Cause No. D-1-GN-20-001610

Texas Democratic Party; Gilberto Hinojosa, in his capacity as Chairman of the Texas Democratic Party; Joseph Daniel Cascino and Shanda Marie Sansing,	§	In the District Courts of
Plaintiffs,	§	Travis County, Texas
vs.	§	
Dana DeBeauvoir, in her capacity as Travis County, Clerk,	§	
Defendant.	§	201sy Judicial District

Response to the Plea to the Jurisdiction
Filed by Intervenor State of Texas

To the Honorable Judge of Said Court:

Come now Texas Democratic Party, Gilberto Hinojosa, in his capacity as Chairman of the Texas Democratic Party, Joseph Daniel Cascino and Shanda Marie Sansing, Plaintiffs herein, who make and file this, their Response to the Plea to the Jurisdiction filed by the State of Texas, intervenor herein, and in support whereof would respectfully show unto the Honorable Court as follows:

I.
Introduction

The world is facing unsettled, and in many ways, unprecedented times due to the COVID-19 pandemic. The State of Texas is operating under a state of disaster. The federal and state governments have suspended laws and regulations normally seen as vital.[1] Every county in

[1] Isabelle Morales, List: 230 Regulations Waived to Help Fights COVID-19 AM. FOR TAX REFORM (April 10, 2020, 2:50 pm), https://www.atr.org/rules (listing 200 regulations that have been suspended because of the pandemic, *accessed* 8 April 2020).

Texas has issued its own series of disaster orders, essentially directing all non-essential work and other interactions to stop. People are ordered not to gather, even in small groups. Schools are closed. As the Court is aware, the challenges caused by the spreading pandemic extend to the judicial system. The Supreme Court, in conjunction with the Court of Criminal Appeals, has been forced to issue a series of orders suspending the operation of deadlines and procedures typically used in cases, and authorizing courts to take necessary steps to protect court staff, litigants, and witnesses. These orders have resulted in the occurrence of what was unthinkable even a month ago. *See, e.g., In re Permian Highway Pipelines LLC*, 03-20-00214-CV, 2020 WL 1670744 at * 1 (Tex. App. — Austin Apr. 3, 2020, orig. proceeding) (mem. op.) (trial court did not abuse its discretion by unilaterally and *ex parte* extending temporary restraining order past the deadline allowed by the rule governing such orders, due to inability to hold temporary injunction hearing within the time allowed). Jury trials have halted, evictions have stopped, and cases are being postponed.

Just days ago, the State emphasized in federal court the importance of exercising their emergency powers to rescue Texas' healthcare system from "systemic collapse" caused by the strain of COVID-19. *See* Def.'s Resp. Pl.'s Mot. TRO, 1 (Mar. 30, 2020) Civil Action No. 1:20-cv-00323-LY. In particular, the State identified a pressing need to preserve personal protective equipment (PPE) for use in treating COVID-19 patients. Many hospitals in Texas are critically short on PPE. After the disaster declaration, the State Medical Operations Center had received 2,178 requests for PPE from health care facilities in Texas. *Id. including* Hoogheem Decl. ¶ 5. One of North Texas's largest hospitals apparently is in danger of running out of protective masks in just weeks. *See* Scott Friedman, et al., Desperate to Keep Protective Gear in Stock, North Texas Nurses Told to Re-Use Face Masks, NBCDFW (March 23, 2020, 10:38 pm),

https://www.nbcdfw.com/investigations/desperate-to-keep-protective-gear-in-stock-north-texas-nurses-told-to-re-use-face-masks/2337375. Other hospitals have PPE stores containing as few as 14 masks, yet "treating a single COVID-19 patient might require as many as 40 masks per day." Emma Platoff, Texas Hospitals Brace for Coronavirus Surge With Uncertain Stocks of Protective Gear, TEX. TRIBUNE (Mar. 25, 2020), https://www.texastribune.org/2020/03/25/texas-hospitals-coronavirus-personal-protective-equipment.

Because of this, the State argued to the federal court that "the point of EO GA-09 is to preserve *all possible* PPE for the vital purpose of protecting healthcare workers on the front lines of fighting COVID-19—a measure that is essential to preventing a systemic collapse due to the spread of infection to those workers." Def.'s Resp. Pl.'s Mot. TRO, 14 (Mar. 30, 2020) Civil Action No. 1:20-cv-00323-LY. Preserving PPE is so essential, the State argued, that "the use of PPE for any non–medically necessary procedures is prohibited by EO GA-09." *Id*. Clearly, the State of Texas must take all measures possible to preserve PPE throughout the state of Texas.

Despite this condition, the state evidently seeks to have 254 county election administrators begin buying and collecting PPE because it is necessary to diminish the risk of voting in person during this time. The Secretary of State's Advisory essentially pushes this outcome.

The images of Wisconsin's primary election on April 7 depict a disaster for PPE preservation; thousands of voters and poll workers used at least one mask and a pair of gloves each, and PPE was recommended for persons working the polls in some areas of the state. Abigail Sullivan Moore, Vos Explains Wearing Full PPE at Polls, Tuesday Video Received National Attention, JOURNAL TIMES (Apr. 9, 2020), https://journaltimes.com/news/local/vos-explains-wearing-full-ppe-at-polls-tuesday-video-received-national-attention/article_75ae7dac-

07c8-5ba8-b32f-7023d5d357ae.html. The more in-person voters in the next election, the more PPE will be expended, exacerbating the State's shortage. At least two poll workers in Florida contracted COVID-19 while handling drivers licenses during the March 17 Primary Election.[2]

It is against this background that this suit was filed. Texas election law allows voters to vote by a mail-in ballot, Tex. Elec. Code § 86.0015, but only in limited circumstances, including when the voter who wants to vote by mail suffers from a disability. Tex. Elec. Code § 82.002(a). The question presented here is whether the COVID-19 pandemic is a disability that allows those affected to vote by mail. If it is, the individual plaintiffs in this suit, and many others whose interests are represented by the plaintiff and intervenor entities, will take the opportunity to vote by mail, to safeguard their health, and the health (and even the lives) of their community.

