

INTEREST OF HARRIS COUNTY AND SUMMARY

As the largest and most diverse county in the state, and currently stricken by the greatest number of COVID-19 cases and deaths, Harris County has an intense interest in this case and in a resolution to the legal issues surrounding holding an election during a dangerous pandemic so that it may conduct a safe and fair election during both the July primary run-off and the November general election. To advise the Court on facts relevant to election administration and underlying claims in this case, Harris County submits an Appendix which includes a declaration of its Administrator of Elections Department, Michael Winn (“Winn Decl.”).

Nothing about this case is contingent or speculative — other than the exact number of deaths and cases of serious illness Texas and Harris County will see due to COVID-19. A deadly pandemic continues with daily new case counts in Texas not dropping¹ even as the State plans to “open up.” Voters are concerned for their health and safety as are election workers. With a population larger than 27 states, it is home to the most diverse population and electorate in Texas with its citizens speaking more than 145 languages.² The size and scope of the County make the smooth operations of elections challenging in the most ideal of circumstances. Winn Decl. at ¶¶ 10, 13. The ongoing threat of COVID-19 presents unique challenges that affect safe voting access throughout the country, and poses no time for partisan rancor to tie the hands of election administrators by limiting the application of existing law. Rather, governments must cooperate to safeguard the health and safety of their citizens. In addition to representing the interests of its

¹ See Dept. of State Health Services, COVID-19 Dashboard, Daily New Cases, <https://tabexternal.dshs.texas.gov/-t/THD/views/COVIDExternalQC/COVIDTrends?:isGuestRedirectFromVizportal=y&embed=y>

² See Lomi Kriel, *Just how diverse is Houston, 145 languages spoken here*, HOUSTON CHRON., Nov. 5, 2015, <https://www.houstonchronicle.com/news/houston-texas/article/Houstonians-speak-at-least-145-languages-at-home-6613182.php>.

County Clerk and elections administration department, Harris County represents the People of Harris County in ensuring that their constitutional rights to vote and fundamental fairness in the electoral process is preserved. This includes not having their government make endangering one's health a condition to exercising the right to vote.

Harris County writes to support the Plaintiffs' position, to advise on the status of preparations to hold a safe and fair election, to describe the problems arising from the Texas Secretary of State ("SOS") ineffective guidance, and to warn of the threats to voting rights and liberty levied by Texas Attorney General Ken Paxton ("AG Paxton"). First, the ongoing COVID-19 pandemic has a profound and practical impact on the ability to hold in-person early and Election Day voting. Application of the existing and broad "disability" definition thankfully will enable increased vote by mail ("VBM") which will serve both to flatten the curve of voter congregation during in-person voting and enable individual at-risk voters to protect themselves. However, the State of Texas refuses to apply the plain language of the law or fully cooperate in efforts to ensure a safe election. Second, AG Paxton's penchant for threatening criminal prosecution to voters, public officials, and presumably even the undersigned counsel for advising their client of the law and court rulings amounts to prohibited voter intimidation and violations of free speech rights and should be enjoined. Finally, VBM age restrictions along with the State's injection of confusion regarding what is a "disability" will have a disparate impact on younger and minority voters given Harris County's demographics.

In addition, Harris County seeks to support its elections administration to work toward viable solutions for the County and the State to hold a safe and fair election during the COVID-19 pandemic — regardless of political party affiliation. Much like "flattening the curve" of the pandemic, a safe and fair election will require flattening the curve of voters congregating in

locations where they physically cannot socially distance. This can be accomplished in large part by expanding VBM from its current typical ratio in a general election of under 10% or the widely varying ratio in primary run-offs of 15% to 40% to a stable, higher percentage so that the in-person voters whether during early voting or election day are decreased to a safely manageable number. Winn Decl. at ¶¶ 31, 36.

Plaintiffs argue, and Harris County strongly concurs, that COVID-19 places all voters in the position of contracting a disease that may be fatal or cause severe suffering with long-term health consequences — that is, “injuring the voter’s health” — should they be forced to vote in person. Consequently, because no one is known to be immune to COVID-19, all voters should be free to vote by mail in the July 14 run-off and the November election. Despite the State’s rhetoric, neither the Plaintiffs nor Harris County are asking for an all-VBM election. *See* State Def’s Resp. to Motion for Preliminary Injunction, Doc. 39 at 31 (“Doc. 39”). Rather, Harris County and its elections administrator need a variety of tools to spread out voter congregation and respond to the pandemic’s ebb and flow, including lessening the number of in-person voters through full application the existing broad definition of “disability.” *See* Winn Decl. at ¶¶ 30, 49.

I. Young and diverse, Harris County has been hit hard by COVID-19 and its population will be disproportionately affected if VBM is not widely available.

Harris County, Texas, is the largest county in the state with 4.7 million people and at almost 2.4 million or 14% of the state’s registered voters. Winn Decl. at ¶ 10. Harris County is also Texas’s largest “majority-minority” county, with sizable populations of African-Americans, Latinos, and Asian Americans. Currently, ballots are printed and administered in four languages, English, Spanish, Vietnamese, and Chinese — the most in Texas. Winn Decl. at ¶ 33. Harris County’s diversity makes holding a safe and fair election more challenging. Ensuring that all eligible voters have safe and effective access to voting during a pandemic requires sensitivity to

that diversity and the particular impact of COVID-19 on the County.

