at 10. The Court ultimately concluded that plaintiffs' equal-protection claim was not viable and dismissed it on that basis,[12] but recognized that if being required to vote via eSlate "does produce a legally cognizable injury, [plaintiffs] are among those who have sustained it." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 207–08 (1962)).[13]

By contrast, *Andrade* explains, status as a voter is insufficient to confer standing without more particularized allegations of harm. For example, the Court

[12] *Andrade*, 345 S.W.3d at 13–14 (concluding that "Secretary made a reasonable, nondiscriminatory choice to certify the eSlate, a decision justified by the State's important regulatory interests," and therefore not violative of equal protection).

[13] *See also, e.g.*, *id.* at 8–9 (collecting cases recognizing that a claim that ballots cast by voters in a particular region are not counted can be a particularized—if widely-shared—injury that may support standing).

dismissed the claim that eSlate violates the right to vote a secret ballot guaranteed by the Texas Constitution as a hypothetical "generalized grievance shared in substantially equal measure by all or a large class of citizens." *Id.* at 15 (citing TEX. CONST. art. VI, § 4) (additional citations omitted). Plaintiffs argued that eSlate was "vulnerable to hackers, compromising vote secrecy" and that "eSlate's audio output, available for disabled voters, can be overheard at a significant distance using only a shortwave radio." *Id.* at 15. But the Court recognized that "[t]he voters' secret ballot allegations involve only hypothetical harm, not the concrete, particularized injury standing requires." *Id.* at 15 (citing *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d at 304–05). It considered that, while "[a]ll voting systems are subject to criminal manipulation, [] there is no evidence or allegation that the eSlate has ever been manipulated in any Travis County election." *Id.*

Thus, the Supreme Court concluded, "[n]ot only does this [] allegation fall within the generalized grievance category, but it violates the prudential standing requirement that a plaintiff 'assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Id.* at 15–16 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)) (citing *United States v. Hays*, 515 U.S. 737, 745 (1995); WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3531.10 (3d ed. 2008) ("absent a more direct individual injury, violation of the Constitution does not itself establish standing"); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) ("The proposition that all constitutional provisions are

enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.")).

Just as the *Andrade* plaintiffs failed to show that voting by eSlate compromised *their* right to vote a secret ballot, Plaintiffs here do not plead facts showing that Texas's mail-in ballot framework harms *them*. To wit, the gravamen of the Individual Plaintiffs' complaint is that they—like all Texans—are concerned about contracting or spreading COVID-19. Beyond that, Cascino and Sansing allege only that each "desires[] to vote in the Texas Democratic Party Runoff Election and under the pandemic circumstances would seek to do so by mail-in ballot." Pet. ¶¶ 3, 4. And Price alleges that he "wishes to vote in the 2020 primary election runoff and the July 14 special election," but that he "will not vote in person because he does not want to risk catching coronavirus or inadvertently infecting others if, unbeknownst to himself, he is an asymptomatic carrier." P-Inter'v Pet. ¶ 34. But Plaintiffs do not specify their ages, their states of health, or whether they expect to be in the jurisdiction on a polling day. For example, one might infer that Intervenor Price is likely under 65 because he is a student at the University of Texas. *Id.* ¶ 1. But he makes no allegations about his health or whether he will be remaining in Travis County during the summer recess. *See id.* We have even less information regarding the remaining Individual Plaintiffs. *See* Pet. ¶¶ 3, 4.

As a result, Individual Plaintiffs offer no basis to infer one way or another whether they will be unable to vote by mail-in ballot. *Cf. Andrade*, 345 S.W.3d at 10. Instead, their allegations emphasize the generalized nature of Plaintiffs' grievance.

E.g., P-Inter'v Pet. ¶ 34 ("Mr. Price reasonably believes that during this ongoing COVID-19 outbreak he, *along with everyone else*, has a physical condition that prevents him from appearing at the polling place on election day without a likelihood of injuring his health.") (emphasis added).