However, if it is not, those same individuals would open themselves up to prosecution by asking to vote by mail when they are not allowed to do so. Indeed, the Texas Secretary of State wrote to local election officials that "if [they] don't move [their] May 2nd election, [they] are subjecting voters to health risks and potential criminal violations." Alexa Ura, Texas Tells Locals They Must Delay Their Upcoming May Elections, TX. TRIBUNE (Apr. 2, 2020), https://www.texastribune.org/2020/04/02/texas-secretary-state-delay-local-may-elections-coronavirus/. That such prosecutions are threatened is beyond dispute — the State intervened in this suit to prevent people from being able to vote safely by mail, and its head lawyer has loudly and frequently threatened to use the authority of his office to prosecute the (supposed) numbers who allegedly vote illegally in Texas and has (on a few occasions) actually done so.

The purpose of this suit to determine the matter, so those who wish to vote by mail may

[2] https://www.sun-sentinel.com/coronavirus/fl-ne-broward-elections-poll-workers-coronavirus-20200326-wmgy775dvjc5jis2oagxlpmule-story.html

do so legally, and not risk the prosecutions that are frequently threatened. The State seeks to prevent this. The State is arguing that none of the parties who want this question answered have any right to ask the Court to answer it, and, regardless, this Court lacks the power to provide them with any effective relief. The Court should reject the State's efforts to prevent it from answering these questions; its Plea to the Jurisdiction ought to be denied.

II.
Governing Standard

A. Pleas to the Jurisdiction Generally

A plea to the jurisdiction contests a trial court's subject matter jurisdiction over a case. *City of Ingleside v. City of Corpus Christi*, 469 S.W.3d 589, 590 (Tex. 2015); *Bailey v. Smith*, 581 S.W.3d 374, 385 (Tex. App. — Austin 2019, pet. filed). Subject-matter jurisdiction refers to the kind of controversies a court has authority to hear, authority conferred by constitution, statutes, and the pleadings. *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996) (orig. proceeding). In filing a plea to the jurisdiction, a party contests the trial court's authority over the subject matter of the dispute, without regard to whether the claims asserted have merit. *Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 554 (Tex. 2000). Whether a court has subject matter jurisdiction is a question of law. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

B. Deciding Pleas to the Jurisdiction

In *Miranda*, the Texas Supreme Court laid out the regimen courts are to follow in analyzing whether a plea to the jurisdiction should be granted. *Miranda*, 133 S.W.3d at 226- 27. When a plea to the jurisdiction challenges the pleadings, the court must determine whether the

pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Id.*; *accord, Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440, 446 (Tex. 1993). In considering a plea to the jurisdiction, the court must liberally construe the pleadings in favor of jurisdiction, looking to the plaintiff's intent. *Meyers v. JDC/Firethorn, Ltd.,* 548 S.W.3d 477, 486 (Tex. 2018); *Texas Ass'n of Bus.*, 852 S.W.2d at 446; City of *Houston v. Gutkowski*, 532 S.W.3d 855, 859 (Tex. App. — Houston [14th Dist.] 2017, no pet). To prevail on a plea to the jurisdiction, a defendant must show that, assuming all factual allegations in the plaintiff's pleadings are true, there is a jurisdictional defect apparent on the face of the pleadings that would be impossible to cure. *City of Houston v. Swinerton Bldrs., Inc.,* 233 S.W.3d 4, 10 (Tex. App. — Houston [1st Dist.] 2007, no pet.); *City of San Angelo v. Smith*, 69 S.W.3d 303, 305 (Tex. App. — Austin 2002, pet. denied).

In deciding a plea to the jurisdiction, the court should hear any evidence necessary to decide jurisdictional issues, but the plaintiff is not required to preview his case on the merits to establish jurisdiction. In fact, the Court is required to accept the allegations made in the petition as true. *Bland Indep. Sch. Dist.*, 34 S.W.3d at 554-55. This is because courts do not require the plaintiff to "put on [its] case simply to establish jurisdiction," *Id.*; *accord Ryder Integrated Logistics, Inc. v. Fayette County*, 453 S.W.3d 922, 928 (Tex. 2015), and so a proper jurisdictional analysis should "not involve a significant inquiry into the substance of the claims." *Bland Indep. Sch. Dist.*, 34 S.W.3d at 554.

C. Dismissal is Disfavored, and Amendment Should be Permitted

Finally, dismissal on a plea to the jurisdiction is not favored by Texas courts. In lieu of dismissal, a court should permit the plaintiff an opportunity to amend his pleading, and only dismiss the claims if it is impossible to do so in way that allows the plaintiff to plead his case in a

way that gives the Court jurisdiction. *Harris County v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004); *see also Dahl v. State*, 92 S.W.3d 856, 862 (Tex. App. — Houston [14th Dist.] 2002, no pet.) (dismissal on sovereign immunity grounds is improper where the plaintiff may be capable of remedying the jurisdictional defect complained of).

III.
Arguments and Authorities

A. Standing

As always fully convinced that no one can ever sue the government over anything, the Intervenor's first jurisdictional challenge to this suit is to claim the Plaintiffs, and others who have intervened in their support — League of Women Voters of the Austin-Area, MOVE Texas Action Fund, and the Workers Defense Action Fund — allegedly lack standing to pursue this suit.

1. Irony of the State's Argument

The Plaintiffs' first response to this argument is *tu quoque* — "and you, also." The State complains the plaintiffs or intervenors lack standing to sue, but it ignores that suit has only been brought against Dana DeBeauvoir, in her capacity as the Travis County Clerk. The State of Texas was not a party to the suit, until it elected to intervene herein.[3] After intervening, it then argues that suit cannot be brought against Dana DeBeauvoir.