A. Harris County’s youth and diversity makes VBM disproportionately less available to its citizens.

Harris County’s tremendous diversity is not uniformly represented across every age demographic. Harris County is younger and more diverse than Texas as a whole. While 12.5% of Texans are over 65 years old, only 9.9% of Harris County residents are.³ Moreover, while approximately 40% Texans are Anglo, only about 30% of Harris County residents are. These demographics are shown in the following tables compiling census data:⁴

Table 1 – Harris County Racial Demographic Totals & Percentages (2019)

<u>Demographic</u>	<u>Percentage</u>	<u>Number</u>
Anglo	29.1%	1,371,578
Latino	43.3%	2,040,870
African American	19.9%	937,952
Asian American	7.4%	348,786

Table 2 – Number of Harris County residents by Age & Race (2018)

<u>Age</u>	<u>Total</u>	<u>Anglo</u>	<u>Latino</u>	<u>African American</u>	<u>Asian American</u>
Children (under 18)	1,253,744	188,061	714,634	200,599	104,060
Voting Age (18-65)	2,964,682	1,156,225	1,185,872	397,267	186,744
Elderly (65 or older)	464,899	315,666	83,682	42,771	16,736
Totals	4,683,325	1,659,952	1,984,188	640,637	307,571

As Table 2 indicates, 67.9% of all Harris County residents who are 65 years of age or older are Anglos, but Anglos are less than 40% of Harris County residents 18 to 65 years of age. Elderly Anglos outnumber elderly Latinos nearly 4-to-1, elderly African Americans more than 7-to-1, and

³ Census Quick Facts, Harris County, TX, <https://www.census.gov/quickfacts/fact/table/harriscounty-texas/PST045218>.

⁴ Census Quick Facts, Harris County, TX <https://www.census.gov/quickfacts/fact/table/harriscounty-texas/PST045218>; cf. Mot. For Preliminary Injunction Doc. 10, at Tables 1 and 2.

elderly Asian Americans nearly 19-to-1.

Texas VBM laws applied to this distribution results in a structurally inequitable voting system that significantly favors over 65 voters, to the detriment of the vast majority of voting age residents. Anglos make up only 29.1% of Harris County,⁵ but have the ability to exercise a greater electoral impact during the pandemic because their significantly older population are all free to VBM. As a consequence, any and all election regulations that limit access based upon age, place a clear and obvious burden that effectively limits access to voting based upon race.

The Twenty-Sixth Amendment to the U.S. Constitution provides: “the right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by . . . any State on account of age.” U.S. CONST., amend. XXVI, § 1. The VBM program — as AG Paxton would apply the law The Twenty-Sixth Amendment to the U.S. Constitution provides: “the right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by . . . any State on account of age.” U.S. CONST., amend XXVI, § 1. The VBM program — as AG Paxton would apply the law — violates the 26th Amendment by abridging the rights of voters under 65 years of age.

In Harris County, there are an approximately 2,368,761 registered voters and 1,929,801 voters are under 65 years of age — 81% of all registered voters. Winn Dec. at Ex. 1. Voters of color make up a significant number of voters under 65 years old in Harris County. The March 2020 Harris County Voter roll shows that 55% of registered voters under 65 are minorities. *Id.* While Latino voters make up 23% of all registered voters in Harris County, 88% of Latino voters are under 65 years of age. *Id.* In essence, the current election process in Texas as applied to Harris County violates Equal Protection and voting rights by treating citizens differently based upon race

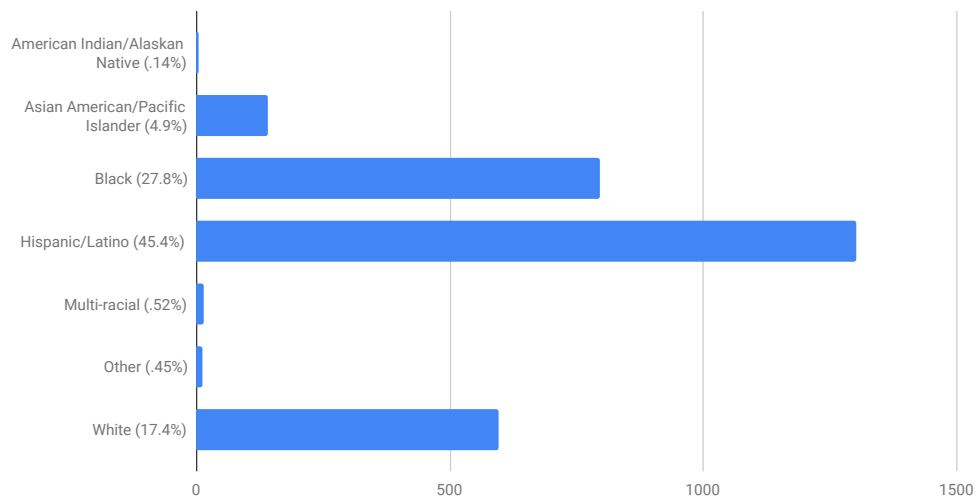
⁵ *Id.*

and age.