Moreover, Plaintiffs allege that certain groups may be unable to go to the polls even if the stay-at-home orders are lifted because of unique risk factors. Pet. ¶ 13. But Plaintiffs do not allege that *Individual Plaintiffs* belong to any of those groups and would be unable to vote under such circumstances. In any event, significant overlap exists between voters with an increased risk from COVID-19 and those already eligible to vote a mail-in ballot under the Election Code's other eligibility provisions—namely, those who are 65 or over, TEX. ELEC. CODE § 82.003, and those with an existing illness or disability, *id.* § 82.002. None of the Individual Plaintiffs has alleged being "personally aggrieved." *Cf.*, *DaimlerChrysler*, 252 S.W.3d at 304.[14]

Even if Plaintiffs' generalized allegations of hypothetical harm otherwise stated injury (they do not),[15] any such harm to the Individual Plaintiffs would be

[14] A federal district court in Wisconsin reached this same result under similar circumstances in *City of Green Bay v. Bostelmann*, No. 20-C-479, 2020 WL 1492975, at *3 (E.D. Wis. Mar. 27, 2020). There, a local mayor claimed that he, as "an individual, may have difficulty casting an absentee ballot or voting in person." *Id.* The court held that the Mayor lacked standing, explaining that such "allegations are too speculative to state an equal protection claim under the Fourteenth Amendment." *Id.* The court further noted that "[t]he complaint contains no allegations that the Mayor requested an absentee ballot, that he was denied an absentee ballot, or that he will be unable to mail or deliver the ballot in time for the election." *Id.* The court concluded that, "[a]s a result, [the mayor] fails to plausibly allege the essential standing needed to proceed," and that he could not "as an individual assert the claims of other non-parties to the action." *Id.*

[15] The United States Supreme Court has rejected the notion that eligible voters have a fundamental right to vote an absentee ballot. For example, *McDonald v. Bd. of Elec. Comm'rs of Chi.*, 394 U.S. 802 (1969), rejected an equal-protection challenge to Illinois's absentee-ballot law, which allowed only four categories of citizens to vote by absentee ballot. The Court held that there was no right "to receive absentee ballots," and the extension of this opportunity to others did not then "deny [the plaintiffs] the exercise of the franchise." *Id.* at 807.

caused by their decision not to vote a late ballot, not any action by the Travis County Clerk. The Election Code already provides for access to the ballot "if [a] voter has a sickness or physical condition described by [§] 82.002 that originates on or after the day before the last day for submitting an application for a ballot to be voted by mail," providing that such a voter "is eligible to vote a late ballot." TEX. ELEC. CODE § 102.001(a). As a result, if any Individual Plaintiff is ineligible to vote by mail at the deadline to apply for a mail-in ballot—but is later unable to vote in person due to coronavirus—that voter can apply for a late ballot under Election Code Chapter 102.

For example, Plaintiff-Intervenors allege that "Mr. Price wishes to vote by mail and to send in his application as soon as possible but . . . is not sure whether his ballot will be accepted and counted if he attempts to vote by mail," and that "Mr. Price faces potential disenfranchisement and/or criminal liability if it were found that he applied for a mail ballot despite knowingly not meeting the statutory guidelines for eligibility." P-Inter'v Pet. ¶ 35. But should Mr. Price, on election day, be afflicted with "a sickness or physical condition that prevents [him] from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring [his] health," he may submit a late ballot under Chapter 102. As a result, any hypothetical disenfranchisement of Mr. Price is the result of his choice not take advantage of Chapter 102. Thus, that harm is neither traceable to the actions of the Travis County Clerk nor redressable by the order he seeks from this Court. Because the Individual Plaintiffs have—at most—alleged a "generalized grievance shared in

substantially equal measure by all or a large class of citizens," *Andrade*, 345 S.W.3d at 15, they lack standing to maintain this suit.

B. TDP and the Plaintiff Organizations also lack standing.

For similar reasons, TDP and Plaintiff Organizations lack standing. Texas courts generally follow federal standing jurisprudence with respect to associational standing: that is, the standing of an organization to sue on behalf of its members. Under that test, "an association 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 446 (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

The Court can begin and end its analysis of organizational standing at the first factor—whether any of the Plaintiffs Organizations' members would "otherwise have standing to sue in their own right." *Id.* For the reasons discussed extensively above, neither TDP nor the Plaintiff Organizations have identified any members who have standing to sue in their own right. Indeed, TDP and the Plaintiff Organizations have not identified any individual members at all, let alone individual members who have standing to sue. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (requiring organizations to "identify members who have suffered the requisite harm" for injury-in-fact); *see also NAACP v. City of Kyle*, 626 F.3d 233, 237 (5th Cir. 2010) (requiring evidence of "a specific member"); *cf. Tex. Ass'n of Bus.*, 852 S.W.2d at 444

("[W]e look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.").