This bears repeating — the State asks the Court to dismiss a suit brought against another party, asserting the other party cannot be sued by these plaintiffs and intervenors. What right

[3] More accurately, the Secretary of State was originally named in the suit but through her counsel she alleged to not be a proper party and was then nonsuited. Now, the only reason any branch of the State is a party to this case is because it intervened. Notable, the State's Petition in Intervention argues that Dan Debeauvoir is the proper party, being the officer responsible for granting or denying a request for a mail ballot.

does the State have to make this request? As discussed in greater detail below, proof of standing requires a litigant (the State) to be personally aggrieved — how is the State personally aggrieved by a suit brought against someone else, a suit it was not a party to until it inserted itself therein by intervention? The state's own intervention claims that it has an interest in the uniform application of the law but the position it takes here and the position taken by the Secretary of State in it Advisory is that local communities need to go obtain a Court order in order to seek clarity. If Texas can be in a case under these flimsy grounds, does this mean any litigant can intervene in any lawsuit, and assert whatever argument it wishes on behalf of another? If not, how does the State have standing to claim the plaintiffs and intervenors have no standing?

The Plaintiffs are aware of authorities saying a question of jurisdiction may be raised at any time. *See, e.g., Smith v. Abbott*, 311 S.W.3d 62, 72 (Tex. App. — Austin 2010, pet. denied). What these authorities do not say, however, is that the issue may be raised by someone other than the party affected by the want of jurisdiction, or by the Court. Is the Rule in Texas that non-parties can "drive-by" cases they don't like and bring jurisdiction challenges? No, the rule is that a party lacks standing to assert claims that affect the rights of others, *see, e.g., Bucholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 150 (Tex. 1982); *In re D.C.*, 128 S.W.3d 707, 713 (Tex. App. — Fort Worth 2004, no pet.); *Massachusetts Indem. & Life Ins. Co. v. Texas State Bd. of Ins.*, 685 S.W.2d 104, 113 (Tex. App. — Austin 1985, no writ), and the Plaintiffs have found no exception to this rule for jurisdictional arguments. Accordingly, the Court should refuse to decide the State's complaints about standing, because of its lack of standing.

2. Everyone has Standing

However, even if the State were able to assert the claim in the first place, its Plea ought to be denied on the merits because it is clear that all the Plaintiffs and all the Intervenors have

standing to bring the suit.

— Standing Generally

Standing is a component of subject matter jurisdiction: for the Court to have subject matter jurisdiction, a litigant must have standing. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 865 (Tex. 2010); *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). Standing questions focus on whether the person who sued can bring the action, as of when the suit is filed. *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 708 (Tex. 2001). A claimed lack of standing may properly be challenged by a plea to the jurisdiction, *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 850 (Tex. 2000); *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993), the purpose of which is to "weed out" lawsuits where a plaintiff's injuries are no different than those of the general public. *Texas Soc. of Prof'l Eng'ers v. Texas Bd. of Architectural Exam'ers*, 03-08-00288-CV, 2008 WL 4682446 at * 3 (Tex. App. — Austin Oct. 24, 2008, no pet.) (mem. op.).

Proof of standing requires there be a real controversy between the parties. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005). A real controversy exists when a litigant is "personally aggrieved" by something his opponent did or did not do, *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008); *Nootsie, Ltd. v. Williamson County Appraisal Bd.*, 925 S.W.2d 659, 661 (Tex. 1996), and has a "personal stake" in the outcome of the dispute. *Inman*, 252 S.W.3d at 304 n. 20; *Elizondo v. Texas Nat. Res. Conservation Comm'n*, 974 S.W.2d 928, 932 (Tex. App. — Austin 1998, no pet.).

— Standing of the Litigants

Two of the litigants in this case are individuals who want to vote by mail to protect their health, but who are afraid the State will take the position that they are not "disabled," and then

prosecute them for their request. Original Petition, ¶¶ 3-4, 15-16, 18. Such a prosecution could occur, as the submission of a false request for a mail in ballot is a felony under the Election Code. Tex. Elec Code § 84.0041(b). It is hard to imagine how anyone could have a more personal stake in the outcome of this suit, especially given that local elections and primary runoff elections are upcoming soon, with other deadlines coming even sooner. https://countyclerk.traviscountytx.gov/elections/calendar-of-elections.html (accessed 8 April 2020); *see also* Tex. Elec. Code § 86.0015(b) (request for mail-in ballot covers all elections for the year during which the request is made).

The State argues that these individual voters have not suffered an individualized harm, Plea at 10-14, an argument that fails because it proves too much. This is not a case where the individual Plaintiffs are seeking to enforce the election laws in a general way, for the benefit of all, or where they merely allege there is some violation of the law that does not affect them directly. Rather, they are alleging that there is a provision of the Election Code that applies to them specifically, that they specifically wish to use, but are uncertain whether, if they do so, they will be breaking the law. Original Petition, ¶¶ 3-4. Indeed, the State's own filings in this case show it is uncertain what the law is and an "Advisory" issued by the Secretary of State last week told local election administrators such as Travis County here, to go seek order from a local Court, which is what this case does. The State says standing requires a particularized injury — the individual Plaintiffs have pleaded just such an injury, and so have standing to pursue this lawsuit.

Another litigant in the suit is the Texas Democratic Party, one of the two largest political parties in the United States. *Id*., ¶¶ 1, 18. While the Texas Democratic Party will not, itself, be requesting a mail in ballot, many of its members and adherents would like to, and would do so if

the option was available to them and would not result in their being prosecuted. The TDP raises and spends money to persuade and turn out voters with the ultimate purpose of them casting a ballot that will be tabulated. TDP would spend money and effort informing its voters to avail itself of vote by mail if there existed a legally binding ruling that it was legal. By state law and the Governor's alleged fiat, TDP's own nominations are subject to a now-scheduled July primary runoff election. TDP is entitled to know how the state would allow TDP's membership to weigh in on resolving the nominations subject to runoff elections. TDP is the administrator of their Primary Election but the state purports to regulate its procedures. TDP is entitled to understand those rules in these new circumstances. At the very least, TDP is entitled to know if it can be threatened with prosecution for encouraging its own members to vote. This is sufficient to vest the Texas Democratic Party with standing to pursue the claims it makes herein, on behalf of its members and the Fifth Circuit has explicitly so held. *See Texas Democratic Party v. Benkiser,* 459 F.3d 582 (5th Cir. 2006).