B. Minorities are disproportionately affected by COVID-19 in Harris County.

With the added impact of the threat of COVID-19, the implications of the use of a voting method that favors Anglo voters over historically discriminated communities is magnified. An analysis of national infection and mortality rates from COVID-19 reveals that minorities may be more greatly impacted by the disease than the general population.⁶ According to preliminary data, African-Americans in particular are significantly more likely to contract and die from COVID-19. In Harris County minorities have higher than average contraction and fatality rates making up the vast majority of COVID-19 cases as the following chart illustrates:⁷

Harris County COVID19 Confirmed Cases



*Data Provided by Harris County Public Health Through 5/9/2020

⁶ Stacy Weiner, *The new coronavirus affects us all. But some groups may suffer more*, ASSOC. OF AM. MEDICAL COLLEGES, Mar. 16, 2020, <https://www.aamc.org/news-insights/new-coronavirus-affects-us-all-some-groups-may-suffer-more>.

⁷ This data, provided by Harris County Public Health through May 9, 2020, excludes cases in the City of Houston itself as the City is not tracking cases by ethnicity. See also Zach Despart, *Harris County releases first racial, ethnic breakdown of coronavirus deaths*, HOUSTON CHRON., Apr. 9, 2020, [https://www.houstonchronicle.com/news/-houston-texas/houston/article/harris-county-racial-ethnic-coronavirus-deaths-data-15189690.php?utm_campaign=CMS%20Sharing%20Tools%20\(Premium\)&utm_source=t.co&utm_medium=referral](https://www.houstonchronicle.com/news/-houston-texas/houston/article/harris-county-racial-ethnic-coronavirus-deaths-data-15189690.php?utm_campaign=CMS%20Sharing%20Tools%20(Premium)&utm_source=t.co&utm_medium=referral)

Because younger voters are more likely to be minorities in Harris County their opportunity to access voting by mail is significantly less than Anglos yet they are at higher risk of serious illness and death from COVID-19. Under these circumstances, the lack of access to VBM creates a disparate impact on the access to a safe and fair election for minority voters.

II. The failure of the Secretary of State to fully advise on the COVID-19 pandemic and the Attorney General's repeated threats create an urgent need for this Court to protect the constitutional rights of Harris County voters.

Harris County Judge Lina Hidalgo declared an emergency over the COVID-19 virus on March 11, 2020. Governor Abbott declared an emergency for the State of Texas two days later. *See* TEX. GOV'T CODE §§ 401.062, 418.011 *et seq.* Because of the unpredictability of the COVID-19 virus, even if the pandemic subsides, it is unclear when it may re-occur. The premature relaxing of restrictions increases the risk of a COVID-19 recurrence.⁸

While models and predictions can be made, it is impossible to know for certain when normal social interaction will be safe, and even if it becomes safe, when the pandemic could re-occur with little warning. Conducting elections does not lend itself to short-noticed changes in election procedures given the planning and mustering of resources necessary to conduct an election. Winn Decl. at ¶¶ 8, 9, 11-13, 24, 29, 33.

Upcoming July run-off deadlines and the complexity of planning the November election leave no room for “wait and see” what the pandemic or the State of Texas will do.

Texas and Harris County are currently scheduled to have primary runoff elections on July 14, 2020, with early voting beginning June 29.⁹ The last day to apply for a vote by mail ballot is

⁸ *See* Tim Colburn, *Covid19: extending or relaxing distance control measures*, THE LANCET, Mar. 25, 2020, available at [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(20\)30072-4/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30072-4/fulltext).

⁹ *See* Governor Abbott Issues Proclamation Regarding July 14 Early Voting for Special, Runoff Elections, May 11, 2020, available at <https://gov.texas.gov/news/post/governor-abbott-issues-proclamation-regarding-july-4th-early-voting-for-special-runoff-elections>; Gov. Greg Abbott, Proclamation, Mar. 20, 2020, available at https://gov.texas.gov/uploads/files/press/PROCLAMATION_COVID-19_May_26_Primary_Runoff_Election_03-

July 2, 2020. *Id.* Holding an election in Harris County is a challenge for every election requiring months of preparation. Winn Decl. at ¶ 11. Adjusting to changes for the July 14 run-off will be easier because it is a low turnout election; moreover, it will provide valuable data for planning the November election. Winn Decl. at ¶ 52. Harris County needs as much preparation as possible for the high turnout November presidential year general election to accommodate COVID-19's effects on public health and safety particularly considering the anticipated added time individuals will take to vote with the repeal of straight-ticket voting and the enormous length of the Harris County ballot. Winn Decl. at ¶¶ 33, 52.

A. Despite the plain language of the “disability” definition, the SOS failed to fulfill her duty to interpret Texas election laws and only injected legal uncertainty and ultimately a poison pill into the election.

As the threat of coronavirus and the resulting COVID-19 pandemic spread this spring, Harris County began to prepare for the primary run-off election which was schedule for May 26. Just a few weeks after the primary, the Governor of Texas issued a Proclamation ordering that the run-off be moved to July 14.¹⁰ The Harris County Clerk and its Administrator of Elections Department, Michael Winn, began preparations to conduct an election during the growing pandemic, monitoring closely elections in other states and researching both the science of the pandemic and the options for protecting election workers and voters alike. Winn Decl. at ¶¶ 6, 11, 12, 41. The Harris County Clerk and other election administrators made requests for guidance from the Secretary of State which is tasked with interpreting the Election Code and maintaining uniformity of election administration across the state. Winn Decl. at ¶ 13; TEX. GOV'T CODE

20-2020.pdf; Texas Secretary of State, *Current Election Information*, available at <https://www.sos.state.tx.us/elections/laws/current-elections-information.shtml>.