Because TDP and the Plaintiff Organizations have not alleged the existence of any specific member, let alone any specific member with standing to sue "in their own right," their claims should be dismissed. *Texas Ass'n of Bus.*, 852 S.W.2d at 446; *see also, e.g.*, *Ga. Republican Party v. SEC*, 888 F.3d 1198, 1203 (11th Cir. 2018) (holding that Georgia Republican Party lacked associational standing because it "has failed to allege that a specific member will be injured by the rule, and it certainly offers no evidence to support such an allegation"); *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (dismissing lawsuit because plaintiff failed to identify a member who was affected by the challenged regulation).

Even if the Plaintiffs' cursory references to unidentified "members" could be sufficient, *e.g.*, P-Inter'v Pet. ¶ 39, those members' alleged harms would still be too speculative to establish standing. For example, Plaintiff-Intervenors allege that one of the organizations, League of Women Voters of Texas, has members statewide who "are observing social distancing guidelines." *Id.* ¶ 41. They assert that "[m]any LWVTX members who are registered voters will not be able to vote in person in upcoming elections due to the present coronavirus circumstances without risking their health and safety," including May 2 local elections. But as discussed above, Governor Abbott approved delaying the May 2 local elections, and the Secretary of State has informed localities that they "must take action to do so immediately."[16]

[16] Exhibit 1 at 1.

"Travis County has recommended each political subdivision postpone their elections until November 3, 2020," and "[t]he Travis County Clerk's Office will not be conducting a May 2, 2020 election for any political subdivision."[17] The inclusion of claims related to the May 2 election—which State and local officials have now addressed—further demonstrates that Plaintiffs' claims are based on unsubstantiated assumptions about a rapidly evolving situation.

TDP and the Plaintiff Organizations also appear to suggest that they separately have standing to sue for harm to the organizations themselves as opposed to harm to the organizations' members. *E.g.*, Pet. ¶ 18; P-Inter'v Pet. ¶ 37–43. But Texas courts do not recognize organizational standing as separate from representative standing. The United States Supreme Court has recognized organizational standing as a separate, viable ground for jurisdiction, but has done so in only one circumstance: In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Court allowed an entity that provided housing counseling and referral services to bring claims for damage to the organization under the federal Fair Housing Act. This is a highly controversial ruling, which has not been broadly applied even in federal courts. *See* Ryan Baasch, *Reorganizing Organizational Standing,* 103 VA. L. REV. ONLINE 18, 21–24 (2017). And it has never been adopted in Texas courts. To the contrary, in *Texas Department of Family and Protective Services v. Grassroots Leadership*, the Third Court of Appeals rejected the "contention that [an organization's] advocacy expenditure," one basis that organizations often use to allege

[17] Travis County Clerk's Office, *Current Election*, https://countyclerk.traviscountytx.gov/elections/current-election.html (accessed Apr. 6, 2020).

organizational standing, creates standing under Texas law. No. 03-18-00261-CV, 2018 WL 6187433, at *5 (Tex. App.—Austin Nov. 28, 2018, no pet.) (mem. op.). More recently, the Third Court of Appeals reiterated that the interests of an organization are not distinct from those of its members for standing purposes. *Tex. Dep't of Ins. v. Tex. Ass'n of Health Plans*, No. 03-19-00185-CV, --- S.W.3d ---, 2020 WL 1057769, at *2 (Tex. App.—Austin Mar. 5, 2020, no pet. h.).

Finally, to the extent Texas law recognizes a separate basis for organizational standing, TDP and the Plaintiff Organizations allege nothing more than "a setback to the organization's abstract social interests," which is insufficient to support organizational standing. *Havens*, 455 U.S. at 379. *See supra*, Part I(A) (discussing speculative nature of injuries).

Because neither TDP nor any Plaintiff Organization has identified any individual member who would have standing to maintain this case, they cannot pursue it either and should be dismissed from the case for lack of standing.

II. Plaintiffs Seek an Impermissible Advisory Opinion Regarding Claims That Are Not Ripe and May Never Mature.

In addition to lack of standing, Plaintiffs' speculative claims are non-justiciable because the Court lacks "the power to counsel a legal conclusion on a hypothetical or contingent set of facts." *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 853 (Tex. 2000) (citing *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 419, 444 (1998) (recognizing that ripeness is a jurisdictional prerequisite to suit)). A claim ripens upon the existence of "a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute." *Bonham*

State Bank v. Beadle, 907 S.W.2d 465, 467 (Tex. 1995) (quoting *Bexar–Medina–Atascosa Ctys. Water Control & Improvement Dist. No. 1 v. Medina Lake Prot. Ass'n*, 640 S.W.2d 778, 779–80 (Tex. App.—San Antonio 1982, writ ref'd n.r.e)). Ripeness requires "a live, non-abstract question of law that, if decided, would have a binding effect on the parties." *Heckman*, 369 S.W.3d at 147 (citing *Brown*, 53 S.W.3d at 305).