An association or other organization has standing to bring a suit in its own name, on behalf of its members, if: (1) its members would have standing to bring a suit in their own right; (2) the interest of the association seeks to protect through a suit are germane to the organization's purpose; and (3) neither the claim nor the relief necessarily require the participation of individual members of the association. *Texas Ass'n of Bus.*, 852 S.W.2d at 447; *Texans Uniting for Reform and Freedom v. Saenz*, 319 S.W.3d 914, 919 (Tex. App. — Austin 2010, pet. denied); *see also United Food & Commercial Workers Union Local 751 v. Brown Gp., Inc*., 517 U.S. 544, 552, 116 S.Ct. 1529 (1996) (test for associational standing in federal court). This test is also incorporated into statute, allowing such suits to be brought by unincorporated associations (as distinct from an associational entity, like a corporation). Tex. Bus. Org. Code § 252.007(b).

The first element cannot be interpreted in a way that imposes unreasonable obstacles on associational representation. *Texas Ass'n of Bus*., 852 S.W.2d at 447. In deciding the issue, courts ask whether an individual member of the association would have the right to sue in his own name, if he wanted to. For example, in a suit challenging zoning amendments, the court rejected the assertion that the association had to own property within 200 feet of the area affected by the change, and instead found the first element was met when it showed two of its members owned such affected property. *City of Dallas v. East Village Ass'n*, 480 S.W.3d 37, 44 (Tex. App. — Dallas 2015, pet. denied). Examples of approved associational standing include a HOA suing, on behalf of its members, to enforce a land use restriction, *Kings River Trail Ass'n, Inc. v. Pinehurst Trail Hldgs., L.L.C.*, 447 S.W.3d 439, 447-48 (Tex. App. — Houston [14th Dist.] 2014, pet. denied), and a corporation organized to protect a particular lake suing to prevent a change to water district's certificate, when the change would potentially harm the lake. *Lake Medina Conservation Soc., Inc. v. Texas Nat. Resource Conservation Comm'n*, 980 S.W.2d 511, 515 (Tex. App. — Austin 1998, pet. denied).

Here, the Texas Democratic Party has millions of members with interests identical to those of the individual plaintiffs in this suit. Their individual interests — the right to cast an effective ballot for Democratic candidates for office, and to do so fairly and safely — is central to the mission of the Texas Democratic Party itself. Finally, there is no reason in the world why each such person should be required to be named as a party to this suit, even assuming this was possible. Under the liberal standards the Court is supposed to apply to the determination of standing, this is more than sufficient to prove the Texas Democratic Party has standing to sue.

The conclusion that all the Plaintiffs and Intervenors have standing is strongly supported by other authorities. In many jurisdictions in many contexts, many different courts have found

that:

— individuals, *see, e.g., Bachur v. Democratic Nat'l Party*, 836 F.2d 837, 840 (4th Cir. 1987); *Ripon Soc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933, 96 S.Ct. 1147 (1976); *Bond v. White*, 508 F.2d 1397, 1400 (5th Cir. 1975);

— political parties, *see, e.g., Florida State Conf. of the Nat'l Assoc. for the Advancement of Colored People (NAACP) v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008); *Green Party of Conn. v. Garfield*, 537 F.Supp.2d 359, 365-66 (D. Conn. 2008); *Crawford v. Marion County Elec. Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181, 128 S.Ct. 1610 (2008); *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586-88 (5th Cir. 2006); *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2006); *Florida Democratic Party v. Hood*, 342 F.Supp.2d 1073, 1078-79 (N.D. Fla. 2004); *Bay County Democratic Party v. Land*, 347 F.Supp.2d 404, 422 (E.D. Mich. 2004); *Cool Moose Party v. State of R.I.*, 183 F.3d 80, 84 n. 8 (1st Cir. 1999); *see also Oliviero v. Diven*, 908 A.2d 933, 937 (Pa. Common Ct. 2006) (recognizing standing of members of political party, whose suit was to "protect the integrity of the election process and the interests of the Republican Party ...."); and

— voting rights groups of all stripes, *see, e.g., OCA-Greater Houston v. Texas*, 867 F.3d 604, 611-12 (5th Cir. 2017); *Perez v. Texas*, 11-CA-360-OLG-JES-XR, 2011 WL 9160142 at * 6, 11-12 (W.D. Tex. Sept. 2, 2011) (discussing standing of LULAC); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350-52 (11th Cir.), *cert. denied*, 556 U.S. 1282, 129 S.Ct. 2770 (2009); *Citizens for Responsible Gov't State Political Action C'tte v. Davidson*, 236 F.3d 1174, 1189 (10th Cir. 2000); *Federal Elec. Comm'n v. Akins*, 524 U.S. 11, 19, 118 S.Ct. 1777 (1998); *League of United Latin Am. Citizens v. Pasadena Indep. Sch. Dist.*, 662 F.Supp. 443, 446 (S.D. Tex. 1987); *Bread Political Action C'tte v. Federal Elec. Comm'n*, 591 f.2d 29, 34-36 (7th Cir. 1979); *see also California Med. Ass'n v. Federal Elec. Comm'n*, 453 U.S. 182, 188-90, 101 S.Ct. 2712 (1981) (individual members of voting rights group also had standing),

all have standing to challenge, complain about, seek the interpretation of, or seek the enforcement of federal, state and local election laws.

The Plaintiffs and the Intervenors in this lawsuit clearly have standing to bring the suit, and to have these important questions regarding the voting rights of Texans resolved. In fact, if they do not have standing, who would? According to the State, not even the state itself would have standing.