¹⁰ Gov. Greg Abbott, Proclamation, Mar. 20, 2020, available at https://gov.texas.gov/uploads/files/-press/PROCLAMATION_COVID-19_May_26_Primary_Runoff_Election_03-20-2020.pdf.

§§ 31.003 (“The secretary of state shall obtain and maintain uniformity in the application, operation, and interpretation of this code and of the election laws outside this code.”), 31.004 (the secretary of state shall provide assistance and advice, including statutory interpretation to elections administrators).

Texas law allows certain voters to request an application to vote by mail. TEX. ELEC. CODE § 84.001. To cast an early voting ballot by mail, a voter must submit an application. *Id.* at § 84.001(a). To be eligible to receive a ballot by mail, a voter must be: (1) absent from the county of residence during early voting and election day, (2) disabled or ill, (3) age 65 or over, or (4) confined to jail but not yet finally convicted of a felony. TEX. ELEC. CODE §§ 84.001-.004.

Texas law also presciently provides broad definition of “disability” for the purpose of qualifying to VBM defining as a “disabled” voter one who 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 (emphasis added). Thus “disability” is something of a misnomer as the definition is much broader than that term is commonly understood. Election administrators naturally thought this broad definition would include those who could contract COVID-19 by voting in-person as polling places tend to be crowded with no room to socially distance. But clear guidance was not forthcoming.

On April 2, 2020, the Texas Secretary of State issued Advisory 2020-14-COVID-19 (Coronavirus) Voting and Election Procedures which covered various election procedures in light of the pandemic including the availability of ballots by mail for persons with disabilities:

One of the grounds for voting by mail is disability. The Election Code defines “disability” to include “a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of need personal assistance or injuring the voter’s health.” (Sec. 82.002.) Voters who meet this definition and wish to vote a ballot by mail must submit an application for ballot

by mail.

SOS COVID-19 Advisory at 2. But the SOS failed to clearly answer the as-applied legal question of who meets the definition in a pandemic when everyone is at risk of contracting the virus.

The Texas Democratic Party then posed the question to a state district court which answered in the affirmative: persons who lack immunity to COVID-19 qualify for VBM under the plain language of the “disability” definition. Order on Application for Temporary Injunction, *TDP v. DeBeauvoir*, No. D-1-GN-20-001610, 201st Dist. Court, Travis County, Texas, Apr. 17, 2020. The Order did not make any ruling about “fear” of the virus, yet the State of Texas appealed the declaratory judgment and preliminary injunction and has consistently mis-represented the ruling as about mere “fear” of the virus with AG Paxton aggressively threatening anyone who exercises their right to vote safely because of “fear” of the pandemic may be subject to felony charges as would anyone who advises them of that course of action. *See Winn Decl.* at Ex. 5.

AG Paxton previously opined that the definition of “disability” is exactly what the statute says, although his onslaught of threats now backtracks on that analysis. *See Tex. Att’y Gen Op. No. KP-0009 (2015) at 2.* This Opinion’s analysis notes that “while proof of disability may not be necessary to apply for a mail-in ballot, its production may be compelled if a voter’s qualifications for voting by mail is challenged in court.” *Id.* at 1-2, n.2. Moreover, if a voter’s qualification as “disabled” is successfully challenged, that voter’s vote is *void*. *Id.* (citing *Tiller v. Martinez*, 974 S.W.2d 769, 775 (Tex. App. – San Antonio 1998, pet. dismiss’d w.o.j.)). This raises another problem with the State-created ambiguity: widespread election contests. Without legal clarity any election results will be subject to an election contest and voters who tried to preserve their health and life by voting by mail will be subject to subpoena, having their vote voided, and possible prosecution. Unless this Court grants the preliminary injunction the SOS will have, in effect, successfully infected the election with a poison pill.

B. AG Paxton focuses his threats of prosecution on Harris County officials.

To prepare the elections, the Harris County Clerk sought resources to successfully implement a safe and fair election. On April 28, the Harris County Commissioner’s Court voted to make up to \$12 million available to cover personal protective equipment (“PPE”) for election workers, sanitation supplies, and the added costs the anticipated higher ratio of VBM as processing mail-in ballots is more expensive per vote than in-person voter. Order of Commissioners Court, Winn Decl. Ex. 2. This act of preparation inexplicably drew the ire of the Attorney General.

The Attorney General’s press statements and abject refusal to accept the trial court’s preliminary injunction have not only injected uncertainty into the process but directed threats of criminal prosecution to voters and those who advise voters including the Harris County Judge, the County Clerk, and presumably even the undersigned counsel. These missives have not been limited to simply answering a state representative’s question, as the State’s brief would have this Court believe. *See* Doc. 39 at 15-16, 21. On May 1, Attorney General Ken Paxton issued a second “advisory,” this one directed at county election administrators (normally the province of the Secretary of State) and again threatening voters and those who advise them with felony charges should they VBM under the “disability” category because of the pandemic. The memo was accompanied by a press release that singled out the Harris County Judge and County Clerk:

Several county officials throughout the State, including the Harris County judge and clerk, are misleading the public about their ability to vote by mail, telling citizens that in light of COVID-19, anyone can claim a “disability” that makes them eligible for ballot by mail.