Ripeness is "peculiarly a question of timing." *Perry v. Del Rio*, 66 S.W.3d 239, 249–51 (Tex. 2001) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974)). A case is not ripe if it involves "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Patterson*, 971 S.W.2d at 442 (quoting 13A Charles A. Wright et al., FEDERAL PRACTICE & PROCEDURE § 3532, at 112 (2d ed. 1984)).

The science of COVID-19 treatment and prevention is rapidly developing, and policy decisions are evolving with it. As a result, any claim that a particular individual will be disabled from attending the polling place on July 14 (or November 3) is not yet ripe. And this Court may not "eschew the ripeness doctrine" because doing so "would create an impermissible advisory opinion." *Id.*

As an initial matter, claims that any individual or group of individuals will be unable to vote more than three months from now are not yet ripe. "A case is not ripe when the determination of whether a plaintiff has a concrete injury can be made only on contingent or hypothetical facts, or events that have not yet come to pass." *In re DePinho*, 505 S.W.3d 621, 624 (Tex. 2016) (alterations omitted) (collecting cases); *see*

also, e.g., *Perry*, 66 S.W.3d at 249 (noting that state law often follows federal law regarding ripeness).

Whether any particular individual satisfies § 82.002's definition of disability as a result of COVID-19 changes over time. As discussed *supra* at 2-3, disability under the Election Code is time-specific. Plaintiffs do not assert that they will be disabled on election day because they are currently experiencing symptoms of COVID-19.[18] Nor could they: The illness has a limited incubation period, meaning that anyone who is sick now will probably not be sick on July 14. Instead, Plaintiffs focus entirely on medical guidance and government directives regarding the need to avoid crowds. *E.g.*, Pet. ¶ 10, 13; P-Inter'v Pet. ¶ 21.

For the purposes of this plea, Texas does not dispute that legal impediments to a particular individual's ability to attend the polls that derive from an illness—for example, a quarantine order—might bear on whether that individual meets the definition of "disability." *See* Tex. Att'y Gen. Op. No. KP-0149 (2018). But whether an individual will be prevented from voting in person in July either by COVID-19 or a related government order is not knowable today. Medical science's understanding of what precautions are necessary and effective to contain the spread of the virus is evolving.[19] As result, policymakers are continually monitoring how the situation

[18] Intervenor Price claims that he will not vote if denied the ability to vote by mail. P-Inter'v Pet. ¶ 34. An individual's unilateral assertion that COVID-19 will affect his ability to vote in person does not affect this Court's jurisdiction unless those assertions are reasonable in light of objective fact. *Cf. City of Green Bay*, 2020 WL 1492975, at *3.

[19] *See* Centers for Disease Control and Prevention, *How Coronavirus Spreads*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (accessed Apr. 1, 2020) ("COVID-19 is a new disease and **we are still learning how it spreads**, the severity of illness it causes, and to what extent it may spread in the United States.") (emphasis original).

affects any number of issues, including its impact on the election.[20] In particular, as discussed above, Governor Abbott has already taken steps to protect the integrity of the electoral process and the health and safety of Texans—including by postponing elections.[21] Plaintiffs identify no reason to infer that further accommodations will not be made if necessary to protect public safety.

Plaintiffs also offer no concrete facts from which the Court may infer that that the virus itself will impact their ability to vote in person on either July 14 or November 3. At most, the original Petition points to a nearly indecipherable graph from a study conducted in the United Kingdom in late February or early March that appears to compare overall expected infection rates to ventilator capacity across the United States. Pet. ¶ 11. And Intervenor-Plaintiffs point to an unnamed study that predicts that Texas infections will peak in May—more than two months before the primary runoff and special election in July. P-Inter'v Pet. ¶ 24. They appear to refer to a study by the Institute of Health Metrics and Evaluation ("IHME") at the University of Washington Medical School that predicts peak infection by state based on information known on March 31, 2020.[22] This study predicts that COVID-19 to peak in Texas on May 5, over two months before the current primary runoff date.