B. Ripeness

The State's second argument is the Court should find it lacks jurisdiction because the issues presented in the case are not yet ripe for adjudication. As the State sees it, the fact that no one knows exactly how the pandemic will play out, and to what degree the restrictions currently being imposed will apply to elections in the future, means the Court is powerless to act until such things become clear.[4]

1. Ripeness Generally

As set forth above, standing focuses on who has the right to bring a suit, whereas ripeness focuses on whether the facts show the injury has or soon will occur, rather than being theoretical or remote. *Patterson v. Planned Parenthood of Houston & S.E. Tex., Inc*., 971 S.W.2d 439, 442 (Tex. 1998); *Barshop v. Medina County Underground Water Conservation Dist*., 925 S.W.2d 618, 626-27 (Tex. 1996); *Auzenne v. Great Lakes Reinsurance, PLC*, 497 S.W.3d 35, 38 (Tex. App. — Houston [14th Dist.] 2016, no pet.). Put another way, saying a case is not yet ripe says the case may not yet be brought, *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000), because an opinion about a "future, hypothetical event" is an advisory one. *Green v. Richard D. Davis, L.L.P.*, 593 S.W.3d 842, 85354 (Tex. App. — Houston [14th Dist.] 2019, n.p.h.).

In contrast, when a case presents a "fully developed controversy," it is ripe. *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 234 (Tex. 2001). Matters are ripe when there is a real controversy involving tangible interests, not a mere theoretical dispute. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995); *Texas Ass'n of Bus. v. City of Austin, Tex*., 565

[4] At which time the State will doubtlessly argue that it is too late to do anything about the matter, with the Plaintiffs and Intervenors then to be accused of having waited too long.

S.W.3d 425, 432 (Tex. App. — Austin 2018, pet. filed). Such a controversy exists both when there is a current controversy that the case could resolve, but also when there is a potential for injury in the future, so long as the injury is shown to be likely to occur. *In re Depinho*, 505 S.W.3d 621, 624 (Tex. 2016) (orig. proceeding); *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 78 (Tex. 2015); *Texas Home Sch. Coalition Ass'n, Inc. v. Texas Ethics Comm'n*, 03-17-00167-CV, 2018 WL 5814462 at * 1 (Tex. App. — Austin Nov. 7, 2018, no pet.) (mem. op.). Both kinds of ripeness — current injury and future injury likely to happen, exist in this case.

2. Current Injury Suffered by Voters

First, it is clear that the effect of the uncertainty as to whether a deadly viral pandemic will allow voters to cast their ballots by mail is not a concern that only comes into play in November, as the State seems to assume. In addition to the November general election, Travis County is scheduled to hold runoff elections, as well as a special election, on July 14, 2020. The question of whether mail-in ballots are proper under the circumstances is not a remote or theoretical concern, it is a real and immediate concern, one the Courts must resolve in less than a few weeks.[5]

Likewise, the way the requests for mail in ballots are treated, a request made now is (in most cases) good for and covers all elections that will occur in the same calendar year as the request is made. Tex. Elec. Code § 86.0015(b)(1)(A). Therefore, whether the request can be made today implicates the availability of mail in ballots for the November general election right now — there is no need to wait until November to see what the situation is at the time.

[5] The State's Plea fails to account for the fact that voter are, right now, have, and will tomorrow, be submitting requests for mail ballots. These Plaintiffs would submit theirs as soon

Moreover, TDP has its own election to run under the state's rules and it and the contracted local election officials need to know immediately what the rules are. The evidence the Court will hear will demonstrate that there is no time to waste. Election officials around the state are watching this Court carefully so they can begin preparing. TDP needs to know, right away, so that it can prepare, or otherwise seek appropriate alternative government relief to protect the rights of it and its members. These are exactly the kind of current, tangible interests that mean a case presented is ripe.

3. Certainty of Future Injury

Even in the absence of the foregoing, the Court ought to find the case is not unripe. The evidence shows that, whatever exact course the pandemic may take, there will still be substantial danger and onerous restrictions in place come July and November. This means that the potential for harm that would be addressed by a resolution of this suit is sufficiently certain for the suit to be found to be ripe. The evidence this Court has received overwhelming proves that, there will be large pockets of social distancing in Texas during the upcoming election and it is impossible for anyone to predict exactly where virus hotspots will occur There is no fanciful concern, it is real, known and needs to be planned for by voters and election administrators alike. If this statute does not permit voters to request ballots by mail in these circumstances, then the Legislature will need to meet and amend the law or the federal courts will have to intervene to enforce federal constitutional rights and laws. One thing is clear, the State's proposal that the "Executive" rule by fiat by suspending state law at some unknown time in some unknown way, is exactly the kind of behavior that is prohibited by the state constitution, for which these Plaintiffs also have standing to redress. *See* Tex. Const. Art. 1, Sec. 28.

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as it is legally safe to do so.

Although a case is not ripe when the concerns to be addressed are theoretical or hypothetical, there is nothing theoretical about the effects of, and dangers presented by, the current global pandemic. This much we know; it is a highly contagious disease, that will kill a substantial number of those infected, and which can be spread to others by those who do not even know they are infected. In order to prevent these deaths, people (especially people seen as particularly vulnerable to the virus) are ordered to stay at home, and everyone is ordered to maintain appropriate social distance in order to arrest the spread of the virus. These requirements have led Travis County to issue an order mandating such behavior, an order that contains no exception that would allow an election to occur or allow those who wish to vote to appear at polling places to do so.

Fear about the virus has already affected elections, such as the recent election in Wisconsin, where the number of polling places available for voters was severely reduced, because poll workers refused to man their stations out of fear of contracting COVID-19. https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html (accessed 9 April 2020) (noting number of polling stations in Green Bay dropped from thirty-one to two, and only seventeen of 270 poll workers were on the job).

All these factors — the requirement to stay home, the need to maintain social distance, the closing of many parts of the government and the effect this has on the availability of polling stations — all affect the voting process, which requires going to a public polling place with thousands of other members of the public, far from one's home because so voting locations may be closed. While it may be true that our lack of a crystal ball means it is impossible to determine exactly what restrictions may be in place in July and November, that degree of certainty is not required. All that is required is evidence showing the problems caused by the pandemic that

would limit the right of citizens to vote are likely to exist, *Depinho*, 505 S.W.3d at 624; *Patel*, 469 S.W.3d at 78, and therefore a decision in this case could effectively define the rights of those affected by them. The State's argument to the contrary notwithstanding, this case is not moot, because the issues presented for resolution are not merely hypothetical — they are both actual and happening right now, and sufficiently likely to happen at the time of the general election to allow the Court to render an non-advisory opinion right now.