AG Paxton Advises County Officials to Avoid Misleading the Public on Vote by Mail Laws, May 1, 2020, *see also* Paxton Memo to County Judges and County Election Officials, Winn Decl. Ex.

5. This threatening focus on the Harris County Judge bears mentioning because other counties were making similar preparations and other county officials have voted for, discussed, or made

public statements about the issue. But Paxton chose to focus on County Judge Lina Hidalgo, the only Latina and only immigrant county judge of the largest Texas counties.

The State argues that the Plaintiffs have made no allegations that Paxton has “threatened to bring criminal proceedings against them.” Doc 39 at 21. But he has directly singled out and threatened the Harris County Judge and Clerk merely for discussing a court order and preparing for a safe and fair election, again pointedly citing to statutes that carry felony charges. Thus, that threat of enforcement is more than “chimerical,” as the State claims. *See* Doc 39 at 21.

III. The July 14 primary run-off and the need for VBM to flatten the curve of voter congregation.

While Governor Abbott has just issued a proclamation increasing the time for in-person early voting by a week for the July 14 run-off,¹¹ this increase does not help those voters who may be particularly susceptible to the pandemic’s horrors and wish to VBM as a result and does nothing to decrease the number of in-person voters who must be accommodated in a manner to allow social distancing. Winn Decl. at ¶ 49.

A. While in-person voting creates a range of risks for election workers and voters, increased VBM offers an opportunity to effectively provide socially distanced voting.

Under the current election process, election judges and workers are required to install, activate, and operate voting booths and equipment and dismantle them at the end of the day after mass voter usage. Winn Decl. at ¶¶ 41, 43. Election workers must handle identification cards handed to them by voters and pass paperwork back and forth with voters. Winn Decl. at ¶ 43. These workers will be subject to direct contact with potentially hundreds of individuals a day, many of whom may be infected or carrying COVID-19. The result of the exposure could see the

¹¹ *See* Governor Abbott Issues Proclamation Regarding July 14 Early Voting for Special, Runoff Elections, May 11, 2020, available at <https://gov.texas.gov/news/post/governor-abbott-issues-proclamation-regarding-july-4th-early-voting-for-special-runoff-elections>

possibility of many workers contracting COVID-19 and workers unaware they have the virus infecting voters in turn inflaming the pandemic. Indeed, this scenario has already played out in Florida and Wisconsin, where the states went ahead their primaries only to see election workers test positive for COVID-19.¹² The State and the Republican Party of Texas downplay the incidence of coronavirus transmission during other state's elections. *See* Doc. 39 at 34; Doc. 41-1. But any incidence is meaningful to that election worker or voter and their families whether the virus is spread without symptoms to yet others, only causes a mild illness, requires hospitalization, or a results slow painful death on a ventilator without the comfort of family or friends. The State fails to explain how many cases of COVID-19 or resulting deaths are necessary to trigger a constitutional problem. Harris County submits that the number is one and it is the government's duty to strive for zero.

When it comes to individual voting rights, any battle of epidemiological experts is beside the point. There is no question a deadly pandemic is ongoing and will continue for months. Moreover, even as the state argues here that the pandemic is not such a problem or a threat to voter's health and lives that the federal courts should act, the Governor has again extended his declaration of emergency,¹³ and the U.S. Senate this week held a virtual hearing because the nation's head immunologist had been exposed to COVID-19 and is self-quarantining. All voters should have the right to decide from themselves whether their risk for COVID-19 warrants avoiding in-person contact, sanitation measures or not, and vote by mail.

¹² *See* Winn Decl. at ¶¶ 7, 45; David Smiley and Bianca Padró Ocasio, *Florida held its primary despite coronavirus. Two Broward poll workers tested positive*, MIAMI HERALD, Mar. 27, 2020, <https://www.miamiherald.com/news/politics-government/article241539451.html>.

¹³ Proclamation Renewing the Declaration Stating that the Novel Coronavirus (COVID-19) Poses and Imminent Threat of Disaster for All Counties in Texas, May 12, 2020, *available at* https://gov.texas.gov/uploads/files/press/DISASTER_renewing_covid19_disaster_proclamation_No_2.pdf.

The risk of holding full volume in-person elections in Harris County would be significantly more acute because of the age of many of the election workers. The average of election workers in Harris County is approximately 68 years old. Winn Decl. at ¶ 30. Approximately 41% of election workers are over the age of 65. *Id.*; Stein Decl. at App. 49. The CDC has indicated that older persons are at particular risk of suffering greater illness and death rates from the COVID-19, and thus should take greater precautions to avoid contracting the disease; moreover, people over 65 years old are at a greater risk of hospitalization and requiring intensive care placing a greater strain on the health care system when outbreaks occur among this demographic.¹⁴

Harris County currently has over 750 election-day voting center locations and 57 early vote locations. Winn Decl. at ¶ 27. Election day requires more than 6000 workers to effectively administer an election. *Id.* Workers would be forced to decide between the possible risk to their health through exposure or refusing to work which could result in the closure of voting locations. The resulting disruption would result in an even more crowded and chaotic voting process that would likely endanger the workers and voters alike, through even more exposure to a greater number of people at fewer locations, and as voters are forced to wait in longer lines risking greater exposure. Such conditions amount to voter suppression as voters leave polling locations because they do not want exposure to a potentially deadly virus, simply cannot wait any longer to vote, or decide not to attempt to vote at all to protect their health.