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[20] Proclamation (Mar. 20, 2020 6:35 PM) (postponing primary to July 14); Proclamation (Mar. 20, 2020 7:30 PM) (postponing special election for Senate District 14); *see also, e.g.*, Executive Order No. GA-14 (Mar. 31, 2010) (relating to statewide continuity of essential services); Executive Order GA-13 (Mar. 30, 2020) (addressing release of violent offenders from municipal custody); Executive Order GA-12 (Mar. 29, 2020) (expanding prior quarantine order regarding individuals traveling from certain jurisdictions).

[21] *See supra*, nn. 4–8 and accompanying text.

[22] IHME, *COVID-19 Projections: Texas*, https://covid19.healthdata.org/projections (accessed Apr. 1, 2020).

Assuming for purposes of this plea that these projections are correct, neither shows a currently ripe dispute that any Individual Plaintiff will meet the definition of disability in July. The British study upon which the original Petition relies is not specific to Texas and does not even attempt to account for any precautions taken by Texas policymakers over the last few weeks.[23] The IHME study upon which the Plaintiff-Intervenors rely predicts that by July 14, no patients in Texas will require hospitalization for COVID-19. Even if a reasonable fear of catching COVID-19 satisfied the definition of disability (it does not), Plaintiffs provide no basis, based on the information available, to conclude that fear would still be reasonable come July or November. As a result, there is no ripe dispute for this Court to resolve. *Waco Indep. Sch. Dist.*, 22 S.W. 3d at 853 (holding that claim not ripe where evidence needed to prove it does not exist); *cf. Robinson v. Parker*, 353 S.W.3d 753, 755 (Tex. 2011) (holding case not ripe where "record is silent as to whether the [defendant] has, in fact failed to comply" with its legal obligations).

Plaintiffs seek to distract from their failure to state a present, concrete claim of disability by asserting that COVID-19 is interfering with election preparations. For example, TDP asserts that it "needs to know how state law permits local election officers to handle" mail-in ballots so that it "can determine how it desires to proceed in selecting nominees." Pet. ¶ 18. Plaintiff-Intervenors go farther and claim that the County needs an answer so that it can "cope with the influx of mail ballots," including

[23] *See generally* Neil M. Ferguson, *et. al.*, Impact of non-pharmaceutical interventions (NPIs) to reduce COVID19 mortality and healthcare demand, Mar. 16, 2020, https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf (looking primarily at models in United Kingdom).

how "many ballots to order its vendor to print and prepare." Intervenor-P's Pet. ¶ 28. Because these alleged injuries remain contingent on facts not yet known, Plaintiffs seek an impermissible advisory opinion.[24]

Both the United States and Texas Supreme Courts have repeatedly held that the "separation of powers . . . prohibit[s] courts from issuing advisory opinions because such is the function of the executive rather than the judicial department." *Tex. Ass'n of Bus.*, 852 S.W.3d at 444 (citing *inter Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1969); *Morrow v. Corbin*, 62 S.W.2d 641, 644 (Tex. 1933)); *see also, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (collecting cases). Under Texas law, the hallmark of an advisory opinion is whether plaintiffs "have posed a problem which is hypothetical, 'iffy' and contingent." *Fireman's Ins. Co.*, 42 S.W.2d at 333. A case is impermissibly contingent if the relevant facts are still evolving, *Waco Indep. Sch. Dist.*, 22 S.W.3d at 853, thereby putting the court in the position of "advising what the law would be on a hypothetical set of facts." *Patterson*, 971 S.W.2d at 444.

As discussed above, both the medical reality and Texas's response are evolving. Though "[p]ublic health experts and government agencies and officials at all levels are [currently] imposing social distancing measures" (P-Inter'v Pet. ¶ 21), there is no

[24] A federal district court recently rejected a similar argument, refusing to make more than minor adjustments to the mail-in voting procedures for an election scheduled on April 7. *See* Order on Motion for Preliminary Injunction, *Democratic Nat'l Comm. v. Bostelman*, No. 3:20-cv-00249-wmc, ECF No. 170 at 5 (Apr. 2, 2020). In that case, notwithstanding an influx mail-in ballots in the final days before the election, *id.* at 9–13, the court deferred to testimony from election officials that they would be able to manage the process safely, *id.* at 35, 39–41. Even that limited relief was subsequently stayed pending appeal, thereby allowing Wisconsin to apply state law. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, No. 19A1016, slip op., at 2 (U.S. Apr. 6, 2020) (per curiam) (citing "unusual nature of the District Court's order allowing ballots to be mailed and postmarked after election day").