D. Immunity

The State's next argument is the argument made in every case brought against the government, in all circumstances — the State argues that Travis County Clerk is immune from suit. According to the State, neither the provision of the Election Code clearly allowing the Court to issue an injunction to enforce its provisions, nor the Declaratory Judgment Act, allow the Court to act in this case. If that is the case, the judiciary has been eliminated as a co-equal branch of government to say what the law is on election matters.

1. Immunity Generally

At its most broad, the concept of sovereign immunity protects the state against damage lawsuits, unless sovereign immunity has been waived. *General Svcs. Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 594 (Tex. 2001).[6] Embedded in the concept of sovereign immunity are two distinct principles: (1) the state is sovereignly immune from suit; and (2) the

[6] The Plaintiffs are aware that a suit against anyone other than the State involves governmental immunity, not sovereign immunity, *Travis Central Appraisal Dist. v. Norman*, 342 S.W.3d 54, 57-58 (Tex. 2011) (sovereign immunity protects the State, while governmental immunity protects other political subdivisions), and so the ordinarily sovereignly-immune State is in the unusual position of arguing that this suit is barred by a kind of immunity that does not apply to it. This is a byproduct of the State's improper assertion of arguments belonging to another party, but, for the remainder of this Response, the Plaintiffs will ignore the distinction between the immunities, because they believe it makes no difference.

state is sovereignly immune from liability for damages. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n. 3 (Tex. 2003); *Travis County v. Pelzel & Assoc*., 77 S.W.3d 246, 248 (Tex. 2002). The state, however, is not immune from all suits. Sovereign immunity does not apply (1) to constitutional challenges to a statute; (2) to claims challenging a government official's ultra vires action; or (3) when the state's sovereign immunity is waived by a grant of legislative permission to sue. *Patel v. Tex. Dep't of Licensing and Regulation*, 469 S.W.3d 68, 75-76 (Tex. 2015), *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009); *Tex. Dep't of Transp. V. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011), *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370 n.6 (Tex. 2009); *Wichita Falls State Hosp*., 106 S.W.3d at 694 n. 3; *Little Tex Insulation Co.*, 39 S.W.3d at 594. Any one of these reasons is enough on its own to preclude a claim of sovereign immunity. In this case, all three apply.

2. Sovereign Immunity Does Not Apply to Constitutional Challenges to a Statute

Defendant-Intervenor wants to have its cake and eat it too. In its Plea in Intervention, Defendant-Intervenor repeatedly and specifically invokes subsection 37.006(b) of the Texas Civil Practice and Remedies Code as a basis for necessitating its intervention. D-Inter'v Plea in Intervention 4, 6-8. Now Defendant-Intervenor has the audacity to ask this Court to allow Defendant-Intervenor to avoid the consequences of its reliance on subsection 37.006(b) by granting a jurisdictional plea on governmental immunity grounds. Defendant-Intervenor claimed that "the State must be made a party to this case under [Uniform Declaratory Judgments Act] § 37.006(b)" and that Plaintiffs' "allegations implicate the constitutionality of that law [(Texas Election Code section 83.002)]." *Id.* at 6, 7. Further, Defendant-Intervenor asserted that, in Plaintiff's Original Petition, "the Election Code is '*alleged* to be unconstitutional." *Id.* at 7 (citing Tex. Civ. Prac. & Rem. Code § 37.006(b)) (emphasis in original). But now, in its Plea to

the Jurisdiction, Defendant-Intervenor is revealingly silent about the longstanding rule that "sovereign immunity is inapplicable when a suit challenges the constitutionality of a statute and seeks only equitable relief." *Patel v. Tex. Dep't of Licensing and Regulation*, 469 S.W.3d at 75-76; *see also City of El Paso v. Heinrich*, 284 S.W.3d at 373 n.6 (Tex. 2009) ("For challenging the validity of ordinances or statutes, however, the Declaratory Judgment Act requires that the relevant governmental entities be made parties, and thereby waives immunity."); Tex. Civ. Prac. & Rem. Code § 37.006(b) ("[I]f the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard."); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697-698 (Tex. 2003) ("[I]f the Legislature requires that the State be joined in a lawsuit for which immunity would otherwise attach, the Legislature has intentionally waived the State's sovereign immunity."); *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994) ("The DJA expressly provides that persons may challenge ordinances or statutes, and that governmental entities must be joined or notified. Governmental entities joined as parties may be bound by a court's declaration on their ordinances or statutes. The Act thus contemplates that governmental entities may be—indeed, must be—joined in suits to construe their legislative pronouncements.")). Defendant-Intervenor having intervened in this suit on the basis that the Original Petition should be read as asserting a constitutional challenge to Election Code section 83.002, Defendant-Intervenor's Plea to the Jurisdiction may be dismissed on the basis of the inapplicability of immunity to such a suit.

2. Sovereign Immunity Does Not Apply to Constitutional Challenges to an Ultra Vires Action

Defendant-Intervenor also ignores "the ultra vires exception [to governmental and

sovereign immunity], under which claims may be brought against a state [or political subdivision] official for nondiscretionary acts unauthorized by law." *Sefzik*, 355 S.W.3d at 621; see also *Heinrich*, 284 S.W.3d at 370 (Tex. 2009). Under the ultra vires exception, immunity does not bar a suit seeking declaratory or injunctive relief against a state or political subdivision official's violations of state law. Heinrich at 370. Plaintiffs' suit is in the nature of an ultra vires claim, and thus fits within the exception to governmental and sovereign immunity. As in *Sefzik,* the relief the Plaintiffs seek in the instant case is "to compel a government official [. . .] to perform some act that [Plaintiffs] consider to be nondiscretionary[.]" See *Sefzik*, 355 S.W.3d at 621 n.2. Plaintiffs have alleged that the "manner and procedure of casting absentee ballots, which includes mail-in ballots, 'is mandatory and directed by statutory requirements'" and that the "Secretary of State has argued that persons who submit mail ballots without authorization to do so are subject to having their ballots voided." Pet. ¶ 17. In turn, Plaintiffs seek an injunction requiring the Travis County Clerk to accept and tabulate mail-in ballots Plaintiffs intend to submit. Pet. ¶¶ 20, 21, 22.