B. Voters are already choosing VBM for the July 14 run-off including under the “disability” category.

The vote-by-mail (“VBM”) process is a lengthy and technical one. *See* Winn Decl. at ¶¶ 15-26. Voters are already requesting VBM and have been submitting applications since the

¹⁴ *See* CDC, *Older Adults*, Apr. 7, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

March 2 primary. There were 70,953 applications for VBM in the primary in Harris County.¹⁵ As of May 9, there were already **78,616** VBM applications for the run-off. Winn Decl. at ¶ 33. This number includes the significant number of voters, about 85% of total VBM requests to date, who request VBM on an annual basis, leaving 11,172 as new VBM requests. Winn Decl. at ¶ 33.

During the primary in Harris County 96.2% of the VBM applications were submitted under the 65+ category and only 0.8% were from the “disability” category. Winn Decl. at 34¶. The bulk of the requests came four-to-six weeks before the primary. *Id.* Although that time period for the postponed run-off has not yet arrived Harris County has already exceeded the total number of requests from the primary. In addition, an uptick in requests in early June is likely as campaigns begin encouraging voters to submit applications through their mail campaign programs. Winn Decl. at ¶ 34.

Of the 11,172 requests post-primary through May 9, 95.8% were in the 65+ age category while 2.9% were from the “disability” category. *Id.* Harris County was already seeing an uptick in “disability” VBM applications before the state trial court’s April 17 ruling with ratio doubling from the primary. Winn Decl. at ¶ 35. Since the trial court’s ruling and the resulting publicity, the ratio of “disability” VBM applications has increased to 8.6% of those additional applications submitted since the ruling. Winn Decl. at ¶ 35. In sum, the VBM requests are already well underway for the July 14 run-off, and voters are already trending toward requesting VBM under the “disability” category presumably because of the ongoing pandemic.

IV. Voters, Harris County, and its Election Administrator Need this Court’s Protection.

Voters need to know there will be safe ways to vote in the July and November elections.

¹⁵ Note that this number includes duplicates, bad addresses, etc. and is thus higher than the total ballots sent to voters, total returned, and ultimate total number of VBM ballots counted of 53,910.

Election administrators need to know clear rules for conducting elections during the pandemic as soon as possible so they may plan accordingly. This ambiguity created by the SOS COVID-19 Advisory and AG Paxton's mis-representations of the state court order and threats of criminal prosecution threaten to result in a patchwork of decisions by each county's elections officer, potentially risking the lives of tens of thousands of Texans, and threatening the integrity of the electoral process. This Court must grant the preliminary injunction so that local officials can conduct a safe election free from threats of criminal prosecution from AG Paxton.

A. Voters and election workers want options and safe voting conditions.

Voters want the option to VBM, and election workers want adequate social distancing which is only possible with a higher ratio of VBM. Prof. Robert M. Stein of Rice University as part of his ongoing work studying voter behavior has conducted polls of both Harris County likely voters and its election workers to ascertain their concerns about voting during the coronavirus pandemic. Stein Decl. at ¶ 2. His results demonstrate that every demographic of voters, whether by party, race, age, or gender, prefers having the option to VBM given the pandemic. Stein Decl. at ¶¶ 4, 6, 8-10, Ex. A. Overall, 69.3% of likely voters stated they were very or somewhat likely to VBM if available. Stein Decl. at App. 57-58. Of voters under 65 (i.e., those who must have a reason under Texas law), 66.6% are very or somewhat likely to VBM if available. Stein Decl. at ¶¶ 57-58. Stein concludes that between one-third and one-half of previous in-person voters are likely to choose VBM over in-person voting. Stein Decl. at ¶ 10.

Voting in-person with social distancing is also popular with voters, and many voters would prefer that over VBM. Stein Decl. at App. 57-58. But, effectively having social distancing at in-person locations depends on having more voters VBM so that the curve of voter congregation can

be spread out. Otherwise, especially in a county as large as Harris County, there will be simply too many bodies to move through too few spaces in too little time.

Prof. Stein also polled 1,800 of the approximate 6,000 Harris County poll workers. Barely half stated they would be likely to work under normal polling conditions, but more than 80% said they would be somewhat or very likely to work if conditions were modified to incorporate social distancing, personal protective equipment, sanitized gloves, or Plexiglas screens. Stein Decl. at ¶ 4, App. 51. The most popular option was social distancing, which again, will not be possible without shifting more voters to VBM. Winn Decl. at ¶¶ 41, 53; Stein Decl. at App. 51

B. Texas Attorney General Ken Paxton heavy-handed prosecutions and threats is a continuation of a long history of Texas voting rights violation.

There is in Texas an unfortunate history — “an avalanche of case studies of voting rights violations” that include “outright intimidation and violence against minority voters.”¹⁶ Indeed, when it comes to civic participation, Texas has rarely respected the words and spirit of the Constitution, from the “white primary” cases which finally ended in 1953 only after a twenty-five year series of Supreme Court decisions,¹⁷ the poll tax system which endured for nearly 100 years until 1966,¹⁸ to illiteracy tests and secret ballots.¹⁹ Even after the Voting Rights Act of 1965, Texas persisted with an “ingenuity and prevalence of discriminatory practices” against language minorities, namely Mexican-Americans, prompting the 1975 amendments to the Voting Rights Act. *See Briscoe v. Bell*, 432 U.S. 404, 405-06, 97 S. Ct. 2428, 2429 (1977). But Texans are a

¹⁶ Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 182-83 (2007).