allegation that this will continue until July. While we can all "well appreciate that the parties would prefer a definite answer" as to how the election will proceed "rather than to take an 'educated guess,'" that does not relieve Plaintiffs of their obligation to ensure that these "questions are presented in a justiciable form." *Fireman's Ins. Co.*, 442 S.W.2d at 333; *City of Green Bay v. Bostelmann*, No. 20-C-479, 2020 WL 1492975, at *3 (E.D. Wis. Mar. 27, 2020) ("The court's decision is not intended to minimize the serious difficulties the City and its officials are facing in attempting to conduct the upcoming election."). Instead, "[t]his is precisely the kind of case in which resolution of the claim presented depends on the occurrence of contingent future events that may not occur as anticipated or may not occur at all." *Patterson*, 971 S.W.2d at 444. It therefore seeks an advisory opinion that falls outside the Court's jurisdiction and must be dismissed. *Id.*

III. Governmental Immunity Bars Plaintiffs' Claims.

The case must also be dismissed because Plaintiffs cannot overcome the County's governmental immunity. A private party may not sue a unit of state government unless the State consents. *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). Because such immunity goes to the jurisdiction of the Court, it is Plaintiffs' burden to "affirmatively demonstrate the Court's jurisdiction by alleging a valid waiver of immunity." *Id.* The Legislature is deemed to have waived governmental immunity from suit by private parties only when the waiver is "effected by clear and unambiguous language." TEX. GOV'T CODE § 311.034; *see Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 641 (Tex. 2004). Any ambiguity weighs against a waiver.

Plaintiffs assert two statutory bases for jurisdiction—Election Code § 273.081 and Civil Practice and Remedies Code § 37.003. Pet. ¶ 7; P-Inter'v Pet. ¶ 12.[25] Neither establishes jurisdiction here.

A. Section 273.081 does not provide for jurisdiction because Plaintiffs have not alleged any violation of the election code.

Election Code § 273.081 does not expressly allow private parties to sue either the State or a county, stating simply 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." TEX. ELEC. CODE § 273.081. But even if that provision allows private individuals to sue local election officials, no Plaintiff identifies any provision of the Election Code that it contends is being or imminently will be "violated."

Quite the opposite. Plaintiff-Intervenors assert that "they need an injunction . . . so that *they* do not risk violating the law." P-Inter'v Pet. ¶ 33. Plaintiffs seek an order "declaring that TEX. ELEC. CODE [§] 82.002 allows any eligible voter, regardless of age and physical condition, to request, receive and have counted, a mail-in ballot, if they believe they should practice social distancing in order to hinder the known or unknown spread of a virus or disease." Pet. ¶ 22(a). But they cannot allege that the Travis County Clerk (or anyone else) has acted contrary to that interpretation because no election has occurred since the Governor's emergency declaration.

[25] Plaintiffs also offer a stray assertion that the Court also has jurisdiction under "other laws," Pet. ¶ 7; P-Intervenor Pet. ¶ 12. But this does not meet Plaintiffs' obligation to affirmatively demonstrate the court's subject matter jurisdiction. *See, e.g.*, *Tex. Ass'n of Bus.*, 852 S.W.2d at 446.

Moreover, Plaintiffs' interpretation of the Election Code is inconsistent with the language adopted by the Legislature. Voting by mail is a privilege, not a right. *See McDonald v. Bd. of Elec. Comm'rs of Chi.*, 394 U.S. 802, 807 (1969) (distinguishing right to vote from right to vote absentee); *accord Fuentes v. Howard*, 423 S.W.2d 420, 423 (Tex. App.—El Paso 1967, writ dism'd). And it is subject to the specific terms prescribed by the legislature. *Kelley v. Scott*, 733 S.W.2d 312, 313–14 (Tex. App.—El Paso 1987, no writ) ("As a general rule, election provisions deemed mandatory in nature permit no application of the substantial compliance rule.") (citing *Branaum v. Patrick,* 643 S.W.2d 745 (Tex. App.—San Antonio 1982, no writ)).