3. <u>To the Extent Immunity is at Issue, it Has Been Waived by Section 273.081 of the Election Code</u>

The Texas Legislature has passed a statute allowing suits seeking to enforce provisions of state election law. The statute, Elections Code Section 273.081,[7] provides that anyone harmed, or threatened with harm, due to a violation of state election law may seek an injunction to prevent the violation from happening or continuing. This statute waives the immunity a unit of government would otherwise enjoy, to the extent it is violating the Election Code. *See, e.g.*, Tex. Elec. Code § 84.012 (mandating early voting clerks send mail in ballots to those who have

properly requested them); *see also Anderson, Clayton & Co. v. State ex rel. Allred*, 62 S.W.2d 107, 110 (Tex. 1933) (allowing suit seeking prospective injunctive relief against prosecution under invalid law; *viz* Tex. Elec Code § 84.0041(b)).[8]

Defendant-Intervenor claims that the Texas Supreme Court "recognized in *Andrade*, § 273.081 does not create jurisdiction; 'it merely authorizes injunctive relief.'" PTJ 28 (citing *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 17 (Tex. 2011)). This is not correct. Contrary to Defendant-Intervenor's misrepresentation of the Court's opinion in *Andrade,* the Court did not state that Election Code section 273.081 does not create *jurisdiction*; instead, the Court stated that section 273.081 does not create *standing*. *Andrade*, 345 S.W.3d at 17 (quoting *Scott v. Bd. Of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966)).

In fact, multiple Texas courts have held that Election Code section 273.081 does create jurisdiction. *Cahill v. Bertuzzi*, 13-09-00183-CV, 2010 WL 2163136, at *6 (Tex. App.—Corpus Christi May 27, 2010, pet. denied) (mem. op.); *Dallas Cnty. Democratic Executive Comm. v. Dallas County*, 05-02-01686-CV, 2002 WL 31439451, at *1 (Tex. App.—Dallas Nov. 1, 2002, no pet.) (not designated for publication). As the Court of Appeals in *Cahill* put it in a memorandum opinion that the Texas Supreme Court denied review of:

> Texas courts have specifically held that section 273.081 of the election code gives the trial court jurisdiction to enjoin violations of the election code, but the relief requested must: (1) be timely to correct the alleged violations; (2) not seek to delay or cancel an election; (3) not interfere with the elective process; and (4) not inquire into or declare the validity of the election. *See Blum v. Lanier,* 997 S.W.2d 259, 263 (Tex. 1999); *Ex parte Barrett,* 120

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[7] Incorrectly cited in the State's Plea, in some places, as "Section 272.081."

[8] This answers the State's claim that Section 273.081 does not apply (and therefore does not waive immunity) because no part of the Election Code is being violated. Plea at 26-28. Enforcing criminal sanctions against voters who seek mail in ballots because of the COVID-19 pandemic would be a violation of the law, if they are, in fact, entitled to such ballots.

> Tex. 311, 37 S.W.2d 741, 742 (1931); *see also Dallas County Democratic Exec. Comm. v. Dallas County,* No. 05-02-01686-CV, 2002 Tex. App. LEXIS 7858, at ----2-3, 2002 WL 31439451 (Tex. App. —Dallas Nov. 1, 2002, no pet.) (mem. op.).

Cahill, 2010 WL 2163136, at *6 (citations in original).

Though the Defendant-Intervenor's assertion that Election Code section 273.081 does not create jurisdiction can be dispensed with by looking to the precedents cited above, the question of the statute's waiver of governmental immunity is a distinct issue. "In deciding whether the Legislature intended to waive [governmental] immunity, 'we must look at whether [the] statute makes any sense if immunity is not waived.'" *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 643 (Tex. 2004) (quoting *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 6 (Tex. 2000)). The thrust of Defendant-Intervenor's argument is that the Legislature intended section 273.081 to be a powerless, effectively meaningless statute. This is not so, and this Court should not accept Defendant-Intervenor's invitation to ignore the Legislature's will.

Section 273.081 should not be read to give trial courts the jurisdiction to enjoin violations of the Election Code only when such violations are committed by private entities. A narrow reading that carves out governmental entities like the County and the State from the statute's reach would not make any sense because governmental entities are primary actors charged with implementing the Election Code. For the Legislature to expressly provide for a remedy without a means for ever obtaining that remedy would be nonsensical at best. In *Dallas County Democratic Executive Committee*, the Court of Appeals held that the trial court had subject-matter jurisdiction and allowed the claims that certain provisions of the Election Code were violated to proceed against governmental entities—Dallas County and the Dallas County Elections Department—without discussing governmental immunity, perhaps because it is so

obviously waived by section 273.081. *Dallas Cnty. Democratic Executive Comm.*, 2002 WL 31439451, at *1. The injunctive relief allowed by Section 273.081 would not be available unless it was possible to sue units of government to enforce election laws, and so the Legislature necessarily must have waived any immunity that would otherwise apply.

In case there is any doubt about whether section 273.081 "makes any sense if immunity is not waived[,]" *Sunset Valley*, 146 S.W.3d at 643, this Court can look to the statute's legislative history for clear evidence of the Legislature's intent to authorize suit against governmental entities and officials. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 700 (Tex. 2003) (Court looked to legislative history to see if there was indication that statute was intended to waive sovereign immunity); Tex. Gov't Code § 311.023(1), (3) (in construing a statute, "whether or not the statute is considered ambiguous on its face," courts may consider the legislative history and the object sought to be obtained).