¹⁷ *Terry v. Adams*, 345 U.S. 461 (1953) (striking down Fort Bend County’s Jaybird Association primary); *Smith v. Allwright*, 321 U.S. 649 (1944); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

¹⁸ *U.S. v. Texas*, 252 F. Supp. 234, 238 (W.D. Tex. 1966) (striking down Texas’ poll tax because it abridged the right of all Texans to vote).

¹⁹ *See Veasey v. Abbott*, 830 F.3d 216, 231 (5th Cir. 2106) (en banc), *cert. denied*, ___ U.S. ___, 137 S. Ct. 612 (2017) (discussing Texas’s storied history of voter suppression).

tenacious bunch, not easily moved by the mere actions of the Courts and words of the Constitution. More decades of discrimination against, and intimidation of, minority voters followed.²⁰ Recently, these invidious efforts have re-surfaced.

Just last year this Court presided over a case concerning discriminatory acts by the State of Texas. On January 25, 2019, Texas' Secretary of State issued an Elections Advisory falsely claiming that 95,000 non-U.S. citizens registered to vote and that 58,000 voted in one or more elections.²¹ AG Paxton and Governor Abbott were so enthusiastic to promote threats of prosecution of immigrants, they beat the Whitley to the tweet, with Paxton tweeting "VOTER FRAUD ALERT" repeating the false claim, and promising to "prosecute crimes against the democratic process"²² Barely an hour later, the Governor Abbott amplified the message, retweeting it and thanking the Attorney General and Secretary of State "for uncovering and investigating this illegal vote registration. I support prosecution where appropriate."²³ Secretary

²⁰ See, e.g., *Houston Lawyers Ass'n v. Attorney General of Tex.*, 501 U.S. 419 111 S. Ct. 2376 (1991) (Texas' method of electing judges dilutes votes of Black and Latino citizens); *Bush v. Vera*, 517 U.S. 952, 116 S.Ct. 1941 (1996), (Texas continues to engage in discriminatory racial gerrymandering in violation of the Voting Rights Act); *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 126 S. Ct. 2594 (2006) (Texas dilutes votes of Hispanics in congressional redistricting); *Veasey II*, 830 F.3d at 231 (voter identification law has disparate impact upon African American and Hispanic voters).

²¹ *Secretary Whitley Issues Advisory of Voter Registration List Maintenance Activity: "Integrity and efficiency of elections in Texas require accuracy of our state's voter rolls,"* Jan. 25, 2019, <https://www.sos.texas.gov/about/newsreleases/2019/012519.shtml>; Tex. Sec. of State, *Use of Non-U.S. Citizen Data obtained from the Department of Public Safety*, Elec. Advisory No. 2019-02, Jan. 25, 2019, <https://www.sos.texas.gov/elections/laws/advisory2019-02.shtml>.

²² Ken Paxton (@KenPaxtonTX), TWITTER (Jan. 25, 2019, 12:37 PM), <https://twitter.com/KenPaxtonTX/status/1088898595653386240>; Carlos Sanchez, *Former Texas Secretary of State Believes Inaccurate Voting List Should be Rescinded*, TEX. MONTHLY Jan. 31, 2019, <https://www.texasmonthly.com/politics/former-texas-secretary-of-state-believes-inaccurate-voting-list-should-be-rescinded/>; *AG Paxton: Texas Secretary of State's Office Discovers Nearly 95,000 People Identified by DPS as Non-U.S. Citizens are Registered to Vote in Texas*, Jan. 25, 2019, <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-texas-secretary-states-office-discovers-nearly-95000-people-identified-dps-non-us-citizens>.

²³ Greg Abbott (@GregAbbott_TX), TWITTER (Jan. 25, 2019, 1:57 P.M.), https://twitter.com/GregAbbott_TX/status/1088918898643271680.

of State Whitley did not get his tweet out to announce the upcoming voter roll purge until nearly an hour later — in a tweet that has since been deleted.²⁴

Under scrutiny, the Secretary’s claims quickly fell apart. Officials in Harris County immediately determined that the vast majority of those on the list²⁵ were, in fact, United States citizens.²⁶ At least one county could not find a single non-citizen on its state-issued list of alleged non-citizen criminal voters.²⁷ Indeed, this very Court²⁸ concluded “that there is no widespread voter fraud” and the State sent “ham-handed and threatening correspondence” to “perfectly legal naturalized Americans” that “exemplifies the power of government to strike fear and anxiety to intimidate the least powerful among us.”²⁹

Texas Attorney General Ken Paxton has a penchant for crying “voter fraud” and a habit of aggressively, and disproportionately, pursuing heavy-handed prosecutions against women and Hispanics, resulting in lengthy sentences for unknowing violations of the law. For example, the Attorney General’s Office charged Crystal Mason, who was on probation but thought she could vote; nevertheless, caught a five year sentence.³⁰ Paxton also prosecuted Rosa Maria Ortega in

²⁴ David Whitley (@TXsecofstate), TWITTER (Jan. 25, 2019, 2:49 P.M.), *previously at* <https://twitter.com/TXsecofstate/status/1088931929540431872>.