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. Instead, it provides that a "qualified voter is eligible for early voting by mail if the voter *has* a sickness or physical condition that *prevents* the voter from appearing at the polling place *on election day* without a likelihood of needing personal assistance or of injuring the voter's health." TEX. ELEC. CODE § 82.002(a) (emphasis added). Plaintiffs assert that they have an apprehension of *becoming* ill that causes them (or their members) not to want to go to the polls on July 14. But they do not assert that they either currently have or expect to have an illness that actually *prevents* them from voting in person. The Legislature undoubtedly could have allowed more widespread voting by mail, but it was not required to do so. *See McDonald*, 394 U.S. at 810–11.

To be sure, some measures may prove necessary to conduct upcoming elections safely in the context of the coronavirus outbreak. But the requested declaration that

a voter qualifies under § 82.002 "regardless of age and physical condition," but merely on a "belie[f] that [one] should practice social distancing in order to hinder the known or unknown spread of a virus or disease" cannot, without more, be squared with § 82.002's text. Plaintiffs do not allege a violation of the Election Code as required to confer jurisdiction under § 273.081.

Moreover, as the Texas Supreme Court recognized in *Andrade*, § 273.081 does not create jurisdiction; "it merely authorizes injunctive relief." 345 S.W.3d at 17. Because the statute only "permit[s] 'persons aggrieved,' 'persons adversely affected,' [or] 'any party in interest,' to sue," the plaintiff must still show "how he has been injured or damaged other than as a member of the general public." *Id.* (quoting *Scott v. Bd. of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966)) (quotation marks omitted) (alteration in *Andrade*). In *Andrade*, where voters "made no showing that the Secretary's certification harmed them other than as members of the general public," the Court held that "for much the same reason their [secret ballot] claims are barred, the voters lack standing to pursue their Election Code complaints." *Id.*

So too here. Because, for the reasons set forth *supra*, Part I(A), Plaintiffs' allegations are "merely hypothetical," they "assert no concrete, particularized harm to justify their claims." *Andrade*, 354 S.W.3d at 18 (citations omitted). Thus, they could not establish jurisdiction under § 273.081 even if Plaintiffs had stated an Election Code violation.

B. The Civil Practice and Remedies Code does not fill the jurisdictional gap.

Plaintiffs also allege the UDJA—Civil Practice and Remedies Code § 37.003—as a basis for jurisdiction. Pet. ¶ 7; P-Interv's Pet. ¶ 12. But "[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." *Tex. Logos, L.P. v. Tex. Dep't of Transp.*, 241 S.W.3d 105, 114 (Tex. App.–Austin 2007, no pet.); *see also, e.g.*, *City of Richardson v. Gordon*, 316 S.W.3d 758, 761 (Tex. App.—Dallas 2010, no pet.) (holding that a declaratory judgment action does not give a court jurisdiction "to pass upon hypothetical or contingent situations, or to determine questions not then essential to the decision of an actual controversy, although such questions may in the future require adjudication."); *Waldrop v. Waldrop*, 552 S.W.3d 396, 411 n.9 (Tex. App.—Fort Worth 2018, no pet.) ("The Uniform Declaratory Judgments Act gives the trial court no power to pass upon hypothetical or contingent situations or to determine questions not then essential to the decision of an actual controversy, even though such questions may in the future require adjudication.") ((citing *Riner v. City of Hunters Creek*, 403 S.W.3d 919, 922 (Tex. App.—Houston [14th Dist.] 2013, no pet.)).

In the context of a political subdivision of the State—such as a county official sued in their official capacity—governmental immunity will bar private individual from bringing UDJA actions absent a clear legislative waiver. *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 620 (Tex. 2011) (per curiam). The UDJA is "not a general waiver of sovereign immunity." *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d

384, 388 (Tex. 2011); *see also Town of Shady Shores v. Swanson*, No. 18-0413, 2019 Tex. LEXIS 1213, 2019 WL 6794327, at *6 (Tex. Dec. 13, 2019). Thus, governmental immunity "will bar an otherwise proper [U]DJA claim that has the effect of establishing a right to relief" on behalf of a private individual or entity "against the State for which the Legislature has not waived sovereign immunity." *Sawyer Tr.*, 354 S.W.3d at 388. Because—for all of the reasons discussed here—it is clear that the Court does not otherwise have jurisdiction over this case, the UDJA does nothing to fill the jurisdictional gap.

CONCLUSION

For these reasons, this case should be dismissed for lack of jurisdiction.

Respectfully submitted,

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I further certify that on April 7, 2020, the foregoing instrument was served via email upon:

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