Here, the legislative history of Election Code section 273.081 leaves no doubt about the Legislature's intent. When the Election Code was completely recodified in 1985, section 273.081 was created as a non-substantive revision of former Election Code articles 1.07 and 14.14. Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986. Article 14.14 stated broadly that "[t]he district courts of this state shall have jurisdiction to issue injunctions to enforce the provisions of this code upon application by any citizen of this state." Acts 1973, 63rd Leg., p. 1111, ch. 423, § 12 (current version at Tex. Elec. Code § 273.081). Article 1.07 more specifically stated:

> The district court shall have authority to issue writs of injunction and all other necessary process at the suit of any interested party, or of any voter, to enforce the provisions of the above two sections and to protect thereunder the rights of all parties and the public; for

> such purpose, jurisdiction and authority is conferred upon all district courts of this state [. . . .]

Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 7 (amended 1967, 1981) (current version at Tex. Elec. Code § 273.081). The referenced "above two sections" included article 1.06, which stated that "[n]either the Secretary of State nor any county judge of this state, nor any other authority authorized to issue certificates, shall issue any certificate of election or appointment to any person elected or appointed to any office in this state, who is ineligible to hold such office under the Constitution of his state or under Section 5 of this code or any other applicable statute." Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 6 (amended 1967) (current version at Election Code 67.016(f)). Thus, because the pre-codification version of the statute expressly provided for injunctive relief and district court jurisdiction for suits against the Secretary of State, county judges of the state, and all other authorities authorized to issue election certificates, it is clear that the 1985 non-substantive revision retained the waiver of immunity that was implied in the pre-1985 version of section 273.081. *See* Tex. Legislative Council, Rpt. of the Elec. Code Study Committee, Vol. II, App. B at 203 (Feb. 1985) (noting for section 273.081 "No substantive change.").

Defendant-Intervenor goes further and argues that "even if [section 273.081] 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.'" PTJ 26. This argument is essentially a rehash of Defendant-Intervenor's assertion that Plaintiffs' claims are not ripe. For the reasons discussed above in response to Defendant-Intervenor's ripeness arguments, Defendant-Intervenor is wrong. Section 273.081 provides jurisdiction and waives immunity when there is a "danger of being harmed by a violation or threatened violation of this

code[.]" As already noted, Plaintiffs have alleged that there is a danger of harm by a threatened violation of the Code because Plaintiffs' mail-in ballots submitted without authorization are subject to being voided in contravention of Election Code 83.002. Pet. ¶¶ 15-17.

4. Sovereign Immunity is Also Waived by the Declaratory Judgements Act

Additionally, and alternatively, the immunity Ms. DeBeauvoir would otherwise enjoy is also waived by provisions of the Declaratory Judgment Act, which allow courts to issue judgments that interpret the meaning of statutes, ordinances, and regulations.

While the Declaratory Judgment Act does not confer jurisdiction on courts where none exists otherwise, *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621-22 (Tex. 2011), when such jurisdiction exists a court may issue a declaratory judgment. *Southwestern Elec. Power Co. v. Lynch*, ___ S.W.3d ___, 18-0768, 2020 WL 960993 at * 4 (Tex. Feb. 28, 2020) (not yet released for publication); *Gant v. Abbott*, 574 S.W.3d 625, 633 (Tex. App. — Austin 2019, no pet.). One case where the Act gives courts jurisdiction is when they seek to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations ..." Tex. Civ. Prac. & Rem. Code § 37.002(b). Among the specific kinds of uncertainties courts may resolve are those of a person whose "rights, status, or other legal relations are affected by a statute ..."; such person is entitled to have determined "any question of construction or validity arising under the ... statute ..." Tex. Civ. Prac. & Rem. Code § 37.004(a); *accord, Machete's Chop Shop, Inc. v. Texas Film Comm'n*, 483 S.W.3d 272, 285 (Tex. App. — Austin 2016, no pet.); *Gattis v. Duty*, 349 S.W.3d 193, 202-03 (Tex. App. — Austin 2011, no pet.). Towards this end, the Act is to be "liberally administered." Tex. Civ. Prac. & Rem. Code § 37.002(b); *Abbott v. G.G.E.*, 463 S.W.3d 633, 652 (Tex. App. — Austin 2015, no pet.); *Reynolds v. Reynolds*, 86 S.W.3d 272, 275 (Tex. App. — Austin 2002, no pet.).

Such a declaratory judgment suit is specifically available when the interpretation sought would force state officials to conform to the law and do what is required of them. Such suits do not "attempt to subject the State to liability," and therefore "do not implicate the sovereign-immunity doctrine." *IT-Davy*, 74 S.W.3d at 855-56; *accord, City of El Paso v. Heinrich*, 284 S.W.3d 366, 370 (Tex. 2009); *Koch v. Texas Gen. Land Ofc.*, 273 S.W.3d 451, 455 (Tex. App. — Austin 2008, pet. denied).

Here, the question is whether the Elections Code permits a voter to request and use a mail-in ballot to vote during the global COVID-19 pandemic because social distancing, possibility for infection, and public health danger fall under acceptable excuses permitted by law. The answer is either "yes" or "no." This dispute over the meaning, interpretation and operation of the governing statutes can be resolved by the declaratory relief sought and it will relieve those who want to vote by mail of the threat of prosecution for requesting a ballot under these circumstances. This is not a case where the Plaintiffs and Intervenors are seeking to use the Declaratory Judgment Act to create jurisdiction where none exists. This is a case where plaintiffs seek a declaration to clarify their rights. This is a proper use of the Act and therefore, the immunity that Ms. DeBeauvoir may otherwise have has been waived in this suit.

Conclusion

Wherefore, premises considered, the Plaintiffs prays the State's Plea to the Jurisdiction be in all respects DENIED, for the reasons set forth herein.

The Plaintiffs pray for such other and further relief, general or special, in law or in equity, to which they may show themselves to be justly entitled.

Respectfully submitted,

TEXAS DEMOCRATIC PARTY

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing response has been sent via the Court's electronic filing system to all counsel of record on April 13, 2020.

/s/ Chad W. Dunn
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