²⁵ The Secretary claimed Harris County accounted for more than 30,000 of the so-called non-citizen registrants. *See* n.22 *supra*.

²⁶ Liam Stack, *So Far, List Suspect Voters in Texas Turns Out to Be Mostly a List of U.S. Citizens*, NEW YORK TIMES, at A11, Jan. 29, 2019.

²⁷ Wallace, *supra*.

²⁸ *See Julieta Garibay et al. v. David Whitley, et al.*, No. SA-19-CA-159-FB (S.D. Tex), and *MOVE Texas Civic Fund, Jolt Initiative, League of Women Voters of Texas, and Nivien Saleh v. David Whitley et al.*, No SA-19-CA-171-FB (formerly No. 3:19-cv-00041) (S.D. Tex), consolidated with *Tex. League of United Latin Am. Citizens et al. v. David Whitley, et al.*, No. 5:19-cv-00074-FB, Doc. 39 (W.D. Tex.).

²⁹ *Tex. League of United Latin Am. Citizens v. Whitley*, No. 5:19-cv-00074-FB, 2019 WL 7938511 (W.D. Tex. 2019).

³⁰ *State of Texas v. Crystal Mason*, Cause No. D432-1485710-00, 432nd District Court, Tarrant County, Texas; Amrit Cheng, *Crystal Mason Thought She Had the Right to Vote. Texas Sentenced Her to Five Years in Prison for Trying*, ACLU, <https://www.aclu.org/issues/voting-rights/fighting-voter-suppression/crystal-mason-thought-she-had-right-vote-texas>.

2017 for two counts of illegal voting.³¹ Ortega, who had moved to the United States as a child, was a legal permanent resident, and thought she was able to vote, caught an eight year sentence.³² Over a thirteen-year period from 2005 to 2018 at least seventy-three cases were brought, 74% of which were against persons with Spanish surnames and 66% were against women.³³

Paxton’s injection of partisan political rhetoric and illogical arguments deepens voter confusion and heightens the as-applied vagueness of the statute. The State argues that “. . . the voters most at risk of becoming seriously ill from COVID-19 — those who are over 65 or who have underlying health conditions — are already eligible to vote by mail.” Doc. 39 at 34. Yet Paxton argues in his Memo that “physical condition” means an “illness or medical problem” and thus voters may not VBM under disability. Winn Decl. at ¶ 51, Ex. 5 at 2. Which is it? Can a voter under 65 with the underlying health condition of a lack of immunity to coronavirus VBM? If not, Texas law as applied by AG Paxton and his threats of prosecution violate voting and Equal Protection rights.

CONCLUSION

Recent events in both Texas and the nation have given minority voters a reason to fear exercising their franchise, which in turn makes it more likely they will be intimidated into not voting because of fear of prosecution or susceptibility to COVID-19.³⁴ Given the public

³¹ *State of Texas v. Rosa Maria Ortega*, Cause No. 1434155D, Criminal District Court No. 3, Tarrant County, Texas.

³² Sam Levine, *This Woman Got 8 Years In Prison For Illegal Voting. Texas Is Showing No Mercy*, HUFFPOST (Nov. 30, 2018), https://www.huffpost.com/entry/texas-voter-fraud-prison_n_5c01a9afe4b0a173c02305c1

³³ Robert Brischetto, *Texas’ desperate search for fraudulent voters*, SAN ANTONIO EXPRESS NEWS, Mar. 9, 2019, <https://www.mysanantonio.com/opinion/commentary/article/Texas-desperate-search-for-fraudulent-voters-13674630.php>.

³⁴ Van R. Newkirk, II, *Voter Suppression is Warping Democracy*, THE ATLANTIC July 17, 2018 (“black and Hispanic voters are . . . more anxious and desperate, and that’s at least in part because democratic norms . . . are crumbling in their hands. Blows to the hard-won victory of the [voting] franchise [impacted the 2016 Presidential election]. But black and Hispanic voters are worried just as much about the elections to come.”). <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/>; see also Alex Vandermaas-Peeler et al., *American Democracy in Crisis: the Challenges of Voter Knowledge, Participation, and*

statements by the Attorney General and his track record, voters reasonably fear that they shall face criminal sanction if they check the “disability” box on a VBM hoping to avoid a likelihood of harm to their health. “[T]he power of the government to strike fear and anxiety to intimidate the least powerful among us” has escalated to attacking elected officials. It is time for the Court to step in again.

Respectfully submitted,

Vince Ryan
State Bar No. 17489500
HARRIS COUNTY ATTORNEY
Scott Lemond
Assistant County Attorney
State Bar No. 00791097
Scott.Lemond@cao.hctx.net
1019 Congress, 15th Floor
Houston, TX 77002
Telephone: (713) 274-5167
Telecopier: (713) 755-8848

_____/s/ Susan Hays
SUSAN HAYS
State Bar No. 24002249
LAW OFFICE OF SUSAN HAYS, P.C.
P.O. Box 41647
Austin, Texas 78704
(214) 557-4819 (telephone)
(214) 432-8273 (facsimile)
hayslaw@me.com

Polarization, PRRI, July 17, 2018, <https://www.ppri.org/research/American-democracy-in-crisis-voters-midterms-trump-election-2018/>.